# International Conference. Basque Economic Agreement and Europe

# Congreso Internacional. Concierto Económico Vasco y Europa

# BASQUE ECONOMIC AGREEMENT AND EUROPE. ECONOMIC AGREEMENT, REGIONAL TAX REGULATION AND STATE AID

# *CONCIERTO ECONÓMICO VASCO Y EUROPA. CONCIERTO ECONÓMICO, FISCALIDAD REGIONAL Y AYUDAS DE ESTADO*

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Association for the Promotion and Diffusion
of the Economic Agreement AD CONCORDIAM

*Asociación para la Promoción y Difusión*
*del Concierto Económico AD CONCORDIAM*

Basque Studies Institute of the University of Deusto

*Instituto de Estudios Vascos de la Universidad de Deusto*

Bilbao
2007

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**Collaborators**

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Basque Society of Economists.
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# AURKEZPENA

Bizkaiko Ogasun eta Finantzetako foru diputatua naizen aldetik eta «Ad Concordiam» Ekonomia Ituna Sustatzeko eta Hedatzeko Elkartearen presidente gisa, niretzat ohorea da liburu hau aurkeztea, hain zuzen ere, 2006ko abenduan Deustuko Unibertsitatean egin zen «Euskal Ekonomia Ituna eta Europa. Ekonomia Ituna, erregio-fiskalitatea eta Estatu-laguntzak» izeneko kongresuko txostenak jasotzen dituen liburua. Ekonomia Ituna gaur-gaurko gaia da, eta are gehiago, gure autogobernurako une erabakigarri honetan: Ekonomia Itunak aitortzen dituen eskumenak, edo horietako batzuk, Europako Erkidegoetako Justizia Auzitegiak Luxenburgon emango duen epaiaren zain daude, epai horrek erabakia emango baitu Euskadiko Sozietateen gaineko Zergaren inguruko epaiketa aurreko arazoaren gainean.

Ez dugu ahaztu behar Ekonomia Ituna, zalantzarik gabe, euskal autonomia erregimenaren berezitasun nagusia dela, eta baliabide juridiko horrek ematen diela aukera Euskadiko lurralde historikoei euren Ogasuna izateko, zergak jasotzeko eta gastua egiteko. Horrek guztiak are interesgarriago egiten ditu abenduan eginiko kongresua eta han aztertu ziren gaiak. Hori dela eta, beren-beregi nabarmendu nahiko nituzke, batetik, kongresuak munduari begira duen hedadura eta, bestetik, zer garrantzi duen gure mugetatik harago Ekonomia Ituna ezagutarazteak, errespetarazteak eta Europar Batasuneko gainerakoen begietan nahikoa «blindatzeak».

Horrela, bada, hiru egunez, Eskoziatik, Portugaletik, Finlandiatik eta Europako Batzordetik bertatik etorritako txostengileek hainbat gai izan zituzten hizpide: Auzitegi Gorenak 2004ko abenduaren 9an Sozietateen Zergari buruz emaniko epaia, Azoreen auzian Europako Erkidegoetak Justizia Auzitegiak emaniko epaia, Europar Batasuneko eskualdeen zerga sistema, estatu-laguntzak, eskualdeetako erakundeek Europako organoetan zerga sistemen arloan duten parte hartzea eta (euskal erakundeen ikuspuntutik) Ekonomia Itunak zer etorkizun duen Europar Batasunean.

Oraingoan aurkezten dugun edizio hau Ad Concordiam Elkarteak egiten dituen jardueren barruan kokatzen da, eta balio behar du zerga sistemari eta Herri Ogasunari buruzko gaien ikerketa sustatu eta herritar gehiagorengana helarazteko. Asmo horren oinarria da Euskadiko autogobernurako Ekonomia Itunaren moduko erakunde garrantzitsu bat ezin dela defendatu, lehenago, ezagutu, balioetsi eta errespetatzen ez bada. Oraingoan, eta abenduan eginiko kongresuak munduari begira zuen hedadura dela-eta, egoki jo da argitalpen hau ingelesez ere kaleratzea.

José María Iruarrízaga Artaraz
Bizkaiko Ogasun eta Finantzetako foru diputatua

# PRESENTATION

In my capacity as Provincial Treasure and Finance Deputy for Bizkaia and as President of the Association for the Promotion and Diffusion of the Economic Agreement «Ad Concordiam», I have the honour to introduce this book which compiles the lectures given in the Conference about the Basque Economic Agreement and Europe, regional taxation and State aids held in December 2006 at the University of Deusto. This subject is a highly topical question, especially now that we are at a crucial moment for our self-government as the competences within the Economic Agreement, or part of them, are waiting for the European Community Court of Justice to pronounce judgement on the preliminary ruling about the Corporate Tax in Euskadi.

We shouldn't leave out the fact that the Economic Agreement is, without any doubt, the main feature of the Basque autonomous régime and the legal instrument which allows the Historical Territories of Euskadi to be provided with their own Treasuries in order to collect and to spend public funds. All these reasons increase the interest in the Conference and in the topics we dealt with there and, therefore, I would like to point out clearly its international influence and to demand its relevance beyond our borders and the acknowledge, respect and safeguard of the Agreement in the rest of the European Union countries´ eyes.

Therefore, throughout three days, lecturers coming from Scotland, Portugal, Finland and the European Commission discoursed upon matters as the Supreme Court Judgement of 9 December 2004 about the Corporate Tax, the European Court of Justice Judgement on the Azores case, regional taxation in the European Union, States aids policy, the participation of the regional institutions in the European bodies when taxation matters are approached and, from the viewpoint of the Basque Institutions, about the future of the Economic Agreement in the European Union.

The launched edition is within the framework of the activities carried out by the «Ad Concordiam» Association and its main aim is to foster and spread the study of subjects related to taxation and public finances to most of the citizens as we believe the Economic Agreement, an essential institution for the self-government in Euskadi, cannot be defended if it is not properly understood, appreciated and respected. On this occasion and due to the international nature of the held Conference, it has been considered advisable the edition to be published in English as well.

José María Iruarrízaga Artaraz
Provincial Treasure and Finance Deputy for Bizkaia

# PRESENTACIÓN

En mi condición de Diputado Foral de Hacienda y Finanzas de Bizkaia y como presidente de la "Asociación para la Promoción y Difusión del Concierto Económico. Ad Concordiam", es un honor presentar este libro que recoge las ponencias realizadas en el Congreso celebrado en diciembre de 2006 sobre el Concierto Económico Vasco y Europa, fiscalidad regional y ayudas de Estado, en la Universidad de Deusto. Temática que está de plena actualidad, y más aún cuando nos encontramos en un momento crucial para nuestro autogobierno ya que las competencias que reconoce el Concierto Económico, o una parte de las mismas, se encuentran a la espera de conocer la sentencia del Tribunal de Justicia de la Comunidad Europea de Luxemburgo, en la que se decidirá sobre la cuestión prejudicial en relación con el Impuesto de Sociedades en Euskadi.

No debemos olvidar que el Concierto Económico es sin duda la principal especificidad del régimen autonómico vasco y es el instrumento jurídico que permite a los Territorios Históricos de Euskadi dotarse de una Hacienda propia, para recaudar y para gastar. Todo ello hace crecer el interés en el Congreso celebrado y en los temas allí tratados, por lo que quisiera destacar expresamente la proyección internacional del mismo, reivindicando la importancia que tiene, más allá de nuestras fronteras, que el Concierto sea conocido, respetado y esté lo suficientemente "blindado" a los ojos del resto de la Unión Europea.

Así, a lo largo de tres jornadas, ponentes venidos desde Escocia, Portugal, Finlandia y la propia Comisión Europea, disertaron sobre asuntos como la Sentencia de 9 de diciembre de 2004 del Tribunal Supremo sobre el Impuesto de Sociedades, la sentencia del Tribunal de Justicia de las Comunidades Europeas en el Caso Azores, la fiscalidad regional en la Unión Europea, las Ayudas de Estado, la participación de las instituciones regionales en los órganos comunitarios en relación con la fiscalidad, y, desde la óptica de las instituciones vascas, sobre el futuro del Concierto Económico en la Unión Europea.

La edición que se presenta se enmarca en el conjunto de actividades desarrolladas por la Asociación Ad Concordiam y debe servir para impulsar y divulgar el estudio de materias relacionadas con la fiscalidad y la Hacienda Pública a los más amplios sectores de la ciudadanía, en la idea de que una institución tan importante para el autogobierno de Euskadi como el Concierto Económico no puede ser defendida si no se la conoce, valora y respeta. En esta ocasión, y dada la proyección internacional del Congreso celebrado, se ha considerado conveniente que la edición se realice también en inglés.

José María Iruarrízaga Artaraz
Diputado Foral de Hacienda y Finanzas de Bizkaia

# PROGRAMME

**Day One, Tuesday 12 December 2006**

*Regional tax regulation: compared models*

16:00 Opening Ceremony.

16:30 First presentation: «Regional tax regulation in the EU». Mr. Dali Bouzoraa, Technical Director of the *International Bureau of Fiscal Documentation.* Amsterdam.

17:15 Second presentation: «EU General regulation framework: harmonisation policies on direct and indirect taxation, since the creation of the European Communities until today». Mr. Franco Roccatagliata, Policy Officer of the Tax Policy Analysis and Coordination Unit. European Commission: Directorate-General for Taxation and Customs Union.

18:00 Coffee break.

18:30 Round-table: «Models of Regional Tax Regulation in Europe».

18:30 Finland (Aland Islands): Mr. Niilo Jääskinen, Senior Judge of the Supreme Administrative Tribunal of Finland.

18:50 Portugal (Azores Islands and Madeira): Mr. Ricardo Borges, Lawyer specialising in Tax law and lecturer at the Faculty of Law, Lisbon University.

19:10 United Kingdom (Scotland): Mr. Ronald McDonald, Professor of Economic Policy and Director of the PhD Programme of Economics Department, University of Glasgow.

19:30 Autonomous Regions of the Basque Country and Navarre: Mr. Fernando de la Hucha Celador, Professor of Financial and Tax Law, Public University of Navarre.

20:00 Debate

**Day Two, Wednesday 13 December 2006**

*Economic Agreement and State Aid*

16:15 First presentation: «Reflections on the recent Sentence of the European Community Court of Justice on the Azores Case» Mr. Jean Louis Colson, Head of Financial Services Unit. European Commission: Directorate-General for Competition.

17:00 Second presentation: «Selection Criteria concerning Direct Regional Taxation and State Aid in the Jurisprudence of the European Community Court of Justice». Mr. Joxerramon Bengoetxea, Lecturer. Universty of the Basque Country, Scientific Director of the Oñati International Institute for the Sociology of Law and ex-ECCJ lawyer.

17:45 Coffee break.

18:15 Round-table: «Economic Agreement and State Aid».

18:15 Mr. Ignacio Sáenz Cortabarria, Lawyer specialising in Competition Law, and representing the Basque Government and Regional Councils.

18:35 Mr. Juan Luis Ibarra, President of the Contentious – Administrative Appeal Court of the Basque Country High Court.

18:55 Mr. Juan Pedro Quintana Carretero, Senior Judge of the Supreme Court Technical Bureau.

19:15 Ms. Beatriz Pérez de las Heras, Professor in EU Law and Director of the European Studies Institute at the University of Deusto.

19:35 Debate.

**Day Three, Thursday 14 December 2006**

*The future of the tax autonomy of regions in the European Union*

16:15 First presentation: «The participation of Regional Institutions in EU bodies dealing with tax regulation». Ms. Noreen Burrows, Jean Monnet Professor in European Law and Dean of the Faculty of Law and Economic and Social Sciences, University of Glasgow.

17:00 Second presentation: «The participation of Basque Institutions in EU bodies dealing with tax regulation. An approach from the Basque Country». Mr. Mikel Antón Zarragoitia, Basque Government Director of the European Affairs Office.

17:45 Coffee break.

18:15 Round-table: «The future of the Economic Agreement in the EU»

18:15 Mr. José Mª Iruarrizaga Artaraz, Provincial Treasure and Finance Deputy for Biscay.

18:35 Mr. Juan José Mujika Aginagalde, Provincial Taxation and Finance Deputy for Gipuzkoa.

18:55 Mr. Juan Antonio Zárate Pérez de Arrilucea, General Delegate Deputy. Provincial Treasure, Finance and Budget Deputy for Álava.

19:15 Mr. Juan Miguel Bilbao Garai, Treasure and Finance Secretary. Basque Government.

19.35 Debate.

20:00 Closing Ceremony.

# «EKONOMIA ITUNA ETA EUROPA. EKONOMIA ITUNA, ERREGIO FISKALITATEA ETA ESTATU-LAGUNTZAK» NAZIOARTEKO KONGRESUAREN IREKIERA-EKITALDIKO HITZALDIA

**Deustuko Unibertsitatea, 2006ko abenduaren 12tik 14ra**

Jaun-andreok:

Arratsalde on guztioi. Deustuko Unibertsitateko Euskal Gaien Institutuko zuzendaria naizen aldetik eta Unibertsitate honetako errektorearen izenean, ongi etorria eman nahi dizuet «Euskal Ekonomia Ituna eta Europa. Ekonomia Ituna, erregio-fiskalitatea eta Estatu-laguntzak» izeneko nazioarteko kongresu honetara. Kongresua Deustuko Unibertsitateko Euskal Gaien Institutuak eta AD CONCORDIAM Ekonomia Ituna Sustatu eta Aldezteko Elkarteak elkarrekin antolatu dute. Hain zuzen ere, Elkarte horretan, Deustuko Unibertsitatea, Euskal Herriko Unibertsitatea eta Bizkaiko Foru Aldundia ordezkatuta daude. Horrez gain, Elkarteak Bizkaiko Foru Aldundiaren babes berezia du.

Nazioarteko Kongresu hau 1981eko Ekonomia Itunaren XXV. urteurrena dela-eta urte osoan erakunde publiko zein pribatuek sustatutako ospakizunen amaiera ezin hobea da. Eskubide historiko hori, Ekonomia Ituna, 1878an jaio zen arren, aurten aipatzeko moduko bi efemeride ospatzen dira: batetik, 1981eko Itunaren XXV. urteurrena, 2002ko Ituna indarrean sartu arte egon zena; 1981eko itunaren ondorioz, hiru lurralde historikoek eskubide hori berreskuratu zuten, horietako biri gerrako errepresalia moduan kendu baitzitzaien. Bestetik, aurten 1906ko Ekonomia Itunaren mendeurrena da, bihar hain zuzen ere. Itun horretan 15. artikulu entzutetsua jaso zen, euskal diputazioen eskumenak aitortzen zituena, arlo ekonomikoan zein administratiboan. Eskumen horiek autonomia-esparrua eman zieten gure lurraldeei, gaur egun ere irauten duena. Artikulu horren testu bera, eta ez da kasualitatea, 2002tik indarrean dagoen Ekonomia Itunaren hirugarren xedapen gehigarrian jaso zen.

Gure Ekonomia Itunak 128 urte ditu dagoeneko, Unibertsitate honek baino apur batzuk gehiago, zentro honek aurten 120 urte egin ditu eta. Ekonomia Ituna, urte asko izan arren, bizi-bizirik dago, eta bizirik dauden gauza guztiek bezala, erronka berriak ditu: gaur egungo erronkak justifikaziorik ez duten erasoen aurrean «blindatzea» eta Europar Batasunean sartzea dira. Erregio-fiskalitatearen eredu moduan, Europan txertatzean eztabaida interesgarria piztu da Estatu-laguntzei dagokienez, batez ere, sozietateen gaineko zergaren euskal foru-arauei buruzko erabaki judizialen ostean eta epaitu aurreko arazoa Europar Batasuneko Justizia Auzitegian planteatu eta gero. Izan ere, gai horren inguruan Espainiako auzitegiek epaiak eman dituzte oraintsu, Europako Auzitegiak ere Azoreen kasuan epaia eman du, eta ziurrenik egunotan beste epairen bat ere argitaratuko da, Kongresua egiten den bitartean. Hori guztia dela eta, gaia puri-purian dago.

Beraz, Kongresu hau guztiontzat emankorra izatea gustatuko litzaidake. Nire hitzalditxoa amaitu aurretik, eskerrak eman nahi dizkiet Kongresua antolatu duten bi erakundeei, AD CONCORDIAM eta Euskal Gaien Institutua, lagundu duten erakunde guztiei, Bizkaiko Abokatuen Bazkuna, Ekonomisten Euskal Elkargoa, Aholkulari Fiskalen Espainiako Elkarteak Euskal Autonomia Erkidegoan duen ordezkaritza, Zuzenbidearen Euskal Akademia, Eusko Jaurlaritzako Europako Gaietarako Zuzendaritza eta Deustuko Unibertsitateko Europako Ikaskuntzen Institutua, baita lankidetzan aritu diren gainerako pertsona eta erakunde guztiei ere. Eskerrak eman nahi dizkiet hizlariei bihotz-bihotzez kongresu honetara etortzeko eskaintza onartzeagatik, baita kongresuaren batzorde antolatzaileari eta «staff» teknikoari ere, egindako lan saiatu, isil eta eskuzabalarengatik. Eta mila esker bereziki Bizkaiko Foru Aldundiari emandako laguntza ekonomikoarengatik, hori gabe ezinezkoa izango zen-eta ekimen hau aurrera ateratzea. Eta, nola ez, eskerrak zuoi guztioi ere gure artean egoteagatik.

Eta, besterik gabe, eta Deustuko Unibertsitateko errektore txit gorenaren izenean, «Euskal Ekonomia Ituna eta Europa. Ekonomia Ituna, erregio-fiskalitatea eta Estatu-laguntzak» nazioarteko kongresu hau modu ospetsuan inauguratuta dagoela adierazten dut.

Eskerrik asko.

Santiago Larrazabal dok.
*Deustuko Unibertsitateko Euskal Gaien Institutuko zuzendaria*

# INTERNATIONAL CONFERENCE: "ECONOMIC AGREEMENT AND EUROPE. ECONOMIC AGREEMENT, REGIONAL TAX REGULATION AND STATE AID"

**University of Deusto, 12-14 December 2006**

Ladies and Gentlemen:

Good afternoon to all of you. As Director of the Basque Studies Institute of the University of Deusto, and on behalf of the Rector of this University, I would like to welcome you to this International Conference entitled "Economic Agreement and Europe. Economic Agreement, Regional Tax Regulation and State Aid", which has been jointly organised by the Basque Studies Institute of the University of Deusto and the Association for the Promotion and Diffusion of the Economic Agreement AD CONCORDIAM. The University of Deusto and the University of the Basque Country as well as Bizkaia Regional Council are represented in this Association. The Conference also has the good fortune of being sponsored by Bizkaia Regional Council.

This international Conference is the finishing touch to the events promoted by public and private institutions throughout the whole year in order to celebrate the 25th Anniversary of the 1981 Economic Agreement. Although the Basque historical right, the Economic Agreement, was born in 1878, this year we are celebrating two important events that deserve special attention. On the one hand we are celebrating the 25th Anniversary of the 1981 Economic Agreement, which has been in force till the 2002 current one came into force, and which has meant that the three Historical Territories could jointly enjoy its right again, of which two of them had been deprived as war reprisal. On the other hand we are also celebrating the Centenary of the 1906 Economic Agreement, centenary that is precisely being celebrated tomorrow. This Agreement included the famous article nº 15 that recognised the powers of the Basque Councils, both in the economic as well as administrative orders, powers that led to the creation

of a certain autonomy for our territories that has been preserved till today. It is an article, whose very text is included, not by chance, in the Third Additional Regulation of the current Economic Agreement, in force since 2002.

Our Economic Agreement is already 128 years old, a few more than this University that is 120 this year. The Agreement is an old but living institution and therefore it is faced with new challenges: its current challenges are its "armour plating" against unjustified attacks and its insertion in the European Union. As an original model of regional taxation, its insertion in Europe has given rise to a passionate debate, lately focusing on anything related to State Aid, especially after the judicial decisions on the Basque regional norms of Corporate Tax, and the putting forward of the prejudgement issue before the European Union Court of Justice. Recent Sentences of the Spanish Supreme Court and the European Court in the Azores case and other certain Sentences that will probably be made public during the Conference days make the focus of this International Conference a highly topical subject.

Therefore, I hope that this Conference will be fruitful for everybody, and I would like to conclude my intervention thanking the two organising institutions: AD CONCORDIAM and the Basque Studies Institute; I would also like to thank the institutions that have collaborated: the Law Society of Bizkaia, Basque Society of Economists, Basque Country Delegation of Spanish Association of Tax Consultants, Basque Aca-demy of Law, European Affairs Office of the Basque Government, European Studies Institute of the University of Deusto and everybody and every institution collaborating with us. I wish to sincerely thank the speakers for having accepted our invitation to this Conference. I am also grateful to the members of the Organising Committee and to the Conference technical "staff" for their hard, unseen and unselfish work. Last but not least, I wish to express our gratefulness to the Regional Council of Vizcaya for its financial backing, without which it would not have been possible to carry out this initiative and, naturally, to all of you for your presence among us.

Finally, in the name of the Rector of the University of Deusto, I solemnly declare this International Conference "Economic Agreement and Europe. Economic Agreement, Regional Tax Regulation and State Aid" opened.

Thank you very much.

Santiago Larrazabal, Ph D.
*Director of the Basque Studies*
*Institute of the University of Deusto*

# DISCURSO DE APERTURA DEL CONGRESO INTERNACIONAL «CONCIERTO ECONÓMICO Y EUROPA. CONCIERTO ECONÓMICO, FISCALIDAD REGIONAL Y AYUDAS DE ESTADO»

**Universidad de Deusto, 12-14 de diciembre de 2006**

Señoras y Señores:

Muy buenas tardes a todos. En mi condición de Director del Instituto de Estudios Vascos de la Universidad de Deusto y en nombre del Rector de esta Universidad, quisiera darles la bienvenida a este Congreso Internacional titulado «Concierto Económico Vasco y Europa. Concierto Económico, fiscalidad regional y ayudas de Estado», organizado conjuntamente por el Instituto de Estudios Vascos de la Universidad de Deusto y la Asociación para la promoción y difusión del Concierto Económico AD CONCORDIAM, en la que están representadas las Universidades de Deusto y del País Vasco y la Diputación Foral de Bizkaia, y que cuenta con el patrocinio especial de nuestra querida Diputación Foral de Bizkaia.

Este Congreso Internacional pone broche de oro a las celebraciones que en el marco del XXV Aniversario del Concierto Económico de 1981 han venido celebrándose a lo largo de todo el año, promovidas por todo tipo de instituciones públicas y privadas. Si bien este derecho histórico vasco, el Concierto Económico, nació en 1878, este año se celebran dos efemérides que merecen especial atención: el XXV aniversario del Concierto de 1981, que ha estado vigente hasta que entró en vigor el actual de 2002, y que supuso que los tres Territorios Históricos volvieron a disfrutar conjuntamente de su derecho, del que dos de ellos habían sido privados como represalia de guerra y el centenario del Concierto Económico de 1906, que se cumple, precisamente mañana, Concierto en el que se incluyó el famoso artículo 15 que reconocía las atribuciones de las Diputaciones Vascas tanto en el orden económico como en el administrativo,

atribuciones que dieron lugar a un ámbito de autonomía para nuestros territorios que se mantiene hasta hoy, artículo cuyo mismo texto es recogido, no por casualidad, en la Disposición Adicional Tercera del actual Concierto Económico, vigente desde 2002.

Nuestro Concierto Económico tiene ya 128 años, algunos más que esta Universidad, que cumple este año 120. El Concierto es una institución tan longeva como viva y como a toda realidad viva se le plantean nuevos retos: sus actuales desafíos son su «blindaje» frente a ataques injustificados y su inserción en la Unión Europea. Como modelo propio de fiscalidad regional, su encaje en Europa plantea una apasionante discusión, centrada últimamente en todo lo relativo a las ayudas de Estado, sobre todo, tras las decisiones judiciales sobre las normas forales vascas del Impuesto de Sociedades y el planteamiento de la cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea. Precisamente, sobre este asunto, recientes Sentencias de los Tribunales españoles, del Tribunal Europeo en el caso de las islas Azores y alguna otra Sentencia que, probablemente, se hará pública a lo largo de estos mismos días de Congreso, hacen que el tema del Congreso sea de rabiosa actualidad.

Por tanto, espero que este Congreso resulte fructífero para todos y quiero concluir mi intervención, dando las gracias a las dos instituciones organizadoras del Congreso: AD CONCORDIAM e Instituto de Estudios Vascos, a las instituciones colaboradoras del mismo: Colegio de Abogados de Bizkaia, Colegio Vasco de Economistas, Delegación del País Vasco de la Asociación Española de Asesores Fiscales, Academia Vasca de Derecho, Dirección de Asuntos Europeos del Gobierno Vasco e Instituto de Estudios Europeos de la Universidad de Deusto y a todas las personas e instituciones que han colaborado con nosotros. Deseo agradecer vivamente a los ponentes el que hayan aceptado nuestra oferta para acudir a este Congreso y dar las gracias a los miembros del Comité organizador y del «staff» técnico del Congreso su duro, callado y desinteresado trabajo, y muy especialmente, dejar constancia expresa de nuestro reconocimiento a la Diputación Foral de Bizkaia por su apoyo económico, sin el cual, no hubiera sido posible llevar adelante esta iniciativa y, naturalmente, darles las gracias a todos ustedes por su presencia entre nosotros.

Y sin más, y en nombre del Excelentísimo Rector Magnífico de la Universidad de Deusto, declaro solemnemente inaugurado este Congreso Internacional «Concierto Económico Vasco y Europa. Concierto Económico, fiscalidad regional y ayudas de Estado».

Muchas gracias.

Dr. Santiago Larrazabal

*Director del Instituto de Estudios Vascos de la Universidad de Deusto*

# PAPERS
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# Regional Taxation In Europe: Its Models And Its Challenges Under State Aid[1]

DALI BOUZORAA[2]

*Technical Director, International Bureau of Fiscal Documentation, Amsterdam.*

## 1. Introduction

In practice, the organisation of governments, including their fiscal relations, constitutional and institutional arrangements, varies considerably from one country to another. The most important factor that determines the distribution of tax law making powers among the various levels of government is whether the state is federal, centralized or regionalized[3].

The combinations of government units found in Europe generally consist of three sub-sectors: (i) federal or central government; (ii) state, provincial, cantonal, or regional governments; and (iii) local governments or municipalities.

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[1] Original version.

[2] This paper has been written in colaboration with TIAGO CASSIANO NEVES. Senior Research Associate, International Bureau of Fiscal Documentation, Amsterdam.

[3] In referring to federal and centralized states, it is important to remember that these are simplifications and that the constitutional reality may defy any easy categorization. *See Frans Vanistendael, Legal Framework for Taxation, Tax Law Design and Drafting, volume I: Chapter 2.*

In several European countries, there is a tendency towards the constitution of a federal state and even formerly centralized states, such as Belgium, France, Italy, Spain, and the United Kingdom, are all in varying degrees in the process of organizing political and fiscal powers at the intermediate level of government[4]. Consequently, the degree of fiscal decentralisation throughout these sub-national levels of government also differs.

Amongst those sub-national levels of government we find the Regions. The term is used, especially, in relation to regions with some sort of historical claim or idiosyncrasy in relation to the remaining territory and different degrees of decentralisation. Examples may include for instance: (i) Scotland, Wales and Northern Ireland, in the UK; (ii) the island-regions of Sardinia and Sicily in Italy; (iii) the Basque country and Navarre in Spain; or (iv) the Finnish province of Äland.

In the European Union, the legislative power for all elements of a tax and its revenue is in many cases not vested in one particular level of government, but distributed over several levels of government. This makes it extremely difficult and delicate to address the issue of Regional taxation in Europe, its models and its challenges under State Aid.

## 2. Asymmetries on the Distribution of Tax Law Making Power

Tax law making powers can be divided in different ways throughout different sub-national levels of government. First, a distinction can be made between various types of taxes, such as income taxes, wealth taxes, turnover taxes, excise and consumption taxes. A second distinction can be made with respect to the elements of any tax, namely the entities or persons subject to the tax, type of taxpayers, tax base, tax rate, and procedure and collection.

The most frequent model is one in which the central government retains control over the determination of the subjects of taxation, the tax base, and the procedural rules, but the power to set rates is shared with other levels of government. For example, in several European countries a surcharge of one or more national taxes is levied for the benefit of local governments. In some cases, besides the power to set the rates, part of the legislative power with respect to the tax base also belongs to regional or

[4] This trend is largely due to the increase of the importance the provision of services by lower levels of government. Basically, there are several arguments in favour of provision of services by lower levels of government: (i) Lower levels of government are likely to know more about the preferences of their citizens and their willingness to pay for public services. They are elected and accountable to their electorate and likely to be better informed about implementation policies than the central government; (ii) Centrally-determined policies are likely to be less flexible and responsive to local conditions, either because of rules of equal treatment across localities, or because central authorities prefer simple and relatively uniform policies; (iii) Decentralisation could protect citizens from excessive use of the taxing power of central governments as a result of tax competition.

local governments. In other cases, federal and regional levels of government hold a parallel taxing power on the same tax.

The distribution of tax law making powers in most centralized states is fairly simple because there are only two significant levels of government: central and local[5]. The distribution of tax law making power in a federal state, on the other hand, is naturally more complex because there is at least one additional level of government (the regional government) large enough to administer a major modern tax system.

**Examples of Fiscal Decentralisation in Europe:**

In Germany, the Federal Government theoretically shares its tax law making power with the state governments. This parallel power is limited, however, by another constitutional provision stating that the state governments lose their lawmaking power when the Federal Government has legislated in a tax area.

In Switzerland, the confederation and the cantons effectively share tax law making power for direct taxes on income and wealth. Conflicts between certain types of tax legislation are solved by harmonization of the conflicting tax rules.

Swiss cantons therefore enjoy strong fiscal autonomy due to the *high proportion of taxes in their revenue, ability to set tax rates and collect tax proceeds.* German Lander, despite broad resources and responsibilities, have no autonomy *on tax matters*. In this area, the central State prevails upon them to guarantee financial solidarity and homogeneity since the Lander cannot set their tax rates and the tax *revenue is largely equalised.*

In a federal or regionalized system, the question is how to distribute tax law making power with respect to major taxes while maintaining an integrated economic union. This leads us to the question of which taxes are best suited for use at different levels of government.

On this aspect, fiscal federalism literature[6] provides valuable insights into the way expenditure functions and revenue-raising responsibilities (such as tax) should be allocated between different levels of government in order to reach a high level of overall welfare.

[5] The local government in most cases is too small to administer any of the important taxes, so the power to impose the most important taxes rests with the central government. The problem in these centralized states is that, as financial needs of local governments grow, the proliferation of different types of local taxes also increases, with natural ill effects on the tax burden and systematic of the tax system.

[6] *Wallace E. Oates, Taxation in a Federal System: The Tax-Assignment Problem, Public Economics Review, June 1996, Vol. 1, pp. 35-60.*

Accordingly, the principles for assigning taxes to different levels of government provide that:

i) Taxes on highly-mobile tax bases should be allocated to higher levels of government in order to avoid locational decisions being based on tax considerations, while lower levels of government should use immobile tax bases;
ii) Tax bases that are very uneven across jurisdictions should be centralised in order to reduce inequities and a potential for allocative distortions; and
iii) Regional arbitrariness in allocating taxes to particular jurisdictions should favour centralisation.

But these are general principles, sometimes far from the difficulties and consensus drawn from a particular political reality. In addition, literature on fiscal federalism has also drawn the attention to the distorting factors of inter-jurisdictional tax competition arising from fiscal decentralisation. The argument being that regional or local governments in their eagerness to attract economic activity in the form of new firms or jobs may tend to hold tax rates below their efficient levels. But again, this risk of adverse effects of tax competition is a debated issue and is somewhat beyond the scope of this address[7].

## 3. Birds Eye View on the Fiscal Autonomy of Sub-Central Governments

As mentioned above, fiscal autonomy is part of the institutional arrangement, such as responsibility and revenue assignment, in which the different levels of government operate and it is not surprising that there are large differences between EU member countries in the way fiscal responsibilities are divided between different levels of government[8].

This division is in part linked to the system of government and in particular whether the country is a federal (Austria, Belgium, Germany, Switzerland) or unitary state. However, the distinction is naturally not clear-cut. Spain and Italy could be classified in both groups, since they are unitary states with some characteristics of a federal state. Spain, for example, has three levels of government (central, regional and local) and even between them there are differences. The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) also have some special characteristics.

These differences can be better understood through Table 1, which outlines briefly the various levels of regional autonomy across Europe.

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[7] Nevertheless, just consider the example of a particular company, which takes advantage of the different tax rules operating in each of the states to arrange its affairs in a more tax efficient way. If it is allowed, under certain circumstances, to do it at a EU level, it should be also allowed to do it at a regional level.

[8] *Taxing Powers of State and Local Government, OECD Tax Policy Studies No. 1, 1999.*

Table 1. **Level of regional autonomy across the EU**

| | Level of Autonomy | | | | Observations |
|---|---|---|---|---|---|
| | **High** | **Medium** | **Low** | **Non-existent** | |
| **Federal States** | | | | | |
| Germany | Länder | | | | Länders have the right to legislate in all areas which are not vested solely in the Federal Government. |
| Austria | Länder | | | | Länders are responsible for the implementation of certain federal laws. |
| Belgium | Regions | | | | Taxation as shared responsibility. Limited fiscal autonomy. |
| **Regional States** | | | | | |
| Italy | | "Special statute" Regions | "Ordinary" Regions | | Tax system and fiscal equalisation still very centralized in the state level |
| Spain | Historical territories (Basque Country and Navarra) | Autonomous Communities | | | Asymmetrical responsibilities of the Autonomous Communities. Constitution confers taxation powers upon autonomies but enables the State to limit them. |
| **Regionalised States** | | | | | |
| France | | | Regions (made up of several "départements") | Central State | Responsibilities of the regions include direct and indirect aid for companies |
| Portugal | | Madeira and Azores regions | | Central State | |
| UK | Scotland | Wales and N. Ireland | | | Asymmetries between Scottish, Welsh and Northern Irish legislative and administrative responsibilities, including tax autonomy. Special status of Gibraltar. |

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| | Level of Autonomy | | | | Observations |
|---|---|---|---|---|---|
| | High | Medium | Low | Non-existent | |
| **Centralized States** | | | | | |
| Denmark | | | | Central State | Special status of Greenland and Faroe Islands is different than the counties and municipalities |
| Sweden | | | | Central State | Low degree of autonomy for regions |
| Finland | Autonomous province of Äland | | Regional councils | Central State | Äland has a full-scale regional government. Regions have limited fiscal autonomy |
| Greece | | | | Central State | Peripheria (regions) are simple sub-divisions of the State |
| Ireland | | | | Central State | Very low degree of autonomy for devolved tiers of government |
| Luxembourg | | | | Central State | State responsibilities include all fields relating to the national interest, including tax |
| Netherlands | | | | Central State | Administrative power rests with the central government. Low responsibilities of provinces and municipalities |

Nevertheless, regional autonomy may involve different degrees of fiscal autonomy since such autonomy may be financed through taxes, grants, service charges and fees (or borrowings). Therefore, another common way to compare and assess fiscal autonomy is the extent to which resources and responsibilities are under the control of local and regional governments.

In fact, there are also large differences in the way EU countries finance their expenditures at sub-national levels of government[9]. For example:

– In Belgium, the regions relied mainly on ceded taxes until the 2001 reform when taxing powers to the regions were increased;

[9] *Recent Tax Policy Trends and Reforms in OECD Countries, OECD Tax Policy Studies No. 9.*

– In Austria, tax sharing represents an important part of income for local government;
– For the German Länder, general grants from the federal government are small and income from shared tax revenue (where local tax autonomy is low) is the most important source of revenue;
– Transfers to local governments are relatively high in the UK and the Netherlands, which indicates their relatively centralised system of financing local governments;
– In Italy, reforms in the 1990s have strongly reduced local governments' dependence on transfers from the centre and extended their autonomy in raising taxes[10].

For example, in the period 1985 to 2004, the percentage shares of government levels in total tax revenues in selected OECD countries (which include EU Countries) varied significantly (table 2), with a noticeable increase of the tax revenues assigned to lower levels of government[11].

Table 2. **Taxes by level of government**

| | | | Federal Central government | | State or Länder government | | Local government | | Social Security Funds | |
|---|---|---|---|---|---|---|---|---|---|---|
| | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** |
| **Federal countries** | | | | | | | | | | |
| Australia | | | 81.4 | 68.1 | 14.9 | 29.0 | 3.7 | 3.0 | – | – |
| Austria | | 0.2 | 48.9 | 54.6 | 13.1 | 8.5 | 10.7 | 9.4 | 27.2 | 27.3 |
| Belgium | 1.6 | 1.3 | 62.7 | 34.0 | – | 23.8 | 4.7 | 5.3 | 31.0 | 35.7 |
| Canada | | | 41.2 | 44.8 | 36.0 | 37.9 | 9.3 | 8.6 | 13.5 | 8.7 |
| Germany | 1.0 | 0.9 | 31.6 | 30.2 | 22.0 | 21.6 | 8.9 | 6.8 | 36.5 | 40.5 |
| Mexico | | | 87.7 | 79.9 | 0.4 | 2.2 | 0.6 | 1.0 | 11.3 | 16.9 |
| Switzerland | | | 33.2 | 34.1 | 26.1 | 24.2 | 18.0 | 16.2 | 22.7 | 25.5 |
| United States | | | 42.1 | 38.8 | 20.2 | 20.2 | 12.6 | 14.7 | 25.2 | 26.4 |
| *Unweighted average* | 1.3 | 0.8 | 53.6 | 48.0 | 16.6 | 20.9 | 8.6 | 8.1 | 20.9 | 22.6 |
| **Unitary countries** | | | | | | | | | | |
| Denmark | 0.8 | 0.3 | 68.4 | 61.5 | | | 28.4 | 35.7 | 2.5 | 2.5 |
| Italy | 0.6 | 0.3 | 62.3 | 53.4 | | | 2.3 | 16.9 | 34.7 | 29.5 |

…/…

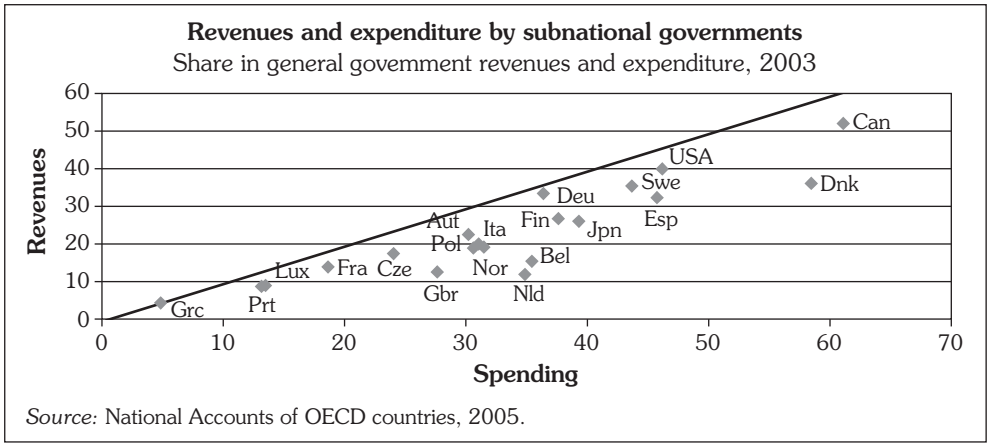
[10] Apparently, this trend is now being reversed.
[11] 2005 OECD report on Fiscal autonomy of sub-central governments.

.../...

| | | | Federal Central government | | State or Länder government | | Local government | | Social Security Funds | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1985 | 2003 | 1985 | 2003 | 1985 | 2003 | 1985 | 2003 | 1985 | 2003 |
| Portugal | | 0.9 | 70.6 | 60.3 | | | 3.5 | 5.8 | 25.9 | 33.0 |
| Spain | | 0.4 | 47.8 | 37.0 | | | 11.2 | 28.2 | 41.0 | 34.4 |
| Sweden | | 0.7 | 54.1 | 55.0 | | | 30.4 | 32.7 | 15.6 | 11.6 |
| United Kingdom | 2.7 | 1.2 | 69.4 | 75.5 | | | 10.2 | 4.8 | 17.8 | 18.5 |
| *Unweighted average* | 1.4 | 0.7 | 64.2 | 61.4 | | | 12.3 | 13.4 | 22.9 | 24.9 |

*Source:* OECD Revenue Statistics 1965-2004.

Figure 3. **Decentralisation ratios in OECD countries, 2004**




*Source:* National Accounts of OECD countries, 2005.

In addition, the following decentralisation ratios demonstrate the current state of financial decentralization as measured by sub-central government shares of total tax revenue and expenditure in OECD countries (figure 3).

Nevertheless, the fiscal autonomy does not refer only to the discretion of a level of government to decide how to spend the available budget, but also its discretion to design and collect taxes to finance it. This design or capacity to deviate from the national framework at regional/local level basically depends on the extent to which the sub-central government has the constitutional authority to decide on the elements of specific taxes. In this field a wide range of models are possible.

**The Spanish Fiscal Decentralization Model:**

The Spanish Constitution of 1978 omits any reference to the form of the State (i.e. it does not describe Spain as a centralized, federal or regional state). The Constitution establishes the so-called optional autonomy system (principio dispositivo). Accordingly, certain groups of provinces, provided that they have common historical, cultural and economic characteristics, have the right to decide whether they want to become autonomous communities[12]. If they decide to do so, they then have to choose which matters they want to be responsible for. The Constitution does not actually assign explicit authority to autonomous communities, but leaves them the possibility of taking authority over a group of matters listed in the Constitution[13]. Nevertheless, the State is responsible for regulating the basic conditions to ensure the equality of all nationals in the exercise of their rights and the fulfillment of their obligations' and is assigned exclusive authority for 'coordination of the economy[14]. It should be noted that the Constitution establishes that the laws of the State will at any rate be supplementary to those of the autonomous communities.

In summary, the Spanish Constitution confers taxation powers upon the Autonomous Communities[15], but enables the State to limit them through a special law. The most important limitation is the prohibition of double taxation, which prevents Community taxes from being similar to state and municipal taxes. Moreover, the Constitutional Court has often broadly interpreted these limits, making it almost impossible for the Communities to introduce new taxes. Therefore, despite constitutional provisions that guarantee Communities both the power to establish taxes and financial autonomy, the limits established by the State have led to a system where taxation powers have remained mostly in the hands of the latter.

From a fiscal point of view, one can distinguish two types of autonomies: autonomy with a common system and the foral system (Basque Country and Navarra).

With regards to the so-called Common system autonomies, it should be noted that fiscal relations between the central government and common autonomies are essentially ruled by a system of limited fiscal autonomy. In July 2001, the central government and the autonomies reached a new agreement on a new financing scheme based on principles of sufficiency, autonomy and solidarity. The new scheme has been extended to the 2002-2006 period and is intended to ensure that the increased fiscal decentralisation does not put the national fiscal consolidation targets at risk. Apart

…/…

[12] Art. 143 of the Constitution. The idea of the Constitution was that some Communities with self-government experiences should be given the opportunity to become fast trackers from the beginning, while the rest would have to start by being slow trackers. These fast trackers were Catalonia, the Basque Country and Galicia. The recognition of historic rights for the Basque Country and Navarra resulted in a much greater level of authority, especially in fiscal matters.

[13] Arts. 148 and 149 of the Constitution.

[14] Art. 149 of the Constitution.

[15] Arts. 133 and 157 of the Constitution.

…/…

from the proceeds from fees from services provided to taxpayers and from loans, the revenue sources of common autonomies include the following taxes:

- Ceded taxes with a taxing power: Personal income tax, wealth taxes; inheritance and gift taxes[16]; transfer tax and stamp tax; and gambling taxes;
- Ceded taxes without a taxing power: VAT (45%); excise duties (40%); tobacco tax (100%); and electricity taxes (100%)[17];
- Share in the remaining State general tax revenues is also provided by way of a guarantee fund.

With regards to the foral system autonomies, is should be noted that the Basque country and Navarra Autonomies are covered by an Economic Agreement with the central government, which is called Concierto Económico and Convenio Económico respectively. Generally, these autonomies share with the State almost all taxes. Conversely, these regions must contribute to the central government by means of the so-called "cupo" (quota), which is linked to the general expenses that the central government makes on their behalf[18].

In conclusion, no single model can be said to exist. In addition, the image and role of regions in Europe is far from clear since from an institutional point of view the European Union is and remains constituted by States. An EU framework centralized in States may therefore impact on the ability of States to pursue wider fiscal decentralization models, especially in an area such as State Aid.

## 4. European Union Constraints in the field of Tax

The practical consequences of the coexistence of 27 different tax systems may be further unbalanced by the asymmetries between regions, their power to tax and even their power to legislate in the field of tax.

The problem starts because the EU framework is basically addressed to its Member States, ignoring to a large extent lower levels of government such as regions. This poses challenges to Regions and States, which although remaining important focal

[16] Legislation on these taxes is enacted at the central government level, with some decision power delegated to the autonomies (e.g. set tax rates of the transfer tax on transfer of immovable property).

[17] Common autonomies are entitled to a block grant from the central government equal to a certain percentage of the taxes collected in their territory.

[18] On the Spanish Model see amongst others *Fiscal Federalism in Spain: The Assignment of Taxation Powers to the Autonomous Communities, Violeta Ruiz Almendral, European Taxation November 2002, Autonomous Communities Taking Advantage of the Mechanism to Ensure the Neutrality of VAT, Violeta Ruiz Almendral Vat Monitor, September/October 2003, The Asymmetric Distribution of Taxation Powers in the Spanish State of Autonomies: The Common System and the Foral Tax Regimes, Violeta Ruiz Almendral.*

points, have seen their autonomy and policy-making capacity reduced considerably as a consequence of two complementary processes: (i) the shift upwards to the supranational EU level of several competences; and (ii) the shift downwards due to pressures for decentralization and devolution mostly at a regional level.

Alongside a centralised monetary policy, the EU Model leaves thereby Member States formally independent with respect to fiscal policy[19]. The EC Treaty contains a number of proposals for further federal development, but the principle of intergovernmental cooperation in fiscal matters has been mostly maintained.

In addition, in areas that do not fall under its exclusive competence the principle of subsidiarity should be applied[20].

Amongst the common policies and activities of the EU, Art. 3(1) of the EC Treaty includes:

– the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
– an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
– a system ensuring that competition in the internal market is not distorted and the approximation of the laws of Member States to the extent required for the functioning of the common market.

Historically, the EU has dealt with existing fiscal obstacles through positive integration (tax harmonization or cooperation between Member States) or negative integration (elimination of discriminatory rules of certain futures of the tax systems of Member States). A third way to remove fiscal obstacles has been pursued through fiscal state aid rules, which are designed to ensure that competition in the internal market is not distorted[21].

Harmonization measures (the so-called positive integration) have not been the most important tool in eliminating the existing fiscal obstacles in the field of direct taxation[22].

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[19] The EC Treaty sets out its objectives in Art. 2, which include (i) the establishment of a Common Market; (ii) the establishment of an Economic and Monetary Union; and (iii) the implementation of Common Policies or Activities.

[20] This principle, which is inspired by the theory of fiscal federalism, is intended to contribute to the maintenance of the respect of the national identities of Member States and to safeguard their powers, and it aims at involving citizens as closely as possible in the decision-making process. In short, subsidiarity limits the action of the Community and implies that national or lower-level powers are the norm and those of the Community the exception.

[21] Although, it is hard to believe that the European founding fathers envisaged an unbalanced outcome at the level of direct taxation (i.e. combination of insufficient community legislation, far-reaching ECJ case law and central state-aid control), this is the current state of affairs.

[22] Articles 90-93 are the legal basis in the EC Treaty for harmonization of taxes on indirect taxes. For direct taxes, no express provision on harmonization of direct taxes. This explains the success of positive harmonisation measures in the field of indirect taxes.

In fact, Art. 94 of the EC Treaty, the legal basis for the existing Parent-subsidiary, Merger, Interest and Royalty and the Mutual Assistance Directives, requires unanimity for its approval. This hard to achieve requirement may well explain the lack of success of a series of wide-ranging harmonization proposals in the filed of direct taxation, especially when compared with indirect taxes such as VAT.

As mentioned above, Member States are in principle free to impose their own tax laws, but there are certain limits for their freedom of action. In fact, tax legislation that violates fundamental freedoms established in the EC Treaty cannot be upheld unless justified under rules, the interpretation of which are strictly interpreted by the European Court of Justice. This process is not the result of community law established by joint action of EU Commission, Council and Parliament, but the effect of the so-called negative integration. Basically, negative integration equates to the interpretation of the fundamental freedoms by the ECJ with a view to abolishing obstacles to the internal market created by national tax provisions and examples of areas of impact of this negative integration are numerous, such as corporate shareholder taxation, exemptions and allowances for non-residents, exit taxes, cross-border losses and recently CFC regimes.

The other area where development has lead to the removal of fiscal obstacles has been the fiscal State aid rules[23]. State aid is a form of State intervention used to promote a certain economic activity. Since restrictions on competition are not a "monopoly" of companies, governments when granting public aid to businesses should be assessed in a similar fashion. As such, the EC Treaty considers incompatible with the EU internal market any aid (including forgone tax revenue) granted by a Member State, which distorts competition and affects trade between Member States.

In order for a specific measure to be considered incompatible State aid (in the form of forgone tax revenue) it is generally necessary for such measure to: (i) give rise to a selective advantage (e.g. favouring certain undertakings or the production of certain goods); (ii) involve state resources; (iii) affect intra-community trade or competition; and (iv) not be justified by the nature of the tax system[24].

In the "Notice on the application of the State aid rules to measures relating to direct business taxation", issued in November 1998, the EU Commission provides a general explanation on the application of the four conditions to fiscal measures and explicitly mentions as selective or specific provisions:

– sectoral fiscal measures, whose applicability is limited to certain sectors of the business activity (i.e. shipbuilding, coal and steel, etc.);

[23] The European Commission is empowered through Art. 87- 89 to tackle State aids which distort competition and therefore are incompatible with common market.

[24] For more details on the application of those rules in tax matters, please see the 1998 Commission notice on the application of the State aid rules to measures relating to direct business taxation and the 2004 Report on the implementation of the Commission notice on the application of the State aid rules to measures relating to direct business taxation.

– horizontal fiscal measures, which are limited to certain functions within a firm but apply to all the firms indiscriminately (i.e. R&D, environment, training and employment investments, etc.); and
– regional or local fiscal measures, whose applicability is limited to a certain area within a Member State.

From the point of view of Regions, the problem rests therefore on the absence of guidelines as to the place of autonomies and regions in the institutional tax framework of the EU, especially as regards State aid. May a regional tax system diverge from the central tax system without violating the selectivity criteria of the State aid rules?

## 5. How European Taxation impacts regional taxation?

The question is then how the above-mentioned European constitutional limits impact the ability of regions to design, levy and collect taxes. In other words, can there be under the EU Model a coexistence of 27 different national tax systems plus regional differences within each of those systems?

For example, assume that a particular region is (i) allowed to set their own corporate tax rates, under which the tax base is determined in accordance with national rules; or (ii) may simply deviate from the tax base applying in the rest of a particular Member State by providing an exemption on certain income or enlarging the scope of certain tax incentive.

One possible solution is to consider that only tax measures that are open to all economic agents operating within a Member State (and not only to agents operating in a region) can be categorised in principle as general measures. In that respect, only measures whose scope would extend to the entire territory of the State escape the specificity criterion. Nevertheless if that assertion would be the case for all situations, then prima facie all national tax variations limited to a geographic subsection of a Member State, such as the ones derived from regional autonomy, would qualify as 'geographically' selective.

Until the recent decision on the Azores case[25], the ECJ and the EU Commission had only briefly touched upon this problem, with quite harsh results for regional autonomies.

For example, Advocate General Saggio in Joined Cases C-400/97, C-401/97 and C-402/97[26] mentioned *"the fact that the measures at issue were adopted by regional authorities with exclusive competence under national law is (…) merely a matter of form, which is not sufficient to justify the preferential treatment reserved to*

[25] ECJ, 6 September 2006, Case C-88/03, Portuguese Republic v. Commission, of the European Communities, not yet published.
[26] It should be noted there was no final ruling in these cases, as the proceedings were later suspended.

*companies which fall under the provincial laws. If this were not the case, the State could easily avoid the application, in part of its own territory, of provisions of Community law on State aid simply by making changes to the internal allocation of competence on certain matters, thus raising the general nature, for that territory, of the measure in question".*

On the other end, the EU Commission has also adopted a rather limitative position with regard to fiscal autonomy in the 2004 report on applying the State aid rules to direct business taxation. More recently the EU Commission has also referred to passages of AG Saggio opinion when challenging the Gibraltar tax system.

But this position does not reflect the fact that various European autonomies are rooted in history and are not an artificial creation by Member States to avoid the State aid rules. Hence, countries like the United Kingdom, Portugal and Spain have pressed the EU Commission to take into account the degree of autonomy of the regional or local authority, before classifying regional tax rates (which are lower than the national tax rate) or deviations to the national tax system as State aid.

So an answer was needed as to which should be the point of comparison, taking into account different degrees of autonomy found in the EU, in considering whether a geographically limited national tax rate or base variation "favours certain undertakings or the production of certain goods". And the breakthrough to the issue of regional taxation and EU State aid rules came partly from the recently decided Azores case.

## 6. The Decentralisation Parameters set out on the Azores Case

In its judgment in the Azores case, the ECJ stated that regional fiscal autonomy does not give rise to selectivity per se, thereby justifying the existence of fiscal autonomy within Europe.

Specifically, the ECJ held that:

> "It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned.
>
> The Commission's argument that such an analysis is rendered inadmissible by the wording of the Treaty and the well-established case-law in that field cannot be accepted"[27].

[27] Para. 58 and 59.

In order to better situate the ECJ decision it is perhaps important to review the background of the case. In 2000, the Portuguese authorities notified (as required by EC Law) the European Commission of a scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores[28]. The measures, approved by the legislative body of the Azores Region, included, in particular, a reduction in the rate of personal income tax of 20 % (15 % for 1999) and a reduction in the rate of corporation tax of 30 % for taxpayers in the region.

Taking into account the State aid rules, the EU Commission responded to the Portuguese notification by initiating an investigation procedure, specifically with regard to that part of the scheme concerning reductions in the rates of income and corporate tax. Pursuant to the investigation, the Commission classified as state aid the tax reductions for residents of the Azores ( Decision 2003/442/EC). After examining the scheme, in light of the guidelines on national regional aid, the Commission, however, considered that such aid meets the conditions for being considered as being compatible with the Common Market, under the derogations of Art. 87(3)(a) of the EC Treaty, i.e. "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment"[29].

Nevertheless, the Commission decision included a caveat in that it made between the financial and the non-financial sectors. In fact, in respect of financial sector firms, the Commission stated that such corporation tax reductions were "not justified by their contribution to regional development" and, therefore, the tax reductions did not qualify as permitted national regional aid under Art. 87(3)(a) (i.e. regional aid) or any other derogation provided for in the EC Treaty. The reasoning was that the existence of real regional handicaps counts for very little for mobile activities, such as financial services and firms of the 'intra-group services' or 'coordination centre' type of activities. Accordingly, Portugal was ordered to recover the aid made available to firms carrying on financial or intra-group service activities. Since the Portuguese law did not establish any intra-group service regime, the impact of the decision was primarily on the financial institutions benefiting from the reduced rates.

Eventhough the Commission decision impacted only on financial firms having their activities in Azores, it could be said that the argument as concerns regional selectivity limited future plans for future divergence between the tax system of mainland Portugal and the tax regime in place in the two autonomies, namely Azores

[28] The Azores, an archipelago of nine Portuguese islands in the middle of the Atlantic Ocean (1,500 km from Lisbon and 3,900 km from North America), is one of the two Portuguese autonomous regions (the other being Madeira), which possesses its own political and administrative statute and has its own regional government and legislative parliament (elected by universal suffrage).

[29] National regional aid in Azores was, in this case, justified due to its contribution to regional development and the fact that it was proportional to the additional costs they were intended to offset.

and Madeira. Portugal therefore reverted to the ECJ and challenged the Commission decision on 3 grounds, being the first ground the important issue for the discussion herein. The most important argument was that the reduced rates were not selective but general measures, since the reference framework should have been the region and not the entire Portuguese territory[30]. The Commission, on the other hand, submitted that the selectivity of a measure was to be determined by reference to the national framework and that the degree of autonomy of the Autonomous Region of the Azores was in fact limited.

In its opinion issued on 20 October 2005, Advocate General Geelhoed pointed out that since the ECJ has never answered this specific question, namely regional autonomy and State aid, it was for the ECJ to set out the applicable principles. For this purposes, the Advocate General distinguished three different scenarios, depending on the decentralization model adopted by a particular State:

- In a first situation, if a central government of an EU Member State unilaterally decides that the national tax rate should be reduced within a defined geographic area, the AG considered that such a measure should be clearly viewed as selective;
- Secondly, if all the local or regional authorities have autonomous powers to set the tax rate for their geographical jurisdiction, whether with or without reference to a "national" tax rate, the AG considered the measure to be non-selective within the meaning of the State aid provisions[31]; and
- In a third situation, where a tax rate lower than the national tax rate is decided upon by a local authority and applicable only within the territory of that local authority, the AG considered that the selective nature of the measure depends on whether or not the lower tax rate results from a decision taken by a local authority that is "truly" autonomous (i.e. institutionally, procedurally and economically autonomous) from the central government of the EU Member State.

By "truly" autonomous, the AG referred to three different parameters of a State autonomy, namely institutional, procedural and economic autonomy.

- By institutionally autonomy, the Advocate General was referring to infra-State bodies with their own constitutional, political and administrative status separate from that of the central government.
- By procedurally autonomous, the Advocate General was referring to the independence of the infra-State body in the procedure of setting the tax rate and

[30] Not surprisingly, the United Kingdom and Spain intervened in the case in support of the Portugal.

[31] This basically corresponds to a model for distribution of tax competences in which all the local authorities at the same level (regions, districts or others) have the autonomous power to decide, within the limit of the powers conferred on them, the tax rate applicable in the territory within their competence. In this case a measure is not selective because it is impossible to determine a normal tax rate capable of constituting the reference framework.

without any obligation on the part of the local authority to take the interest of the central State into account.

– Finally, by economically autonomous, the Advocate General was referring to the situation of whether the forgone tax revenue (through a tax reduction) is cross subsidised or financed by the central government, so that the economic consequences of such tax reductions are not ultimately borne by the region itself.

The AG then concluded that when a local authority decides to institute a tax rate lower than the national rate and it exercises its (tax) autonomy institutionally, procedurally and economically, such decision cannot be qualified as 'selective' for State aid purposes.

The ECJ judgment of 6 September 2006 basically followed the AG opinion. For the purposes of examining a measure adopted by an infra-State body in the exercise of powers sufficiently autonomous vis-à-vis the central power, the ECJ referred back to three different scenarios, set out in the AG opinion. In a more polished way (but without deviating from the Advocate General's conclusions), the ECJ considered that the exercise of sufficiently autonomous powers requires constitutional autonomy (i.e. separate political and administrative status), procedural autonomy (i.e. no direct intervention by the central government) and financial autonomy (i.e. the cost of tax reductions is borne by the autonomy and not offset by aid or subsidies).

The difference between the AG opinion and the final decision of the court resides strictly in the issue of procedural autonomy. The ECJ made no reference to an "obligation on the part of the local authority to take the interest of the central State into account in setting the tax rate" and that missing element may play an important role in evaluating autonomies, whereby the power to legislate is limited by national interest parameters[32].

In applying the set of principles, laid down by the AG, to the Azores scenario, the ECJ started by noting that the Azores have been designated an "autonomous region" and that this region has the power, in certain circumstances, to exercise their own fiscal competence and the right to adapt national fiscal provisions to regional specificities. Nevertheless, the ECJ noted that the reduction in tax revenue, resulting form the lower rates, is offset by a financing mechanism, in the form of compensatory financial transfers from the central State. In this regard, the ECJ considered that the decision of the government of the Autonomous Region of the Azores to exercise its power to reduce the rates was not economically autonomous, in view of the budgetary transfers made by central government.

In conclusion, the ECJ considered that the relevant legal framework for determining the selectivity of the reduced rates was the whole of the Portuguese territory and

[32] This "forth" parameter could in fact jeopardize or make the analysis more intricate, as regards cases where the freedom of the infra-body to legislate is limited constitutionally by principles of solidarity, maximum or minimum tax burdens or similar restrictions.

that such reductions were not justified by the nature or the overall structure of the Portuguese tax system.

## 7. But do "true autonomies" really exist?

Taking into account the parameters set out by the ECJ, it appears that the issue of regional selectivity under EU State aid rules received a well-deserved new input. Nevertheless, the ECJ decision on the Azores case begs the question as to whether the distinction between an autonomous infra-State body and a not "truly" autonomous infra-State body is a rather straightforward distinction, i.e. easy to apply in practice. Basically, do "true autonomies" under the principles laid down by the ECJ even exist?

As mentioned above, in Europe, no single model of regional autonomy can be said to exist. Therefore an assessment of the various decentralisation models may well prove insufficient. Interpretation issues are therefore bound to arise as to whether a specific region fulfils the criteria of being institutionally, procedurally and economically autonomous and a clarification/update by the EU Commission on this field is therefore welcomed.

For example, the third condition set out by the ECJ (i.e. whether the forgone tax revenue is cross-subsidised or financed by the central government) is a very intricate criterion to assess in practice. Indeed, interpretation of this criterion may range from (i) strict offsets (Euro for Euro compensation of the revenues foregone as a result of the tax deviation); (ii) broad budget equalization measures; and (iii) very broad unrelated "compensation" such as a common social security system, or ensuring defence and foreign policy by the central state. Also, it is not totally clear whether the compensation should come from the central state only, or whether intra infra-body compensation would fall under the criterion.

Although it is understandable that the Commission is concerned that regionalization of taxes may make it possible to operate changes to the general tax system and in that way circumvent EU State aid rules, namely the strict limits set out for regional aid, such concerns should not be made at the expense of the process of EU fiscal decentralization, a model adopted by certain EU States to preserve and guarantee the unity of their own territories, or to recognize historical realities.

In addition, forthcoming challenges may well prove a good opportunity to review the issue or regional taxation and the EU State Aid rules. One of those opportunities will soon arise on the currently pending Gibraltar case (UK overseas territory which is part of the European Union), in which the EU Commission opposes reforms to Gibraltar's corporate tax system by concluding that they were incompatible with the EU rules on State aid[33].

[33] This case however raised additional issues besides the Regional State Aid.

**The Gibraltar case:**

On 30 March 2004 the European Commission "pushed the breaks" on the proposed reforms to Gibraltar's corporate tax system, which were intended to take effect from 1 July 2004.

According to the planned reform (which could be said to deviate from other EU benchmark tax systems) companies domiciled in Gibraltar would be subject to a yearly payroll tax (per employee) and to a business property occupation tax. As such, every employer in Gibraltar would be required to pay payroll tax for the total number of its full-time and part-time employees who are employed in Gibraltar plus a business property occupation tax at a rate equivalent to a percentage of their liability to the general rates charged on property in Gibraltar. One interesting (and controversial) point of the reform would be that the liability to payroll tax together with business property occupation tax would be capped at 15 % of profits (that would probably mean that an offshore company without any physical presence in Gibraltar would pay no tax at all). The project included other features, such as a registration fee applicable to all Gibraltar companies and an additional top-up or penalty tax on profits generated by certain designated activities.

In its scrutiny of the reform plans, the Commission considered that a number of features of the reform proposals would be liable to confer an advantage on Gibraltar companies. At the top of the list (i.e. the first ground of dispute) was the regional selectivity, which would mean that the proposed system would grant an advantage to Gibraltar companies compared with UK companies. Basically, the corporate tax rate tax in Gibraltar would be set at 15%, rather than the United Kingdom's 30% statutory corporate tax rate.

The essence of the Commission's view on the regional selectivity of the Gibraltar tax reform proposals, is that they provide, in general, for a lower level of taxation than that applicable in the United Kingdom and that this difference amounts to a selective advantage for companies active in Gibraltar. According to the Commission, a distinction based solely on the body that decides the measure would remove all effectiveness from Art. 87 of the EC Treaty, which seeks to cover the measures concerned exclusively according to their effects on competition and Community trade. The Commission, in making its point on regional selectivity, even referred to the above-mentioned controversial position of AG Saggio opinion on the cases involving the Basque region. In addition, the Commission pointed out that the use of a purely institutional criterion to differentiate 'aid' from 'general measures' would inevitably lead to differences in treatment in the application of the rules on aid to Member States, according to whether they had adopted a centralised or decentralised model of allocating tax competence[34].

[34] Raymond H.C. Luja State Aid Reform 2005/09: Regional Fiscal Autonomy and Effective Recovery, European Taxation, December 2005.

Nevertheless, it is possible that the acceptance by the ECJ of new parameters to determine regional selectivity may well play a role in the forthcoming discussions of this case.

Another region where the parameters set out by the ECJ will deserve future attention is the Basque Country. As mentioned above, the Basque territory is an autonomous community with the status of a historical region within Spain, and its institutional and economic autonomy very likely represent one of the highest standards of autonomy found in EU Member States.

**The Basque Model:**

*The Spanish constitution outlines a quasi-federal system where three levels of government coexist: central, regional, and local. In general, the autonomous area of the Basque Country benefits from a special tax regime, within the framework of the national laws of Spain. Under such special regime, the parliaments of the different regions comprising the Basque Country (Alava, Guipuzcoa and Bizkaia) are authorized to adopt and modify certain taxes within certain prescribed limits. The recognition by the Spanish Constitution of historic rights of the Basque Country resulted in a need to agree on the details of the functioning of the financial and tax system and the Economic Agreement between the Basque country and Spain (Concierto Económico) served that purpose. The Economic Agreement embodies the Spanish fiscal decentralization model, which entails a maximum level of tax autonomy. Conversely, these regions must contribute to the central government by means of the so-called "cupo" (quota), which is linked to the general expenses that the central government makes on their behalf*[35].

*In summary, under the Economic Agreement the Basque Country is given right to have its own tax systems, which include most of the powers to regulate and administer the main taxes, including personal and corporate taxes (VAT is for example excluded). The agreement includes, notwithstanding, a set of provisions that aim to guarantee an adequate level of harmonization between regional system and the common territory system.*

*Accordingly, the (regional) tax system shall nevertheless be in accordance with the (i) constitutional principle of solidarity; (ii) the general structure of the Spanish tax system; (iii) the coordination, fiscal harmonisation and cooperation with the Spanish State; and (iv) international agreements signed by the Spanish State (i.e. double tax treaties and European Union).*

In addition, when drafting tax legislation the infra-state bodies are required: (i) respect the general tax law in matters of terminology and concepts; (ii) maintain an

[35] In the case of the Basque Country, the authority on taxation matters is exercised by the governing bodies (Diputaciones forales) of the three foral provinces: Álava, Bizkaia and Guipuzcoa. Their treasuries regulate, levy and administer all the (conceded) Basque Country's taxes.

overall effective fiscal pressure equivalent to that in force in the rest of the State; (iii) respect and guarantee fundamental freedoms throughout the territory of Spain, without giving rise to discrimination or a lessening of the possibilities of commercial competition or to distortion in the allocation of resources; and (iv) use the same system (as the common territory) for classifying (…) industrial, commercial (…) activities.

## 8. Conclusion

Fiscal autonomy has been and will continue to be (perhaps even more) present in the political and social landscape of some of the most important European regions and State aid rules may have a limited role in tackling such fiscal autonomy. Taking into account the parameters set out by the ECJ, it appears that the issue of regional selectivity under EU State aid rules received a well-deserved new input.

Perhaps the outcome on the regional selectivity may reinforce the necessity to develop additional measures to curb (potential) tax competition by infra-state bodies (under the so-called "shadow" of fiscal autonomy). Nevertheless, the outcome on the Azores case may be said to have been a "fine day of sunshine" for the European "true" autonomies! If they actually exist!

# Community Taxation and Direct Taxes. General framework, development and Community limitations to the taxing power of the different taxation national levels

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## 1. Introduction

### *1.1. The European tax system*

Can we talk about *Community taxation* or, in other words, about a system of fiscal regulations of Community origin which can be described, in the widest meaning of this term, as *"Community tax system"*?

If we start from the premise that a *European tax system* will mean the existence of a group of European taxes as a whole, on top of the ones of the Member States,

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and which are the result of the execution of full competence of the Union Institutions in fiscal matters, the answer to the question is clear: a European taxation derived from a legal system of such a nature- particularly concerning direct taxes- does not exist, and it will never be able to exist in the light of the in force provisions of the Treaty establishing the European Community (EC Treaty) and its subsequent reviews.

In fact, the Treaties- pillars on which the European construction relies- don't confer direct legislative power in fiscal issues on the Community Institutions. Therefore, they cannot create new taxes because neither they can define their taxable bases or the methods to determine the fiscal burden, nor they can assure their levying.

Nevertheless, this doesn't imply the Community's roll in fiscal issues lacks relevance. We shouldn't forget that the EC Treaty itself contents provisions aiming at avoiding any tax discrimination in relation to imports and exports of goods; that it confers on the Community the power to establish agricultural taxes and duties on coal and steel; that the excise duties are subject to Community harmonization; or that taxation on supplies of goods or services has its origin in Community regulations, by means of a harmonized system of value added taxation.

However, on the other hand it is also true that, even when, as it happens with the VAT, a share of the tax revenue levied by Member States is bound to provide funds to the Community budget, the Community Institutions don't have any direct authority on the inspection and levying and cannot implement an effective economic policy through its own budget, which allows them to adapt their fiscal instruments to the expense capacity.

The legal limitations of the Community Institutions and the political reasons, they are based on, prevent, right now, the European Union from being similar to a federal State. The limitations in the financial available resources don't help particularly to reach a homogeneous fiscal system at the European level. As it can be easily confirmed, fiscal systems in the European Union vary substantially among them, not only with respect to the intensity but to the structure of taxes as well[2].

It can be affirmed, therefore, the concept of *Community taxation* is, more than a real and proper legal system, a *"system of European regulations of fiscal nature which have some incidence on the structure and evolution of the national taxation of Member States in order to achieve the targets of the European construction"*[3]

Nevertheless, this apparently restrictive confirmation of the Community roll in the fiscal policy field shouldn't be a surprise. Taxing power, as a resources source and economic policy instrument, constitutes an essential element for the sovereignty of the

[2] See the European Commission document *Structures of the Taxation systems in the European Union*: 1995-2004; http://ec.europa.eu/taxation_customs/taxation/gen_info/economic_analysis/tax_structures/index_en.htm

[3] P. Dibout, "Fiscalité et construction européenne: un paysage contrasté", Revue des Affaires Européennes, 1995, 2, 5.

States. So, it is reasonable that a prerogative of this nature is inalienable for the States and, as such, it is zealously defended by them, and that any attempt of the Community to extend its competences in this field provokes strong debates and negative responses.

Finally, it can be noticed that Community fiscal policy is laid out, in the EC Treaty, essentially as a *negative* policy, aiming functionally at preventing measures which hinder the fundamental freedoms of movement within the Community (of goods, persons, services and capitals) and the right of establishment. The EC Treaty, explicitly, prohibits any discrimination with regard to goods and services produced in other Member States and, through this prohibition, it promotes the Community trade.

### *1.2. The direct taxation provisions within the EC Treaty*

Taxation is not included among the main tasks of the Community laid out in article 2 of the EC Treaty.

What's more, concerning the taxation field, only the abolishment of customs duties is included within the explicit activities listed in articles 3 and 4, commending to the Community the performance of the necessary actions in order to achieve such targets, without exceeding its scope of competences.

Except for the regulations concerning the Customs Union, the only remarkable provision in the EC Treaty in force, specifically of fiscal nature, is in Chapter 2 of the Title VI in the Third Part (articles from 90 to 93), just after the regulations about competition; quite a far location, conceptually and formally, from the Community principles stated in the First Part.

In the EC Treaty there are some other references to fiscal matters (articles 23, 58, 175 and 293).

Examining in further detail the fiscal provisions of the EC Treaty, it can be noticed that article 90[4] establishes a general prohibition of fiscal discriminations to the detriment of imported goods from other Member States. It is just the reception in the Community Law of set principles in some other branches of International Law, for instance the GATT Treaty. Article 91[5] is its natural consequence: the prohibition of applying a higher duty on imported goods than on the internal ones must come along with

[4] Article 90 ECT: *"No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."*

[5] Article 91: *"Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly."*

a symmetrical prohibition of benefiting goods to be exported by means of granting higher tax refunds than the amount of national taxes effectively paid.

As it can be noticed, they are provisions based mainly on customs regulations and, therefore, on a tax policy more oriented to be a trade policy instrument than a proper fiscal policy tool.

Article 93[6] is the only one which holds a wording in *positive* terms, but this article only concerns indirect taxation and constitutes the grounds of the Community harmonization in VAT and Excise Duties. There is still not equivalent provision for direct taxation in the Treaty. When the Community Institutions have intervened, in a more or less direct way, in the national fiscal legislations about taxation on income, they have done it by virtue of article 94[7], a provision which doesn't specifically regulate taxation but the approximation of provisions of the Member States, which affect directly the functioning of the common market.

The Community activity by virtue of article 94- legal basis, as we have just mentioned, of the few Directives in direct taxation- has come across many difficulties, among other reasons, because the distortions caused by the coexistence of different tax regimens in the Member States are not *per se* a violation of the Community principles. In order to propose a draft of a Directive that harmonises some aspects of direct taxation, it has been necessary the Commission proves such distortion was a real obstacle for the functioning of the common market. Moreover, the unanimity requirement to adopt fiscal provisions makes their approval almost impossible. As it is easy to imagine, obtaining the simultaneous support of the 27 Member States to a proposal of a Community Directive on taxation matters is really difficult.

## 2. Limitations on national taxation sovereignty: general framework

### *2.1. The European Court of Justice (ECJ) role within the direct taxation framework: freedoms in the common market and no-discrimination*

If, despite the aforementioned, taxation has finally played a more remarkable roll than the one initially laid out by the drafters of the Rome Treaty, is due, basically, to

[6] Article 93 ECT: *"The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14."*

[7] Article 94 ECT: *"The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."*

the ECJ's activity, that, has been supported, to a certain extent, by the national Courts which have referred to the European Court countless conflicts caused by the implementation of the common market.

In fact, the contradiction between a united Europe for commercial purposes and twenty seven (today) different fiscal systems has provoked plenty of conflicts, many of which have been solved by the Courts and a significant number of them by the ECJ which, in a no easy task, has come to very reasonable solutions.

The principle of *no-discrimination or equality in treatment*, as it has been formed by the Community case-law, not only prohibits obvious discriminations on account of nationality but any other form of hidden discrimination that, by any means, will cause a similar result.

This is the first remarkable "constitutional" limitation on the taxation power of the Member States; as the Court has been repeatedly held in its decisions concerning direct taxation: *"Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law"*[8].

### *2.2. The remedies of the EC Treaty to tackle general fiscal measures violating the good functioning of the common market*

Some of the general fiscal measures of the Member States can hinder the good functioning of the common market.

The EC Treaty provides the Community with means of action aiming at abolishing the different sort of competition distortions which hinder the good functioning of the market.

Against such measures, the Treaty has stipulated the possibility of harmonising the fiscal provisions of the Member States, in accordance with the provisions of article 94 (Council Directives issued unanimously).

As we have already mentioned, the transnational procedures of harmonization, adopted on this legal basis, have been few so far but really important:

– The mutual assistance by the competent authorities of the Member States in the field of direct taxation. (Council Directive 77/799/EEC).
– The common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (Council Directive 90/434/EEC).
– The common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Council Directive 90/435/EEC).

[8] ECJ, C-279/93 (*Schumacker*), paragraph 21.

– The common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Council Directive 2003/49/EC).
– Taxation of savings income in the form of interest payments (Council Directive 2003/48/EC).

On the other hand, certain general provisions in force or in draft in the Member States which can distort competition or cause distortions can also be eliminated by virtue of articles 96[9] and 97. (Consultation to the Member States concerned by the Commission, and where appropriate, the Council Directives adopted by a qualified majority).

### *2.3. Application of the regulations about State aids to measures related to direct taxation*

The particular problems of State aids are going to be analysed in detail in other lectures of this Congress. Because of this, I am just going to focus on the essential elements of the Community framework, just to place my previous analysis in context.

Article 87 (1) of the ECT[10] establishes as a basic principle the incompatibility of *public aids to undertakings* with the common market. This general prohibition is alleviated by several exceptions, stated in the following paragraphs of the same article, which favour certain sort of aids regarded as *compatibles*, i.e., useful from the Community viewpoint, due to their social nature or because they contribute to the development of the poorest European regions.

This article speaks about *aids granted by Member States (...) in any form whatsoever.* Among the different forms of public aids, fiscal measures have called the European Commission's special attention. This particular interest is justified, at least, because of its quantitative importance as fiscal measures represent approximately 30 per cent of the total aids reviewed by the Commission.

It is impossible to make a really detailed inventory of all the cases in which a fiscal measure can be classified as a State aid. The form adopted by an aid of general nature depends on the evolution of taxation methods and of tax planning.

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[9] Article 96 ECT: *" Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned. If such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting by a qualified majority, issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty."*

[10] Article 87 (1) ECT: *"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."*

The distortions of free competition caused by the State fiscal aids are subject to a prior regime of authorisation by the Commission, under the control of the community judge. The notion of aid is an objective concept in relation to which the Commission cannot use any discretional power at all. Under article 88 (3), such distortions are subject to a compulsory notification procedure to the Commission.

Member States cannot implement their drafts of fiscal aids without its authorisation. The Commission examines the compatibility of the aids with the common market not according to their form but to their effects. If it classifies the aids as incompatible, it could require the Member State to alter or abolish it. If the aids had been implemented against the provisions of the procedural regulations, the abolishment implies, in principle, the beneficiaries must refund them to the Member State.

The Treaty provisions don't have direct effect, therefore the competence is conferred exclusively on the Commission, which is the only one that can execute this control.

Certainly, the fiscal sovereignty of the Member States can be jeopardized, or at least reduced, due to the obligation of abolishing a draft of a fiscal measure against article 87, as a consequence either of the immediate observation of the Commission's Decision or of the subsequent condemning judgement of the Court of Justice, which ends the procedure brought under article 88 (2), on the application of the Commission or of another Member State.

## 3. Evolution of Community taxation and the new limitations on the national taxation sovereignty

### *3.1. The "global approach" and the coordination of fiscal policies*

Since 1996 the European Commission has made clear that it intends to change the "*harmonising*" strategy that in fiscal matters had followed up to that moment. That strategy based on article 94 of the EC Treaty and on the proper functioning of the common market, cornerstone of European integration, had acted as a brake on the process of fiscal harmonization, regardless its promising success in the beginning of the 90s.

According to the Commission, taxation couldn't be seen as an element out of the process of European economic integration any longer. Only within the same framework as the rest of the Community policies, and with scrupulous respect to the principle of subsidiarity, there could be a significant advance. The lack of amendments in the Institutional framework in relation to fiscal matters- as it could have been, for instance, the change of the unanimity rule into the qualified majority one- which had allowed a more efficient action in order to adapt national legislations which hindered the full functioning of the common market, the Commission didn't have another way out but asking Member States to reach a higher level of approximation among their own fiscal policies.

This was how the new strategy of "*coordination*" of fiscal policies of Member States started, which is still on today.

In the first Community document of analysis[11], the lack of coordination of taxation systems- or even worse, the competition sometimes harmful, among the States- was pointed out to be the cause of distortions in the common market and an element which contributes to provoke unemployment. There was a contradiction in the existence of an economic policy able to eliminate monetary obstacles, but useless in order to abolish fiscal barriers. The Commission was, as a consequence, especially against the erosion of tax revenue of the Member States, and all the more so at a time when all of them were making huge efforts in order to meet the Maastricht criteria concerning budgetary discipline matters.

The fact is that not only is the common market incompatible with double taxation but with no-taxation as well. The necessity to reach an agreement on, at least, a minimum effective taxation on corporate activity and capital income was evident then.

In 1997, the Council of Ministers of Economy and Finances *(Ecofin)* reached a political agreement- described as historical- on a *package* of fiscal measures aiming at fighting against harmful competition. Among the elements included within this package, there was a *Code of conduct on company taxation* and, in parallel with it, a *Commission notice on the application of the State aid rules to measures relating to direct business taxation*. The Code of conduct was the key element of the package, as it was the right instrument in order to prevent economic distortions and the erosion of taxable bases within the Community.

### *3.2. The Code of conduct: its legal form*

The *Code of conduct* for business taxation was initially passed by on 1 December 1997 by a Resolution of the European Council[12], and was definitively adopted six years later, after intense and hard negotiations at a political level[13]. It was, without any doubt, the most innovative product of that fiscal package.

From a merely formal point of view, the Code is *an atypical measure*. In fact, it was formally adopted by a "Resolution", which is an instrument without an explicit definition in the EU Treaty[14]. On the other hand, this resolution was adopted not only

[11] Fiscal Policy in the European Union, SEC(96) 20 March 1996.

[12] Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, on a code of conduct for business taxation. Annex I to the conclusions of the Ecofin Council meeting concerning taxation policy, in JO 2 January 1998.

[13] See press release by the European Commission, IP/03/787 3 June 2003.

[14] Article 249 of the EU Treaty establishes that in *order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and*

by the Council but *"by the representatives of the Governments of the Member States, meeting within The Council"*. It was quite a cryptic wording, at first, with the likely purpose of pointing out the Code of Conduct affects a primary competence of Member States. It is not a legally binding instrument but a gentlemen agreement. It can be described as a formal political commitment among the Governments of the Member States.

Therefore, resolutions can be classified under the Community measures known as "soft law"[15]. These instruments are not obligatory *per se,* although they have their own legal nature and belong to the Community legal system, so, even without the binding effects of typical legal acts they can affect the attitude of the Member States and of the European organizations themselves[16].

It is true an important part of the literature has raised doubts about the Community nature of the Code. However, the Code has been regarded as part of the *acquis communautaire*[17], in fiscal legislation, in the negotiations in order to become a Member State, not only concerning the recent accessions to the European Union but future ones as well[18].

On the other hand, there is no need to explain that according to article 230 of the EC Treaty[19], as the Code of conduct hasn't got any legal binding effect, the Court of Justice hasn't got any power to review its legality.

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*the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions,* without mentioning "resolutions", which was used for the Code of Conduct. In his Opinion of the *NIPFO* case, the Advocate General La Pergola defines effectively the term "resolution": *Resolutions are one of those atypical acts (but not less important) the Council and the Commission issue at times- from the perspective, nevertheless, of a growing integration among the legal systems of Member States- in order to express their political will, describing the elements of the principle agreements reached within the Institution aiming at avoiding those agreements to be questioned. In other words, Resolutions (especially those by the Council) are just, by principle, political commitments, even though they announce simultaneously their subsequent development through the legally efficient forms laid out in article 249 of the Treaty.* Opinion by the Advocate General La Pergola issued on 30 September 1997, case C-4/96 (NIFPO ltd and others) paragraph 56.

[15] For a further study of the *non-legislative approaches or non-binding measures* ("soft law") in the Community taxation policy, see paragraph 4.3 of the Communication from the Commission *"Tax policy in the European Union- Priorities for the years ahead"* COM (2001) 260 23 may 2001, OJ 284 10 October 2001.

[16] A good proof of it is paragraph J of the Code of Conduct, in which *the Commission intends to examine or re-examine existing tax arrangements and proposed new legislation by Member States case by case*, taking into account the new (and more strict) interpretation of the provisions on fiscal State aids.

[17] This is, for the new Member states, the legal Community framework in force at the time of the accession.

[18] See the Annex of the Council Decision 2006/35/EC on the principles, priorities and conditions contained in the Accession Partnership with Turkey, in which explicitly is listed as a *short-term priority* the commitment to the principles of the Code of Conduct for Business Taxation and ensure that future legislation complies with the principles of the Code of Conduct for Business Taxation. OJ 26 January 2006.

[19] Article 230 ECT: *"The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other*

In relation to its content, the Code enlarges the list- really short- of Community measures adopted in these last twenty years concerning business taxation[20], and it is on top –at least partially- of the Community provisions in force about State aids.

Due to this partial superposition and to the possible misunderstanding such situation can provoke, we should spend some time trying to make the complex relations between the Code of Conduct and the Community Competition Law clear.

Nevertheless, before tackling this issue and to build a reasonable speech, it is quite suitable to get to know the Code of Conduct and its political targets in further detail. Therefore, the understanding of its effects on fiscal legislations, national and regional, will be easier.

### *3.3. The Code of conduct: its political targets*

The Code of conduct intends to fight against *fiscal harmful competition*. But, what is exactly fiscal competition and when is it harmful? The Council Resolution 1 December 1997 tries to answer these questions. However, as the Resolution itself is the result of a complex commitment, it leaves without answering some interpretation problems.

The Council Resolution points out the positive effects of fair competition among taxation systems of Member States and reinforces the fact companies, when operating in a common market, have the right to enjoy the fundamental freedoms[21] of the EC Treaty, without obstacles. However, right after, the Code states that*….tax competition may also lead to tax measures with harmful effect.*

Direct taxation is an own competence of Member States, but, even in this field, national legislative powers must be executed within the respect to the Community Law. Therefore, Member States are not absolutely free to adopt fiscal measures regarded as appropriate by them. The most important conditioning is the prohibition of any discrimination form on account of nationality. But, obviously, the provisions in the EC Treaty[22] about competition law, and particularly the ones concerning State

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*than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties."*

[20] See: The common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (Council Directive 90/434/EEC); Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of transfers of profits between associated undertakings (arbitration) and the common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Council Directive 2003/49/EC).

[21] Free movement of workers and capital, free rendering of services and right to establishment.

[22] *…Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law,* ECJ, Judgement 14 February 1995, case C-279/93 (*Schumacker*) paragraph 21: see also Judgement 11 August 1995, case C-80/94 (*Wielocks*) paragraph 16: Judgement

aids (articles 87 and 89 of the EC Treaty) are also a remarkable limitation on the powers of Member States.

The Resolution adopting the Code of conduct mentions expressly the Code, due to its nature of political commitment, does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty. Therefore, the Code of conduct has not any harmonization aim. In particular, the Code of conduct is not the right instrument to reduce the companies' taxation differences- with fiscal residence in the different Member States- which operate in a common market. These differences- which could be regarded as almost "natural"- come from the fact that company taxation is a quasi-exclusive competence of the Member States.

The Code doesn't intend to limit the competition distortions caused by the application of different national and regional fiscal regimes, at least not as a direct target. It respectfully reserves such target for the Community policy on State aids laid out in the aforementioned articles 87 and subsequent ones of the EC Treaty, which couldn't, and it is not intended, be replaced by the Code.

For a better understanding of the aims of the Code of conduct it is suitable to go back in time and read the Commission Notice[23] which is the origin of the already mentioned Council Resolution.

In that document it is stated tax competition is, in general terms, regarded as a positive element as a means of benefiting citizens and imposing a downwards pressure on public expense. However, according to the Commission, *"unrestrained competition for mobile factor can bias tax systems against employment"*[24] and, in that context, can make more difficult to reduce the overall fiscal burden.

Such a competition, besides, reduces the room for manoeuvre to meet other Community objectives such as the protection of the environment, the safeguard of the *European social scheme,* the energy savings policies and so on. In short, tax competition can hamper Member States' efforts to reduce budget deficits. So, eliminating it, although is not a necessary end in itself, is a means to comply both with the Maastrich criteria and with the Stability and Growth Pact. For this reason, *"Market integration, without any accompanying tax-coordination, is putting increasing constraints on Member States' freedom to choose the appropriate tax structure, by broadening the tax base and lowering the rates"*[25]

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15 May 1997, case C-250/95 (*Futura*) paragraph 19; Judgement 28 April 1998, case C-118/96 (*Safir*) paragraph 21; Judgement 16 July 1998, case C-264/96 (*I.C.I.*) paragraph 21.

[23] Communication from the Commission to the Council *"Towards tax co-ordination in the European Union. A package to tackle harmful tax competition"* 1 October 1997. COM(97)495.

[24] COM(97)495, p. 2.

[25] COM(97)495, p. 2.

The States have a certain level of expense which cannot easily be reduced (or at least not without the detriment of the services rendered to citizens). Therefore, tax competition provoked by specially generous tax systems[26] causes logically a shift of the tax burden in Member States from the easier mobile economic activities (mainly capital) to the less mobile taxable bases of labour (comprising not only employees' salaries but employer's benefits as well) which, are, by definition the less mobile factors. The Code of conduct is, as a consequence, the reasonable reaction against the remarkable difference that exists, nowadays, between the workers mobility and the capitals mobility within a common market.

The European Council couldn't ignore that, from an economic viewpoint, an allocation of productive factors essentially in the basis of fiscal benefit was absolutely inefficient. Specially when, besides, such measures are adopted by the Member States with the only aim at attracting taxable bases from their neighbours, from the rest of the Community partners.

The Code of conduct intended to solve this problem by means of establishing some limitations on fiscal competences, which it had been impossible to do it through the typical harmonization of the Community fiscal legislations. The Commission itself, once it confirmed the impossibility of keep on moving in the harmonization process- after the blockage subsequent to the unfortunate events in the beginning of the 90's- had already announced pragmatically the shift from harmonization to coordination in national tax policies, as a possible solution to get out of the impasse[27].

The atypical nature of the Code is the main reason for its election as the right legal instrument, assumed obviously because of the almost unreachable possibility to reach agreements unanimously without signing complex commitments. Let's remember the unanimous agreement of all Member States is a compulsory premise of any Community act in fiscal matters[28].

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[26] Although such measures are compatible with the provisions of State aids.

[27] The Commission outlines that "any proposal of Community intervention in fiscal matter must be fully adjusted to the principles of subsidiarity and proportionality". More than harmonization as an end in itself, measures in order to provide for a more efficient defence against *"the loss of fiscal sovereignty that Member States have been suffering in favour of the markets"* are required. European Commission, *"Taxation in the European union- report on the development of tax systems"* COM(96)546 22 October 1996 pg. 13.

[28] For direct taxation, we find the legal basis in article 94 ECT: *"… for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market."* , and requires the Commission to act unanimously.
The decision of placing the Code of conduct within a package of fiscal measures differing substantially ones from others intends to make easier for the Member States to reach a unanimous agreement. The offer to Member States of a *package* of measures to be accepted simultaneously allows the annulment of the veto coming from different States. The composition of the so-called "Monti pacakge", in fact, was thought in a way that each Member State could find useful for its own economic or fiscal system at least the approval of one of the measures proposed by the Commission, but in order to obtain it the State had to agree on the whole lot of measures within the package.

According to the intention of its authors and of the Member States which have signed it, the Code of conduct helps to tackle the mentioned problems, allowing a certain level of competition among national legislations and safeguarding, therefore, the Member States' inalienable principle of national fiscal sovereignty.

### *3.4. The Code of conduct: its essential contents*

As it has been mentioned, the key of the Code is the definition of a *harmful fiscal measure*, concept which is developed in a pragmatic way by means of several examples listed in paragraphs A and B[29].

Tax measures which provide for a significantly lower effective level of taxation than those levels which generally apply in the Member State concerned and which have, or may have, remarkable incidence on the localization of business activities within the territory of the Community are to be regarded as potentially harmful. Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other.

The Code establishes some criteria which must be taken into account when assessing the measures which are eligible to be within its scope, harmful or not, depending on its possible effects within the Community. The range of fiscal measures, which the Code covers, goes from legislative provisions and regulations to mere administrative practices.

Within the catalogue of harmful fiscal measures, they are eligible, basically, specific measures for non-residents and measures for transactions with non-residents, isolated completely from the national economy in such a way they don't have any effect on the national taxable base, applicable even if there is no effective presence of the beneficiary in the territory of the Member State, which adopts them, and which are granted either leaving out the generally acknowledged principles at the international level (for instance, those granted against the principles concerning transfer pricing agreed within the OECD) or with lack of transparency.

At the signature of the Code, Member States committed themselves, on the one hand, not to adopt new harmful measures (*standstill*), and on the other, to review their own internal legislation and their administrative practices in force, and to alter them,

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[29] *"A. Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community.*
*Business activity in this respect also includes all activities carried out within a group of companies.*
*The tax measures covered by the code include both laws or regulations and administrative practices.*
*B. Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code."*

to the necessary extent, in order to abolish any harmful measure (*rollback*) as soon as possible. But besides, they also commited themselves to change among each other information about the fiscal measures in force- or in draft- as long as they could be eligible to be within the scope of the Code and to set up a group in charge of recognizing the previous fiscal measures and supervising the information concerning them and of fostering the implementation of the principles of the Code and the elimination of harmful fiscal measures in third countries and in territories in which the Treaty is not applicable.

In particular, Member States which have dependant or associated territories, or which have peculiar responsibilities or fiscal prerogatives over other territories, committed themselves, within their constitutional framework, to guarantee such principles in those territories[30].

The recognition of measures which could be within the application scope of the Code corresponds to an specific group which was set up in 1998 by the Council of Ministers ECOFIN[31]. This group, after an initial stage of hard work, stipulated that with regularity it had to issue several reports in order to express its opinion concerning the assessed fiscal regimes.

In a first preliminary report[32], after assessing almost 300 fiscal incentives regimes, 66 were pointed out as harmful because they were meeting the criteria stated in the Code of conduct.

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[30] It is worth remembering and in April 1988, under the impulse of the European Member States, the OECD issued a document on harmful competition in fiscal matters, and during the course of the G-8 meeting the leaders of the big countries set out their interest in going further into the analysis of the harmful tax competition on the worldwide economy. The OECD analysis – which is different from the Community one not only because of its wider geographical scope (worldwide) but because it is focus mainly on the financial activity- establishes several orientations aiming at tackling the issue of harmful preferential regimes in the OCED scope, at listing the worldwide tax-havens and at setting up a Forum on harmful tax practices, in charge of safeguarding the implementation of the recommendations laid out in 1998; OECD, *Towards Global Tax Co-operation, Progress in Identifying and Eliminating Harmful Tax Practices,* Paris, 2000.
Even though the Commission must be recognized as the "mother" of the first organized project to fight against harmful tax competition, due to the document which it presented in March 1996 in the informal Ecofin Council of Verona- SEC(96)487- it cannot be forgotten that the activity performed in parallel by the OECD has accelerated the Community activity, as the first document of the High Standard Group which made the draft of the fiscal package admits ( « … de nombreux représentants ont souhaité la poursuite d'actions spécifiques visant à restreindre ou à mettre fin à la concurrente déloyale dans ce domaine, parallèlement aux travaux entrepris par l'OCDE »; V. COM(96)546, 3.15).

[31] Conclusions of the Council of 9 March 1998 concerning the implementation of the "Code of Conduct" group (taxation on companies), in OJ 1 April 1998. The group, which met for the first time on 8 May 1998, chose Ms. Dawn Primarolo, Paymaster General of the British treasury, as President, adopting so the informal name "Primarolo Group" up to today.

[32] Document of the Council SN 4901/99, 29 November 1999. Different from the usual practice in relation to the works within the Council groups, the report, which was admitted and approved by the Ecofin on the 28 February 2000, is public and can be consulted among the available documentation on the European Union council web. The subsequent reports haven't been published by the Council. This

The approval of this first report by the Council was a very hard task, which took a year of negotiations before reaching an agreement. Such approval took place in the Ecofin Council of November 2000[33], in which they renewed the commitments to implement the entire fiscal package, according to the will stated by the Heads of the Member States during the European Council of Santa María de Feira, held in July in the same year.

Even though we cannot ignore the frequent controversies among Member States- and even between them and the Commission - about the pace and the way of eliminating the fiscal regimes which are not in line with fair competence, we must confirm the significant effects caused by the implementation of the Code of conduct. From 1998 up to now, the tendency of Member States to adopt fiscal benefits potentially harmful in the Commission's eyes has been reduced significantly, and the few measures adopted have been, in any case, subject to previous and very careful scrutiny by the Council control group.

Several law drafts have been communicated in a preventive stage for the group to examine them and many measures eligible to be within the scope of the Code have been withdrawn before the dateline or are in a process of being gradually eliminated[34].

### *3.5. The Code of conduct: difficulties in its application and the competition conflicts*

According to the conclusions of the Ecofin Council on 1 September 1997, a period of two years should have been enough in order to eliminate measures regarded as harmful. The resolution stated that, in any case, *"…from 1 January 1998, the effective elimination will have to be implemented in the period of five years, even though a longer period could be justified in particular circumstances, the Council should asses."*

Later[35], the Ecofin Council changed the calendar to eliminate harmful tax measures and set out that no company can start to benefit from such tax regimes after 31 December 2001, although there was an exception for fiscal regimes which had a

lack of transparency- which can be regarded as unjustified- has been severely criticized by the Ombudsman (See Communication issued by the Ombudsman's Office, EO/02/ 1 July 2002).

[33] The report had to be approved in the European Council of Helsenki, in December 1999, along with the rest of the measures in the package but the excuse of the halt on that occasion was the proposal of Directive on minimum taxation of savings, which caused a sudden stop to the group of measures which were within the package.

[34] Conclusions of the Ecofin Council on 26 and 27 November 2000. Communication from the Commission to the Council and the European Parliament *"First annul report on the application of the Code of conduct in business taxation and fiscal state aids"* Document COM(1998)595 25 November 1998.

[35] Conclusions of the Ecofin Council on 26 and 27 November 2000. Communication issued by the EU Council on 27.11.00 n. 453.

previous Decision of the Commission –adopted in the framework of State aids- which had allowed a longer duration[36]. On the other hand, there was also a prevision as to allow the Commission to authorise- reporting previously to Primarolo Group- the extension of the effects of certain fiscal regimes, already regarded as harmful, further than the stipulated time limit of 31 December 2005.

In March 2003, -in application of the conclusions of the Ecofin held in the beginning of that same year[37]- the Council supported finally the Primarolo Group's report, penalizing 66 measures for being harmful. Almost at the same time, Member States presented their lists of legislative regulations which amended the fiscal regimes in question, in order to adequate them to the Council Decisions. Even more, in order to reach a good agreement at the moment of the final approval of the fiscal package[38], there was a subsequent modification of the rules of the game. Indeed, an extension was granted for the elimination of six fiscal regimes (which had already been regarded as harmful by the Primarolo Group) which, in certain cases, will finish in the end of 2011 (and even later under certain circumstances).

The case of the Belgian Coordination Centres[39], because of its complexity and of the conflict provoked between Community Institutions, the Council and the Commission, is worth special attention.

In July 2003, the Council authorised Belgium the implementation, until the end of 2005, of its fiscal regime for Coordination Centres, in those cases the authorisation had been granted before that date. This regime was regarded as compatible with the common market under article 88 (2) third subparagraph of the EC Treaty[40].

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[36] For these regimes it is stipulated the company can be beneficiary of such measures until 31 December 2000 or if it was already enjoying such regime on 31 December 200- until 31 December 2005 (that is, at least for 5 years, with the intention of no punishing all those companies which had entered the abolished regime in a non-suspicious period, allowing them to recover the cost of implementation of such regime).

[37] See Communication issue by the EU Council on 21.1.2003, n. 15.

[38] Communication issued by the EU Council on 3.6.2003, n. 138.

[39] The Coordination Centres were implemented by means of the Royal-Decree of 30 December 1982, n.187. At first, Belgium stipulated a fiscal exemption for 10 years for the income obtained by the CC, which created a minimum number of jobs (centres of administrative nature, of preparatory or ancillary nature or financial centralization centres), in favour of the companies they belonged to. Later, short after their implementation, due to the Commission actions in the scope of its activity of control of the measures which can be included among State aids (ex article 87), the mentioned fiscal regime was subject to important limitations and amendments. Nowadays, the main characteristic of the fiscal regime of the Coordination Centres at issue is the calculation of the taxable base in the Corporate Tax in the basis of a scheme according to the cost plus method, regardless of the real income.

[40] Council Decision 2003/531/CE, 16 July 2003, Council Decision of 16 July 2003 on the granting of aid by the Belgian Government to certain coordination centres established in Belgium. OJ L184 23 July 2003.

Article 88 (2) ECT: *"…On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances."*

However, according to the Commission, such extension was against a previous negative decision of the Commission itself, issued on 17 February 2003, in the execution of its exclusive competences on State aids issues[41].

The Commission, consequently, lodged an action before the Court of Justice asking for the annulment of the Council Decision.

The Court, in its judgement of 22 June 2006, annulled the mention Decision of the Council, arguing its evident "overpower". According to the Community judge: *"…if the Member State concerned has made no application to the Council under that provision before the Commission declares the aid incompatible with the common market, the Council is no longer authorised to exercise the exceptional power conferred upon it by that provision in order to declare such aid compatible with the common market"*[42].

Nevertheless, the Commission was not able to celebrate such an important reassurance of the principle of inviolability of it sovereign powers in State aid issues for a long time. In fact, Belgium had also lodged an action before the Court of Justice. Obviously, it was not against the Council Decision of July 2003 but against the Decision adopted before by the Commission, in February of the same year. However, the Court, in a judgement given on the same date[43], annulled partially the Decision of the Commission because such Community Institution hadn't taken into account the principle of *legitimate expectations*[44] of tax payers. For the Court, Coordination Centres, which had claimed for a renewal of the authorisation pending on the date of notification of the Decision of the Commission, *"had reasons to have legitimate expectations on the concession of a reasonable transitory period in order to adapt to the consequences"* coming from the Decision.

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[41] The invitation to submit comments before the infringement proceedings, published in OJ C147 20 June 2002 and the Communication IP/03/1032 from 16.7.2003.

[42] ECJ judgement 22 June 2006 C-399/03 (Commission v Council), also ECJ judgement 29 June 2004 C-110/02 (Commission v Council).

[43] ECJ judgement 22 June 2006, joint cases C-182 and C-217/03 (Belgium and Forum 187 Asbl v Commission).

[44] According to Advocate General Mr.Léger, *"the principle of the protection of legitimate expectations… can be seen as the corollary of the principle of legal certainty, which requires that Community legislation must be certain and its application foreseeable by legal persons…"* Giving up an exhaustive definition, the Advocate General sets out there is violation of the principle when certain conditions are met. *"…, First of all, there must be an act or conduct on the part of the Community administration capable of having given rise to such an expectation… Next, the person concerned must not be able to foresee the change to the pattern of conduct previously adopted by the Community administration… Lastly, the Community interest which the contested measure seeks to achieve must not justify the infringement of the legitimate expectation of the party concerned. That condition is satisfied where the balancing of the interests in question shows that, in the circumstances of the case, the Community interest does not prevail over that of the person concerned in seeing the situation maintained that it might legitimately have assumed to be a stable one";* Opinion of Advocate General, 9 February 2006, in joint cases c-182/03,c-217/03 and C-399/03.

The Court understood the Commission, acting this way, had violated the principle of equality. It had provoked, in fact, an unjustified discrimination between the Coordination Centres whose authorisation had been granted short time before the adoption of the Decision (which could enjoy the peculiar fiscal regime till 31 December 2010) and the Coordination Centres with authorisation granted after the notification of the appealed Decision- in substantially comparable situations- to which not any transitory measure would be granted, despite not any inalienable public interest hindered it.

### *3.6. The link between the Code of conduct and the Community regulation on State aids*

As we have just realized after examining the case of the Coordination Centres, the controversies between the Community provisions on State aids and the agreements adopted between Member States and the Commission in the framework of the application of the Code of conduct, have given cause for a good amount of actions before the Court of Justice. There are still many pending cases. However, regardless of the jurisprudential interpretation, which can infer general principles from particular cases to be solved, it is appropriate, in this session, to make a more general assessment of the relation between these two legislative instruments.

Without denying the evident likeness between both instruments, it is worthy of note that, to star with, the Code of Conduct on business taxation and the Community discipline on State aids, regulated in articles 87 and subsequent of the EU Treaty, pursue different targets, have a different legal effectiveness and aim at reaching very different agreements.

In spite of it, and irrespective of what has been said so far, it is unquestionable fiscal measures set out by the Code of Conduct can be subject to examination as potential fiscal State aids, and not only at a theoretical level because, in fact, many of the fiscal measures listed by the Primarolo Group with the help of the Commission have been studied in deep detail by the Community services on competition. And that is something which was already provided by the Resolution of 1 December 1997, that in its paragraph J stipulated that "*some of the tax measures covered by this code may fall within the scope of the provisions on State aid in Articles 92 to 94 (87 and 89) of the Treaty*"[45].

[45] Paragraph J of the Code of conduct stipulates that *"Without prejudice to Community law and the objectives of the Treaty, the Council notes that the Commission undertakes to publish guidelines on the application of the State aid rules to measures relating to direct business taxation by mid 1998, after submitting the draft guidelines to experts from the Member States at a multilateral meeting, and commits itself to the strict application of the aid rules concerned, taking into account, inter alia, the negative effects of aid that are brought to light in the application of this code. The Council also notes that the Commission intends to examine or reexamine existing tax arrangements and proposed new*

It is evident the assessment of the Sate aids, which are granted by a reduction of direct taxation for companies, is an independent act, based on different criteria from those adopted in the Code of Conduct in order to set whether a measure must be considered as harmful or not. However, as, on the other hand, it has been confirmed by the Commission itself[46], the intention to act in tune in particular cases has been confirmed. Without any doubt, between both assessments converging results can be found, in the sense that harmful fiscal measures almost automatically fall into the category of State aids, although the rule is not always fulfilled the other way round.

As the Commission has observed in its Notice on the application of the State aid rules to measures relating to direct business taxation[47]: "*The qualification of a tax measure as harmful under the code of conduct does not affect its possible qualification as a State aid. However the assessment of the compatibility of fiscal aid with the common market will have to be made, taking into account, inter alia, the effects of aid that are brought to light in the application of the code of conduct.*"

And further ahead, in the same document, a compendium in which the Commission states its guide lines in fiscal State aids policy, it specifies even that: "*If it is to be considered by the Commission to be compatible with the common market, State aid intended to promote the economic development of particular areas must be "in proportion to, and targeted at, the aims sought'. For the examination of regional aid the criteria allow account to be taken of other possible effects, in particular of certain effects brought to light by the code of conduct*."[48]

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*legislation by Member States case by case, thus ensuring that the rules and objectives of the Treaty are applied consistently and equally to all."*

[46] The statement of the European Commissary for Competition in those days, Mario Monti, doesn't leave any room for doubts about the complementarity of the double Community action: *« J'ai demandé aux services de la Commission chargés de la concurrence d'examiner toutes les affaires d'aides d'État à caractère fiscal relevant de la fiscalité des entreprises, de façon à permettre à la Commission de respecter avec diligence l'intégralité de ses obligations institutionnelles, notamment sur la base de sa communication du 11 novembre 1998 [véase nota siguiente] concernant l'application des règles relatives aux aides d'État aux mesures liées à l'imposition directe des entreprises. Cette mission de la Commission a été soulignée dans les travaux ayant abouti à la résolution du Conseil du 1er décembre 1997 relative au code de conduite »*; Press Release IP/00/182 from 23.2.2000.

[47] European Commission Notice *"on the application of the State aid rules to measures relating to direct business taxation"*, (98/C 384/039), paragraph 30, OJ 10 December 1998.

[48] European Commission Notice *"on the application of the State aid rules to measures relating to direct business taxation"*, (98/C 384/039), paragraph 33, OJ 10 December 1998. The selectivity of a fiscal measure based on its application to a limited territory is quite a controversial issue. The Commission Notice of 1998 left a certain scope for interpretation, link to the justification of the "nature and general scheme" of the tax system, argument proceeding from case-law: *"The main criterion in applying Article 92(1) (current 87) to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified "by the nature or general scheme of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax*

In one of the working documents from its services[49], in which the progress of the tasks in respect to the Code of Conduct is assessed, the Commission made an effort to point out the possible diverging points between the two proceedings, stating that, in particular, out of the 66 fiscal regimes regarded as harmful by the Primarolo Group, seven of them- properly notified to the services of the Commission- were not classified as State aids, or if they were, they were regarded as compatible with the rules of the common market.

Indeed, in only 43 out of the 66 listed measures by the Council working group- as measures in force in the Member States- the provisions on State aids under article 87 and subsequent of the EC Treaty were of application.

In connection with it there is another important difference between the Code of Conduct and the provisions of the EC Treaty, which is the one related to the geographical scope of application. In addition to the regimes applicable in territories out of the scope of the Treaty provisions, those fiscal measures that, being within the general framework of business taxation, do not fulfil one of the four necessary elements of the notion of State aid: the selectivity, are also out of the application scope of the State aid regulation

The Code of Conduct, as a mere political agreement, cannot derogate the EC Treaty provisions by itself. The different nature of both provisions, i.e. between the Code of Conduct and the obligations imposed by the Community discipline on State aids, doesn't allow us to establish a rule of predominance between both, at least at the level of intervention. The agreements and obligations of both are to be applied cumulatively[50]. This implies that Member States must always observe the most restrictive

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*system in the Member State concerned. If this is not the case, then State aid is involved."* Communication 98/384, paragraph 16.

Concerning regional fiscal policy, it is worthy of note the transcendence of a recent statement of the ECJ, that in its judgement of 6 September 2006 (C-88/03, Portugal v Commission), paragraphs 56-59, has set out how to determine the reference framework according to which the assessment of selectivity of a fiscal measure in respect to the "normal" regime must be made. *"The reference framework need not necessarily be defined within the limits of the Member State concerned, so that a measure conferring an advantage in only one part of the national territory is not selective on that ground alone for the purposes of Article 87(1) EC. It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned…"*

[49] European Comisión "Questions liées au processus de démantelement prévu par le Code de conduite (fiscalité des entreprises)", SEC (2000) 1539, 19 September 2000.

[50] It its Decision of 30 April 2002, case T-195/01 (Gibraltar Government v Commission), the Court of First Instance stated the notification to the Primarolo Group cannot in any case substitute the formal notification foreseen in the Community provisions for State aids.

rules and it doesn't matter whether they are imposed by the Treaty or agreed among the Member States through a *gentlemen's agreement*.

## 4. Final notes

In practice the fact there has been a mutual influence between both instruments can be noted. An influence which has allowed the Council and the Commission to converge on coherent and compatible solutions.

The control scheme implemented by the Council in order to follow the fulfilment of the Code of Conduct is slow by nature and is subject to proceedings of arbitrage an of political mediation which makes it extremely fragile. It differs hugely from the proceedings through which the Commission acts in State aids issues, which can be expeditious and extremely effective. Therefore it is evident that the control activity executed against quite a great number of harmful measures by the Competition services, undoubtedly, has contributed to the success of the Code of Conduct, providing it with the partial binding effects- even at legal level- it lacked by itself.

In all honesty, we should also say that a circumstance has happened, by chance, at the political-administrative level that has fostered the synergies between the different services of the Commission. Professor Monti, who was the European Commissary for Taxation in the end of 1998, became Commissary for Competition during the following five-year period, and it would have been difficult to imagine the "putative father" of the *tax package*- within which the Code of Conduct is the main element-, being the Head of the services of Competition and abandoning the political progress of something he had personally promoted.

The Commission, on the other hand, has acted with some flexibility (which the Treaty allows) when applying the State aids regulations, seeking a rational application, in the basis of the *bona fide* of the receivers an in the essence of the clear lines of action- guide in this issue before 1998- in order to avoid the reimbursement of the aids illegally granted to companies. It can be affirmed that the "carrot and stick" policy adopted by different services in the Commission, in a strategic harmony, has finally borne fruit.

Just some final comments on the last advances of the Code of Conduct.

When examining the new Member States, the Group of "Enlargement" of the Council (made up by the 15 pre-enlargement Member States), attending to the Commission's suggestions, was particularly strict in the assessment of the fiscal measures which could be within the scope of Code of conduct. It's this so that more than half of the assessed measures (50 on the whole more or less) were regarded as harmful[51].

[51] The Council has not made the list of such measures public.

The effects of tax competition in the enlarged Europe are still to be evaluated. On the one hand, it is evident more mobile activities will move (if they haven't done it yet) to places where there is lower fiscal pressure[52]. On the other hand, a relevant movement of companies and capitals towards the new Member States will contribute to rebalance their national economy, letting them come closer to the average of the Community.

All the aforementioned, in the long term, will surely have a remarkable effect on the State aids policy. As it has already been mentioned, *"aids to promote the economic development of areas where the standard of living is abnormally low"* (Article 87 (3) (a) ECT may be considered to be compatible with the common market[53]. Therefore regional aids can have a useful role but it happened they have to be granted to the most disadvantage regions[54]. As a result, bearing in mind the methodology the Commission has adopted in order to set the intensity of the aids compatible under the article 87(a) (3) of the ECJ[55], it seems likely that, at least at a first stage, the new Member States are the main beneficiaries. Concerning the newest Member States (Bulgaria and Romany) the whole of their territories will be, as a rule, eligible to enjoy regional State aids.

It is evident the action of the Code of Conduct, due to is nature, is limited to fight the particular regimes adopted by Member States, but- as it really happens to the own rules about State aids matters- is helpless against tax national schemes that, on the whole, pursue to be an irresistible magnetic pole for cross-border companies (sometimes not necessarily for their effective activity)[56].

As it has been stated, and as it can be observed, the Commission in its Notice on the application of the State aid rules to measures relating to direct business taxation[57], the EC Treaty doesn't offer the possibility to make the Member States fiscal legislations

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[52] Nowadays it cannot be ignored taxation is one of the parameters a company firstly takes into account when making a decision about production or localisation.

[53] This exception has been subject to interpretation by the ECJ which has stated that: "*The use of the words "abnormally" and "serious" in the exemption contained in (a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the community as a whole"* ECJ, judgement 14 October 1987 (Germany v Commission) case 248/84, paragraph 19.

[54] *"…the permissible aid ceilings should reflect the relative seriousness of the problems affecting the development of the regions concerned. Furthermore, the advantages of the aid in terms of the development of a less favoured region must outweigh the resulting distortions of competition…"* European Commission *"Guidelines for national regional aid for 2007-2013"*, (2006/C-54-08) OJ 4 March 2006, paragraph 5.

[55] *"The Commission accordingly considers that the conditions laid down are fulfilled if the region, being a NUTS (18) level II geographical unit, has a per capita gross domestic product (GDP), measured in purchasing power standards (PPS), of less than 75 % of the Community average (19). The GDP per capita (20) of each region and the Community average to be used in the analysis are determined by the Statistical Office of the European Communities."* Paragraph 16 of the, mentioned in the previous footnote, Guidelines.

[56] Let's think of cases of particular taxation schemes- today into the Community- which allow the network of Bilateral Agreements on double taxation signed by Malta and Cyprus with third countries, or even easier, the new low flat rates recently adopted (or in process of adoption) by several new Member States.

[57] Notice (98/C 384/03) aforementioned, paragraph 16.

be in line under article 94, by means of the adoption of the appropriate Directives, against general fiscal measure which hinders the correct functioning of the common market. The differences between general provisions which can distort competition and caused distortions can (correctly must) be abolished under articles 96 and 97 of the EC Treaty, according to which, in the necessary and previous consultation from the Commission to the Member States *"the Council shall, on a proposal from the Commission, acting by a qualified majority, issue the necessary directives"* but this articles have never been applied for tax purposes yet. Nowadays, sovereignty, subsidiarity, an even, why not, opportunity, are switching their objectives towards a coordination of national tax policies, which make Member States get spontaneously in line when they adopt their national tax legislations.

I leave for the rest of the speakers, more competent than me, the legal assessment of the possible impact of the Azores case on decentralized fiscal regimes with fiscal autonomy (original or devolved). Nevertheless, in the basis of the contents of this speech, let me doubt whether this is the right moment to relaunch the policy of competitiveness among Member States. On the contrary, I believe this is the right moment to launch a new Code of conduct which assures a fair tax competition between general measures of any sovereign State or autonomous infra-state body.

# Äland Islands, a fiscal area without tax competence

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## 1. What is Äland?

The archipelago of the Äland Islands is situated in the Baltic between Sweden and Finland. Äland consists of more than 6,500 islands. Only about 60 of them are inhabited all the year round. Nine tenths of the island's 26,500 inhabitants live on the largest island, the mainland Äland. The population of Äland is 95 per cent Swedish-speaking. Thus it forms a distinct minority within the Swedish-speaking minority of Finland[2].

Äland is an affluent society. Its GDP is at the level of 154.5 while that of Finland is 115 (EU-25 = 100). Economically Äland is highly dependent on shipping, tourism, services and agriculture.

Since 1954, Äland has had a flag of its own, a blue-yellow-red Nordic cross flag. Äland has own postage stamps since 1984, and the current Act on Autonomy transferred

[1] Original version.

[2] For further information on Äland consult http://www.aland.ax/alandinbrief/.

postal services and broadcasting to the competence of Äland. Recently Äland has also acquired an own Internet root ".ax" which replaces ".fi" in sofar as Äland is concerned. The Älanders hold Finnish passports, but the word 'Äland' is inserted in passports issued in the Äland Islands to persons with the regional citizenship of Äland.

Äland got its Swedish population during the early Middle Ages. Since the 13th century Äland was politically, jurisdictionally and ecclesiastically considered as a part of of Finland, which was an integral part of the Kingdom of Sweden. As a consequence of the War of Finland in 1808-9 between Russia and Sweden, Finland, Äland included, was united to Russia. The Grand-Duchy of Finland constituted in the Russian empire an internally autonomous state with its own constitution, legal system and administration.

## 2. Background of the Äland autonomy[3]

After the February Revolution of 1917 in Russia, a popular movement seeking reunification of Äland with Sweden emerged among Älanders. After Finland had declared her independence in December 1917, Soviet Russia, Sweden, France and Germany recognized her independence in January 1918 without reservations as regards her international borders. However, in 1919, Sweden claimed that the question of the sovereignty over Äland should be decided by the Versailles Peace Conference which decided to refer the Äland Islands question to the newly established League of Nations in 1920. Meanwhile the Finnish Parliament had adopted the first Act on Autonomy of Äland in 1920. The Act aimed at the preservation of the Swedish character of the Islands by establishing a system of regional self-government.

The Council of the League of Nations recognized in its resolutions of 24 and 27 June 1921 Finland's sovereignty over the Äland Islands. Finland, however, undertook to guarantee the inhabitants of Äland the right to maintain their Swedish language, culture and customs. This arrangement was to prevent any changes in the ethnic character of Äland as a result of immigration from the Finnish-speaking parts of the country. After Finland had enacted the stipulations concerning voting rights, taxation and the acquisition of land, set out in the resolution of the League of Nations of 27 of June, 1921, the first election to the Äland Legislative Assembly was held and the regional authorities provided in the Act on Autonomy were constituted in 1922.

A new Act on Autonomy was adopted in 1951. It widened the scope of the autonomy and a special regional citizenship was introduced as a condition for the right to vote in local elections in Äland and for the right to acquire real property in Äland. The right of establishment in Äland was also made subject to regional citizenship.

[3] Cf N Jääskinen, 'The Case of the Äland Islands – Regional Autonomy versus the European Unionin of States', in S Weatherill and U Berniz (eds) *The Role of Regions and Sub-national Actors in Europe*, Hart Publishing 2005, 90-92.

A reform of the legislation on the autonomy of Äland took place in the 1980s, and a new Act on Autonomy was adopted by the Finnish Parliament and the Legislative Assembly of Äland in 1991. The new Act widened the autonomy and defined in detail the fields in which the legislative and administrative powers belong to Äland and the fields in which competence is exercised by the State of Finland.

## 3. The constitutional architecture of the autonomy[4]

Under the Act on Autonomy, the population of Äland is represented by the "*Lagting*", or Legislative Assembly, which appoints the "*Landskapsstyrelse*", the Regional Government of Äland.

Pursuant to Section 75 of the Constitution of Finland, the specific provisions in the Act on the Autonomy of Äland govern the legislative procedure for that Act. The Act on the Autonomy is not formally a Constitutional enactment. However, according to the Act itself it may be amended, explained, repealed or exceptions to it may be made only by consistent decisions of Parliament of Finland and the Legislative Assembly of Äland. In Parliament of Finland the decision shall be made as provided for the amendment of Constitutional Acts, and in the Äland Legislative Assembly by at least a two-thirds' majority of votes cast. Consequently, from a norm hierarchical point of view the Act on Autonomy can be compared to the Constitution. Politically the Act has the character of a bilateral arrangement between two parties.

The Act on Autonomy forms the basis of Äland's autonomy. It specifies the fields in which the Äland Legislative Assembly has the right to pass laws. In the other fields, the general State legislation applies as elsewhere in Finland.

The division of legislative competences between the State and Äland is *mutually exclusive*. Therefore, state legislation within the competence of Äland is inapplicable even if the Äland Legislative Assembly has failed to legislate in the field in question.

According to the Act on Autonomy, the *administrative powers* follow the legislative powers. As regards the *judicial powers* the competence belongs to the State. This means that at the last instance the Supreme Court of Finland and the Supreme Administrative Court of Finland, as the case may be, are the ultimate interpreters of Äland's regional legislation.

The division of legislative competences has been carried out by enumerating exhaustively those matters belonging to the competence of Äland (28 items) and those belonging to the authority of State (42 items). Through an *ex ante* control, a system based on the Act on Autonomy, is ensured that Äland has not exceeded its competence in enacting new

[4] Cf Jääskinen (note 2 above) 92-94, S Palmgren, 'The Autonomy of the Älans Islands in the Constitutional Law of Finland', in L Hannikainen and F Horn (eds), *Autonomy and Demilitarisation in International Law: The Äland Islands in a Changing Europe*, Kluwer Law International 1997, 85-98.

legislation. The President of Republic may veto a regional law of Äland if it falls outside the legislative competence of Äland or threatens the external or internal security of Finland.

The budgetary powers of Äland are vested in the Legislative Assembly. When confirming the budget, the Legislative Assembly shall strive to ensure at least the same standard of social benefits for the population of Äland that is enjoyed elsewhere in the country.

A child acquires Äland's regional citizenship at birth if the child's father or mother possesses the regional citizenship of Äland. Finnish citizens immigrating into Äland can apply for regional citizenship after five years' continuous residence in Äland. The regional citizenship of Äland is necessary in order to:

– vote and stand as candidate in elections to the Legislative Assembly and in local elections.
– own and hold real estate in Äland.
– exercise a trade or profession in Äland.

Restrictions upon the right of owning and holding real estate have been imposed in order to preserve land in the possession of the local population.

Äland has no treaty-making competence. International agreements concluded by Finland also apply to the Äland Islands. If an international undertaking affects the autonomy of Äland, including questions falling within Äland's legislative competencies, the consent of Äland's Legislative Assembly is, however, necessary before the agreement enters into force in Äland. Consequently, Finland cannot ensure in advance the entry into force of such international agreements in respect of Äland. This also applies to the treaties that transfer powers from Äland's organs to the EU.

## 4. The Fiscal System[5]

The Legislative Assembly has competence to legislate on additional tax on income in the Islands, the provisional extra income tax, trade and amusement taxes, the bases of dues levied for Äland and the municipal tax. The municipal tax in Äland is in average 16.78 per cent of the taxable income (2006).As regards other direct taxes and indirect taxation the competence belongs to the State.

Äland's annual budget for 2006 was 274.1 million euros. Äland receives an annual contribution (*the amount of equalization*) from the State funds to cover the costs of the

[5] The Finnish Prime Minister's Office has published an interesting comparative study by Bertil Roslin where the economic systems of several European autonomies are compared. The survey covers the Faroe Islands, Greenland, Isle of Man, Jersey, Guernsey, Gibraltar, Scotland, South Tyrol, the German speaking community of Belgium, Catalonia, the Balearic Islands and Äland. See B Roslin, *Europeisk självstyre I omvandling,* Statsrådets kanslis publikationsserie 11/2006, Helsinki 2006. Unfortunately the study is available only in Swedish. The figures represented here are from Roslin's study.

autonomy. The amount is calculated by multiplying the State budget revenues by a certain index (*the basis for equalization*), which is currently 0.45 per cent. The amount of equalization was 181,8 million euros in 2005. In addition, an extraordinary grant may be given to Äland Parliament for particularly great non-recurring expenditures that may not justifiably be expected to be incorporated in the budget of Äland. An extraordinary grant may only be given for purposes within the competence of Äland.

If the income and net wealth tax levied by the State in Äland during the fiscal year exceeds 0.5 per cent of the corresponding tax in the entire country, the excess has to be refunded to Äland. The sum of this tax retribution was 20.5 million euros for 2004. The purpose of the tax retribution is to adjust the share of Äland's population's contribution to the budget of Finland to its proportion of the population.

Äland is entitled to a *special subsidy* from the State funds in the cases of economic disorders affecting especially the Islands and natural disasters, nuclear accidents, oil spills or other comparable incidents. Fortunately, there has not been a need for the use of this instrument so far.

Originally the intent was that Äland would finance the costs of autonomy. However, the forms of taxation that were attributed to Äland's legislative competence lost their economic relevance already before the Second World War. The Act of Autonomy of 1990 liberated the expenditure side of Äland's budget from the necessity to follow the structure of the Finnish budget expenditure. However, Finland has not agreed to devolve the competences on income taxation or indirect taxation to Äland.

According to the prevailing opinion in Äland, the Finnish tax system is structurally not adapted to the needs Äland economy especially concerning the need of the shipping and financial services sectors.

It is also claimed that the present equalization system encourages spending by the Äland Legislative Assembly as it is not responsible for collecting the tax revenue from Äland's population. However, the present financial system provides for the autonomy a stable financial basis that is less volatile than Äland's regional economy. In this context it is of importance that the interaction between the amount of equalization, based on the expenditure of the current State budget, and the tax retribution that is calculated two years afterwards, represents a countercyclical automatic stabilizer of Äland's regional economy.

## 5. Äland in the EU[6]

Äland was given a special status in Finland's accession to the EU. According to Art.299 (5) the EC, the Treaty applies to the Äland Islands in accordance with the

[6] Cf Jääskinen (note 2 above) 94–101, N Fagerlund 'The Special Status of the Äland Islands in the European Union', in L Hannikainen and F Horn (eds) (note 3 above) 189-256. On the negotiations leading

provisions set out in Protocol No 2 to AA 1994. Pursuant to the Protocol, the Treaties apply to Äland with certain derogations. These derogations are, in the *chapeau* of the Protocol, justified with a reference to the special status that Äland enjoys under international law. The text of the Protocol has also been incorporated in Protocol 8 to the EU Constitutional Treaty.

The first derogation is that the provisions of the EC Treaty shall not preclude the application of the existing provisions on restrictions on the right of natural persons not enjoying the regional citizenship of Äland, and for legal persons, to acquire and hold real property in Äland without permission by the competent authorities of Äland. The same applies to restrictions on the right of establishment and the right to provide services. The Äland provisions that benefit from the derogation must have been in force on 1 January 1994 and their application must take place on a non-discriminatory basis (Art.1 of Protocol No 2 to AA 1994). This derogation secures the continued application of the restrictions relating to acquisition of real property by outsiders on the Äland Islands set out in the 1921 Resolution of the Council of the League of Nations.

## 6. Äland tax derogation[7]

The second derogation set out in the Protocol was based on the economic necessities peculiar to the geographic situation of Äland. According to Art. 2 of the Protocol, the territory of Äland is excluded from the territorial application of the EC provisions concerning harmonization of the laws of the Member States on turnover taxes and on excise duties and other forms of indirect taxation. However, this exemption does not affect the Community's own resources and it does not apply to the Community provisions relating to capital duty. Thus Äland has a fiscal status comparable to that of the French *départements d'outre-mer*.

The derogation aimed at ensuring the continuation of tax-free sales on ferry traffic to and from Äland even after June 1999 when the tax-free sales in EU internal traffic otherwise ceased, which was considered necessary to maintain transport links between this relatively isolated archipelago and Finland and Sweden. About 70 per cent of Äland regional GDP is generated within a value chain that consists of shipping, tourism and related financial services. Continuation of the tax free sales on the ferries was seen as the most effective means of ensuring of Äland's economic welfare. Examples of other islands areas in the Baltic sea region, e.g. Gotland, had shown, that economic prosperity was not possible without effective transport links provided by private economic operators, not by the public authorities.

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to the Äland Protocol of the Act of Accession of 1994 see A Kuosmanen,, *Finland's Journer to the European Union*, European Institute of Public Administration EIPA 2001, 257-266, 269.

[7] Cf Fagerholm (note 5 above) 210-226.

Äland remains thus outside of the harmonization of indirect taxes in the EU. Äland has not any special status concerning direct taxes or the customs union. During the accession negotiations Finland gave an oral promise not the allow Äland becoming a 'tax haven'. Also the text of the Äland protocol requires that the tax derogation may not lead to distortions of competition[8].

The Äland tax derogation has been implemented by establishing a virtual tax border between Äland and the EU. This has caused competitive disadvantage for other economic sectors of Äland than shipping and tourism. As I mentioned above, the legislative competence on the matter is vested with the State and Finland has not agreed to establish a different indirect tax system for Äland and thus not used the derogation for other purposes than allowing tax free sales on the Äland ferries and Mariehamn airport.

## 7. The Future of Äland's Tax Status

The question of fiscal competence has since long formed a bone of contention between Äland and Finland. Several working groups have studied the issue but the two parties have not even reached a joint view on the question whether Äland is a net contributor to the Finnish State finances or not.

In Äland, there has been wide and increasing support for and own tax competence. Partially this has been motivated by the aspirations to develop Äland into some kind of "Isle of Man" of the Baltic Sea. This concept of "off-shore Äland" would imply tax benefits for mobile tax bases, especially financial services. This kind of development has firmly been opposed by the Finnish authorities who see the model an invitation to unfair tax competition and possible public order problems, bearing in mind the closeness of Russia with the wide illegal sector of her economy. It is difficult to see how this concept could be united with Äland continuing to be a part of the EU.

Recently, political forces in Äland not supporting the off-shore Äland concept have also become more interested in Äland's own tax competence. This is explained by the failure of Finland to protect her shipping sector against low wage country competition. Äland's shipowners represent about 20 per cent of this sector in Finland and they employ 40 per cent of the Finnish seamen. Therefore, Äland has unsuccessfully wanted a special Äland ship registry with tax and social advantages. The politicians of Äland think that this example demonstrates that it is not possible to achieve a tax system adapted to Äland's special economic need unless Äland has the legislative competence in this sector. However, Älands possibilities of using tax advantages as economic

[8] The already repealed Äland Islands' Captive insurance scheme has been considered as unfair tax competition by the Commission. The scheme was based on tax benefits given by Äland authorities to such insurance activities regarding to the part of Companies tax corresponding to the Äland municipal tax.

instruments may be limited as Äland has a big public sector with good social, health and educational services. To cover these needs with revenue from income taxes instead of the State equalization amount and tax retribution may prove to be problematic.

# The Azores and the Madeira Autonomous Regions: Regional Tax Regulation in Portugal after the ECJ Azores Case (C-88/03, of 6 September 2006)[1]

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## 1. The Azores and the Madeira Autonomous Regions

Portugal is comprised of two autonomous regions, both being archipelagos set in the Atlantic Ocean.

[1] Original version. This short article corresponds to the written version of the oral lecture delivered at the Conference on "Models of Regional Tax Regulation in Europe - Portugal (Azores and Madeira)" in the International Congress on Economic Agreement and Europe (Economic Agreement, Regional Tax Regulation and State Aid), organised by the Institute of Basque Studies of the University of Deusto, in Bilbao, and by the Association for the Promotion and Dissemination of the Economic Agreement, AD CONCORDIAM, which took place in that city from 12 to 14 December 2006. It is descriptive and informative rather than doctrinal and investigative, and therefore deprived of major footnote references. On 19 February 2007 the anticipated new Portuguese Regional Finances Law was published (*Lei Orgânica* no. 1/2007, in *Diário da República*, 1.ª Série – N.º 35 – 19 de Fevereiro de 2007, pp. 1229-1238, available on-line at http://www.dre.pt/), and the old one (*Lei Orgânica* no. 13/98, of 24 February, as

The Azores[2] is an archipelago about 1,500 km from Lisbon and about 3,900 km from the east coast of North America, comprised of nine major Islands and eight small islets which extends for more than 600 km. Their combined population is about 240.000. Fisheries, due to an immense exclusive economic zone of 1.1 million km², and tourism, which benefits from the islands' volcanic origins and dramatic scenery, are some of the main activities.

The Madeira archipelago[3] lies north to the Azores, with the Madeira and the Porto Santo being the only inhabited islands. Their combined population is about 250.000. Additionally, there are the uninhabited Desert and Savage Islands. Madeira is a world-class tourist destination, a sector which accounts for most of its GDP. Nevertheless, the Madeira International Business Centre[4], a.k.a. the Madeira Free Zone (MFZ), now represents around 20% of the archipelago's GDP.

## 2. A brief constitutional note on the Autonomous Regions of Azores and Madeira

The regional autonomies derive from the Portuguese new Constitution of 1976 (*Constituição da República Portuguesa* – CRP), introduced following the end of the 48-year dictatorship of the *Estado Novo* by the *coup* of 25 April 1974.

The Azores and the Madeira are fully part of the Portuguese territory (Art. 5 (1) of the CRP) although Portugal respects the autonomies' organizational and functioning regimes (Art. 6 (1) of the CRP). The regions have their own political-administrative

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amended by *Lei Orgânica* no. 1/2002, of 29 June) revoked. This article takes this change into account, as well as the Portuguese Constitutional Court ruling no. 11/2007 (Procedure no. 1136/2006), of 12 January 2007, on the constitutionality of this new Law, available on-line at http://www.tribunalconstitucional.pt/tc/home.html. A new State Aid regime for the Madeira Free Zone (MFZ) was requested by the Portuguese Government to the European Community (EC) for the 2007-2013 period. This article considers information available up to 25 May 2007.

Since the Conference revolved around the ECJ Azores Case (C-88/03), and although I was not requested to produce my views on the subject - as more qualified speakers were invited for that issue -, I decided to add a few remarks to this article, largely benefiting from the insight and reasoning I derived from my attendance to this very interesting and high level event. In particular, I felt that there was too much unanimity on the fair judgement of the ECJ Azores Case, maybe because it serves – properly I would add – Basque's pretensions. Although I agree that the Azores Case is indeed favourable to the Basque model of *Concierto Economico*, I reject the idea that the ECJ Azores Case is beyond criticism *vis-à-vis* the actual issue that was at stake: the Portuguese model of autonomous regions. Nevertheless, I want to express clearly that even if the ECJ had judged the case in the different light that I consider below, the Basque model of *Concierto Economico* would be equally safeguarded.

The author wishes to thank Professor Santiago Larrazábal Basáñez and the organizing committee for their gentle invitation and excellent welcome in Bilbao.

[2] See: http://en.wikipedia.org/wiki/Azores

[3] See: http://en.wikipedia.org/wiki/Madeira

[4] See: http://www.sdm.pt

Statutes and bodies – a parliament and a government subject to specific regional elections (Arts. 6 (2), 231 and 232 of the CRP) – but these are framed within the sovereignty integrity of the State (Art. 225 (3) of the CRP).

The Statutes and electoral laws of the regions are drafted by the regions' parliaments; however they are discussed and approved in the national parliament (Art. 226 of the CRP). The legislative autonomy of the regions is limited to the matters defined in their Statutes, and if no specific regional legislation exists on a given matter national one applies (Art. 228 of the CRP).

Regional legislative activity is subject to the signature or veto of the Representative of the Republic (Art. 230 and 233 of the CRP) and the regional parliaments may be dissolved by the President of the Republic (Art. 234).

Portugal is therefore a unitary State with regional autonomies, which are nevertheless subject to the Constitution and the national law.

## 3. Legal framework governing the Autonomous Regions

The legal framework that governs the autonomous regions involves a set of different laws.

On top, we have the CRP, with the fundamental principles. The Regional Finances Law (*Lei de Finanças das Regiões Autónomas*) sets the financial relations between the autonomous regions and the State. The degree of regional autonomy is developed in the Statutes[5]. Further down the normative pyramid, Regional Legal Decrees, under the guidelines of the Regional Finances Law, adapt the national tax system to the regions specificities[6].

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[5] *Estatuto da Região Autónoma da Madeira* – Law no. 13/91, of 5 June, amended by Law no. 130/99, of 21 August, and by Law no. 12/2000, of 21 June; *Estatuto da Região Autónoma dos Açores* – Law no. 39/80, of 5 August, amended by Law no. 9/87, of 26 March, and by Law no. 61/98, of 27 August.

[6] *Decreto Legislativo Regional* no. 2/2001/M, of 20 February, amended by *Decreto Legislativo Regional* no. 29-A/2001/M, of 20 December, *Decreto Legislativo Regional* no. 30-A/2003/M, of 31 December, *Decreto Legislativo Regional* no. 21-A/2005/M, of 30 December, and by *Decreto Legislativo Regional* no. 3/2007/M, of 9 January, has adapted the IRC in the case of Madeira. *Decreto Legislativo Regional* no. 6/2000/M, of 28 February, as amended by *Decreto Legislativo Regional* no. 13/2001/M, of 10 May, regulates the deduction for profits reinvested by Madeira IRC taxpayers.

*Decreto Legislativo Regional* no. 3/2001/M, of 22 February, as amended, namely by no. 29-A/2001/M, of 20 December, *Decreto Legislativo Regional* no. 21-A/2005/M, of 30 December, and by *Decreto Legislativo Regional* no. 3/2007/M, of 9 January has adapted the IRS in the case of Madeira. *Decreto Legislativo Regional* no. 5/2000/M, of 28 February, as amended by *Decreto Legislativo Regional* no. 14/2001/M, of 10 May, regulates the deduction for profits reinvested by IRS taxpayers.

In the Azores the adaptation is made through a sole instrument: *Decreto Legislativo Regional* no. 2/99/A, of 20 January, amended by *Decreto Legislativo Regional* no. 33/99/A, of 30 December, *Decreto*

As a result of these adaptations, mainland Value Added Tax (VAT) reduced, intermediate and standard rates are 5%, 12% and 21% whereas those of the regions are 4%, 8% and 15%. The mainland standard Corporate Income Tax (IRC) rate is 25% (although lower rates of 20% and 15% apply in some circumstances under the simplified taxation regime for small undertakings and the hinterland regime) whereas those of Madeira are 22,5% or 17,5%, depending on the activities, and that of the Azores is 17,5%.

For 2006 income, the Personal Income Tax (IRS) brackets range from 10,5% minimum (for income < Euro 4.451) to 42% marginal (for income > Euro 60.000) in the mainland. Madeira with 8,5% minimum (for income < Euro 4.451) to 41% marginal (for income > Euro 60.000) does not depart much from the mainland standards. However, the Azores with a 8,4% minimum (for income < Euro 4.451) to 33,6% marginal (for income > Euro 60.000), enjoys significantly lower rates by comparison.

Ultimately, it is also worth noting that there is a Decree-Law that transfers tax competences to the autonomous region of Madeira (Decree-Law no. 18/2005, of 18 January). The scope of these competences is apparently all-encompassing as it up to "the Regional Government of Madeira to exert the whole of the competences envisaged in the Constitution and in the law with regard to its own tax revenue, practicing all the acts necessary to its administration and management" [Art. 1 (2)]. In practice such scope is not altogether clear.

On the one hand, it is doubtful whether the Madeira Government can issue either taxpayer-specific binding tax rulings or general instructions, and whether these can conflict with national tax rulings or instructions. On the other hand, the Madeira Government has already invoked its autonomy in the means of collection of (back) taxes so as not to publish regional tax debtors in the existing list of tax debtors, as demanded by Art. 64 (5) and (6) of the *Lei Geral Tributária* (approved by Decree-Law no. 398/98, of 17 December, as amended on this issue by Art. 57 of Law no. 60-A/2005, of 30 December, the Budget Law for 2006). The Finance Minister has already expressed his view that if the Regional Government persists in this attitude the Directorate-General of Taxes will nevertheless access the data of the regional debtors and publish it.

## 4. Constitutional powers of the Autonomous Regions (tax and fiscal-wise)

The autonomous regions have the following constitutional powers, tax and fiscal wise:

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*Legislativo Regional* no. 4/2000/A, of 18 January, *Decreto Legislativo Regional* no. 40/2003/A, of 6 November, and *Decreto Legislativo Regional* no. 3/2004/A, of 28 January.
Madeira has also adapted to the regional specificity national tax incentives granted under a contractual regime through the *Decreto Legislativo Regional* no. 18/99/M, of 28 June, amended by *Decreto Legislativo Regional* no. 17/2006/M, of 23 May.

– Approve the Regional Plan, Budget and Accounts and participate in the drafting of the national plans (Art. 227 (1) (p) of the CRP);
– Participate in the definition of national tax and fiscal policies (Art. 227 (1) (r) of the CRP);
– Exert their own taxing power, under the law (in practice, under the Regional Finances Law) and adapt the national tax system to the regional specificities under a frame-law of the parliament of the Republic (in practice, under the same Regional Finances Law) (Art. 227 (1) (i) of the CRP);
– Entitlement to the tax revenue levied or generated in their jurisdiction, under the Regional Statutes and the Regional Finances Law, as well as entitlement to a participation in the State's tax revenue, under a national solidarity principle, and to other given income, allocating it to its expenses, under the Regional Statutes and the Regional Finances Law (Art. 227 (1) (j) of the CRP).

## 5. The old Regional Finances Law

The Regional Finances Law details the autonomous regions entitlement to the tax revenue levied or generated in their jurisdictions.

This corresponds, for e.g., to the IRC attributable to the activity in the region, to the IRS due by residents in the regions, irrespective of their place of activity (!), and also to the IRC and IRS of non-residents liable to final withholdings on income generated in the region (!!), just to mention the case of the direct taxes (see Arts. 12 and 13 of the old Law and 16 and 17 of the new Law).

This Law also defines some principles governing the adaptation of the national tax system to the regional specificities (see Art. 32 of the old Law) which were now extended so as to encompass also the *per se* tax power of the regions (see Art. 45 of the new Law): (i) coherence between the national and regional systems; (ii) regional legality (demanding that a Regional Legal Decree of the region's parliament is used for the purpose); (iii) equality between regions; (iv) flexibility (the regional tax systems can either create taxes applicable only in the regions or adapt the national taxes to the regional specificities); (v) sufficiency (regional tax revenue should cover public regional expenditure); (vi) functional efficiency (creating incentives to the investment in the regions and fostering economic and social development is viewed as desirable).

The regions have the legislative competences to create (see Arts. 35 and 36 of the old Law and 47 (3) and 48 of the new Law): (i) improvement contributions levied on real estate increases in value due to regional public works or investments; (ii) special contributions compensating increased regional spending due to private activities externalizing on public goods or regional environment; (iii) surcharges of up to 10% on the taxes in force in the regions.

The regions also have the legislative (and regulatory) competences of adaptation of the national tax system. Examples of this competence are (see Arts. 37 of the old Law and 49 of the new Law): (i) the special deductions to the tax due on reinvested commercial, industrial and agricultural profits; (ii) the Madeira and Santa Maria (Azores) Free Zones; (iii) the reduction of up to 30% of the IRS, IRC, Value-Added Tax (VAT) and excise normal rates; (iv) the possibility of conditioned and temporary tax incentives, on a contract basis, concerning national and regional taxes (although this again has to be exercised *sub lege*, under the framework of the national Tax Incentives Statute (*Estatuto dos Benefícios Fiscais* – EBF).

Finally, the regions have administrative competences and rights (see Arts. 39 and 40 of the old Law and 51, 52 and 53 of the new Law): (i) to operate as the active party in the tax relation, being entitled to the national and regional taxes collected in the regions; (ii) to create assessment, liquidation and collection services; (iii) to regulate these services; (iv) to use the State's tax services in the regions in exchange for a fee; (iv) to have the Regional Secretary of Finance replace the national Finance Minister in the grant of tax incentives which are of the specific and exclusive interest of a single region; (v) to have the Regional Governments heard by the national Finance Minister when granting tax incentives which involve more than one region.

## 6. The Constitutionality of the new Regional Finances Law

As mentioned, a new Regional Finances Law was recently published on 19 February 2007, revoking the former one.

The Constitutionality of this new Law was scrutinized by the Portuguese Constitutional Court at the request of a group of members of the national parliament belonging to the *Partido Social Democrata* (now in the opposition to the national government, but nevertheless the ruling party in Madeira with absolute majorities therein ever since 1978, where it has won more than 40 different elections and where its President has become the longest running President of a democratically re-elected government). The issue at stake was that the new Regional Finances Law is supposed to produce a significant decrease in 2007 *vis-à-vis* 2006 in the State transfers to Madeira (less € 34.000.000), as well as a reduction of its VAT revenue (less € 3.790.000) and of the cohesion fund for outermost regions (less 50%), while slightly increasing those transfers to the Azores.

The legal reasoning of the claim focused on the fact that the new Law, by reducing the degree of financial autonomy of the regions, infringed the autonomous regions Statutes, which, under Arts. 280 (1) (c) and 281 (1) (d) of the CRP, prevail over other infra-constitutional laws, even if these have a reinforced status, such as the Regional Finances Law. This contradiction amounts to an illegality or even an unconstitutionality insofar as the Statutes' rule which is contravened has direct constitutional standing as

that represents an infringement of the constitutional principle of hierarchical prevail of the Statutes over other laws.

Additionally, it was stated that the principles of a Democratic Law State, confidence in the rule of law and autonomic insular regime set in Arts. 2, 9 and 6 (1) of the CRP were infringed, as the holders of office in the regional bodies had been elected in October 2004 up to 2008, and this interim change in rules might jeopardize the fulfillment of their government program, due to the lack of financial means.

Nevertheless, more detailed legal reasoning and further arguments were provided against specific provisions or other technicalities of the new Law, namely at the light of the solidarity principle of Arts. 225 (2), 227 (1) (j) and 220 (1) of the CRP.

The Constitutional Court considered that it was not entitled to scrutinize, on a *a priori* supervision of the constitutionality, the illegality of the Regional Finances Law *vis-à-vis* the Statutes, even if this was an indirect violation of the CRP. It considered that it was only allowed to rule on the direct and immediate violation of constitutional rules by the Regional Finances Law.

On substantial grounds, the Constitutional Court decided that there was indeed a shift of policy but not of a degree that infringed the principle of confidence in the rule of law or that put the financial autonomies at risk. It stated, namely, that the solidarity principle is a two-way street that can also apply from the regions to the mainland continent and that the principle of prohibition of the State guaranteeing the regional debt was compatible with that solidarity, in spite of being contrary to the old Law former principle, which was that of allowing the State to guarantee the regional debt.

The issue of whether the collection of taxes takes place through the State's services or regionalized services, and if the transfer to the latter system might be regulated by a national Decree-Law, and only subsequently organized by the regions legal bodies, was also held as compatible with the CRP.

Of the 13 judges 4 voted partly against the decision, namely: (i) on the issues of the prohibition of the State guaranteeing the regional debt (which ultimately violates, in their views, the idea of a unitary State, and which is in contradiction to similar situations such as the State guarantees granted to municipalities and public enterprises); (ii) on the confidence in the rule of law principle (as the 2007 regional budget had been drafted taking into account the old Regional Finances Law, in force at the time, and had entered into force on 1 January 2007, the new Law affects that budget and its envisaged revenue and responsibilities retroactively); and (iii) on the possibility of the regionalization of the collection of taxes being made by a national Decree-Law and not via an exercise of the regions' own legal competence.

It is worth noting that the President of the Regional Government resigned due to the approval of this new Regional Finances Law and forced new regional elections. In 6 May 2007 the Madeira branch of the *Partido Social Democrata* again won the regional elections with an overwhelming majority (64,2%).

## 7. Main changes introduced by the new Regional Finances Law

Two main differences exist concerning the tax regulation in the new Regional Finances Law *vis-à-vis* the old one. The former now develops the principles governing the creation of taxes by the regions and envisages a mechanism for ruling on the transfer to the regions of the State's tax services.

Under Art. 47 (1) of the new Law the regional parliaments may create taxes:

– solely applicable in the region;
– provided that the Regional Finances Law principles are observed;
– that do not overlap matters of existing national taxes, even if exempt or excluded from liability herein;
– that do not overlap matters of national taxes, even if they are not envisaged by existing taxes;
– whose enforcement does not hinder the trade of goods and services within the national territory.

These taxes cease to be applicable in case similar taxes of national scope are subsequently created (Art. 47 (2) of the new Regional Finances Law).

As previously noted on 6. above, the transfer of tax attributions and competences to the regions, in case decentralisation and regionalisation of the State services is deemed to be beneficial, is to be defined by a Decree-Law of the national government [Art. 62 (1)]. Until this Decree-Law is published, the State services render effective the regions' taxing powers, including the assessment and collection of taxes [Art. 62 (2)].

## 8. The Madeira Free Zone and the Santa Maria (Azores) Free Zone

Both autonomous regions have Free Zones, but whereas the Madeira one is apparently applicable to the whole archipelago that of the Azores is applicable to one island only. Nevertheless, and despite both Free Zones existing on paper, only the MFZ exists in practice, and there is currently no EC State aid regime approved or requested for Santa Maria.

Although some revamp of the Azores Free Zone has recently been discussed among the local business community, it seems that the Regional Government is not backing the idea, possibly fearing that it may artificially boost the GDP of the region, jeopardizing its Objective 1 status, and the inherent EC funds, as apparently has happened in Madeira.

The tax incentives applicable in the MFZ are provided for by national laws, namely Arts. 33 and 34 of the EBF, and consist of:

– IRC and IRS exemption on foreign source income derived from activities carried out in the institutional scope of the MFZ by entities settled therein (for pre-2000 licensed entities; a low taxation rate – 1%, 2%, 3% - applies to 2003-2006 licensed entities);
– IRC and IRS exemption on dividends, interest, royalties and service fees paid by entities settled in the MFZ (in most cases if paid to non-residents only);
– Stamp Tax exemption for operations carried out in the MFZ;
– Municipal Property Ownership Tax exemption on real estate directly used to carry out the activity of the entities settled in the MFZ;
– Municipal Property Transfer Tax and Stamp Tax exemptions on the transfer of premises used by entities settled in the MFZ and of participations in those entities.

Currently, a new State Aid regime for the MFZ was requested by the Portuguese Government to the EC for the 2007-2013 period. Approval is expected soon, along the lines of the new Canary Islands Special Zone regime[7]. The main features of the new regime should include 3% (2007-2009), 4% (2010-2012) and 5% (2013 onwards) IRC rates, still subject to job-creation standards, and an extension of the MFZ termination period from 2011 to 2020.

In the traditional climate of clash between the national legislation and the Madeira interests (see 3. and 6. above) a special payment on account (*Pagamento Especial por Conta – PEC*) of the MFZ companies IRC began to be levied in 2005 in spite of the fact that the majority of these companies are totally exempt from tax. By the Budget Law for 2006 Art. 98 (9) of the IRC Code clarified that the PEC due by entities with only exempt income was the minimum € 1250. Additionally, it applied this understanding retroactively to the year 2005, stating that the delivery up to 31 January 2006 of the amount of that PEC would extinguish the infringement procedures relating to the lack of payment.

This seems to be an awkward way of generating revenue with poor legal support and in total contradiction with previous practice (before the Budget Law for 2006) and unconstitutionally, namely in contradiction with the way that the ability to pay principle should apply in the case of an IRC exemption (before and after the Budget Law for 2006). Besides, Art 103 (3) of the CRP is very clear in stating that taxes of a retroactive nature are not allowed. Moreover, the PEC may amount to a violation of the approved EC State aid, in the sense that a subsequent and State unilateral payment on account of a prior EC-approved exemption from IRC is introduced. There are already some preliminary court decisions from the Madeira tax court stating that this PEC cannot apply as there is *fumus bonus iuris* of violation of the ability to pay principle and the confidence in the rule of law principle (as it is illogical and surprising for those believing in an IRC exemption to find that they have to make payments on account of it…).

[7] See: http://www.zec.org

## 9. Some short remarks on the ECJ Azores Case[8]

This case, as is now well know, concerns the annulment of the European Commission Decision 2003/442/EC[9] which classified as State aid incompatible with Art. 87(3)(a) (i.e. regional aid) or other derogations provided for in the EC Treaty the reductions on the IRC rate of taxpayers domiciled in the Portuguese autonomous region of the Azores, insofar as these applied to the financial sector. Mobile activities, such as financial services and 'intra-group services', were deemed as not worthy of those reductions, due to their deemed limited contribution to regional development and their disproportional nature with regard to the handicaps they were intended to alleviate.

The Portuguese Government's view that the reduced IRC rate was not selective but a general measure, since the reference standard was not the region itself but the whole Portuguese territory, was rejected.

To support this, the Advocate General (AG) Geelhoed introduced a distinction, followed by the ECJ, between three levels of autonomy, the latter two being: (i) where a local or regional authority has autonomous powers to set the tax rate for its geographical jurisdiction, whether with or without reference to a "national" tax rate (a non-selective measure *vis-à-vis* State aid provisions); and (ii) where a tax rate lower than the national tax rate is decided on by a local authority and applicable only within the territory of that local authority (the selective nature of which depends on the local authority not being institutionally, procedurally and economically autonomous from the central government).

First of all, I have some difficulty in understanding the difference between (i) and (ii), in the sense that the criterion used seems a very formal one, unless some sort of "economic autonomy", as defined for the latter, is also deemed to exist in the "autonomous powers" of the former. In other words, if the tax expenditure of a local or regional authority is offset by a State transfer or a central government subsidy, it should not be relevant if the tax rate is set within pre-defined brackets, as in (ii), or not, as in (i). *De facto* budgetary constraints may effectively limit the ability of a local or regional authority to set its own tax rate, regardless of "legal landmarks".

Secondly, it is hard to understand that institutional autonomy (i.e., a constitutional and political and administrative separate status), and procedural autonomy (i.e., no

[8] A good description of the facts and a similarly fine appraisal of some of the implications of the Azores Case may be found in Neves, Tiago (2006), "Regional selectivity: A fine day of sun for the European "true" autonomies" at Talk Tax Blog (http://worldtax.blogspot.com/2006/09/regional-selectivity-fine-day-of-sun.html), 10 September 2006 . Nevertheless, I tend to disagree with the conclusion of this Blog post, when it states that "the outcome on the Azores case may be said to have been fine day of sun for the European "true" autonomies!", as it somewhat implies that the Azores autonomous region is not a true autonomy.

[9] European Commission Decision 2003/442/EC of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax, *OJ* 2003 L 150, p. 52.

direct intervention by the central government in the procedure of setting the tax rate and the waiver of the local authority to take the interest of such government into account) are not enough. These distinctions may create serious constitutional problems in the Member States as some models of regional integration, namely those with less financial autonomy, are now unsafe from scrutiny *vis-à-vis* the State aid provisions. They will favor federal or quasi-federal systems, those likely to be found in larger Member States (e.g. Germany), at the expense of smaller Member States (e.g. Portugal).

In this regard, it is worth noting that the AG went so far as to say, in paragraph 70 of his Opinion: "To my mind, the fact that the contested reductions were taken on the basis of such a national solidarity principle in itself negates the concept of true procedural autonomy in the sense I have outlined. Rather, the very idea of such a principle obliges regional and central government to cooperate in the furtherance of the cause of redistribution across the whole of the Portuguese territory"!

Thirdly, it is difficult to understand that the outermost regions' preference of Art. 299 (2), the economic and social cohesion principle of Arts. 2 and 3 (1) (k), and the solidarity principle of Art. 2, all of the EC Treaty, do not play any role here. If a IRC rate can be lowered by the Azores for all sectors of activity, save the financial one, then one of the few areas where the outermost hardship (geographical isolation, difficult climate and economic dependence on a small number of products) is likely to affect the Azores in a lesser way, and where an outermost region can try to compete and gain a role in the EC and international arena – largely benefiting from the EC free movement of capital, which extends to third countries, under Art. 56 of the EC Treaty – is excluded at the start.

Again, this may create constitutional problems in Member States with outermost regions or with different regional degrees of development, as that diversity may imply a national solidarity principle and compensatory State transfers, which can from now on be challenged by the EC institutions.

Let us imagine loosely for a moment that the EC was a State, having its own budget, comprised of very different regions (the national States). Would the EC structural funds and subsidies, bound by the principles of outermost regions' preference, economic and social cohesion and solidarity, not offset in some way the national States' budget expense decisions? Maybe the EC, viewed as a regional (super-)State would not be compliant with its own given, and now established, criteria for "true autonomy"…

Fourthly, it is obvious that unitary States with no degree of regional autonomy (I assume this to be the case of Luxembourg and Estonia, for e.g.) may also target needed regions or local communities differently through their State Budget. This may inspire a circumvention of the "economic autonomy" criterion by the States, which may allocate more national resources to the regions through their own budgets, at the expense of transparency. For instance, Portugal might decide to patrol its far territorial waters more intensely or to give more incentives to tourism in low populated areas (effectively targeting the Azores in a positive way).

Fifthly, I was a bit puzzled by the fact that the distortion of competition within the Community or inter-State trade was assumed so easily in the overall discussion. Only a handful of Portuguese financial institutions exist in the Azores, and I believe that they have been there long before the IRC reduction was implemented. I have no knowledge of foreign banks shifting their operations to the Azores. In other words, there is absolutely no evidence that any distortion of competition existed. I want to believe that Portugal defended the Azores case of the sake of principle, rather than on the grounds of particular banking conveniences. And the reason why no distortion of competition existed is that the effective IRC rate of the Azores regime (22,4% in 2000, and currently 17,5%) is still higher than the nominal rate or the effective rate of financial powerhouses such as Ireland or Luxembourg, without the natural advantages of these regions (English or French-speaking workforce, central location and very strong bank secrecy in the case of Luxembourg).

Last, but not least, it is somewhat strange to assume that Portugal, on economic policy grounds, would tolerate an intra-State distortion of competition or an internal tax haven within its own borders, as it is much more likely that the Azores IRC rate would affect the domestic allocation of financial institutions to a greater extent than the EC one. This may be a symptom that Portugal, in itself, does not view the IRC rate of the Azores regime, insofar as it applies to the financial sector, as likely to supersede the hindrances and additional costs of that outermost status.

At the end of the day, I think that, on the one hand, Portugal could have done more to reverse the burden of the proof that the Azores measure was not compliant with the State aid provisions, and that, on the other hand, the fact that the financial sector and harmful tax competition "clouds" were overlying the issue may have influenced decisively the bend of the European Commission, the AG and the ECJ.

A word of caution for the times ahead: the broad understanding of regional specificity taken by the European Commission, the AG Geelhoed and the ECJ is prone to produce havoc if taken by the WTO *vis-à-vis* the EC as far as State aid is concerned. Indeed, the EC is possibly opening the gate to a Trojan horse – which it will later be prevented from expelling under the *pacta sunt servanda* and the *venire contra factum proprium* principles as per Art. 27 of the Vienna Convention on the Law of Treaties - in going far beyond the international accepted standard for regional specificity.

There is no specific discipline for subsidies in the service sector [see Arts. II (2) and XV of the General Agreement on Trade in Services (GATS)]. Nevertheless, Art. 2 (1) (b) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) states: "*Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification*".

Footnote 2 of the SCM Agreement clarifies: "*Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise*".

Additionally, Art. 2 (2) of the said Agreement emphasises: "*A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement*".

In other words, the Azores regime is compliant with the specificity criterion of WTO Law, with its focus on institutional and procedural autonomy (in a narrow, non-Geelhoedian sense), as it does not favour certain enterprises over others and corresponds to the setting or change of generally applicable tax rates by a level of government entitled to do so[10]. Notwithstanding, it is not compliant with the EC State Aid rules as, to be so, it would have to favour the IRC rate applicable to certain enterprises (non-financial) over others (financial). The European Commission, the AG Geelhoed and the ECJ would have most probably reached a different conclusion on the Azores Case if they had resorted to the WTO SCM Agreement to fill the loophole of what regional selectivity was *vis-à-vis* EC State aid.

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[10] For an analysis of the compatibility of the MFZ with the WTO Law, which raises far more complex problems, see: Borges, Ricardo Henriques da Palma / Mota, Pedro Infante (2005), "WTO and Direct Taxation [Portugal]" in AAVV (2005), *WTO and Direct Taxation*, Linde Verlag, Vienna, [Org: Michael Lang, Judith Herdin, Ines Hofbauer], pp. 603-606.

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# The Economic Case for Scottish Fiscal Autonomy: With or Without Independence[1]

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**Abstract**

This paper contains a discussion of the tax, public spending and economic implications for Scotland of fiscal autonomy. By 'fiscal autonomy' we mean that Scottish Executive and Parliamentary spending would be funded by taxes raised in Scotland or through public borrowing by a Scottish Treasury. Revenue transfers to Scotland under the Barnett formula would cease. Two types of fiscal autonomy are discussed: within the UK and Scotland as an independent country. With independence, Scotland would gain the ability to issue its own currency, otherwise the economic benefits of fiscal autonomy to Scotland would not differ significantly between the two constitutional arrangements. It is argued that the current block grant system is inefficient because it does not require the Scottish Executive to balance the benefits of public spending against the pain of financing. With deficient incentives political decision-makers are

[1] Original version.

unlikely to strive to increase efficiency in the provision of publicly provided goods, or to try to get the right balance between provision of goods and services by the Scottish public and private sectors, and nor to promote economic growth in Scotland. Moreover, as the tax burden caused by the incentive and spending deficiencies in the Scottish public sector is not readily apparent to the Scottish electorate, the electorate has little inclination to discipline its elected representatives. If fiscal autonomy were introduced, incentive structures for both the Scottish electorate and its representatives in Edinburgh would change radically. We would expect that matters such as value for money in public spending, balancing public spending with its costs in terms of higher taxes, and promotion of economic growth would be given much greater emphasis than under the present incentive system.

## Introduction: I: background and some politics

In earlier work (Hallwood and MacDonald, 2004 and 2005), we argued that a range of taxes (but not all) currently under the control of Westminster should be devolved to the Scottish Executive and Parliament under a system of fiscal federalism in the UK. The Steel Commission Report (2006) is broadly in agreement with us, and we find ourselves in agreement with many of its arguments. However, there is one thing in particular to which we take exception. This is its dismissal of fiscal autonomy - all spending and taxing being devolved to Scotland, as a mere political step on the road to an independent Scotland. While the thinking of the Steel Commission on this matter is largely driven by political considerations, we think that the economics of fiscal autonomy deserves examination, and this is the subject of this paper.

The main thing that becomes apparent is that fiscal autonomy is like fiscal federalism but more so! By this we mean that the economic incentives created by fiscal autonomy, for both the Scottish electorate and its elected representatives in Edinburgh, are even clearer than under fiscal federalism because these Scottish entities would have to bear the full tax cost of every last pound of Scottish government spending. This hard budget constraint is not quite so hard under the fiscal federalism we discussed in our earlier work because we envisaged some fiscal transfers from Westminster continuing. With fiscal autonomy this would no longer be the case. Indeed, Edinburgh might make transfers to Westminster in payment for public goods (such as defence) supplied by the Union as a whole. It is also true, as pointed out by the Steel Commission, that fiscal autonomy would put an end to equity transfers - aimed at equalizing tax burdens as a percentage of per capita regional incomes. But from a Scottish point of view, this might not be such a disadvantage especially if North Sea oil tax revenues persist at recent high levels.

One of the key issues that we addressed in our earlier work is that the design of an effective and credible fiscal federalist arrangement relies crucially on ensuring that a hard budget constraint is in place when fiscal powers are devolved. If such a constraint

is not in place, or if it is in place but it is easily circumvented, the fiscal federalist settlement will not achieve the essential disciplining of politicians, although it may still achieve other objectives of fiscal devolution. Our argument here is that fiscal autonomy automatically provides a hard budget constraint and it is therefore a superior form of fiscal devolution to fiscal federalism. In essence in a fiscal autonomy arrangement the market – particularly the capital market - provides the hard budget discipline, rather than an institutional or legal arrangement.

We would also like to comment on the advantages of fiscal autonomy adding to the democratic process in both Scotland and the Union. We think that the Scottish electorate is intelligent enough to know and to vote its preferences. A new system of fiscal autonomy would be one thing, independence from the Union quite another. As fiscal autonomy would mean devolving more taxes to Scotland than would a system of fiscal federalism, we think that fiscal autonomy in a meaningful sense is the more democratric, at least from the perspective of local democracy. The promotion of the latter we observe is becoming of increasing interest in the UK in recent years.

A similar 'democracy argument' can also be used against those who would retain the present bloc grant system as a bastion against socialist tax and spend politicians who, it is thought, would use new powers over taxes simply to raise them. But, again, this is a matter for the electorate who has the power of the ballot box to choose the politicians they want.

## Introduction II: the economic context

Our main argument is that the current large gap between spending by and taxes raised through Edinburgh – known as "vertical imbalance" or "fiscal mismatch" - is inefficient because it does not provide sufficient incentives for Edinburgh to make efficient use of its public revenues. The thrust of research on public finance is that decision-makers (the Scottish electorate as principal and its agents the Scottish Executive and Parliament) will make more efficient decisions concerning the use of public money if they have to bear the costs involved. This suggests that public spending by Edinburgh should be more closely aligned with taxes raised in Scotland, and less reliant on a bloc grant from Westminster. At the moment the allocation of additional revenues to Scotland is based on an unconditional grant known as the *Barnett formula*[2]. This formula is often regarded as favouring Scotland since it delivers a higher per capita level of revenue to Scotland than to many other regions of the UK. Jettisoning the Barnet formula

[2] The Barnett formula was first applied in 1978. In 1979 the Treasury conducted a needs assessment exercise which generally favoured Scotland (and Northern Ireland) and despite the fact that Barnett was supposed to act as a convergence formula (equalising per capita spending across the regions in the UK) it has in fact simply enshrined the favourable differential that existed in 1979.

would probably mean smaller flows of public finance from Westminster to Scotland[3]. However, a new system of public finance – one of fiscal federalism as argued in our earlier work (see Hallwood and MacDonald, 2004 and 2005), or of fiscal autonomy as we will argue here, could produce an improved allocation of resources in the longer run and the opportunity to incentivise growth and ultimately generate additional public revenues. Increased efficiency depends largely on how politicians react in the new revenue and tax environment. They are more likely to respond positively the greater is transparency and accountability in the system. In our view, a system of fiscal autonomy would be the most transparent to the Scottish electorate because the link between public spending and the need to raise taxes in Scotland is as clear as it can be.

Some of our arguments here are similar to those in our previous work as the difference between fiscal federalism and fiscal autonomy is qualitative, but fiscal autonomy implies a greater degree of fiscal independence than does fiscal federalism. As explained in our earlier work, fiscal federalism involves a considerable proportion of taxes raised in Scotland being assigned to and directly returned by Westminster to Scotland. The key taxes included in such an assignment could be income tax, VAT and corporation tax. We argued for this on the basis of the economic theory of fiscal federalism (for a survey see Oates (1999)[4]. With fiscal autonomy more tax sources, perhaps all of them, would be devolved to the Scottish Parliament. To a much larger degree Scottish fiscal matters – on the sides of both spending and, especially, the tax-raising – would be the responsibility of the Scottish Executive and Parliament. In this paper we consider two forms of fiscal autonomy – full fiscal autonomy in which all expenditure and taxes, including VAT, are devolved to Edinburgh. This form of fiscal autonomy is consistent with Scotland being independent and as we note in our previous work, and as is confirmed in the Steel report, this kind of fiscal autonomy does not exist within a nation state. We refer to fiscal autonomy as a step less than full fiscal autonomy and this consists of (potentially) the devolution of all taxes apart from VAT.

A new system of fiscal autonomy within the UK need not entirely cut off fiscal transfers between Scotland and the rest of the UK - it rather depends on what new political settlement was reached. However, it is likely that an independent Scotland – one with home rule - would have no more formal fiscal interactions with the rest of the UK. If this were the case, residual fiscal links between Scotland and the rest of the UK would pass only through the fiscal mechanisms of the European Union.

In the case of fiscal autonomy within the UK, Westminster would continue to supply some public goods to the Union as a whole, for example, defense and diplomatic

[3] See Gallacher and Hinze (2005) for a recent discussion of the Barnett formula and its usefulness as a funding formula for the Scottish parliament.

[4] The UK is usually defined as a 'unitary' rather than a 'federal' state. However, it is often recognised that almost any degree of fiscal devolution in a unitary state creates some federal characteristics. When we refer to 'fiscal federalism' we are referring to the devolution of taxes and pubic spending and not to a new legal definition of the political structure of the UK.

services. If Scotland were to pay for these goods fiscal transfers between Westminster and Edinburgh would continue. Fiscal transfers to balance equity in public spending might also continue. In this set up, a fiscally autonomous Scotland might well be able to continue to use various administrative systems that are already in place, for example, the pension and income tax systems. Scotland would probably make fiscal transfers to Westminster as payment for public goods supplied. It is usually argued that equity payments flow south to north in the UK - either because Scotland is a deserving case, or, because it needs to be bought off with southern generosity to remain in the Union (see McLean and McMillan, 2002). Of course an argument can be made that equity transfers have run from Scotland to Westminster since the discovery of North Sea Oil. Either way, though, the equity flow issue and the existence of a surplus or deficit on Scotland's budget is not crucial to the case for fiscal devolution.

Our thinking here, and in our earlier work on fiscal federalism, is that a more efficient fiscal system for Scotland might eventually so grow the Scottish economy and tax-base as to obviate the need for inward equity transfers from Westminster, to the extent that the equity flow is indeed in that direction. The Irish success with its fiscal policy, especially its tax policy, is by now a *cause celebre* of what a small open economy – such as is Scotland's – can do with a fiscal system that allows it to fine tune its fiscal policies to promote economic growth. An argument that impresses us is that requiring the Scottish Executive and Parliament to bear responsibility for raising the taxes that finance their public sector spending in Scotland will lead them to be more concerned with promoting enterprise and economic growth in Scotland than they currently appear to be. It is not as if the idea of properly aligning public spending and taxing decisions is a new one. Indeed, Adam Smith in 1776 (page 250) pointed out that:

> "…those public works which are of such a nature that they cannot afford any revenue for maintaining themselves, but of which the conveniency is nearly confined to some particular place or district, are always better maintained by local or provisional revenue, under management of a local and provincial administration, than by the general revenue of the state… Were the streets of London to be lighted and paved at the expense of the Treasury, is there any probability that they would be so well lighted and paved as they are at present, or even at so small an expense?"[5].

The current system of bloc grant from Westminster is far from providing this balance between spending and taxing with, we think, unfortunate long-term consequences for the Scottish economy. The politics of the Scotland Act (1998) has gotten in the way of sensible economics. For example, Hallwood and MacDonald

[5] Smith also questioned the fairness of having people outside a benefit area paying for benefits enjoyed by others: "The expense, besides, instead of being raised by a local tax upon the inhabitants of each particular street, parish, or district in London, would, in this case, be defrayed out of the general revenue of the state, and would consequently be raised by a tax upon all the inhabitants of the kingdom, of whom the greater part drive no sort of benefit from the lighting and paving of the streets of London" (page 250).

(2005) demonstrate that the United Kingdom has one of the largest vertical imbalances in Europe, with only 14 % of revenue raising devolved to sub-central levels of government.

We look at it this way, the present bloc grant system leaves Edinburgh the choice, within any administrative constraints set by Westminster, of how to spend the grant across the spectrum of public goods supplied by government. The whole of the grant is spent as there is little or no obvious benefit to Scotland of returning an unspent portion to Westminster. This system gives the Scottish Executive and Parliament little incentive to choose the right balance between the supply of private and of public goods in Scotland - that is, to get the relative size of the private and public sectors in Scotland right. Recent data on the share of the public sector in Scotland underscore this point For example, in the third quarter of 2005 public sector employment in Scotland stood at 23.4% of the total Scottish workforce (the comparable figure for the whole of the UK was 20.2%), a rise of around one per cent since the start of devolution. However, this headline figure disguises some remarkable changes in sub-categories. For example, employment in so-called quangos has risen by around 40 per cent since devolution and employment in Scottish Executive's core departments has risen by around 18 per cent since the advent of devolution. In the mind of the Scottish electorate such changes are surely a matter of great importance. Some in Scotland argue that the public sector is too large and stultifies private enterprise. Others would argue for a larger public sector. However, the present public sector funding system in Scotland largely makes this important debate moot. What would be the point of having such a debate when Westminster - under the rigid Barnett formula, largely sets the level of Scottish public spending?

## 1. Outline of the rest of the paper

The outline of the remainder of this paper is as follows. In the next Section we briefly discuss arguments favouring transferring taxing as well as spending decisions to decision-makers at the same level of government. These arguments relate to the promotion of efficiency in the use of existing resources (allocative efficiency) and the promotion of economic growth. In Section 3 we continue by setting out various governmental budget constraints under different politico-financial-economic systems. These are the currently operating "Barnett system", a system of fiscal federalism that we discussed in Hallwood and MacDonald (2004 and 2005), a possible system of fiscal autonomy within the UK, and, finally, fiscal autonomy outside of the Union. Realizing that government operates with a budget constraint, and does not have unlimited resources available for public spending, points up the need to manage government spending and taxing efficiently. Section 4 offers a general discussion of some important issues relating to the implementation of various forms of fiscal devolution and in Section 5 we consider what kind of taxes might be devolved under the various forms of fiscal devolution. After considering these arguments we will turn in Section 6 to a discussion

of the benefits of Scotland operating its own currency which, presumably, would only be possible with independence. We argue, however, that there is little benefit and, perhaps, a net cost, in Scotland operating an independent currency. Section 7 concludes.

## 2. The Theory of Fiscal Federalism

The theory of fiscal federalism considers the provision of goods financed by taxes at the regional level as well as the appropriate revenue collection system at this level of government. The main issues concerning system design that we discuss are efficiency, hard budget constraints, economic growth, and social cohesion.

### *2.1. Efficiency*

The basic principle in the traditional theory of fiscal federalism is that sub-central government should have the ability to provide goods and services that match the particular preferences and circumstances of their constituents. The key presumption of fiscal federalism is that the provision of public services should be located at the lowest level of government encompassing geographically the relevant costs and benefits. In that way efficiency and economic welfare can be increased above that generated by a more uniform allocation mechanism.

Rational decisions are much more likely to be made when people in a 'benefit region' have to face up to the costs as well as enjoying the benefits of public expenditure. In terms of this kind of argument, goods which are ideal candidates for centralised provision, because their benefits extend nationwide (or there are economies of scale) are foreign affairs, defence and interregional infrastructure such as transport and telecommunications. But many other public goods have benefits that are locationally circumscribed – such as the local fire department, street infrastructure, and spending on health and education to name a few. Of course the efficient provision of these goods or services may also be ensured in a system where private sector companies have to enter a competitive bidding process for their provision[6]. Indeed, if a single private sector company is providing goods or services across a large enough number of sub-central groupings they may be able to benefit from economies of scale[7].

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[6] See Tanzi, 1999.

[7] The idea of a benefit unit encompassing decision-making over both costs as well as benefits has a long lineage in economics. As long ago as 1956 Charles Tiebout argued that the idea of a benefit unit applied even, perhaps, especially, when households and firms could vote with their feet. That is, mobile households and firms could choose the particular benefit unit that supplied the public goods and services that they most wanted. The distribution of households would be rational as long as each paid the full cost of the goods and services supplied. This benefit unit argument – paying for what you get (in a world of either geographically mobile or immobile households and firms) is important for two main reasons. First, because the quantity of

### *2.2. Hard and soft budget constraints*

The principle of equalisation, effected by a bloc grant raises a moral hazard issue caused by the lack of a hard budget constraint on public spending. If a region knows that the size of the bloc grant it receives is related to the size of its fiscal imbalances, the incentive to reduce its fiscal imbalance is compromised: the region in effect faces a soft budget constraint. This is a danger with the present first because the block grant is not being adjusted downwards appropriately to reflect Scotland's falling population. Secondly, because given the block grant there is little incentive to cut government spending (and the budget deficit).

The 'new fiscal federalism' (Oates, 2004) takes a public choice perspective. This contends that politicians and civil servants are not seen as necessarily behaving to maximize the welfare of the electorate; rather they are concerned with their own utility – and for reasons of personal satisfaction, having control over a large budget is better than a small budget. This public sector as a monolith (or, Leviathan) argument is influential and implies that fiscal federalism acts as a constraint on the behaviour of a revenue-maximizing government[8]. At issue is how to align more closely the decisions of politicians and bureaucrats (the agents) with those of the electorate (the principal). From this public choice perspective horizontal tax competition between fiscal jurisdictions reduces the scope for wasteful government spending and, therefore, increased fiscal decentralization should limit the size of the public sector. Further, given this combination of benefits, increased tax competition between jurisdictions need not mean reduced provision of public goods[9].

Cooperative federalism (coordination of tax regimes between federal units, somewhat as now between Edinburgh and Westminster) can serve governmental interests rather than those of their citizens[10]. Generally, the constitutional expert Ronald Watts (1996) comes out against excessive cooperative federalism as there is some 'democratic value in competition among governments to serve their citizens better" (page 55).

An example of the soft budget constraint in Scotland might be that poor Scottish standards of physical health are used as an argument for more public spending on

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public goods and services supplied will be neither too large nor too small. When the cost and benefit of the last few items of a public good produced are equal production is at the right level. If the cost of the last few units (i.e., marginal cost) is greater than marginal benefit, the provision of public goods is too great. When marginal costs is less than marginal benefit there is a case for expanding provision. It is for this reason we argue in favour of some devolution of taxes to facilitate a marginal tax rule (discussed below). Secondly, tax costs are properly apportioned to benefits, taxes are non-distortionary in that they do not adversely affect the locational decisions of households or firms. Moreover, if costs vary between regions the case for fiscal federalism is strengthened. Where interregional cost differences exist a SCG can take advantage of this to improve welfare – providing more of the public goods that have low costs and less of those with high costs.

[8] See Buchanan and Brennan, 1980.

[9] Empirical studies testing the 'Leviathan' hypothesis have produced conflicting results. See, for example, Oates (1985), Grossman (1989) and Ehdaie (1994).

[10] Breton quoted by Watts, 1996.

health in Scotland supported by a commensurately larger grant from Westminster. However, with a hard budget constraint on public spending the Scottish Executive and Parliament might be encouraged to treat poor health in Scotland differently, by moving further towards preventative measures within health spending. Relevant fiscal measures might include public education through the schools of the causes of poor health, and higher taxes on health-compromising consumables

However, the benefits of moving to a harder budget constraint might be lost unless central government can credibly commit to its budget constraint. This is a so-called "time inconsistency" issue. Unless central government can credibly commit not to rescue an over-spending subcentral government or distance itself from political pressures from subcentral government to raise spending limits, spending by sub-central government is unlikely to be contained[11]. We argue that the concept of time consistency is a key element in the design of a fiscal system for Scotland because it relates strongly to the credibility of that system. A system of fiscal autonomy in a Scotland remaining within the UK is as close to a credible commitment that we can think off. Fiscal autonomy in an independent Scotland would entirely remove the Executive and Scottish parliament facing moral hazard temptations of bailout.

What might be compromised in a move to a harder budget constraint – the closer matching of spending and taxing in Scotland - is the insurance function played by central government. Regions affected by adverse asymmetric economic shocks may be supported by transfers from central government – but this is likely to be more difficult when subcentral government spending and taxes are closely matched. Such asymmetric shocks could well occur if Scotland was, say, overly reliant on North Sea oil tax revenues, known to be quite variable over time. The trade-off between risk sharing and moral hazard is problematic for the design of a system of fiscal federalism[12]. If fiscal federalism is the choice, one way around the issue might be for central government to insure individuals (e.g., as with unemployment insurance) thereby guaranteeing benefits to welfare recipients and senior citizens[13]. Of course, with independence and fiscal autonomy Scotland would forgo transfers from Westminster so that that insurance scheme would be lost and it would therefore be crucially important that some form of smoothing of North Sea Oil revenues was derived, perhaps along the lines of the Norwegian oil stabilization fund. With fiscal autonomy within the UK some aspect of Westminster's insurance function might be retained – for example, reduced payments for centrally provided public goods during an economic downturn.

[11] With fiscal federalism one way of achieving time consistency is to have a 'no-bailout' clause in the financial settlement with Westminster. The exact nature of such a clause is at this time difficult to foresee. However, such a clause could be backed up with legislation that prevents a bailout in pre-defined circumstances, and it is even possible to make members of the Scottish Executive personally liable if a bailout did occur. It could also be further reinforced by ensuring that any debt issued by Edinburgh was its liability and not Westminster's.

[12] See Perrson and Tabellini (1996) and Oates (2004).

[13] See Perrson and Tabellini, 1996.

### *2.3. Economic growth*

The key economic argument in favour of fiscal federalism, that it improves efficiency in the use of resources ("allocative efficiency"), should also apply in a dynamic – economic growth – framework[14]. For example, the ability of local politicians better to reflect local preferences on education, innovation, private capital and the infrastructure could have an important influence on growth.

A second argument, and one which we believe may be of considerable importance for Scotland, is that the current devolution settlement for Scotland does not give local politicians an incentive to improve economic growth in Scotland. At present the Scottish Parliament is given a lump sum, based on the Barnett formula, which is spent on public services and goods and politicians have little incentive to spend much of the budget on improving economic growth since the benefits of that improved growth, in terms of increased tax revenue, accrue to the exchequer in London. Giving politicians in Scotland an incentive to improve economic growth would effectively reward Scotland with the benefits of growth – thereby increasing the incentives to promote it.

A third argument, which is related to the previous one, is that fiscal federalism might not only provide incentives for local politicians to consider local preferences but also to spend time searching for innovations in the production and supply of public goods and services which could result in their costs and prices being lower.

A fourth argument in the theoretical literature is that by lessening the concentration of political power and promoting some tax competition, fiscal federalism loosens the grip of vested interest groups on public policy and this promotes democracy and (longer term) economic growth[15]. That said, achieving allocative efficiency in practice has two dimensions: the incentivising dimension, associated with greater revenue powers discussed above – and also improved productivity on the spending side. Devolution has to provide the opportunity to realise greater efficiency on the spending side – but many feel the potential has not been fully grasped. For fiscal federalism to work the appropriate institutional framework has to be in place including a willingness on the part of the local politicians to abide by the rules of a hard budget constraint[16]. In this regard, one particular aspect of the Scottish scene is that there is some evidence to suggest that Scotland is more producer orientated and resistant to competition, particularly in public services, so undermining the potential gains in allocative efficiency.

A final argument relates to changes in savings patterns under a fiscally devolved system which, it is conjectured, leads to higher savings and economic growth. For example, Brueckner (1999, 2005) has argued that fiscal devolution, by allowing public

[14] See Oates, 1993.
[15] Various statistical studies support the notion that fiscal federalism promotes growth. These include Oates, 1985, Bahl and Linn, 1992, Thieben, 2003, and Mankiw, Romer and Weil, 1992.
[16] See Tanzi, 2001.

good levels to be tailored to suit differing demands of young and old consumers, who live in different jurisdictions, increases the incentive to save. This stronger incentive can, in turn, lead to an increase in investment in human capital, and a by-product of this higher investment is faster economic growth.

### *2.4. Social capital*

Recently a number of researchers have argued that decentralisation of fiscal policy, by bringing government closer to the people, may strengthen social capital. We argue in this section that if the financing of public spending in Scotland becomes more obviously the direct responsibility of Scottish voters, they will be more energised to monitor their political representatives. If a majority of the electorate do not think that their representatives are providing value for taxes paid, they have the means elect other representatives. The lack of connection between public spending in Scotland and much concern for the issue of value for money is debilitating to the Scottish polity. This shows up in the fear that any reform of the tax system will only lead the same sort of politicians to raise further the level of Scottish public spending. But with greater tax autonomy in Scotland things would be very different: the electorate would become energised to monitor the performance of the people they elect to represent them.

Although this literature probably has greater import for developing and transitional countries, it is worth briefly outlining here. To quote De Mello (2000):

> '…social capital is a multidimensional concept, broadly defined as trust, norms, and networks that foster mutually beneficial cooperation in society. It involves civic virtue, interpersonal trust, social cooperation and cohesiveness, and associational engagements among social groups'.

A somewhat narrower definition defines social capital *as informal norms that promote cooperation between individuals*[17].

Knack and Keefer (1997) try to extract a common element from the various definitions of social capital:

> "All concepts of social capital have in common the idea that trust and norms of civic cooperation are essential to well-functioning societies, and to the economic progress of these societies."

A number of researchers have associated social capital with growth. Growth can be improved in countries where social and political institutions protect property rights and discourage non-productive activities aimed at grabbing a large share of the social product (i.e., what economists call 'rent seeking behaviour'). Such an environment creates a pro-

[17] See Fukuyama (1999).

investment climate and fosters entrepreneurship, thereby stimulating growth. Social capital can also stimulate growth by lowering the transaction costs associated with formal mechanisms, such as formal legal contracts and bureaucratic rules[18].

Although there are a variety of determinants of social capital, from religion, education and ethnic polarization, a number of researchers have argued that the vertical structure of government is an important determinant of social capital[19]. There are a number of reasons why the devolution of fiscal policy may improve social capital[20]. First, the basic economic (or, 'allocative') efficiency argument of the traditional fiscal federalism model should imply that a government's actions are more easily monitored by the local community and this should help to foster transparency and accountability in public sector actions. Hence the decentralisation of fiscal policy should reinforce the perception of citizens that government respond to their needs and preferences faster and more effectively.

Second, the decentralisiation of fiscal policy should lead to stronger links between community groups and between the community in general and government. With devolved policy making – either federalist or with autonomy, local citizens are encouraged to take on more responsibility for social and economic development and discussions between the government and local communities tend to be greater. Again it is easier to enforce social norms and contracts in smaller jurisdictions yet as Scottish devolution would seem to demonstrate, it is not clear that local societal norms are more favourable to securing allocative efficiency, than those favoured by central government. The strengthening of these ties is likely to promote social cohesiveness, civic virtue, facilitate interactions among communities and discourage self interest.

Third, closer government encourages community-wide participatory initiatives, such as the formation of groups, associations, and social/cultural activities among community members. Such civic cooperation can improve allocative efficiency if the total benefit to society of acting in a cooperative fashion outweighs the total cost of non-cooperative actions. Fostering this civic level playing field diminishes the payoff for citizens to engage in free-riding behaviour and illegal or illegitimate activities, such as tax evasion, dishonesty and corruption.

### *2.5. Fiscal devolution and economic growth: the empirical evidence*

There have been a number empirical studies of the growth – fiscal federalism link. The majority of initial contributions to the empirical literature on the link between fiscal

[18] The following authors stress the link between social capital growth: Abramovitz, 1986, Rodrick, 1998, and Knack and Keefer, 1997.

[19] See La Porta, 1997 on religion, Heliwell and Putnam, 1999 on education, and Fox, 1996, on ethnic polarization.

[20] The discussion here draws on de Mello (2000).

decentralization and economic growth (see, *inter alia*, Bahl and Linn, (1992), Kim (1995), Huther and Shah (1996), Davoodi and Zou (1998), Zhang and Zou (1998), Oates (1985, 1999), Thie≥en (2003), Xie, Zou and Davoodi, 1999) are inconclusive in the sense that some find a positive relationship, while otheres find the relationship is actually negative. However, these early studies suffered from a number of econometric problems and from using data sets containing countries with widely different characteristics. More recent empirical work on the fiscal devolution growth link, which avoids some of the deficiencies of the earlier work (see, inter alia, Lin and Liu (2000), Akai and Sakata (2002), Stansel (2005) and Iimi (2005)) finds a clear and statistically significant positive relationship. For example, Stansel (2005), uses a new data set comprising 314 US metropolitan areas to show that there is a a positive and highly significant relationship between fiscal decentralisation and economic growth: a one standard deviation increase in decentralization produces a 2.5 per cent increase in per capita income growth.

Another way of approaching the fiscal devolution - growth link is to assess if a lower tax burden and smaller public sector would stimulate economic growth in Scotland, an issue which we have seen is of great importance from a theoretical perspective. Recently published work by Lee and Gordon (2005) using cross-section data for 70 countries over the period 1970 to 1997 suggests that lower rates of corporation tax contribute to faster rates of economic growth. In particular, after controlling for other growth inducing factors, lowering corporate tax rates by ten-percent can increase the growth rate of real GDP by between one- and two-percent per year. Lee and Gordon (2005) also address the well-known lack of systematic relationship between tax burdens and rates of economic growth. They suggest that high rates of economic growth can lead to higher tax burdens due to the need to build infrastructure, and that this can confound a null hypothesis of an inverse relationship between tax burdens and economic growth rates.

Some added (indirect) insights on the effect of tax burden on growth may be gleaned from the ZEW IBC taxation index, which determines and analyses the effective tax burden of companies and on highly skilled manpower in twenty European countries and the United States of America. The 2005 study clearly shows that international tax competition has reduced the company tax burden across countries (relative to the 2003 study). The Nordic countries are shown to tax capital at relatively low rates, relative to the European average, but tax labour at relatively higher rates. Ireland has adopted a similar policy but with a much lower tax burden on capital. The tax burden on both capital and labour is relatively low in the Eastern European Countries. One interesting aspect of this study is that it shows the tax burdens on capital and labour for each of the Swiss Cantons and these are extremely low compared to other continental countries and comparable to the tax burden in the new accession countries.

De Mello (2000) seeks to test the link between fiscal federalism and social capital. He uses three social capital indicators: confidence in government, civic cooperation

and associational activity for 29 market economies[21]. He 'explains' the level of these indicators using five measures of the degree of fiscal federalism. These are two revenue-based indicators – SCG tax and non-tax autonomy, two expenditure based indicators – the size and expenditure share of SCG, and vertical imbalances in intergovernmental fiscal behaviour (which measures the gap between SCG expenditures and own-revenue)[22].

The strongest and most significant relationship occurs for the vertical imbalances indicator which exhibits the appropriate relationship with respect to the different measures of social capital[23]; other indicators of fiscal decentralisation prove to be statistically insignificant across all three measures of social capital[24]. The findings are taken to support the subsidiarity principle of public finance, which in the traditional theory of fiscal federalism is justified in terms of allocative efficiency, that social capital can be boosted when local differences in needs and preferences are taken into account by policy makers[25]. For example, confidence and trust in government improves when the vertical imbalance is reduced. Since, as we have noted, there is an important vertical imbalance in the structure of fiscal policy in the UK this would seem to reinforce the case for fiscal federalism in Scotland.

## 3. Government budget constraints

A government running a budget deficit, that is, government spending (G) greater than tax revenue (T), has to finance it in some way. At least four different systems can be envisaged for Scotland. First, with fiscal autonomy in an independent Scotland, or full fiscal autonomy, the Scottish government's budget constraint would look like that of any other independent country:

$$G - T = \Delta B + \Delta M \qquad (1)$$

where G is Scottish government spending and T is taxes raised in Scotland. Thus, a budget deficit is financed either by issuing bonds – or, more generally, Treasury securities ($\Delta B$), and/or 'printing' money ($\Delta M$). The ability to print money requires a separate currency, and as we argue later, there is good reason to suppose that an independent currency is not necessarily a good option for Scotland - Scotland is not

[21] The data was originally collected by the World Values Survey for the period is 1980-81 to 1990-91.
[22] The estimation is conducted by regressing the three different measures of social capital onto the fiscal decentralisation indicators and a set of control variables.
[23] It is negatively related to both Confidence in Government and Associational Activity and positively related to Civic Cooperation.
[24] The econometric results are shown to be robust to a sensitivity analysis.
[25] Of course, these findings are suggestive rather than conclusive since the author has a limited data set in terms of its cross sectional and time series dimensions and also because the measures of social capital are rather crude and do not capture broader aspects of social capital.

an optimal currency area. The viable options for an independent Scotland would, therefore seem to be either to remain with the pound sterling or to adopt the euro as its currency. In either event, monetary expansion, $\Delta M$, would not be available. Moreover, if the euro was adopted, and presuming that the EU's stability pact was still functioning, limits would be placed on the size of $\Delta B$ – no more than three-percent of GDP.

Secondly , the Scottish government's budget constraint under a system of fiscal autonomy within the UK would reduce to:

$$G - T = \Delta B \qquad (2)$$

That is, a Scottish budget deficit would be financed by issuing Scottish Treasury securities. As with the budget constraint under fiscal federalism – see below - $\Delta B$ would not be entirely at the discretion of the Scottish government because of the need to maintain consistency in the budget stance of the UK as a whole. A Stability Pact limiting the size of $\Delta B$ would be needed.

Thirdly, the Scottish budget constraint under the fiscal federal system proposed in Hallwood and MacDonald (2004 and 2005) is:

$$G - T = \Delta B + F - X \qquad (3)$$

where F is fiscal transfers to Scotland (for 'needs equalisation') from the Westminster budget, and X represents taxes raised in Scotland and directly passed to Westminster. (If Westminster continued to collect North Sea oil taxes these would be included in X). In this fiscal federal set up $\Delta B$ would represent issue of marketable securities by a Scottish Treasury – but, again, managed with Westminster to achieve internal budgetary consistency in the union as a whole.

Fourthly, under the present Barnett formula system of financing Executive spending

$$G - t = \Delta b + F - X \qquad (4)$$

This uses T = t + X. Taxes raised in Scotland, T, are broken down as own-sourced and retained by the Scottish Executive, t - funds raised under the 'tartan tax' would fall into this category. X again represents taxes raised in Scotland but sent directly to Westminster. F is again fiscal transfers to Scotland. G – t is not a budget deficit but the measure of vertical imbalance between spending and own-sourced taxes[26]. $\Delta b$ is (emergency) borrowing by the Scottish Executive from Westminster (i.e.UK government inter-departmental transfers, not an issue of Scottish Treasury securities.

[26] Even under the present system, T remains as taxes raised in Scotland but it drops out of the budget constraint because the vast bulk of these are directly passed to Westminster. If the Executive activated the 'tartan tax' own-sourced taxes, t, would increase in size.

It is worth noting that whether F – X is positive, Westminster subsidises Scotland, or negative, Scotland subsidises Westminster has for many years been the subject of intense debate.

As we argued above that the 'Barnett budget constraint' does little to incentivise the Scottish Executive to promote efficient resource allocation either within the Scottish public sector, or between the public sector and the private sector, nor to institute a growth promoting fiscal policy we would like to set out these arguments in more detail. We will usually refer to "fiscal federalism" – the budget constraint defined by equation (3), arguing that it promotes superior resource allocation and economic growth incentives, than does the Barnett system – equation (4). As the budget constraints under fiscal autonomy are at least as hard as under fiscal federalism - no transfers from Westminster, we think that the economic advantages of fiscal federalism also apply to fiscal autonomy.

## 4. Some fiscal devolution issues for Scotland

In our earlier work on fiscal federalism and Scottish finances we emphasised the principle of a *balanced tax assignment*[27]. The idea is that taxes raised through assignment under a system of fiscal federalism should as far as possible be sufficient to match identifiable expenditure in Scotland. With fiscal autonomy the presumption is that public spending and revenues should be as nearly as possible balanced – that is, abstracting from any deliberate but temporary unbalancing for reasons of managing the business cycle. A basic principle in economics is that economically rational decisions – in the public as well as in the private sector - are most likely to be adopted when decision-makers have to balance the benefits of particular spending decisions with the costs of these decisions. Indeed, such rational decision making is most likely to occur at the 'margin' and in order to give politicians incentives to make appropriate decisions at the margin we earlier proposed a *marginal tax rule*. Thus, in a new fiscal settlement – federalist or with autonomy, the ability to increase expenditure in one particular area would have to be paid for either by a reduction in spending in another category or by an increase in taxes.

Under the present bloc grant system there is little connection between spending decisions taken by the Scottish Executive and Parliament and decisions on how and from whom to raise the necessary revenues. Pressure for more government spending in Scotland can always blame Westminster and the Barnett formula for squeezing Scottish public funds. Thinking on government spending in Scotland would change dramatically if the Scottish polity had also to consider the revenue side of its political calculus. We argue that the main problem with financing public spending by Edinburgh - governed as it is by the Barnett formula, is that it is almost entirely concerned with equity – or horizontal balance – in the UK, to the detriment of economic efficiency.

[27] An assigned tax is one whose proceeds are shared between the different levels of government on the basis of either derivation or equalisation.

Introducing a harder public sector budget constraint than exists at present – and as we have said it would be harder and probably more credible with fiscal autonomy than with fiscal federalism, could have advantages for Scotland. First, and most simply, improved alignment of decision-making by the executive with the preferences of the electorate would improve the use of financial resources – this represents a static improvement in efficiency. Second, Edinburgh does not at present have strong incentives to use tax revenues to raise economic growth in Scotland because increased tax revenue from a faster-growing tax base would be paid to Westminster and *not* re-channelled back to Edinburgh – an improved growth performance would represent a dynamic improvement in efficiency. Thirdly, the present incentives for greater efficiency in public spending – that is, cutting the costs and raising the productivity of public services such as health and education – are also probably deficient[28]. While it is true that under the bloc grant, cost saving in one area of public spending can be used for greater spending in another, up to now cost savings have not shown up as lower taxes. There is of course the 'tartan tax' can be cut to reflect lower expenditure needs, but the amount of variability is not great.

In Hallwood and MacDonald (2005) we emphasised that in moving to a system of either fiscal federalism or fiscal autonomy that there may be a trade-off involved between efficiency and equity. The last paragraph summarises some potential ways in which efficiency could be improved by having taxes raised in Scotland kept in Scotland. However, what of equity in the UK as a whole – that is, similarly situated individuals in the UK receiving similar publicly financed benefits?

A fiscal autonomy settlement, with or without independence, would involve moving away from the current equity settlement implicit in the Barnett arrangement and the common social security and pensions system within the UK and this may sideline equity between Scotland and the rest of the UK. This is of course not clear-cut since a fiscally autonomous Scotland may have a superior resource base with which it could satisfy superior equity objectives while at the same time improving the efficiency objective. However, we believe that the potential advantage of either fiscal autonomy or a fiscal federal system is that even if equity transfers did decline Scotland could still be better off in the longer term. A fiscal system that promotes economic growth will potentially deliver greater tax revenues – which would not have to be handed over to Westminster, and could be used to support higher levels of public spending and/or lower taxes in Scotland in the long run.

Fiscal autonomy would also leave Scotland vulnerable to adverse economic shocks because macroeconomic stabilization would be harder to achieve without the *automatic* stabilizer of counter cyclically sensitive net transfers from Westminster. At present net transfers increase when Scottish-sourced revenues decline as, for example, with a decline in oil taxes relative to those in the UK as a whole. In order to address this issue we would be in favour of a fiscally autonomous Scotland establishing an oil revenue stabilisation fund on the lines of the Norwegian example. Given the higher oil prices

[28] Although, of course, there are other ways in which public sector efficiency could be improved – see Crafts, 2004. See The Economist, 9 April, 2004, for a discussion of this issue.

of recent years there would seem to be a window of opportunity to do this. While Stancke (2003) points to the successful operation of Norway's Petroleum Fund, it should be emphasised that given the historical volatility of oil tax revenues, fiscal autonomy could prove less comfortable for Scotland than is the present block grant system.

Even our balanced tax assignment proposal under a federalist tax system has risks for Scotland because public revenues would not be as cushioned as they are with the present system. However, variability in revenues could be managed through one of a variety of public sector borrowing mechanisms[29]. Besides, the status quo, has risks too as it does little to promote either static or dynamic economic efficiency, leaving Scotland the poorer for it. And nor should Scotland be too confident that Westminster will always stick with the Barnett formula that has been so generous to it.

While not necessarily required with fiscal autonomy, if the new system of public finances was one of fiscal federalism, a needs assessment exercise would need to be

[29] There are four models of how SCG debt accumulation is disciplined: market discipline, 'collegiate' administrative discipline, rules based discipline and borrowing targets set by central government. This characterisation is based on Ter-Minassian and Craig, 1997. See also IMF, 2003). None of these is perfect. A few high-income countries allow subcentral government borrowing disciplined by-and-large by capital markets. These include Canada, Finland, Portugal and Sweden. Four conditions are necessary for effective market discipline. Markets must not be required to treat governments as privileged borrowers, there should be adequate information flow to lenders on SCG financial and economic conditions, bailout should be excluded – to prevent moral hazard, and borrowers should have in place institutional arrangements that promote adequate response to deteriorating credit ratings should these occur. Given the high level of development of UK financial markets, one might think that such a system could work here. But there are dangers: even in such a highly developed market economy as Canada, market discipline has not been tight when judged by the rapid increase in provincial indebtedness and deterioration in provincial credit ratings. Only with a lag of more than a decade have the most indebted provinces acted meaningfully to contain growth in their indebtedness (see Ter-Minassian and Craig, 1997, and Krelove, Stotsky and Vehorn, 1997).
Rules based systems – where the rules are specified in laws - are in place in the USA, Spain and Japan. Thus, borrowing at some levels of subcentral government is limited to the estimated debt service capacity of a subcentral government or to some other indicator of creditworthiness. A rules based system also has the advantages of transparency and evenhandedness. The main disadvantage of this system is that subcentral government may attempt to circumvent the rules by, for example, reclassifying current spending as capital spending or moving some spending off balance sheet.
In a collegiate administrative system the centre and the region agree what is thought to be reasonable borrowing limits within dimensions such as the perceived needs of subcentral government, the overall fiscal balance and macroeconomic condition. There is an obvious political dimension in the bargaining process that may promote short-term political interests at the expense of excessive borrowing by subcentral government. Indeed, the Australian system of administrative controls – whereby the federal and state governments agree borrowing limits in the Loan Council, has been supplemented with efforts to introduce some market-type discipline (see Craig, 1997, and Ter-Minassian and Craig, 1997).
A fourth debt management arrangement is that of direct control of subcentral government borrowing by central government. This is the system in effect in the UK whereby CG annually approves borrowing limits for local authorities and restriction may be placed on the loan characteristics including the term and type of loan (see Potter, 1997). Inflexibility is a possible disadvantage of this method of control, especially given informational advantages on local needs that subcentral government may possess in comparison with central government.

conducted in order to tie down the size of any bloc grant provided from Westminster. Also, some sort of transition mechanism would be needed that minimised the amount of disruption to Scottish public finances. This goes for fiscal autonomy too.

We are also of the opinion that any legislation creating tax assignment for Scotland, or, fiscal autonomy short of independence, should allow scope for further modification of the Scottish fiscal system – much as on the lines of the Spanish system where regional finances under the law are reviewed every five years. For one thing fiscal federalism is currently evolving worldwide, and in several countries is being allowed to evolve. For another thing, it is very hard to get it absolutely right first time – something that we believe the Scotland Act (1998) failed to achieve.

Our thinking is that a good tax system for Scotland would be one that stimulates efficiency in public spending which, in turn, will improve social cohesion and economic growth in Scotland and in the UK as a whole. We think that the hard budget constraint imposed by fiscal autonomy could achieve this[30].

## 5. Optimal currency area issues and the case for fiscal autonomy

Earlier we argued that an independent Scotland, one operating under governmental budget constrain equation (1), would need to make a decision on whether to include using the money supply as a means of financing budget deficits. We recognised that to have this power Scotland would need to issues its own currency and break the rigidly fixed link with the pound sterling. In this section we emphasise arguments against Scotland having a separate money. The relevant economic research here is that on optimum currency areas.

### *5.1. Monetary union, trade creation and exchange rate behaviour*

We believe that it is in an independent Scotland's interest to continue to use the pound sterling, or, if the UK joins the euro, then to adopt that currency. We argue for this because if Scotland did not have the same currency as the rest of the UK it would face enormous strains on its trade and investment linkages with what is easily its largest trade partner - the rest of the UK[31]. A floating exchange rate might impart unwelcome

[30] And as we argued in Hallwood and MacDonald (2004 and 2005) fiscal federalism would be a step in the right direction if it assigned a portion of an agreed range of tax revenues to Scotland (such as taxes on personal income, corporations and expenditures); allowed partial devolution of income tax; and devolved in entirety a further range of taxes such as stamp duties, betting and gaming duties and vehicle excise duties. This system would also keep a meaningful equalization grant to provide for equity considerations, something that is in line with standard practice in the rest of the European Union and much of the rest of the world.

[31] Evidence for this, though not directly based on Scottish data, is found in MacDonald, 1999 and 2000, Buiter, 2000, Layard *et al.*, 2000, Glick and Rose, 2002, and Artis and Ehrmann, 2000.

macroeconomic shocks onto Scotland, trade with the rest of the UK might fall, or would be under strain as the exchange rate floated, and costs would be incurred in restructuring Scottish trade away from the rest of the UK[32].

The logic of having a common currency between two regions is that by simultaneously reducing transaction costs, currency risk and the opacity of relative prices encourages trade. Studies looking at countries which have *left* a currency union find that trade integration with the remaining members falls by about one-half from the level associated with monetary union in the year or so immediately following exit[33]. Accordingly, if Scotland were to leave the UK monetary union, it might experience a large and rapid fall in its trade with its largest trade partner – the rest of the UK[34].

A possible scenario is that even outside the UK monetary union, Scotland's trade intensity with it remains high for many years, but in the meantime Scottish business is caught between the costly effects of exchange rate volatility on its trade with the remaining members of the UK monetary union, and incurring the costs of finding new trade partners in the EU and elsewhere. We draw the conclusion that the trade adjustment costs that Scotland would incur over the long-term from leaving the UK monetary union would be drawn out and might be unacceptably high. Indeed, given that much of Scottish trade is in the financial services sector, and that this sector trades almost exclusively with the rest of the UK, it is highly probable that this sector would rapidly shift its operations over the border to avoid the vagaries of a flexible exchange rate that would almost inevitably follow Scotland's exit from the monetary union[35].

Of course, and as we made clear in our earlier work, participation in a monetary union is a further argument for Edinburgh having sufficient fiscal flexibility to counter asymmetric shocks that arise within the UK union. Although this point seems to have been fully recognized in the context of the debate on the UK joining the euro, it has not been given much emphasis in the debate on fiscal devolution for Scotland.

## 6. Conclusions

In this paper we have argued the case for fiscal autonomy for Scotland. Fiscal autonomy, which can be designed for Scotland within the UK political union or for an independent Scotland, offers a much sharper and clearer incentive mechanism – for both the private sector and the elected representatives in Edinburgh - than the current Barnett financial arrangement and also relative to other lesser forms of fiscal devolution,

[32] Besedes and Prusa, 2003, show how difficult it is for countries to create new trade partners.
[33] See Glick and Rose, 2002.
[34] In the most recent year for which there is data, 2000, 51.3 percent of Scottish exports were to the rest of the UK, the remainder being to the rest of the world.
[35] Another interesting aspect of Scotland's choice of currency area is the finding of Frankel and Rose (2000) that the beneficial effects of a currency union work *only* through trade creation and not through macroeconomic influences or the tying of monetary policy to a non-inflationary trade partner.

such as fiscal federalism. We have argued that there is now compelling empirical support for a link between the ability to change taxes on labour and capital and the efficiency with which resources are allocated within a country or region. Issues of equity transfers and the insurance properties of the present UK wide social security system would need to be addressed in the design of a fiscal autonomy settlement and in that regard we advocate an oil stabilization fund along the lines of the arrangements in Norway. If Scotland were to be fiscally and politically independent of Westminster, we argue that Scotland should retain its fixed links with the pound sterling.

Our analysis points to a risk-return trade off for Scotland inherent in fiscal autonomy. The root of this trade off is the hardness of the budget constraint imposed by fiscal autonomy compared with either fiscal federalism or the present block grant system. The potential return to fiscal autonomy is faster economic growth resulting from properly incentivised public spending and taxing decisions. Thus, each extra pound of public spending has to be balanced with extra taxes (or, in the short run, public borrowing, which in the long-run itself has to be repaid through higher taxes of one sort or another). The extra risk stems from the loss of an annual bloc grant of more-or-less known size from central government. With fiscal autonomy, tax revenue shortfall is not bailed out by central government. Net transfers between Scotland and Westminster do not move in counterpoint to the size of the Scottish tax take, increasing in years when Scottish tax collections fall. The big economic question for the Scottish public is then is it willing to accept this risk-return trade off or is it more comfortable with the cushioning effects of fiscal federalism as proposed in Hallwood and MacDonald 2004 and 2005, or the even greater cushioning of the present block grant system? As economists we would argue that the incentive generating effects of fiscal autonomy could be so great that the potential returns from fiscal autonomy could outweigh the potential risks, and we believe there is accumulating empirical support for this contention.

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# Models of Regional Tax Regulation in Europe: Autonomous Regions of the Basque Country and Navarre[1]

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By virtue of the Constitution in force, the Spanish State is territorially organized into Autonomous Communities (infra-state bodies similar, with some peculiarities, to the German Länders but different from the Italian regions or from the French territorial organization), which enjoy the competences conferred by the Constitution, their Statutes of Autonomy and those other competences that may be transferred by the central State. Consequently, the exercise of those competences (health, education and so on) requires public expense sustained on the adequate financial resources that, for the Autonomous Communities in the common regime, the Constitution lists, leaving its specific determination to an Organic Law.

Following the classic patterns of fiscal federalism, we find in our legal system a model, with its particularities, of centralized public income and decentralized public expense, in such a way the Communities in the common regime finance their expenses

[1] The original version of this speech is in Spanish.

by means of ceded taxes from the State (transfers in economic terms), which, however, keeps the legal title for itself and the legislative competences concerning them. Or, said it in other words, their political autonomy doesn't correspond exactly to their financial autonomy, being more extensive the first as they depend budgetwise upon the central State transfers.

This situation started changing in 1996 and culminated in 2001 when the central State allowed the Autonomous Communities to regulate, with some constrictions, some aspects about the ceded taxes (possibility to change the tax rate, to establish some fiscal benefits and so on) but always keeping the legal title and the original legislative competence for itself, so, with all the required shades, the regional financing system (in our system Autonomous Communities) still relies on the central State's transfers, which causes an asymmetry between the political State model (tending towards federalism) and its financial model (tending towards centralism).

The obstacles of the system grow if we take into account the difficulties to set, on the one hand, efficient parameters in order to allocate the revenue territorially and, on the other, fair criteria to allocate income, as all the Communities haven't got the same competences and the cost of the exercise of each of them is not similar either. Moreover, in order to respect the interregional solidarity principle, setting the inter-territorial financial compensating mechanisms- that helps Communities with lower income per capita to reach the national average- is needed, in the same way it happens in the European Union with the structural funds or any other mechanism established to equalize the Domestic Gross Product or to diminish economic differences between Member States. It is in this field where disagreement on financing through public transfers has come up and is still pending. Some Communities defend this financing must be calculated on the basis of population, of the Community's Domestic Gross Product's weight in the State and so on, stressing specially the investments rate of return- supported by the richest communities- in detriment of some other parameters (infrastructural deficit, population weight, differential of Domestic Gross Product compared to the State's average and so on).

However, not every State tax has been ceded to the Autonomous Communities and, for instance, the Corporate Tax is fully kept by the State because of the consideration that its cession- even the collecting aspects- would affect the single market and would cause distortions in it. And problems of a different nature arise when distributing the VAT revenue, due to the asymmetry between the final aim of the tax- consumption- and its taxable events (supplies of goods, supplies of services, imports and intra-community acquisitions), problems, which are solved with formulas difficult to accept from a legal or even economic point of view.

Together with the financing system of the Autonomous Communities in the common regime (briefly set out due to the time I have for this lecture), our constitutional system lays down the Agreement systems (*"Concierto"* for the Basque Country and *"Convenio"* for Navarra), which are, similar in substance, specially after the reforms which took place in 2002 and 2003, respectively; systems we must talk about as they are the aim of our participation in this session.

*Concierto* and *Convenio* are financing systems whose main characteristic is the division between income and expenses, in such a way that economic resources are regulated- and this is a key issue from the point of view of its judgement under the Union Treaty- administrated and levied by the *Foral* Provincial Councils (in the Basque Country's case) and by Navarre in the case of the *Foral* Community. We could talk, therefore, about their own tax systems, although it doesn't mean they are not subject to external (tax harmonization rules) and internal (limitation within the State's laws which ratify both tax systems) constrictions.

Basically we should differentiate between agreed taxes and non-agreed taxes. The first ones are competence of the *Foral* Territories and the second ones of the State, however, the levying of the State in these territories is just a token as it is only competent for the collection of the imports in the VAT and in the Excise Duties (or taxes on specific consumptions in the European terminology). Nevertheless, the law-making power of the *Foral* Territories is, in many of the agreed taxes, merely formal, as these regions must adopt the same rules in terms of substance and form as those established at any given time by the State. This happens mainly in the indirect taxation field (VAT, Excise Duties and Registration Duty), which is also subject to the limitations coming from the tax harmonization promoted by the European Union. Besides, they also have to apply the same rules as in the rest of the State in the case of a direct tax, the Tax on Income of Non-Residents.

As a result "the right to invent taxes", as Albert Hensel or Hans Nawiasky from the German legal literature named it last century in the thirties, that is, the ability to adopt a different regulation from that of the State can be found in the so-called agreed taxes subject to autonomous legislation and, in particular, the Personal Income Tax, the Corporate Tax (with some shades), the Wealth Tax, and the Inheritance and Gift Tax. Obviously, concerning the first two, the *Foral* Territories must respect- in spite of their legislative freedom- the basic principles of the European Union regarding the freedom of establishment and the free movement of capitals and workers.

It has to be taken into account the concept of tax harmonization doesn't exist in direct taxation yet but the concept of approximation of the laws - which has been used by the European Commission- does, and above all, the harmonization performed by the Luxemburg Court's case-law, which has been called the second harmonization, specially concerning Corporate Tax and the link between a different regulation from the central State's one and the State aid notion; this fact that has impacted not only on the Basque Country and Navarre but on other European Union Member States within which there are regions with own tax systems as well. And not to mention the Spanish legislation concerning the tax haven concept in which some territories and/or countries within the European Union are included and, therefore, discriminated, contravening perhaps basic principles of the European legal system; concept included, for instance, in the new Personal Income Tax, recently approved by virtue of the 35/2006 Law, 29 November. We could wonder, from the Community point of view,

what would happen if any Union Member State considered, for instance, the Basque Country or Navarre to be tax havens, consideration which cannot be supported by virtue of our legal system as we are trying to defend.

The fundamental essence of both Agreements (*Convenio* and *Concierto*) is the revenue resulting out of the levying of the agreed taxes, in the Basque Country and in Navarre, is spent on the public expense corresponding to the conferred competences with no possibility of being able to ask for the central State to bail them out in case of shortage of economic resources. However, as the central State still holds some competences in those territories- which are exclusive according to the Constitution- and the revenue obtained in those territories is not enough to finance them- the Basque Country and Navarre transfer some funds to the State (the so-called Quota in the case of the *Concierto*) in order to compensate the State for the cost of the services the State is still rendering in both territories. This economic contribution is calculated upon complex mathematic formulas but it is mainly based on the weight of each territory's Domestic Gross Product relative to that of the State, being the 6,24 per cent in case of the Basque County and the 1,60 per cent in case of Navarre. As a result the State is not the one which transfers public funds (as happens with respect to the Autonomous Communities in the common territory) but the receiver of part of the revenue of the agreed taxes levied by those *foral* territories.

This is synthetically and basically the core of both Agreements and, at the same time, it is the model through which the Basque Country and Navarre contribute to the inter-territorial solidarity within the Spanish State. Therefore, we are not talking about privileged tax regimes or tax havens- as they haven been regarded by the Spanish State constant actions to the Courts against the Corporate Tax legislation; accusations which have even reached the European Commission and the European Court of Justice- but about different regimes, from those of the Autonomous Communities in the common regime, which enjoy Constitutional protection and respect and historical legitimacy. The Agreement regimes are, consequently, as constitutional as those of the Autonomous Communities in the common regime could be.

In the light of the recent judgement of the Luxemburg Tribunal on the Azores Islands regime, we could say a different regulation in the Corporate Tax (target of all the judicial actions) is not classified as State Aid in the sense this concept is formed under the European Union Treaty, according to the case-law of the aforementioned Court. And this is due to two fundamental reasons: a) the *foral* territories enjoy full law-making power regarding the Corporate Tax and b) the central State doesn't compensate for the loss of revenue than can be caused as a consequence of the exercise of this legislative competence by the *foral* territories. In addition to this, differences in the Corporate Tax regulation, leaving out some isolated and flagrant cases, haven't been adopted with the proved intention of attracting investments or companies, as if, it was true, it would lead, for instance, to the annulment of the Corporate Tax regulation (mainly the tax rates) adopted in countries like Ireland or

Slovakia, where the average effective tax rates are much lower than the EU average, for being classified as State aid. Ultimately, the underlying problem moves to the European Union, that since 1975 has been unable to establish some harmonizing rules (or some rules to approximate different legislations) for the Corporate Tax; inability that will be increased both by the new accessions in 2007, new countries that most likely are going to use their taxing powers in order to attract inversions, and by the maintenance of the unanimity rule in fiscal issues that the European Constitution draft stipulates.

Moreover, it is important to bear in mind, in order to asses impartially the *Concierto* and the *Convenio*, a company doesn't move its place of production or of activity to the Basque Country or to Navarre due exclusively to fiscal reasons but also to some other factors as infrastructures, the workers qualification, the legal certainty of the country where the investment is going to be allocated and so on.

Being *Concierto* and *Convenio* two similar legal institutions in the way they stipulate the financial relations with the central State, there are some differences between them more related to the territorial organization than to the economic aspects. In fact, while the territorial scope of the Community of Navarre is just one province and the previous statements are correct, in the case of the Basque Country the taxation competences are not conferred on the Autonomous Community but on the Historical Territories (provinces), which make it up. As a result, the Basque Community hasn't got, as such, any competence concerning the agreed taxes and the peculiarity and main difference in comparison with Navarre is the *Foral* Provincial Councils' revenue is distributed as follows:

a) Part of it finances the own competences of the *Foral* Provincial Councils.
b) Another part is transferred to the Basque Government in order to pay the conferred competences under its Autonomy Statute. Without any intention to cause controversy, the transfers from the *Foral* Provincial Councils to the Basque Government represent the 85 or 95 per cent of the Basque Country total budget.
c) Another part of the revenue is transferred to the central State (Quota) formally paid by the Basque Autonomous Community but economically borne by the *Foral* Provincial Councils.

All in all, we are facing a fiscal co-federalist system- incomparable in other European countries, except for Switzerland- where the levying capacity in the cantons is higher than the one of the State they belong to. Not even the German system would be valid to explain the Basque Country and Navarre financing systems. Due to the time limit to analyse these financing systems, we are unable to get into the details of controversial and latent issues, for instance the horizontal and vertical coefficients of the financing flows, so I thank the audience for the attention and apologise, as I guess some other speakers must have done, for not having tackled important issues that have been left out of this lecture.

I would like to thank very much the attendants and, especially, the organizers of this open debate, which proves that, even in fiscal matters, the "Europe of the Regions" is given preference over the "Europe of the States".

Thank you very much

Navarre, 29 November 2006.

# Reflections on the European Community Court of Justice Judgement of 6 September 2006 on the "Azores" Case[1]

MR. JEAN-LOUIS COLSON

*Head of Financial Services Unit European Commission: Directoriate-General for Competition*[2]

Mrs. Chair-woman, Madams and Sirs:

First of all, I would like to thank the Organising Committee of this International Conference "The Basque Economic Agreement and Europe" for its initiative and kind invitation to take part in it. It is a great honour and pleasure for me to be here at the auditorium of Deusto University today to set out some personal reflections on the recent judgement of the European Community Court of Justice on the "Azores" case.

The ECJ judgement issued on 6 September 2006 in the case C-88/03 "Portuguese Republic v. European Commission", known as the "Azores judgement", is specially relevant to State aids issues. For the first time, indeed, the Court (Grand Chamber

[1] The original version of this speech is in Spanish.

[2] The opinions expressed are personal and do not represent the one of the Institution the author belong to.

composed of eleven judges) establishes some criteria in order to classify, either as State aid either as general measures, some fiscal measures adopted by a regional or local body in line with the national law. In this respect, the Court clarifies the concept of selectivity (regional in this case) which, along with the concepts of advantage or benefit, of State resources and of affectation to trade between Member States, make up the State aid notion.

In 1999, the Azores region, in the exercise of the competences which had been conferred on it, reduced the income tax rates applicable to all economic agents. As a result, a lower tax rate than the one in the continental part of Portugal was in force in the region.

In its 2002 Decision, the Commission classifies this measure as a State aid. In relation to the selectivity criterion, which was the only one in question, the Commission thought it was fulfilled and the measure, therefore, wasn't of general nature. This statement was founded on the fact that regional selectivity is the result of a comparison between the situation of the beneficiary enterprises of the aid and the rest of the non-beneficiary companies in a reference territorial framework which must be *national*. This obligation of a national reference framework is based, on the one hand, on the Treaty economy and the main role that central States authorities play in it and, on the other hand, on the useful effect of article 87 EC Treaty, which cannot be applicable with different results depending on the statute of the public authority which approves the measure when its effects on competence are exactly the same.

The judgement, which is closely in line with the Advocate General Mr. Geelhoed's Opinion, is mainly didactic and, in some aspects, very similar to a ruling judgement. The Court identified three situations *"in which the issue of the classification as State aid of a measure seeking to establish, in a limited geographical area, tax rates lower than the rates in force nationally may arise."* In the first situation the central government unilaterally adopts the decision and, in such a case, it is clear (so clear the Court doesn't even say it) the measure is selective and, therefore, a State aid. In the second situation, all the local authorities at the same level in a Member Sate (regional, municipal or others) have autonomous power to decide, within the limit of the powers conferred on them, the tax rate applicable in the territory within their competence. In such a case, the measure taken by any local authority at the same level is not selective because it is impossible to determine a normal tax rate capable of constituting the reference framework. The Commission is in favour of the same solution, and so had expressed it, for this second situation, also known as "symmetric devolution".

In the third situation, the one applicable to Azores, a regional or local authority adopts, in the exercise of sufficiently autonomous powers in relation to the central power, a tax rate lower than the national rate and which is applicable only to undertakings present in the territory within its competence. It is a situation of "asymmetric devolution", in the sense that the authority in question has fiscal autonomous powers, within the

Member State to which it belongs, that the rest of the regional authorities at the same level haven't.

In such a case, the Tribunal doesn't reject the legal appropriate framework to determine the selectivity of a tax measure may be the geographical area concerned if the infra-State body *"on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate."* Then, the Court sets out three criteria that must be fulfilled in order to conclude that the decision was adopted by the authority in the exercise of sufficiently autonomous powers: first of all, the regional or local authority must have, *"from a constitutional point of view, a political and administrative status separate from that of the central government"*; second, the decision *"must have been adopted without the central government being able to directly intervene as regards its content"*; third, *"the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government."*

In the Azores case, it is clear the third criterion is not fulfilled as the tax rate reductions are offset by a financing mechanism stated by virtue of the same Law and managed by the central government. Therefore, it cannot be said there is, under these circumstances, neither true fiscal autonomy and, specially, nor financial autonomy in the region in question.

It is certain this judgement clarifies, as I have mentioned in the beginning of this lecture, the concept of regional selectivity, however, it should be stressed that there are also some open questions pending and the Commission and the Court should answer them in future. Not being able to be exhaustive, we could mention the following ones:

Although the first criterion set out by the Court seems quite easy to be interpreted (a political and administrative status separate from that of the central government by virtue of the Constitution), the second one, however, is more complex: the Court requires the measure must have been adopted without the central government *being able to* intervene. This means it is not enough the central government hadn't actually intervened in that specific case but the central government hadn't been legally able to intervene or, in other words, hadn't had the power to do it. In this context, the value of custom and usage comes up immediately. As we know, it is really important in constitutional law (not so much in administrative law), according to which some constitutional institutions never use some of the powers the Constitution confers on them. Moreover, this criterion, which must be read along with the sentence according to which *"it is necessary (…) the infra-state body has powers to adopt (…) measures (…), regardless of any considerations related to the conduct of the central State",* requires us to wonder about the value, in this context, of the compulsory non-binding enquiries that, however, have an impact on the infra-state's body decision. This two examples show the difficulty in analysing this second criterion taking into account the variety of constitutional situations.

The third criterion stated by the Court is even more difficult to interpret: a first interpretation will lead to assume that in order to find selectivity it would be necessary the measure to be offset direct and clearly. In other words, finding out if the loss of financial resources consequence of the tax reduction (and that loss solely taken) causes a financial transfer from the central State (or from other regional bodies) is the only factor to be taken into account. A second interpretation, based on the fact money is fungible and the loss of financial resources causes a reduction in public expenses, would be all financial transfers to the regional government should be taken into account. So, in order to implement this criterion it would be necessary to calculate if there is a financial balance in favour of the regional authority or, in other words, a net financial transfer coming from the central State (or from other regional bodies). Finally, a wide interpretation would require that, in order to calculate this net financial transfer, all the services the central State renders to the regional authority should be assessed and quantified.

It is no concern of mine to choose among all these interpretations. I just can set out some arguments to help us understand such a complex problem. It can be said to support the second interpretation, the economic impact of such a measure and, therefore, the distortion of competition which causes, are the same as the ones in a mere regional State aid and, therefore, it shouldn't be legally treated in a different way from the point of view of competition policy. Besides, it should be highlighted only rich regions could adopt the questioned measures without compensation from the central government: so, the first interpretation would have, as a consequence, that just the richest regions in the European Union would partially escape from the State aid control, in contradiction to the basic principle of economic and social cohesion in the Treaty. The words used by the Court (aids or subsidies) also suggest its will of taking into account all the financial transfers and not just the ones which correspond to the measure in question. In favour of the first interpretation, it is needed to mention the difficulty and complexity of the calculations when summing up very different natured financial flows, the issue of the period of time during which this calculations have to be made, the interest in setting a criterion, which will never be fulfilled, or a vacuum methodology, if it interpreted too widely and the requirement for Community Law to pay attention to the evolution towards higher levels of autonomy, which can be observed in several Member States.

Allow me just two additional remarks before ending. First, a tax reduction applicable in a territory doesn't automatically imply a tax revenue reduction. On the contrary, it can boost economic activity and so cause an increment in the net tax revenue. This more dynamic approach doesn't seem to have been taken into account by the Tribunal[3] whose perspective is more static and in accordance with the accountancy. Could we infer from it that the true interpretation of the word "compensation" is "direct

[3] Nevertheless, the Court doesn't reject it completely (see the word "may" in paragraph 75 of the judgement).

compensation or offset"? Could we assume that if tax revenue increases, the third criterion is not applicable any more? Second, it could be considered the three criteria defined by the Court are not criteria in order to apply the concept of region *"on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate.",* but additional criteria to this notion. This understanding comes from the fact that the Court speaks about a decision adopted "in these circumstances" (those of a region as the previously described one) and right after, sets out the criteria which are supposed to define the nature "sufficiently autonomous" of the decision. Such an interpretation, which will mean the Commission would have to interpret quite an abstract notion in Competition Law, cannot be deduced from the Advocate General's Opinion, which was prior to the judgement.

I hope my words have contributed to clarify a difficult judgement. I am convinced, anyways, that practice, more than an abstract analysis, and the case-law to come will allow us to fully understand this judgement. Thank you very much for you attention.

# "The selectivity criterion concerning direct regional taxation and State aids in the jurisprudence of the European Court of Justice"[1]

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## 1. Introduction

There is no need to remember the relevance and topicality of the issues my contribution is going to be about; it affects the most genuine aspects of the Basque institutional specificity, both of the Autonomous Community of the Basque Country (ACBC) and of the Historical Territories (HH.TT.), and the most sensitive and outstanding aspects of the parliamentary sovereignty: the link between the political representation and taxation. The political representatives, the members of parliament, "*junteros*", are the ones who pass by the "laws" and stipulate the taxes in the General Assemblies, *Juntas Generales*: no taxation without representation!

By extension, the Community Law's treatment of Basque taxation would be applicable to the questions of the *Foral* Community of Navarre, even though from the

[1] The original version of this speech is in Spanish.

perspective of the internal legal system, the latter enjoys a legal status the Historical Territories lack, as their laws or *Normas Forales* are eligible to be referred to the ordinary Courts with jurisdiction for suits under administrative law. The specific status of Navarre relies on the formal rank of law of the *foral* legal instruments that regulate its taxation system; and from a political perspective, the reason for the lack of judicial controversies is the party ruling in Navarre is politically in line with the neighbouring Autonomous Communities and, above all, with the previous government of the State.

Direct regional taxation is paradoxically an issue which doesn't particularly divide the political parties or the social agents within the Basque institutional framework, according to the classical dividing lines (the political and ideological cleavages) of political culture, which, at least, doesn't add any extra difficulties to the task. This internal consensus is being counteracted by the open attacks of the neighbouring Autonomous Communities to the Autonomous Community of the Basque Country, because they do not accept the self-government of the Historical Territories in taxation issues.

First, I have to specify some aspects in relation to the subject of my speech I am not going to comment on, due to time limitations or because they are going to be tackled by other speakers: the question of the participation of the Historical Territories in the EU and the legislative power of the Historical Territories, the direct regional taxation Comparative Law, the Community measures of approximation, cooperation or even harmonization, or the Community Law concerning State aids. I am going to explain neither the details of the fiscal pluralism existing in the Spanish State nor the details of the Economic Agreement system.

Starting from the acknowledge of a legal fact which is the sovereignty of the Historical Territories and, particularly, of the legislative, or more precisely, normative powers of the General Assemblies in taxation issues, I am focusing on a particular issue which is the analysis of how the Community legal system and, specially, the case-law of the ECJ tackles direct regional taxation from the point of view of the selectivity criterion in relation with State aids.

Article 87 (1) of the EC Treaty states:

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition *by favouring certain undertakings or the production of certain goods* shall, in so far as it affects trade between Member States, be incompatible with the common market."

Article 87 (3) of the EC Treaty foresees that can be considered to be compatible with the common market: " (a) aids to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (…) (c) aids to facilitate the development of certain economic activities or of certain economic areas, as long as such aids do not adversely affect trading conditions to an extent contrary to the common interest; (…)."

The ECJ case-law has determined the State aid notion comprises the following elements: existence of an aid or benefit for the undertakings in the measures concerned; measures granted by the State; speciality or specificity of the measures, as they aim at benefiting certain undertakings or productions, and distortion of competition or affectation of the community trade. Article 87 (2) states "ex-officio" exemptions concerning social targets or those to make good the damage caused by natural disasters or exceptional occurrences. Article 87 (3) foresees "possible exceptions". In order to achieve them, the State authorities are required to ask for a Decision to the European Commission declaring the intended measures meet the targets stated in the third paragraph. According to a settled ECJ case law, the national judges' capabilities, in case of non-notified aids, must aim at confirming such circumstance- i.e., they are really State aids- and if they do so, they should annul the concerning regulations because they have been adopted without observing the compulsory notification to the European Commission, being the national judge unable to declare the compatibility or not of the aids. The Treaty keeps this evaluation for the Commission. But the domestic judge does have the capability to interpret if the measures are State aids, which, unless they fall under the scope of paragraph 2, should have been notified.

The European Commission has assessed tax regulations adopted by the Historical Territories on several occasions and has even classified some of them as State aids non-compatible with the common market. For instance, the temporary exemption in the Corporate Tax, known as "tax holidays", for starting-ups in 1993[2]; or the reduction of the taxable base for starting-ups, known as "mini-tax holidays" in 1996[3]; or the 45 per cent tax credit for investments in big investing projects[4]; or the special Corporate Tax regime for direction, coordination and financial canters[5] and the tax credit for export activities classified as State Aid regarding the legislation in force in the common territory regime[6]. This list is not of an exhaustive nature but just indicative.

The ECJ, in its Decision issued on the 14 December 2006, concerning the joined cases from C-485/03 to C-490/03, Commission v. Spain, sentences the Kingdom of Spain to recover the granted aids by the three HH.TT., which had been found not to be in line with the Community Law in the following Decisions:

– Commission Decision 2002/820/EC, of 11 July 2001, on the State aid scheme implemented by Spain for firms in Álava in the form of a tax credit amounting to 45 % of investments. (C-485/03);
– Commission Decision 2002/892/EC, of 11 July 2001, on the State aid scheme applied by Spain to certain newly established firms in Álava. (C-488/03);

[2] Commission Decision 2001/86/EC, 20-12-2001 (OJ L 040, 14-02-2001, p. 11).
[3] Commission Decision 2002/806/EC, 11-07-2002 (OJ L 279, 17-10-2002, p. 35).
[4] Commission Decision 2003/27/EC, 11-07-2003 (OJ L 17, 22-01-2003, p. 1).
[5] Commission Decision 2003/81/EC, 22-08-2002 (OJ L 31, 06-02-2003, p. 26).
[6] CS Decision 31-10-2001 (OJ L 60 01-03-01, p. 57).

– Commission Decision 2003/27/EC, of 11 July 2001, on the State aid scheme implemented by Spain for firms in Vizcaya in the form of a tax credit amounting to 45 % of investments (C-487/03);
– Commission Decision 2002/806/EC, of 11 July 2001, on the State aid scheme applied by Spain to certain newly established firms in Vizcaya (C-490/03);
– Commission Decision 2002/894/EC, of 11 July 2001, on the State aid scheme implemented by Spain for firms in Guipúzcoa in the form of a tax credit amounting to 45 % of investments (C-486/03);
– 2002/540/EC: Commission Decision of 11 July 2001 on the State aid scheme applied by Spain to certain newly established firms in Guipúzcoa (C-489/03).

In this contribution I am paying special attention to the particular case, in which the highest Community court, the European Court of Justice, had the chance to assess this issue, although it didn't in the end, and the last relevant judicial Decision on this question, of 6 September 2006, issued in the case C-88/03, Portugal v Commission, known as the Azores case, without spending much time on the details. I am also presenting the joined cases C-400/97, C-401/97 and C-402/97, the Spanish State versus General Assembly of Gipuzkoa and others, and I will analyse the Opinion of the Advocate General in the issue, only available document but non-binding at all for the ECJ and which does not pre-judge the position to be adopted by the Court in similar cases, as it has been confirmed by the Azores case.

As the last part of the presentation, I will comment on the Spanish Supreme Court judgement of 9 December 2004, which judges an issue that was referred in a preliminary ruling, which was withdrawn in the end.

Finally, I will end with some theoretical conclusions about the taxation sovereignty of the Historical Territories from an EU approach, focusing on the following aspects: the theory of the clear act, the institutional autonomy of the Member States, the State aid notion under Community Law and the Aids Community policy, and tax harmonization under Community Law.

## 2. The joined cases C-400/97, C-401/97 and C-402/97, Spanish State versus General Assembly of Gipuzkoa and others

### *2.1. Description of the questions and preliminary ruling*

The three General Assemblies of the *Foral* Governments (*Diputaciones*) of Gipuzkoa, Alava and Bizkaia adopted the laws (*Normas Forales)* 11/93, 26 June, 18/93, 5 July and 5/93, 24 June, respectively, concerning urgent fiscal measures to support investments and to promote economic activity (we are naming them as the contested *Normas Forales*).

Such *Normas Forales* established for a period of time, from the date they entered in force to the 31 December 1994, a series of fiscal benefits concerning the Corporate

Tax and the Personal Income Tax. The adopted measures granted some advantages to companies and individuals subject under the scope of the Historical Territories tax regimes. With respect to the enterprises, they were in the form of exemptions, reductions or tax-credits in the taxes concerning start-up undertakings, investments in fixed material assets, in research and development, in exportation activities, depreciation rules, capitalization of small enterprises and job creation and professional education. The same benefits were of application to individuals subject to Personal Income Tax, which carried out business or professional activities and applied the direct calculation method in order to determine their benefit.

With respect to the subjective scope of the mentioned fiscal benefits, this was set in the light of three consecutive parameters. The mentioned *Normas* were applicable, in the first place, to the taxpayers of exclusive competence of each of the Historical Territories that has passed them by; secondly, to the taxpayers who, being subject to fill their returns to the *foral* Administration that had adopted the *Norma* and to any of the other two, had their fiscal domicile in the Historical Territory that passed it by or, having it in common territory, performed in the Historical Territory that passed it by the biggest proportion of it business turnover; finally, the taxpayers who, being subject to fill their returns to the *foral* Administration that had adopted the *Norma* and to the State Administration or jointly to the *foral* Administration that had adopted the *Norma* and to any of the other two and to the State Administration, had their fiscal domicile in the Historical Territory that passed by the *Norma* and performed 25 per cent or more of their business turnover in the Basque Country of their total operations in the previous year.

In relation to the Personal Income Tax, the fiscal benefits stated in the *Normas Forales* were of application to the taxpayers with fiscal residence in the territories of Bizkaia, Alava and Gipuzkoa.

It is noteworthy the Commission in its 93/337/CEE Decision, 10 May 1993[7], addressed to the Kingdom of Spain, had made a pronouncement about other *Normas Forales*, 28/1988 (Alava), 8/1988 (Bizkaia) and 6/1988 (Gipuzkoa) of the same content as the one of the contested *Normas Forales.* The Commission considered the fiscal aids for investments were, in relation to the Corporate Tax and to the Personal Income Tax, incompatible with the common market by virtue of article 92 (1) of the ECT (article 87 ECT at present), taking into account they were granted in contradiction article 52 of the ECT (article 43 ECT at present). The Commission asked Spain to amend its taxation system with the target of abolishing the distortions with a dead line ending on 31 December 1993. The decision was not challenged, either by the addressee, under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), or by the Basque Authorities, which had adopted the laws at issue, under the fourth paragraph of the same article. Fulfilling the Decision,

[7] Commission Decision 10 may 1993 concerning a scheme of tax concessions for investment in the Basque Country (OJ 3-6-93 L134, p. 25).

the Spanish added an Eighth Additional Provision to the 42/1994 Law, 30 December under the title "Grant of tax incentives and subsidies to persons resident in the European Union but not resident in Spain[8]." It amended the previous regime in such a way that companies should be entitled to a refund by the State tax authorities of the amounts actually paid in excess of those which they would have been required to pay if they had been able to rely on the laws of the Autonomous Community or the Historic Territories of the Basque Countries[9]. As a result of the adoption of this provision, the Commission concluded in its letter of 3 February 1995 to the Permanent Representation of Spain in the European Union, that *the Basque tax arrangements were no longer discriminatory* for the purpose of article 52 of the Treaty[10].

The State Administration contested the three Normas Forales at issue in June and October 1994. The applicant in the main proceedings based its case on pleas including infringement of articles 52 and 92 of the Treaty, as the aforementioned *Normas Forales* excluded from the fiscal advantages the citizens and companies of other Member States that, although they carried out an economic activity in the Basque territory, were not resident in Spain. By three orders for reference with identical content, made on 30 July 1997, the Basque Autonomous Community High Court of Justice (Chamber for Contentious Administrative Proceedings) referred the following question to the Court for a preliminary ruling:

"'On a proper construction of article 52 of the EC Treaty and, as the case may be, article 92 (1), do those provisions preclude legislation, affecting a territory within an Autonomous Community of a Member State, on urgent fiscal measures to aid investment and stimulate economic activity, which may benefit taxable persons who pay tax exclusively to the tax authorities for that territory or are resident there for tax purposes and whose volume of transactions in that Autonomous Community during the preceding tax year exceeds 25 per cent of their total volume of transactions, and which does not include among those to which those measures apply other natural and legal persons resident in the State itself or in another Member State of the European Community?"

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[8] Spanish Official Gazette 31 December 1994.

[9] The Decision of 13 October 1998 in a suit referred by the State Advocate against the 14/1998 *Norma foral* of the General Assembly of Gipuzkoa, stated that the fiscal regime of the Basque Country is different from the rest of the State as it happens with other Autonomous Communities, as Canary Islands and Navarre, and in the case of the Basque Country and Navarre such peculiarities are reflected in the system of agreements or conventions. Nevertheless, it considered that the Norma was violating the legality principle affecting the Transfer Tax, Corporate Tax. Personal income, Industrial and Commercial Activities, Local Property and rest of the municipalities' taxes, that in addition would have been an infringement of article 52 of the Treaty establishing the European community, if the obligation of reimbursement to the companies settling in any other member state hadn't been impose to the State in order to compensate the existent differences between the amount paid in application of the common territory fiscal regime and the amount paid as a result of the application of the fiscal regimes existing in the Basque *foral* territories.

[10] The Constitutional Court Sentence of 25 April 2002 when judging the unconstitutionality appeal 1135/95, ended sating the unconstitutionality of the Eighth Additional provision of the 42/1994 Law.

The national Court stated in the order of reference that the application of the mentioned legislation had as a consequence that tax payers non residents in the Spanish State were subject to the central State tax system and, therefore, excluded from the hypothetical grant of the tax benefits in the contested *Normas Forales*.

The General Assemblies and the Basque Government, defendants and intervener, respectively, in the main proceedings, raised an admission objection before the ECJ, based on their opinion that the references for a preliminary ruling were not strictly necessary for the resolution of the disputes pending before the national High Court and they failed to define the factual and legal circumstances of the main proceedings. With the adoption of the Eighth Additional Provision of 42/1994 Law a remedy had already been provided for any effects contrary to Community Law that the disputed *Normas Forales* might have. This provision, which applied with retroactive effect, could solve any unfavourable situation, which might arise owing to the application of the tax system of the Historical Territories of the Basque Country. In addition, the Commission had recognised that the adoption of the provision in question dispelled any doubts as to the compatibility of the tax provisions of the Basque Country with the relevant provisions of Community law. They also emphasised the fact that all the parties to the three main proceedings informed clearly the High Court that they did not think a decision was necessary on the validity of the contested *Normas Forales*, since any incompatibility with article 43 of the Treaty was eliminated by the approval of the additional provision.

### *2.2. The Advocate General's conclusions*

About the objection, with a well founded criterion, the Advocate General (AG) remembers the existing case-law stating that the decision to refer a preliminary ruling by the national court, in charge of the main proceedings, can be questioned by the Court only if it is obvious that the interpretation or the assessment of the validity of a provision of Community law has no connection with the purpose or the subject-matter of the case. The AG points out that the parties are not at all in agreement on how to answer the question referred for a preliminary ruling and, consequently, how to resolve the dispute *de qua*, which therefore appears anything but contrived according to the Decision in the case Foglia v. Novello. In addition, according to the AG, the observations submitted by the parties in writing and at the hearing do not clearly indicate the temporal scope of the measure adopted by Spain in order to eliminate the incompatibility of the local legislation with the provisions of the Treaty, or the effectiveness of that measure in actually putting an end to the inequality of treatment allegedly caused by that legislation.

However, besides these considerations that the ECJ could have likely assumed, the AG adds another one, further controversial, which will have a major influence on the process of development of the case and even on the Supreme Court judgement of December 2004. Concerning the presumed incompleteness of the three references

for a preliminary ruling, which do not state with the necessary precision that a number of fiscal systems co-exist in the various areas of Spanish territory, but lead to believe that there is only one general system with exceptions in particular areas, the AG believes that the presence of a number of fiscal systems raises, really, a substantive problem, which will be dealt with in the appropriate place, that is in the context of assessing the measures in question in the light of the Community Law on State aid, an not in the light of article 43 of the EC Treaty.

This general affirmation of the AG shifted the controversy as it was posed by the national Court, i.e. referred to the contested *Normas Forales*, towards the compatibility of the tax system as a whole with articles 43 and 87 of the ECT. In particular, the AG finally declares himself in favour of the interpretation that the defendants in the main proceedings were trying to avoid but that the literacy of the preliminary ruling questions could have suggested and that had a certain ascendancy in the Spanish judiciary, i.e. that there would exist an only general system with exceptions, "privileges" or "charts", for particular areas. The reading of the Conclusions doesn't clear up if this is a mere internal issue and, therefore, of compulsory respect by the Community Institutions or if this is also a Community issue due to its impact on aspects as State aids.

### *2.3. On the substance of the case*

The AG starts with a description of the Agreement regime, which assigns the competence to regulate within their territory the tax system to the authorities of the Basque Historical Territories, with the exception of the import duties and import levies included under Excise Duties and Value Added Tax, whose regulation is of the exclusive competence of the State.

The Economic Agreement (Article 6 of Law No 12/1981, as amended by Law No 27/1990) provides that natural and legal persons who are not resident in the territory of the Spanish State are subject to the fiscal legislation of the State. They are, therefore, excluded from the advantages provided by the fiscal legislation of the Basque Country. Under the Eighth Additional Provision of 42/1994 Law, companies which operate in the Basque territory but are unable to make use of the tax relief granted by its authorities are to be entitled to a refund by the State tax authorities of the sums actually paid in excess of those which they would have been required to pay if they had been able to rely on the laws of the Historical Territories. The AG believes, dissenting from the Commission's position, that this Additional provision didn't eliminate completely any discrimination in treatment. His reasoning is based on that in the accounts of a company, there is a considerable difference between exemption upstream, such as that guaranteed by the *foral* legislation, and refund *a posteriori*, which is introduced by the Additional Provision. The mechanism of '*solve et repete*' does not eliminate the discriminatory situation as companies from other Member States should use time and staff to track the administrative files required to obtain the refund, with the resulting

additional costs for the company. This AG's analysis is made superficially without taking into account the administrative expense on time and staff incurred by companies "residing in the HHTT" or for companies "residing in any other Member States", when they have to justify they meet the conditions of turnover percentage over the total of their operations required by the *Norma Foral*, and subsequently comparing such expense and effort with the one caused by the *repetitio ex post*.

The AG continues with a brief but precise review of the Community case law concerning the freedom of establishment (articles 43 *et seq.* of the ECT). Within the scope of application of articles 43 and 48 of the EC Treaty, companies' domicile is used to determine, in similar terms as nationality for individuals, their subjection to a legal system of a particular State. Freedom of establishment gives the nationals of a Member State the right to take up activities as self-employed persons and pursue them on the same conditions as those laid down by the law of the Member State of establishment for its own nationals, and comprises, pursuant to article 58 of the EC Treaty (now article 48 EC), the right for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to carry on business in the Member State concerned through a branch or agency[11]. As the Court stated in Commission v. France[12], "acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would … deprive that provision of all meaning". While it is true that, in the absence of harmonisation measures, the regulation of direct taxation falls in principle within the competence of the Member States, they must exercise their powers consistently with Community law. Therefore, discriminatory tax treatment, which obstructs or limits the exercise of the right of establishment, falls within the scope of article 43 of the EC Treaty[13].

With respect to possible limitations on the freedom of establishment, article 46 of the EC Treaty clearly states that only in specific and exceptional cases- public policy, public safety or public health- the existence of discriminatory national legislation can be justified but considerations which are merely economic in nature, such as the loss of tax revenue or the fight against tax fraud, cannot justify the existence of restrictions[14]. One of the ways of justification that was used at a time by the ECJ (*Bachmann* case[15]) is the need to safeguard the cohesion of the tax system in the sense of a direct link between taxation and deduction or of an offsetting relation between the sums received

[11] ECJ Decision 12 April 1994, C-1/93 Halliburton Services ECR I-1137, paragraph 14.
[12] ECJ Decision 28 january 1986, C- 270/83 Commission v France ECR 273, paragraph 18.
[13] ECJ Decision 4 October 1991, C-246/89 Commission v United Kingdom ECR I-4585; ECJ Decision 14 February 1995 C-279/93 Schumacker ECR I-225; ECJ Decision 27 June 1996 C-107/94 Asscher ECR I-3089; ECJ Decision 15 May 1997, C-250/95 Futura Participations and Singer ECR I-2471; ECJ Decision 16 July 1998, C-264/96 ICI ECR I-4695.
[14] ECJ Decision 13 July 1993, C-330/91 Commerzbank ECR I-4017.
[15] ECJ Decision 28 January 1992, C-204/90 Bachmann ECR I-249, paragraph 28.

by the State following taxation and those returned to the taxpayer in the form of deduction always within the same tax system[16]. The defendant and intervenient parties in the main proceedings argued that the criteria for applicability reflect the internal distribution of powers between the tax authorities of the Basque Country and those of the State and the cohesion would be then in the balance between the different existing tax systems in the Spanish State. The ECJ has set so many conditions for the *Bachman* case Decision to be of application in decisions as *Svensson*, *Asscher*, and *Futura Participations*[17] or *Bosal Holding*[18] that it can be affirmed that we are facing an extravagant jurisprudence. The Decision 13 December 2005, in the case C-446/03 Marks & Spencer, has offered the opportunity to the Court to specify more the exception when declaring that articles 43 and 48 of the ECT precludes the legislation of a Member State which excludes in general terms the possibility for a resident parent company of deducting the losses suffered by its subsidy resident in another Member State, although it foresees such possibility in the case of losses suffered by resident subsidies but they do not preclude if the non-resident subsidy has run out of all the possibilities of compensating the losses in its State of residence.

The AG believes that the legislation of the Basque Country makes the grant of tax concessions conditional on residence, fiscal domicile or a considerable percentage of the total volume of transactions in the Basque territory. A company from another Member State that wishes to open a branch, agency or establishment in the Basque Country while maintaining its own business (and therefore its fiscal domicile) in the State of origin could not benefit from this aid. However, he doesn't qualify this statement with the effects of the mentioned Additional Provision. The AG proposed to answer the first question in the sense that article 43 of the EC Treaty precludes legislation on urgent measures to aid investment which may benefit taxable persons who pay tax exclusively to the tax authorities of the Basque Historical Territories or are resident there for tax purposes or whose volume of transactions in that Autonomous Community during the preceding tax year exceeds 25% of their total volume of transactions, and which does not include among those to which those measures apply other individuals or legal persons resident in another Member State of the European Community.

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[16] See J. Bengoetxea "Los principios de coherencia y autonomía fiscal" in "Derecho Comunitario. Análisis jurisprudencial", p. 197-216, edited by Consejo General del Poder Judicial and the Basque Government, Vitoria-Gasteiz, 1997.

[17] Mentioned in the above footnotes. In *Bachmann* case, the loss of tax revenue due to the deduction of contributions to life insurance was offset by the tax applied on pensions, income and capital payable by the insurers. In the *Svensson* case the Court also stated that the existence of such a link was not sufficient: it should be a direct link between the two operations involved. In that case, concerning a system of housing benefit in the form of an interest rate subsidy on loans from credit institutions established on the national territory, the Court decided (paragraph 18 of the judgment) that "in this case there was no direct link between the grant of the interest rate subsidy to borrowers on the one hand, and its financing by means of the profit tax on financial establishments, on the other."

[18] C- 168/01, Decision 18-09-2003.

The second part of the preliminary ruling is referred to the possibility of compatibility of the measures to promote investments adopted by the Basque authorities with the provisions of the Treaty concerning State aids (articles 87 *et seq.* of the EC Treaty). The AG Saggio will conclude they are non-justified State aids. He states that as long as they are non-notified State aids, the internal Courts are able to annul them directly[19]. This thesis is not deeply discussed in the case and he doesn't consider analysing that the measures had been subject to assessment by the Commission under article 43 of the EC Treaty and, therefore, they could be considered as having been already analysed by the Commission, which had probably lead to evaluate if the authorities that had adopted such measures could have alleged a protection of their legitimate expectations as the Commission hadn't posed the debate within the framework of the control of State aids. But this is a different question. The AG doesn't analyse either if the obligation of notification is particularly applicable to a kind of measures whose classification as State Aids would have been original and unclear.

In order to analyse whether the measures within the *Normas Forales* fall within the concept of aid referred to in article 87 (1), the AG focus the assessment on three factors: whether the measures in question can be attributed to the Spanish State; whether there is an appreciable advantage or benefit for companies, obtained as a result of public measures; and the specific nature of the State measure, in so far as it is intended to favour certain undertakings or the production of certain goods. The AG continues by studying the three elements but mixing them up at times. The core of this issue lies in the specificity or selectivity.

### *2.4. The existence of an advantage or benefit*

He considers there can be no doubt that the measures adopted by the General Assemblies, by virtue of powers conferred by 12/1981 Law approving the Economic Agreement, constitute an aid granted in the form of fiscal advantages and are attributable to the State. He bases his belief on a settled case-law of the Court, according to which the concept of aid embraces "not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect[20]."

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[19] The Decision of 11 July 1996, SFEI, C-39/94 SFEI ECR I-3547, paragraph 39, in which the Court stated that "the involvement of national courts is the result of the direct effect which the prohibition on implementation of planned aid laid down in the last sentence of Article 93(3) has been held to have.' The Court then added that 'the immediate applicability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified".

[20] ECJ Decision 23 February 1961, C-30/59 Steenkolenmijnen v High Authority (ECR 1-3); more recently ECJ Decision 15 March 1994, C-387/92 Banco Exterior de España ECR I-877; ECJ Decision 1 December 1998, C-200/97 Ecotrade ECR I-7907.

It is of interest to recall the particular precedent invoked by the AG, the Banco Exterior de España judgment, where the Court stated that "a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92 (1) of the Treaty"[21]. From this affirmation he concludes that the *Normas Forales* at issue in this case constitute aid, since they have the effect of mitigating the tax burden imposed on the companies that fall within the scope of those laws.

In order to reach to such conclusion he leaps in his reasoning: nobody doubts that State aids can adopt the form of tax exemptions but what has to be proved is that theses exemptions made the beneficiaries be in a better financial position than the rest of the taxpayers. However, how do we determine who the rest of the taxpayers are? If the exemptions are granted to all companies subject to the same tax regime that meet certain conditions, it must be proved that the exemption granted to a particular company makes it be in a better situation from the very moment its competitor can access the same exemption. The third element will stress this issue.

### *2.5. Attribution to the State*

When studying whether the measures disputed are attributable to the State, the AG is even more superficial as he finds sufficient to recall the judgment of the Court in Germany v Commission[22], where it was attributed to the GFR a system of aid set up by the Land of Nordrhein-Westfalen under a programme to improve the regional economic structure, in favour of companies established in certain areas of its territory. «The regional legislation had been adopted on the basis of a federal framework law. In assessing the legality of the Commission decision which found the programme of regional aid to be incompatible with the common market, the Court stated first that "the fact that the aid programme was adopted by a State in a federation or by a regional authority, and not by the federal or central power, does not prevent the application of Article 92 (1) of the Treaty if the relevant conditions are satisfied. In fact, this provision, in referring to any aid granted by a Member State through State resources in any form whatsoever, is directed at all aid financed from public resources. It follows that aid granted by regional and local bodies of the Member States, whatever their status and description, must be scrutinised to determine whether it complies with Article 92 of the Treaty". The question of aid granted by regional authorities was also discussed in the case *Exécutif régional wallon and Glaverbel v Commission* whose judgment was issue on 8 March 1988[23] by the ECJ. In that case the Court examined, in a case brought by the Walloon regional executive,

[21] C-387/92, cited above, paragraph 14 and Decision 19 May 1999 C-6/97 Italy v Commission [1999] ECR I-2981, paragraph 16.
[22] Decision 14 October 1987, Case 248/84 [1987] ECR 4013.
[23] Joint cases 62/87 and 72/87 ECR p. 1573.

the legality of the decision addressed to the Belgian State by which a proposal of aid to production, which was to be granted by the aforementioned regional authority, was considered not to be compatible with the common market[24]. In short, the fact that the particular aid measures are adopted or granted by regional authorities does not prevent their being attributable to the State for the purpose of the application of the Community rules on State aid. As a result, the laws at issue in this case fall within the scope of Article 92 of the Treaty.»

The quotation above has been reproduced in full in order to allow us to realize properly the lie in it, similar to the previous one. In the same way, nobody doubts that the aid granted by a regional authority can be classified as a public aid; this is not what is being questioned in the contested *Normas Forales*. It is clear, also in Community law, that as we are dealing with public resources we are in the State scope. However, it would be quite a wrong conclusion to infer from this statement that there is a direct link between the fact they are granted by regional authorities and the necessary specificity of their nature. In particular, if the aids of a *Land* are based on the development of a federal framework law, it may be because they are a part of the tax system. The case of the HHTT provides a peculiarity that the AG seems to have missed and this is that analogy with a State framework law an its development by a HT (under such framework law) is not applicable at all; this is inconceivable in the Agreement or Consensus systems, where different and independent tax systems co-exist but this issue leads us to specificity again.

### *2.6. The specificity or selectivity*

We have reached the core of the problems we are worried about. The specificity or selectivity means the aid favours, in terms of competition, "some undertakings or productions" in the widest world of comparison where other undertakings or productions can be comparatively hurt. The AG accurately points out the jurisprudential criteria used to detect specificity. They are aids intended for specific sectors[25], a particular company[26], or even companies situated in a particular region[27]. The Advocate General

[24] The attribution to the States of aid measures adopted by regional authorities may be inferred from the general system laid down by the Treaty, under which the sole interlocutor of the Commission in the procedure for reviewing aids, as in every subsequent stage of the centralised system of review prescribed in Article 93 of the Treaty, is the State. In this context, see Decision 111 July 1984, Case 130/83 Commission v Italy ECR 2849. On that occasion, in censuring the Italian Republic for not complying with a decision of the Commission which found certain aid and subsidies granted by the Sicilian Regional Authorities under a regional law to be incompatible, the Court dismissed the objection raised by the Italian Government which stated that it had made several approaches to the Sicilian Regional Authorities with a view to inducing them to repeal the provisions referred to in the Commission's decision (paragraph 3 of the judgment).

[25] ECJ Decision 2 July 1974, C-173/73 Italy v Commission ECR 709, paragraphs 12, 27 and 28.

[26] Case 173/73, mentioned above, ECJ Decision 2 February 1988 Joined Cases 67/85, 68/85 and 70/85 Van der Kooy ECR 219.

[27] German Republic v Commission, C- 248/84, mentioned above.

Darmon in his Opinion in Sloman Neptun[28] refers to the measure as a derogation from the scheme of the general system in which it is set but the Court didn't assume such criterion. The AG proposes the analysis based on the comparison of the *foral* system and the Spanish common system without noticing a crucial element the Spanish common system is not applicable in the Historical Territories. The AG makes the same mistake he accuses the defendants in the main proceedings of when examining the principle of cohesion, as he doesn't really understand that specificity must be examined within the same tax system and not between independent tax systems even if they operate within the same Member State.

The AG believes that "it must be clarified whether those measures are in effect "State aid", giving a competitive advantage over other companies which are subject to the common system, or a general measure which, as such, comes within the political and economic choices of the State which are not subject to review at Community level under the rules stated in article 87 et sequent of the Treaty, but may be subject to other less rigorous provisions of the Treaty. For this purpose, we can, as a first approximation, understand as 'general measures' provisions of a legislative and regulatory nature which are applied generally within a particular Member State, while measures, attributable to the State, which favour certain economic sectors or certain operators as opposed to others are to be regarded as "aid" within the meaning of article 87." With independence of the absolutely reduccionist and wrong content of the previous affirmation, that he himself has to qualify in the following paragraph, we are facing a Jacobin attitude – standardizing and centralist- which denies that within the same State can be produced a fragmentation of tax systems or even a federal assignment as it seems to suggest that measures adopted by a federal entity, by a territorial fragment of the State, cannot be, by definition, legal or regulative in nature or of general application within a Member State.

The AG observes specificity or selectivity then in the fact that they are fiscal benefits granted exclusively to companies which meet the requirements indicated in the *Normas Forales*: in essence, companies which have their residence for tax purposes in the Basque Country. He also observes selectivity in the fact that it is an "exceptional" legislative measure in relation to the "general system". He doesn't pay attention to the connecting factors at all, so important in the Agreement tax regime. The mistake in concept or category can be clearly noticed when he considers the tax system applicable in the territory of the Spanish State out of the Historical Territories is the general system, when truly it is just the applicable system in the biggest part of the Spanish territory and to most taxpayers in Spain.

Paragraph 35 literally states: "Those are intended exclusively for companies situated in a particular region of the Member State in question and constitute for them an advantage which companies intending to carry out similar economic operations in other areas in the same State cannot enjoy."

[28] ECJ Decision 17 march 1993 (joined cases C-72/91 and C-73/91, ECR p. I-887).

To the argument alleged jointly by the defendants in the main proceedings and the State advocate, as intervenient in the preliminary ruling (but plaintiff in the main proceedings!) based on the affirmation that the tax competence allocating factors to the Historical Territories are not different from the ones that distribute competence between sovereign authorities of two Member States of the European Union and that the divergences between sovereign systems cannot constitute State aid for purposes of article 87, while the only remedy to the distortions caused to the market would be the adoption of measures to harmonise national laws, the AG answers back that the presumed tax sovereignty "is merely a matter of form, which is not sufficient to justify the preferential treatment reserved to companies which fall within the scope of the provincial laws. If this were not the case, the State could easily avoid the application, in part of its own territory, of provisions of Community law on State aid simply by making changes to the internal allocation of competence on certain matters, thus raising the "general" nature, for that territory, of the measure in question."

It seems ridiculous to believe that any State would fragment its only tax system in order to obtain several tax systems just to be able to invoke the general nature of the measures. It seems also absurd that the State could do it "easily", as the AG suggests. Even if it was *just* a matter of redesigning the internal assignment of competences in particular matters, which wouldn't be the case of the Spanish State in tax issues. Any constitutionalist knows constitutional redesigns are never done any old how or frivolously.

Besides, the AG adds that such argumentation would be difficult to justify in view on the ECJ case-law[29] and, in particular, in the Decision Commission v. Italy, (Region of Sicily)[30], from which it emerges that "all the measures which involve a competitive advantage limited to companies which invest in a particular area of the Member State are attributable to the State in question and cannot therefore, by definition, in the scheme of the fiscal system of the State, be understood as measures of a general nature". He mixes the criteria again: it is not a question of distributing competence within the same tax system but of the existence of different systems.

But the worst is yet to come, in paragraph 38 the AG affirms that "the fiscal autonomy of the Basque Territories does not reflect any specificity of the territory in question - in terms of economic conditions such as level of employment, production costs, infrastructures, labour cost - which would require, indirectly, fiscal treatment different from that in force in the rest of the Spanish territory. The scheme, which results from the provisions in question, satisfies only the desire to favour investment in the Historical Territories. The reasons given by the Basque Authorities for the

[29] The decisions mentioned above and the Decision 14 November 1984, Intermills (323/82, rec. p. 3809).

[30] Decision Government of the Republic of Italy v. Commission, cited above, and 9 December 1997, Tierce ladbroke (C-353/95 ECR p. I-7007).

adoption of the measures at issue show that they are short-term measures which aim to improve the competitiveness of the companies to which they apply in order to meet the challenges of the market. This clearly shows, once again, the exceptional nature of the measures in question, which derogate from the general scheme of the tax legislation." In this paragraph the AG's approach can clearly be noticed: it is impossible for a territorial system to be general, at most it would be justified by a regional specificity as an exception of the general system.

But the whole building is constructed on an error. There is no general system in Spain. It is odd that a former president of the Court of First Instance is surprised by the fact that the only reasoning behind tax measures is favouring investments. Does anybody know a tax system which doesn't follow such logic?

As we will see, the Azores decision states clearly that these digressions by the AG were completely extravagant.

### *2.7. Withdrawal of the case*

By order of 16 February 2000, the President of the Court of Justice decided to withdraw the joined cases C-400/97, C-401/97 and C-402/97 from the Court register. By writings of 8 February 2000, the High Court of the Basque Country had informed the ECJ that the preliminary ruling, referred by writ of 30 July 1997, was about to be withdrawn. The Court of referral decided in the main proceedings about the costs corresponding to the defendants in the main proceedings.

This is the only legal reality that can be proved. According to the Supreme Court's judgement of 9 December 2004, the preliminary rulings were withdrawn "as a consequence of the agreements obtained with the central administration". Behind it there was a complex net of legal and, especially, political negotiations that ended up in the withdrawal of the rulings. It can be guessed the preliminary ruling was risky and disconcerting. For the defendants in the main proceedings, the General Assemblies and the *Foral* Governments (*Diputaciones*) and for the Basque government as intervenient in the case, the Opinion of Advocate General Saggio was a serious threat not only of annulling the *Normas Forales* but, *a minore ad maius,* the Agreement system itself as well, on which the tax sovereignty of the Historical Territories, held by the General Assemblies, and the particular federal scheme of the Basque Autonomous Community rely. The Convention system of Navarre was also under threat but, due most probably to political reasons, it seemed to escape untouched from the attacks of the neighbouring Autonomous Communities and the State Advocate Corps.

However the State Advocate and the Kingdom of Spain as Member State had serious reasons for the withdrawal. From a procedural viewpoint of the proceedings, they were in a schizophrenic situation as they were the plaintiffs and the defendants, something unique in Community Law and completely against the principles of fair

proceedings, of equality and of contradiction (articles 24 of the Spanish Constitution and 6 of the European Convention of Human Rights), not to comment on its moral and political indecency. It was the author of the referral to the High Court of the Basque Country but at the same time the State Advocate on behalf of the Kingdom of Spain, referred his observations to the European Court of Justice in defence of the *Normas Forales* that he himself was contesting in the main proceedings.

On the other hand, the Commission adopted a peculiar attitude as it had agreed with the system of the *Normas Forales* from the perspective of the right of the freedom of establishment in the basis of the Eighth Additional Provision of the 42/1994 Law and after the AG concluded that the contested measures were incompatible with the freedom of establishment as they were discriminatory. With respect to the nature of aids, the Commission seemed to be in line with the AG but it was in the situation that the DG of Competence hadn't acted when the regime came to its notice.

The Court of Justice itself might have been quite relieved after the preliminary ruling was withdrawn, as its legal and procedural system allowed and still allows regions the same procedural consideration as individuals and therefore, the situation was that the plaintiff in the main proceedings was at the same time defending the defendants in Luxemburg so one of the essential elements of the litigation and the real *raison d'être* of the prejudicial system was being defeated.

All the concerned parties were likely relieved after the withdrawal of the issue *a quo*. Just the High Court of the Basque Country was perplex facing the situation; it was the Court which had referred at its own initiative a preliminary ruling which no other party had believed to be required precisely in view of the Commission's writing stating the system as compatible with the freedom of establishment. Now it withdrew the ruling being perhaps more confused than before. We are facing a failure of the judicial cooperation system foreseen in the Treaty, a failure the AG helps without a doubt to happen.

We can speculate about what had happened before the Court of Justice. It is absolutely clear the Opinion issued by the AG is not binding on the Court of Justice or nohow determines it. Even if the Court of Justice had issued a negative decision on the compatibility of the *Normas Forales* with the Community Law, it is perfectly possible it hadn't assumed Saggio's Opinion on specificity and selectivity and had showed more constitutional respect towards the institutional autonomy of Member States. The withdrawal of the ruling has caused the Supreme Court to have in its hands the internal categorization of the Spanish legal system or the Community classification of the tax regime of the Historical Territories.

With a retrospective view and in the light of the Azores case, it can be considered that perhaps the most appropriate would have been not to withdraw the main proceedings and continue with the preliminary ruling. At that moment so I informed the Basque Government. They didn't reasonably pay attention to my suggestion, which was offered in my condition of former advocate of the European Court of Justice.

## 3. The judgement of the Supreme Court of 9 December 2004 in the issue

The *Normas Forales* at issue are 24/1996, from Alava, 3/1996, from Bizkaia and 7/1996, from Gipuzkoa and they grant tax aids consisting in a tax base reduction for some start-up companies and in some tax credits. Some of their provisions have been subject to Commission Decisions of 11 July 2001 and of the Court of First Instance Decisions of 6 March 2002 and of the ECJ.

The entrepreneurs association from La Rioja referred a case to the High Court of the Basque Country against the *Normas Forales* of the General Assemblies of Gipuzkoa 7/1996, of Bizkaia 3/1996 and of Alava 24/199, and subsidiaryly against a series of articles in these *Normas Forales*. The High Court deemed the case partially, rejecting the objection concerning lack of legitimation[31]– in the basis of absence of interest or the mere hypothetical nature of the presumed delocalisation effect- presented by the defendants and annulled articles 26 of the *Normas Forales* without costs. Plaintiffs and defendants appealed respectively to the Supreme Court.

With respect to the objection, the Supreme Court concludes that it cannot be denied to the entrepreneurs association from La Rioja a sufficient legitimation to contest the *Normas Forales* at issue to the extent that they can be discriminatory or their application can damage the entrepreneurial interests, whose defence is one of its specific targets.

Getting into the crux of the matter, i.e., the nature of the *Normas Forales*, we are analysing the Supreme Court argumentation, which is provided as a result of a jurisprudential line. The Supreme Court makes its argumentation in two levels, a general one with two steps, the analysis of the nature of the tax regime of the Historical Territories within the system of legal sources, considering that the *Normas Forales* do not have the rank of law and the second about the contested *Normas Forales*. At the specific level the Court focuses on analysing the appealed judgement and the issue of compatibility with the Community Law and with the internal law. These latter aspects are the ones I analyse in this paper.

A) General level of the tax system of the HHTT (fifth legal foundation). First the Supreme Court denies the (formal) nature of law of the *Normas Forales,* in spite of its "sui generis" legislative power, preserving the legislative power for the State [Spanish Constitution art.62 (2)] and for the Autonomous Community [art. 152 (1) and 153 a)].

[31] Objection rejected previously in judgements of 3 November 2004, 26 July 2003 and 11 February 2004 which acknowledge legitimation to the Chamber of Commerce from La Rioja, to the Autonomous Community of La Rioja and to the Autonomous Community of Cantabria in order to contest the *Normas Forales* concerning the Corporation Tax: legitimate interest is not only higher and wider than direct interest but it is auto-sufficient on its own as it presumes the contested administrative provision or the general provision has affected, or is able to affect, directly or indirectly, but in an effective and proved way, that is, not just in an hypothetical, potential or future way, in the correspondent legal sphere of the plaintiff.

"The *Normas Forales* themselves admit the subordination to the Agreement Law, which defines the principles to which the exercise of the legislative power of the Historical Territories must be subject…the legislative capability of such territories must be executed in the constitutional and legal framework, although the limits imposed are, at times, extraordinarily wide and means, in fact, a delegalisation (sic!) in tax matters which is possible by virtue of the aforementioned First Additional Provision of the Fundamental Law…And, anyway, as long as there is not a review of the Fundamental Law of the Constitutional Court which allows to refer to that Court the *Normas Forales*, legislative product of the general Assemblies, of administrative rank, they must be subject to the constitutional and legality control of the ordinary courts which deal with cases of administrative law, fulfilling the requirements of the judicial control [article 24 (1) of the SC] and of observation of Law by public powers."

Secondly, when examining article 26 of the *Normas Forales*, the Supreme Court states its contradiction with article 4 of the Economic Agreement, which establishes the interdiction of lessening the possibilities of commercial competition or of distorting the allocation of resources and the free movements of capitals and labour, as well as the need to maintain an overall effective fiscal pressure not lower than the one in force in the rest of the State. These requirements constitute limits to the tax autonomy of the Basque Country. The Court comments on these issues in detail in the seventh and eighth legal foundations where it sums up several principles of previous judgements on the tax regime of the Historical Territories. We cannot get into these matters but we are interested in an affirmation added in the fifth foundation that seems to be misplaced,

> "The highest Community instances have considered discriminatory the provisions at issue (article 26 of the *Normas Forales*) and it must be affirmed the Community system rejects the creation of incentives that promote, to the detriment of others, the localization of companies in a particular territory of the European Union, altering the rules of free competition among them.
>
> The most evident proof of the mentioned distortions occurs, precisely, in the scope of the European Community Law, as it's known, of direct and preferential application to the internal system, and that the national judges, as Community judges of common Law, must safeguard and protect."

An analysis of these two paragraphs can show they are inaccurate and even distorted. They don't really say much: nor who "The highest Community instances" are, nor which the provision in the "Community system" which rejects the creation of such incentives is, nor which the territory they are talking about is. It mentions an evident proof of distortions in the scope of the European Community Law but it is not explained at all what it is referring to, nor the concept of aid, of freedom of establishment or tax harmonization is mentioned. Summing up, the weak argumentation of the Supreme Court is founded in an only argument to substantiate the incompatibility, the following categorical argument:

> "And, in short, this Chamber has confirmed the annulment of article 26 of each of the Normas Forales contested from Alava, Gipuzkoa and Bizkaia (24/1996, 5 July; 7/1996, 4 July; 3/1996, 26 June regulating the Corporate Tax); by the way, articles which were derogated afterwards (Norma Foral 7/2000, 29 March, 3/2000, 13 March and 7/2000, 19 July)."

B) At the specific level of the argumentation (sixth foundation), the Supreme Court analyses the judgement of the High Court of the Basque Country referred to the Supreme Court and distinguishes two parts.

> One of them, in which, in general terms, it is stated that the appeal provided *"a question of European Community Law"* from which stem some internal law consequences, which is the annulment of the contested Normas Forales, under article 62 (1) e) of the Law which regulates de administrative proceedings, because of the absolute absence of the required proceedings as they were approved omitting the procedural stage foreseen in article 93 (3) of the ECC Treaty, of previous communication to the Commission, as they granted tax benefits eligible to be classified as "State aids".
>
> *And in the other part the judgement makes some particular considerations.* It is understood that article 26 of the *Normas Forales* contains a strong exemption which affects the basic obligation to contribute (article 31 SC) and it is not proportionate or appropriate in order to achieve the legitimate targets of economic promotion, as it is eligible to affect indirectly the free movement of persons and goods provoking a series of unacceptable advantages, violating the principle of legality which cannot be applied to aims which are not in particular constitutionally qualified (sic). On the contrary, the measure foreseen in article 45 of the *Normas Forales*, consisting in tax credits for job creation (600.000 pts. per person/annum of increment of the media of workers with permanent labour contract, as long as it is maintained at least for two years) is regarded as proportional because of the burden that permanent contracts mean for companies, not being possible to affirm the granted tax credit would improve the competition position of the companies. And, finally, the Court "a quo" doesn't study the rest of the measures in the contested *Normas Forales* because all the issues are globally explained and it must be taken into account the general reasoning about the mere difference between the (tax) systems and subsystems in the same unitary space, "irrespective of the fact that in another appeal against the same *foral* provisions which is being solved, a denial to many of the provisions at issue is given"

Our analysis will be focus on the question of European Community Law and the presumed absence of notification of the measures. With respect to this question, the High Court of the Basque Country, after mentioning the case-law issued by itself, affirmed that up to such date the matter at issue hadn't been solved in a preliminary ruling and therefore they were facing a conflict under internal law, which had to be sort out according to the constitutional and ordinary legality principles and rules "exceeding from the legitimate interest and from the particular capacities of such association (entrepreneurs association from La Rioja) to pose a question as the definition of State aids, that suggests an hypothetic conflict between the Basque tax legislation and the equality in treatment, the free competition and the right of establishment of

the Community companies and not with the principles and fundamental rights the Spanish citizens can set out against the content of such tax regulations…". This is the part the Supreme Court is going to review in the basis of its peculiar understanding of the direct effect case law under Community Law. Here you are its reasoning:

> "Well, the general stated thesis the judgement and some of the representatives of the defendants in the proceedings are based on, represents a notion of the European Community Law that cannot be shared, as it implies that Spanish citizens cannot allege as a foundation for their petitions the rules and principles of the European heritage against the tax provisions which can violate the requirements under such law. Or, in other terms, any European citizen can claim the European regulation of "State aids" before the national courts, without being justified a discriminatory exclusion of Spaniards that, according to the criterion in the appealed judgement, should limit the foundation of their petitions to internal law. The direct effect and the primacy of European Law, in the scope of the competences assigned to the European institutions and with respect to the identity of the Member States and to their basic constitutional schemes, has been stated repeatedly by the case-law of the ECJ and of the CFI, as well as by the doctrine of the Constitutional Court and the jurisprudence of this Supreme Court and such efficacy of the European Community Law affects vertical relations (public authorities/individuals) and horizontal relations (between individuals). This full effect of the European Law is stipulated in article 250 of the Treaty (ex-art.189), in a way that it is directly applicable and produces immediate effects to the extent that it confers individuals of any of the States rights and interest that national Courts must protect and, the application of any incompatible legislative measure with the provisions of the European Law is violating this effect. Even, although the non-application of the incompatible national law allows the prior application of the Community Law, a Member State, which keeps in force a national provision against it, doesn't fulfil the obligation of adopting the needed measures in order to assure the observance of the Treaty and of the acts of the Institutions (art.10 of the Treaty, ex-art.5). Or, said it in other terms, the primacy and the direct effect of Community provisions doesn't excuse Member States from the obligation of abolishing incompatible provisions of their internal legal system. So, it is about avoiding situations of uncertainty in relation to the possibility that any Community citizen (without excluding the own nationals) claims for the European law. And, in particular, the discrimination or existence of elements of "State aids", if they were in the appealed *Normas Forales*, would affect residents in other Member States and residents in the Spanish common territory.
>
> As a result, the interest, and consequent legitimation, cannot be denied to the appealing association in order to claim for the application of the European regulation that also protects the entrepreneurs it represents."

The Supreme Court accepts, in the sixth foundation, the first cause of review stated by the representative of the entrepreneurs association of La Rioja, and, by virtue of article 95 (1). d) of the Law which regulates the administrative jurisdiction, proceeds to analyse if the *Normas Forales* violate the European Law, the constitutional provisions (articles 2, 14, 31, 138, 139, 149, 158), the statutory (art.41), the Economic Agreement (articles 11, 12 and 13), or the jurisprudence, all mentioned by the plaintiff.

So far, the Supreme Court describes correctly the meaning of the direct effect in Community law and the right of individuals to claim for it. But this was not questioned nor denied by the High Court of the Basque Country and here we find the Supreme Court's error. What the High Court was saying is that it didn't have evidence of the nature of aid of the *Normas Forales*, so it is almost impossible to conclude there is a violation of the obligation to notify them. It says literally: "up to date" there was no evidence the mentioned issue had been subject to preliminary decision. This is true. This is why the High Court proceeded to analyse the problems from a point of view different from the Community approach about State Aids.

From the Community Law, this judicial strategy, which consists on affirming there is no evidence so far that the *Normas Forales* are State aids and therefore the subject is not analysed from the Community's point of view can be objectionable and even reprehensible. The fact there is no preliminary ruling to this respect doesn't mean it is not a question of Community Law, aspect which will require a prejudicial referral or, at least a previous Community approach by the High Court before applying the theory of the clear act and solved the question on its own. This is really what the Supreme Court is going to do but in a way which, in my opinion, is against Community Law. It proceeds to classify as State aids a series of measures whose nature of aid was reasonably doubtful. From this *a priori* classification it annuls formally the measures at issue, as they haven't been notified to the Commission.

### *3.1. The analysis of the provisions in the Normas Forales and their compatibility with European Law*

The following indirect reference to Community Law is made at the end of the tenth legal foundation, announcing a circular analysis of the problems:

> The specific analysis of the provisions of the *Normas Forales* will point out that in some cases, the ones within the notion of State aids, can be noticed a favourable treatment towards certain companies depending on the territorial connecting factor, and to this extent they turn out to be contrary to the constitutional principle (of equity). But it is a different case when the difference in treatment can be justified by a legally relevant foundation or an element of peculiarity, as it is the constitutional or statutory acknowledgment of the tax *foral* systems.

In the eleventh foundation, the confusion grows bigger as the Supreme Court mixes the equivalent tax pressure -essential requirement for no discrimination- with the capability of financial contribution from the Basque treasuries to the State:

> exactly, the European parameter which will be used in order to appreciate the annulment of certain articles of the *Normas Forales* which are being judged is also useful as a valid mechanism in order to verify the total tax pressure. Or, said it in other words, the contradiction with the Community Law, from the perspective of the "State aids" regime,

is also a sufficient evidence in order to appreciate the lack of "financial equivalence" globally considered between financial systems.

Community Law doesn't question at all the financial equivalence between treasuries but the treatment granted to companies. The collecting issue of tax pressure hasn't got any Community interest, unless in order to study the convergence criteria within MEC; the interest only comes from the potential discriminatory treatment that relies in the fact that, in absence of direct tax harmonization measures, within the same territory some undertakings are granted and some others are comparatively harm by means of every kind of public measures, among them, fiscal ones.

Nevertheless, when analysing the issue of solidarity, the Supreme makes a peculiar statement that, although it is a secondary argument, can clash with the bottom of the argumentation according to which the selectivity of the aids stems from their regional nature:

> It is admissible a certain degree of tax competitiveness between Autonomous Communities, with different offers of incentives, as long as, due to their importance, must not be classified as authentic "State aids" subject to a special regime under European law.

The Supreme Court makes its analysis of the aids in the fourteenth and fifteenth legal foundation. With this aim, the Court follows the AG's thesis in the commented opinion, so we are not repeating the criticism here. In the paragraph concerning selectivity, it is interesting to comment on the addition made by the Supreme Court:

> The fact that the beneficiary companies are not specific companies, identified beforehand, does not exclude the system of the scope of article 92 of the Treaty (now art.87), to the extent they are eligible to be identified because they meet certain requirements, as it is the establishment or development of the activity in a particular territorial area.
>
> The Court of Instance considers the effect that in the analysis of the question can have the existence of "(tax) systems and subsystems in the same unitary space" which is mentioned in the appealed judgement. That is, the existence of tax measures whose scope of application is limited to a certain area of the territory of the State, along with the general regime applicable to the rest of the territory (common territory), as a consequence of the rules, which assign competence in tax matters.

These are the only paragraphs where the Supreme gets close to explain the presumed selectivity of the measures. Once again we confirm the risks of characterizing the regime applicable in common territory as the *general* regime in relation to which the regime applicable in the Hitorical Territories is characterized as *specific*.

In fact, for tax purposes they are different but coordinated regimes. From the perspective of Community Law, we could even talk about different regimes as if they were in different Member States. But about this aspect, the Supreme adopts a very different and inaccurate approach:

> Member States can legislate, in accordance with their legal system and with the way to distribute territorially the political power, on (direct) taxes, but when they are doing it they must respect the provisions of Community Law; in particular, to what is of relevance now, the ones which lay down freedom of movement of capitals clearly against discriminatory fiscal measures. So the Community institutions are legitimate in order to execute harmonizing actions concerning those aspects of taxation whose divergence distorts the conditions of free concurrence or hinders the exercise of fundamental freedoms. And there is no doubt direct taxes affect the costs of production, being capable of creating artificial advantages and disadvantages, specially because of their reflect on capital costs, in the operations to restructure or concentrate companies, having an effect on free competence, free movement of capital and freedom of establishment.
>
> Tax incentives are possible in order to promote certain regions or economic activities, but, from the perspective of the instrumentality tax issues present, the need of compatibility with Community Law is evident. In such a way that measures as accelerated depreciation or tax incentives, in general, are not eligible to be classified as State aids, forbidden by article 92 (now art. 87), or subject to certain notification requirements to the Commission by virtue of article 93 (now art. 88) of the Treaty.

The affirmations poured in these paragraphs are many and very confusing, although they are stated as a general theory on direct taxation. I am about to criticize the most amazing statements. First of all it says that, in general terms, the provisions of the Treaty concerning free movement of capitals are against discriminatory tax measures. This is not correct in an strict sense: discriminatory tax measures can be forbidden by the freedom of establishment or the free render of services or the free movement of workers. The free movement of capitals assures there are no restrictions or limitations on the movement of capitals between Member States, issue that does not directly affect the Corporate Tax. On the other hand, the affirmation about the harmonizing power of the Community institutions to avoid distortions, even though is true, is quite restricted. Much more relevant is the obligation of no discrimination for Member States as a consequence of the need to respect Community Law when exercising their exclusive competence in direct taxation. The affirmation about the inevitable incompatibility of tax incentives with Community Law is wrong: as long as they don't discriminate, Member States can grant tax incentives and unlimited tax benefits; as there is no harmonization in this subject, Member States keep their competence almost untouched, and the only condition is no discrimination. The last conclusion the Supreme Court makes is even more striking: it is difficult to understand why tax benefits or accelerated depreciation are out of suspicious.

In the sixteenth legal foundation, the Supreme Court makes a detailed exam of every provision in the contested *Normas Forales* from the perspective of Community Law about State aids, but understood in the way the Supreme Court does, that is, as "favourable deviation", "specific tax benefit" or "significant exemption" or "particularly beneficial" for the companies under the *special legislation* (the *foral* one!) in relation to the *general regime* (the common one!). It reaches ridiculous conclusions when it affirms that the tax for export activities (article 43) is not an aid as it is similar to the

existing in the common territory. A measure like this has been specifically confirmed as State aid by virtue of the ECCS Decision of 15 July 2004, five months before the Supreme Court's judgement! This way of approaching the problem is contradictory with the presentation of the tax regime of the Historical Territories the Supreme Court has made in the framework of the Constitution, the Statute of Autonomy and the Economic Agreement, paying attention to the tax system on the whole.

No well-founded arguments are provided in order to prove the selective nature of the *Normas Forales*. In the opinion of the Chamber of the Supreme Court just because they are territorial and because they are different from the ones applicable in the common regime are regarded as selective. The Supreme Court has made a wrong analysis of the tax regime of the Historical Territories when considering this is just applicable to the companies settled in a particular region while the general system is the one in force in the common territory, ignoring the connecting factors among the five tax systems are not determined strictly in the basis of territory but of fiscal domicile and percentage of operations. The central State legislation is not applicable in general terms in the whole territory of the State but in relation with the taxpayers who are under its legislative scope[32]. The Supreme Court has decided to ignore an essential fact, that is, there is no general legislation which is applicable, because of such nature, to all taxpayers not even as a principle.

In the seventeenth legal foundation, the Supreme Court examines whether the provisions in the *Normas Forales* considered as State aid can be included within the exception foreseen in paragraphs 2 and 3 of the former article 92 of the Treaty (article 87 now). Paragraph 2 provides *"ex-officio"* exemptions relating to social targets or those to make good the damage caused by natural disasters or exceptional occurrences. This is not the case. Paragraph 3 foresees "possible exceptions". In order to achieve them, the State authorities are required to ask for a Decision to the European Commission declaring the intended measures meet the targets stated in the third paragraph. According to a settled ECJ case law, the national judges' capabilities, in case of non-notified aids, must aim at confirming such circumstance- i.e., they are really State aids- and if they do so, they should annul the concerning regulations because they have been adopted without observing the compulsory notification to the European Commission, being the national judge unable to declare the compatibility or not of the aids. The Treaty keeps this evaluation for the Commission. But the domestic judge does have the capability to interpret if the measures are State aids, which, unless they fall under the scope of paragraph 2, should have been notified.

The Supreme Court rejects the appeal referred by the Historical Territories and confirms the annulment of article 26 of the *Normas Forales*. It admits the first objection made by the Association of Entrepreneurs de La Rioja, without examining the rest of the alleged objections. It annuls the first instance judgement and states the annulment

[32] See the comments on this judgement by I. Alonso Arce, "Una sentencia inoportuna y desafortunada" *Actualidad Aranzadi*, Junio 2005.

of articles 26 in the *Normas Forales*, of article 11,2.a); article 14 in relation to "business promotion companies"; article 15,11; article 29,1.a); article 37; article 39; article 40; article 45.2,1º; articles 49, 53, 54 and 60, because of the required notification, under article 93 (article 88 now), to the European Commission of measures that are circumstantially evidenced to be classified as "State Aids". According to article 73 of the Law for administrative proceedings, the annulment of the mentioned articles doesn't affect the efficacy of the judgements or of the definitive administrative acts issued by virtue of them before the annulments provides general effects. The costs of the judicial proceedings before the Supreme Court are imposed to the Government and General Assembly of Bizkaia (*Diputación Foral y Juntas Generales de Bizkaia*) and to the Government and General Assembly of Gipuzkoa (*Diputación Foral y Juntas Generales de Gipuzkoa*).

In short, the judgement declares the illegality of elements, which were applicable to any company, regardless of the size of the business, and questions even the real core of the Corporate Tax, i.e., the tax rate, the 10 per cent tax credit for investments in fixed assets, the tax credit for job creation or the depreciation rates. It also annuls some measures, which affect specifically small and medium size companies, as the case of free depreciation of assets. Some of the measures regarded as illegal have been amended since 1996, some others were annulled and in some cases they were "harmonized" with the State. Most of the tax incentives were annulled after an agreement reached between the Central and the Basque treasuries in the beginning of 2000, in a process known as the "fiscal peace". Others, which the Supreme Court annuls now, however, hadn't been questioned by the Central State. The only way of defence would be to refer an annulment action to the Supreme Court, according to article 241 of the Fundamental Law of the Judicial Power or an action to the Constitutional Court in the basis of violation of article 24 of the Spanish Constitution. It should be asked, then, the referral of a preliminary ruling with a double target: the subject itself and the clear act and the possible infringement of article 234 in the light of the jurisprudence *Klöber*[33] and now of the judgement of 13 June 2006, in the case C-173/03, *Traghetti del Mediterraneo*[34].

## 4. The Azores judgement

In 1999, the legislative body of the Azores Region adopted the arrangements for adapting the national tax system to the region's specific characteristics under its powers in the matter. This legislation provided a reduction in the rates of Income and Corporation Tax which was automatically applicable to all economic operators with the specific aim to allow undertakings in the Azores to overcome the structural handicaps resulting from their location in an insular region on the periphery of the Community.

[33] C-224/01, 30 September 2003.
[34] C-173/03, 13 June 2006.

The abovementioned tax scheme was notified late to the Commission and entered into force without authorisation. After analysing the measures at issue, the Commission takes the view that those aids are operating aids, that may be only authorised if, in compliance with the conditions laid down in the Guidelines on national regional aids, they were justified since they contribute to regional development and if they were of a level proportional to the additional costs it is intended to compensate. Therefore, they could not be granted in favour of undertakings that carried out financial activities or activities of the "intra-group services" type (activities the economic basis of which is to provide services to undertakings belonging to the same group), as such activities do not contribute sufficiently to regional development.

Portugal has brought an action for annulment against this Decision before the Court of Justice in so far as it classifies the measures at issue as State aids. First, the Court of Justice remembers the EC Treaty prohibits selective State aids, that is to say, those in favour of certain undertakings or the production of certain goods. However, theses measures don't constitute State aids incompatible with the common market if they are justified by the nature and overall structure of the tax system. The Court points out that in order to determine the selectivity of a measure adopted by an infra-State body which establishes in one part of the territory of a Member State a tax rate which is lower than the rate in force in the rest of that State, it is appropriate to examine whether that measure was adopted by that body in the exercise of powers sufficiently autonomous vis-à-vis the central power. It also must be examined whether that measure indeed applies to all the undertakings established in or all production of goods on the territory within the competence of that body.

Therefore, the legal framework appropriate to determine the selectivity of a tax measure may be limited to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate. In this context, in order that a decision taken in such circumstances can be regarded as having been adopted in the exercise of sufficiently autonomous powers, that decision must have been taken by a regional or local authority which has, from a constitutional point of view, a political and administrative status separate from that of the central government. In addition, it must have been adopted without the central government being able to directly intervene as regards its content.

Finally, the financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or the Central government. It is necessary that the infra-State body assumes the political and financial consequences of such measure. The two aspects of the fiscal policy of the regional government of Azores- on the one hand, the decision to reduce the regional tax burden by exercising its power to reduce tax rates on income and, on the other, the fulfilment of its task of correcting inequalities deriving from insularity- are inextricably linked and depend, from the financial point of view, on financial transfers managed by

the Central government. Accordingly, the Court of Justice states that these measures must be assessed in relation to the whole of the Portuguese territory, in the context of which they appear not to be general measures but selective.

In the light of these criteria, it seems quite sensible to conclude the Supreme Court should review its doctrine on the inherent selectivity of Basque taxation. The analysis should be more complex and enter into the assessment of the Agreement system on the whole, as well as in the Quota system.

## 5. Conclusions

### *5.1. The theory of the clear act*

One of the criticisms the Supreme Court makes in relation to the Basque High Court judgement is that it has judged the case without taking into account the objection based on the European regulation of "State aids". In the Supreme Court's opinion any European citizen can make such objection before national Courts, without a justification for the exclusion discriminatorily of the Spaniards that, according to the criterion of the appealed judgement, had to limit the fundaments of their claim to internal Law. But the Supreme Court is focusing the question from a different perspective from the one held by the Basque High Court. According to this Court, the nature of State aid of the *Normas Forales* at issue was not a clear fact and therefore, the claim for annulment based on the lack of required notification was rejected. In the view of the Supreme Court, their nature of State aid was evident and so the notification was mandatory.

However, no Member State is obliged to notify the direct tax legislation to the European Commission. What must be notified are the specific measures in order to support certain undertakings or certain sectors as these are the ones within the scope of the notion of aid. The Supreme Court seems to have applied the theory of the clear act. It is the only one which has seen so clear the nature of aid; the rest and, above all, the Basque High Court don't seem to have had it so clear. Regarding it as a cleared act is even less justified and in such a case the Supreme Court had been really exempted from the obligation to examine whether it was a clear act or not. The conditions required by the Community Law in order to apply the parameters of the theory of the clear act were laid down in Cilfit[35] for the first time and confirmed in Lyckeskog[36]. The Supreme Court doesn't seem to have taken into account such precedents and has really applied some of the criteria of the Community case-law concerning State aids, in almost a mechanical way, but ignoring the difficulties. This is particularly obvious in the case of the selectivity criterion where the reasons provided by the Court are few and not powerful: there is selectivity because there is a difference in relation to the Common

[35] Judgement of 6 October 1982, Cilfut and others (283/81, ECR p. 3415).
[36] C-99/00, 4 June 2002.

territory. The Supreme Court should have referred a preliminary ruling. Article 234 of the EC Treaty [and the Council Regulation 659/1999 (DOCE L 083)] required the Court to do it unless it could prove the situation was a clear act. From here on, we could even speculate about the possible judicial liability in the basis of an infringement of the Community Law, which has provoked defencelessness, although the absence of individuals personally affected can make the issue difficult.

The Basque High Court has chosen to avoid the clear act theory. If it didn't have the evidence that Community Law had classified the *Normas Forales* as State aids, it could have felt legal curiosity about the issue and referred a preliminary ruling to Luxemburg, even if the parties were against such eventuality. But the Supreme Court preferred to leave aside the European question and judge on the basis of internal law. Its former experience concerning preliminary rulings might have left the Court with a disgusting feeling. Anyways, as the High Court was not the last instance, it had the possibility but not the obligation to refer it. The obligation just affected the Supreme Court.

Facing the proceedings in progress concerning direct taxation of the Historical Territories and in the light of the Azores case, with the value of precedent in our case, both the Basque High Court and the Supreme Court should, in my opinion, chose one of the following strategies:

– Consider it a cleared case by the ECJ when stating clearly (paragraphs 57 and 60 of the Azores Decision) that it cannot be inferred that a measure is selective on the sole ground that it is applicable only in a limited geographical area of a Member State and when applying to the particular case the criterion in relation to budgetary transfers from the central government.
– If they had any doubt left when assessing this criterion, they should refer a preliminary ruling.

### *5.2. Institutional Autonomy*

The Constitution "protects and respects the historic rights of the territories with traditional charts (fueros)" and adds that "the general updating of historic rights shall be carried out, where appropriate, within the framework of the Constitution and of the Statutes of Autonomy" (First Additional Provision). The Statute of Autonomy of the Basque Country states that the Historical Territories are entitled to form part of the Autonomous Community of the Basque Country, defining the territory of the Autonomous Community by the boundaries of the Historical Territories. The institutions of the Historical Territories shall be governed by the judicial regime exclusive to each [article 37 (1)] and the Statute shall not entail any alteration of the nature of the specific *foral* regime or of the jurisdiction of the particular regimes of each Historical Territory [article 37 (2)]. The Statute mentions several competences of the Historical Territories and mentions in article 37 (3) some that, in all cases, are of their sole jurisdiction.

Article 41, which states that tax relations between the State and the Basque Country shall be regulated by the traditional system of the Economic Agreement or Conventions, lays down that "the competent Institutions of the Historical Territories may maintain, establish and regulate, within their own territory, the tax system, bearing in mind the general tax structure of the State, the rules container in the Economic Agreement itself for co-ordination, fiscal harmonization and collaboration with the State, and those to be issued by the Basque Parliament for the same purposes within the Autonomous Community."

The Commission in the different Decisions on tax measures of the Historical Territories and the Court of Justice in the Decisions of 11 November 2004 in the joined cases C-186/02P and C-188/02P (Ramondin) and in the joined cases C-183/02P and C-187/02P (Demesa) had stated that their decisions did not question the Economic Agreement regime and the competences of the Historical Territories concerning direct taxation. They did not apply in any case an automatic criterion of regional selectivity but assessed the particular measures and regarded them as selective.

The arguments posed by the General Assemblies (and by the Spanish State in the preliminary ruling) were partially based on an important principle of Community Constitutional law, the respect for the institutional autonomy of the States; in our case one of the main features of the internal institutional system is the tax or fiscal sovereignty of the General Assemblies. It is quite clear that AG Saggio crossed over the limits of such principle when he interpreted the different tax systems of the Spanish State in a contradictory way as the representatives of that State. The approach of the AG hinders a territorial system from being *general;* to the most it would be justified by a regional specificity- low level of employment, serious industrial crisis- as an exception from the general system in accordance with paragraphs 2 and 3 of article 87. But this building is constructed on an error: the AG mentions a specific system- the one in the Historical Territories- and a general system but there is not a real general system in Spain. That is what the Spanish government stated but the AG regarded this constitutional argument as a "mere formality".

Much more serious is the fact that the Supreme Court makes the same mistake, not only when it denies the nature of legislative power to the General Assemblies[37], matter that could be just a "mere formality" with no interest for the Community Law about the rank of the different sources of the Spanish law, although it means ignoring materially the authentic federal nature of the Basque Autonomous Community[38], but

[37] It states explicitly "…it is evident the Statute of Autonomy of the Basque Country doesn´t create the General Assemblies as legislative chambers and is, equally, clear they can not approve regulations with the rank of law."

[38] In my opinion, the system or constitutional block comprised by the Additional Provision of the Spanish Constitution, the Statute of Autonomy of Gernika, the Economic Agreement and the Law of Historical Territories provide a strong federal nature to the Basque Autonomous Community; the original tax sovereignty lies in the General Assemblies; representatives and owners of the political and constitutional principles *no taxation without representation.* The Historical Territories, at the same time, following a

above all when it regards the *foral* tax systems as *special* and *specific* in relation to the *common* regime, the general one, and so they are automatically selective. This nature could only be corrected by the Constitutional Court (or by the Supreme Court in a subsequent judgement) now. If a preliminary ruling was referred to the ECJ questioning such nature, the Court should refrain from classifying the Spanish internal system, although it could clarify the notion of selectivity in relation to territoriality and to the fragmentation of the tax system within a State. In order to do so, similar or comparable situations in other Member States would be of great help. In fact, they are examples, which give evidence of the legal pluralism within the Community system. The status of the Criminal Law in United Kingdom or even in Finland with the Älaand Islands could provide interesting lessons. This is why the Azores judgement becomes so relevant because, along with the arguments provided by the agents of the Spanish and the British Governments, lays down the limits within which regional regimes of direct taxation are compatible with the selectivity criteria. An advantage just applicable in part of the national territory cannot be regarded as selective on this sole ground: "political and fiscal independence of central government which is sufficient as regards the application of Community rules on State aid presupposes that the infra-State body not only has powers in the territory within its competence to adopt measures reducing the tax rate, regardless of any considerations related to the conduct of the central State, but that in addition it assumes the political and financial consequences of such a measure" (paragraph 68 of the Azores judgement).

### *5.3. Public Aids and Community Policy on Aids*

Even if the Supreme Court were right, even if it had referred a preliminary ruling to the Court of Justice and this Court had classified the contested measures as State aids according to Community Law, there is one question left, can these measures be annulled on the grounds of a failure to notify? Wouldn't be possible to sustain that in a situation where direct tax systems are of the exclusive competence of Member States, where there are no harmonizing provisions and where in principle the general tax regimes, the potential advantages, are granted to all undertakings which meet the conditions required by the law, there would be a presumption of validity of the system because in fact there are no disadvantaged companies: the advantages are granted to all undertakings under the scope of such tax regime, that is, to all taxpayers? In the light of such presumption, the competent authorities could defend the obligation to

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model of upward federalism or central federalism create the Basque Autonomous Community. Nothing similar happens in the rest of the Spanish State. In the particular subject of the tax regime, there is no comparison in the whole of the EU and the principle of institutional autonomy of the Member States laid out in article 5 of the EC Treaty leads to the respect of such system whose defence must be the task of all the institutions of the particular Member State, Think of the special regimes in the Äalnd islands or in Scotland. About this matter, see s. Wheatherill and U. Bernitz, *the Role of the Regions and sub-national actors in Europe*, Hart, Oxford 2005.

notify was not evident at all: obligation which would only have made clear after a Court of Justice's sentence which interprets it[39]. In these circumstances, annulling the measures on the basis of lack of notification when at first sight the notification is not mandatory seems to exceed the limits of the proportionality principle and to violate the principle of legitimate expectations[40].

The Supreme Court has had an attitude concerning Public Aids in accordance with the centralization policy the European Communities have launched in relation to Competition Law. Its course of action makes evident the inherent risks in the system and the countless occasions when there are genuine doubts about the application of Community Law that, nevertheless, are directly solved by the national judges in the basis of a wrong application of the theory of the clear act.

Nowadays, the Commission's own policy on State Aids is under review in an Action Plan, which is under consultation. The Commission aims at applying the provisions of the EC Treaty on State Aids in order to urge Member States to contribute to the Lisbon Strategy directing aids to improve competitiveness of the EU industry, to create sustainable jobs (more aids in R&D, innovation and risk-capital for small enterprises) to safeguard regional and social cohesion and to improve public services. The Commission also aims at rationalising and simplifying the proceedings, with the intention of the rules being clearer and less aids are to be notified, and at speeding up the decision-making process. The Action Plan intends that aids distort competition to a lesser extent and are better directed in such a way that public money is used efficiently with the objectives to improve economic efficiency, contribute to growth and sustainable job creation, increase regional and social cohesion, improve services of general economic interest and promote sustainable and development and cultural diversity. The new system must allow a quick and easy authorisation for the aids which distort competition to a lesser extent, especially when obtaining the money at the financial market is more difficult, so the Commission can focus on the cases, which can seriously distort competition and trade. In order to do it, it would look for more flexible and effective procedures, better enforcement, higher predictability and enhanced transparency. For instance, at the moment Member States must notify most of the subsidies they intend to grant to the Commission. The

[39] The Court of Justice admits, in the framework of the CS Treaty, that the nature of aid of tax measures is no evident: "It was also legitimate for the Commission, faced with tax measures not obviously to be classed as 'aids' under Article 4(c) CS, to take the view that it was useful to initiate an investigation in all the Member States in order to check whether their legislation contained the same type of measures as those adopted in Spain." (C-501/00, Spain v. Commission, ECJ judgement 15-07-04, paragraph 55).

[40] A similar argument was provided by the Historical Territory of Alava in the Ramondin case (C-186/02 P and 188/02 P judgement 11 November 2004, paragraph 56): " In reality, the Court of First Instance should, before addressing any question of categorisation as State aid, have considered that tax measures adopted before the conclusions of the Ecofin Council meeting on 1 December 1997 concerning taxation policy (OJ 1998 C 2, p. 1) and the Commission notice of 10 December 1998 on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3) were excluded from the review of State aid. Where such measures formed part of the industrial policy implemented by the Member State concerned, they should have been excluded from the outset from the scope of Article 92 of the Treaty."

Commission suggests simplifying the procedures and that a higher amount of aids are exempted of the obligation to be notified.

What it has in common with the new policy of competition decentralization is the affirmation of a shared responsibility between the Commission and Member States: the Commission cannot improve State aid rules and practice without the effective support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly.

### *5.4. The selectivity criterion*

We have confirmed this is the key point of the classification of tax measures as State aids: the fact they favour one or several undertakings to the detriment of others. The provided criteria by the AG and by the Supreme Court in order to classify the measures as specific are based on their territorial nature and on the presumed specific nature in relation to a regime wrongly classified as general and applicable in the common territory. However, this sort of consequences cannot be inferred from the ECJ case law. The *status quaestionis* is stated by the ECJ as follows: (judgement Spain v. Commission aforementioned, paragraphs 120 to 125).

> The tax deduction introduced by Law No 43/1995 can benefit only one category of undertakings, namely undertakings which have export activities and make certain investments referred to by the contested measures. Such a finding is sufficient to show that this tax deduction fulfils the condition of specificity which is one of the characteristics of the definition of State aid, that is, the selective nature of the advantage in question (see, with respect to a preferential rediscount rate for exports granted by a State in favour only of exported domestic products, Commission v France, paragraphs 20 and 21; with respect to interest rate rebates on loans for export, Case 57/86 Greece v Commission [1988] ECR 2855, paragraph 8; with respect to a system relating to insolvency derogating from the ordinary rules for large undertakings in difficulties which owe particularly large debts to certain, mainly public, classes of creditors, Ecotrade, paragraph 38).
>
> In order to establish the selective nature of the contested measures, it is not necessary for the competent national authorities to have a discretionary power in the application of the tax deduction at issue (see Case C-75/97 Belgium v Commission, paragraph 27) even if the existence of such a power may enable the public authorities to favour certain undertakings or productions to the detriment of others and, therefore, to establish the existence of aid within the meaning of Articles 4(c) CS or 87 EC.
>
> On the other hand, the nature and organisation of the tax system of the Member State concerned of which the national measures form part may constitute, in theory, a proper justification for the nature of that provision as a derogation with respect to the rules generally applicable. In that case, those measures, in so far as they are consonant with the logic of the tax system in question, do not meet the requirement of specificity.
>
> It must be recalled that as Community law stands at present, direct taxation falls within the competence of the Member States, although it is settled case-law that they

must exercise that competence consistently with Community law (see, in particular, Case C-391/97 Gschwind [1999] ECR I-5451, paragraph 20) and therefore avoid taking, in that context, any measures capable of constituting State aid incompatible with the common market.

However, in this case, in order to justify the contested measures with respect to the nature or the structure of the tax system of which those measures form part, it is not sufficient to state that they are intended to promote international trade. It is true that such a purpose is an economic objective, but it has not been shown that that purpose corresponds to the overall logic of the tax system in force in Spain, which is applicable to all undertakings.

Furthermore, it is settled case-law that measures of State intervention are not characterised by reference to their causes or aims, but must be defined in relation to their effects (see, in particular, Case C-5/01 Belgium v Commission, paragraph 45). The fact that the contested measures pursue a commercial or industry policy objective, such as the promotion of international trade by supporting foreign investment, is thus not sufficient to take them outside the classification of 'aid' within the meaning of Article 4(c) CS.

The logic of the tax system, its nature and organization must be examined. They can constitute a proper justification for the nature of that provision as a derogation with respect to the rules generally applicable and, in this case, the measures do not meet the requirement of specificity. Although the ECJ keeps on using the terms general and exceptional, they are not necessarily linked to territory. The Azores judgement has made it clear.

### *5.5. Tax Harmonization in Community Law*

Laszlo Kovacs, European Commissioner for Taxation, has recently announced that the Commission has self-imposed a date to make progress in a key issue which is the definition of the common taxable base in the Corporate Tax. Talking about tax rates harmonization would be a dream as harmonizing the tax base is difficult enough, that is to say what is going to be taxed. The Commissioner's strategy is to launch a reinforced cooperation in this field. Even Member States with more favourable regimes for undertakings (holidays, low tax rates, allowances and exemptions) as Ireland, United Kingdom or Slovakia have joined this proposal. France and Germany report the practice of a kind of fiscal dumping or unfair competition caused by the application of lower tax rates in some Member States as Ireland (12,5%), Poland or Slovakia (19%) than the ones applicable in France (33%) or Germany (even up to 38%!).

The advances in the harmonization of direct tax field are really weak. The Commission has got little progress and has frequently chosen to attack specific regimes[41]. A Directive

[41] So in the Ramondín case (C-186/02 P and 188/02 P judgement 11-11-04, paragraphs 34 and 35), the Historical Territory of Alava wonders which the reasons which led the Commission to initiate a large

about taxation on savings (on the interest of savings) has recently entered into force and it foresees the information exchange about the income coming from the savings of individuals, who have the Union citizenship in a Member State different from the one of their residence, with the aim of taxing them in the State of origin. Member States hope to fight tax fraud this way, binding the banks to collaborate with the tax administrations. If the mere exchange of information is considered a success, this shows we are far away from the harmonization of specific aspects, one of the famous redlines or vetoes the government of the United Kingdom imposed on its negotiators of the Constitutional Treaty.

Under these circumstances nowadays it seems unlikely that in a Member State, Ireland for instance, its highest Court declares the annulment of the measures in the Corporate Tax because they haven't been notified to the Commission.

### *5.6. Conclusion*

If this is an absurd, we should wonder why the Supreme Court has taken it for granted. To say it bluntly: will the Supreme Court dare declare the annulment of the provisions in the Corporate Tax of the common territory, imagining it contains, as it probably does, some more favourable measures for the undertakings under such regime, as they haven't been notified to the Commission, being clear their nature of aids as they are applicable just in a part of the territory of the Spanish State?

If the answer is negative we should wonder why the Court hasn't had any objection to do it in the case of the *foral* regimes.

We can also think about the proper composition of such Court when it is bound to asses questions that affect directly regimes as the *foral* ones, proof of the private and public legal pluralism of the Spanish State. If there is a real legal pluralism, why is not reflected on the highest jurisdictional institutions? Is a jurisdictional union being imposed on a diverse and complex reality? When the House of Lords makes a decision

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number of procedures against the Normas Forales of the Basque Country were and why a series of fiscal measures were removed from the list drawn up by a group called 'Primarolo', responsible within the Council for detecting fiscal measures to be abolished for the purposes of tax harmonisation, only to be subsequently challenged through the State aid procedures. In its opinion, the reluctance of a number of Member States makes any agreement within the Council regarding tax harmonisation impossible. That is why, it adds, the Commission chose the quicker and simpler route of State aid procedures.
In the same way, in the case on steel industry (C-501/00, Spain v. Commission, ECJ judgement 15 July 2004) the ECJ explains the Commission (Decision 31 October 200, concerning the Spanish laws on Corporate Tax , OJ 2001, L 60, p.57 paragraph 28) did not, however, order the recovery of the aid at issue from the recipient steel undertakings, in particular because of the different position it had adopted in the past in respect of similar national measures and the length of the investigation procedure, which was not attributable to the Kingdom of Spain, so that 'even the most cautious and well-informed steel firms could not have foreseen the tax provisions under examination being classed as State aid contrary to article 4 of the ECSC Treaty, and … they could rightly claim legitimate expectations'.

on issues concerning the Scottish Civil Law, its composition (Scottish Law Lords) is logically different from the occasions they decide on English Law issues.

As a matter of fact, if the European Union seeks inspiration in any Comparative Law scheme in order to achieve harmonization, the most interesting and effective is precisely the Spanish one, with the harmonization of the five tax systems plus the specific status of Ceuta, Melilla and the Canary Archipelago.

# Economic Agreement and State Aids[1]

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First of all[2] I would like to thank the organizers, the Ad Concordiam Association and the Basque Studies Institute of the University of Deusto for the invitation to take part in these sessions within this international Conference.

My lecture will attempt, somehow, to help us understand why the judgement 9 December 2004[3] of the Supreme Court in application of Community Law, specifically

[1] The original version of the speech is in Spanish.

[2] Please kind reader be aware of these footnotes I am including now with the aim of providing certain references for you, which, I believe, can be useful during this reading of my lecture at the round-table.

[3] Supreme Court Judgement in appeal no. 7893/1999, overturning, partially, the High Court judgement of 30 September 1999 in appeal 3753/1996. This judgement, in addition to the confirmation of the annulment of article 26 of the *Normas Forales* by the General Assemblies of Gipuzkoa, no. 7/1996, 4 July, of Bizkaia, no. 3/1996, 26 June, and Alava no. 24/1996, 5 July, regulating the Corporate Tax, annuls the following articles in the aforementioned *Normas Forales:* article 11 (depreciation rules); article 14 (2) (a) concerning the "business promotion companies"; article 16 (11) (rule of valuation); article 29 (1) (a) (tax rate 32,5%); article 37 (tax credits for investments in material fixed new assets); articles 39 and 40 (reserve for productive investments and acquisitions of variable rent shares); article 45 (2) (1ª) (free

in regard to State aids, has been considered as an "attack"[4] on the Economic Agreement.

I will start, firstly, by referring to the "State aid" concept, in the sense of article 87 of the EC Treaty, that- as it has been pointed out by previous speakers- is a Community concept. And one of its components is the *selectivity* –which is, as we will observe, really controversial, principally in the light of what the Supreme Court have stated.

Talking of State aids, as you may know, the European Commission is the only competent institution to determine if they are or not compatible with the common market (of course, under the supervision of the Community Courts). However, I must underline that this exclusive attribution is very different from the competence to classify a public measure as a State aid in the sense of article 87 of the EC Treaty, being this question necessarily previous to the examination of the compatibility of a public measure (aid) with the common market. The competence to analyse the State aid concept belongs, in addition to the Commission, to the internal courts of the Member States[5].

Well, concerning the Basque fiscal measures, we can find several Decisions by the Commission specifically in relation to State aids. I am going to focus on those adopted in three particular dates and, of course, I would try to set out, as clear as possible, the argument regarding the selectivity requirement within the State aid notion, which was stated by the Commission in each one of them.

The Commission pronounced on this for the first time in 1993[6]. Please, let me get into a brief bracket to comment on what I consider to be, on many occasions, a tendentious interpretation of this Decision. In this 1993 Decision, the Commission considered the analysed fiscal measures to be incompatible with the common market *"bearing in mind they are granted against the article 52[7] of the Treaty"*. In this way,

depreciation); article 49 (Small and medium enterprises: concept and depreciation rules); articles 53 y 54 (direction, coordination and financial centres)), and article 60 (business promotion companies).

[4] I reproduce the expression "attack" used in the media, when the high politicians in the Basque Country made statements to journalist, once they got to know the content of the mentioned Supreme Court of 9 December 2004 ("It is an attack against the Agreement") See, ad exemplum, El Correo newspaper from 28 January 2005 page 38.

[5] Judgment of the ECJ Court of 22 March 1977. - Steinike & Weinlig v Federal Republic of Germany, 78/76 14 paragraph: *"…thus a national court may have cause to interpret and apply the concept of aid contained in article 92 (current article 87) in order to determine whether state aid introduce without observance of the preliminary examination procedure provided for in article 93 (3) ought to have been subject to this procedure."* See also the Commission Notice 95/C312/07 on cooperation between national Courts and the Commission in the State aid field (OJ 23.11.1995).

[6] 93/337 Decision by the Commission 10 may 1993 concerning a scheme of tax concessions for investment in the Basque country (OJ 3.6.1993). It is concerning, in particular, the *Normas Forales* by the General Assemblies 28/1998 (Alava), 8/1999 (Bizkaia) and 6/1988 (Gipuzkoa), which stipulated a 20 per cent tax credit (with the possibility of being incremented) of the investments in the Corporate Tax.

[7] Current article 43 (freedom of establishment).

as the Commission itself admitted, if the distortions against the mentioned article 52 were eliminated, the fiscal measures would be classified as compatible aids. This is the literal reading of the mentioned Decision[8]. I end the bracket.

Later, on 11 July 2001, the Commission adopted a block of Decisions (6) in relation to, on the one hand (3), a 45 per cent tax credit for investments of more tan 2.500 million pesetas and, on the other (3), the so-called "micro-tax holydays", adopted in 1996[9] ( in 1994 in Alava), for new undertakings[10]. The Commission classified the fiscal measures as incompatible aids with the common market. We can say nothing about it. They are Sate aids[11].

Besides, tomorrow's judgement[12], connected directly with the aforementioned Decisions by the Commission, can declare there is a non-fulfilment in the execution of the recovery order imposed by the Commission Decision.

And once we have reached this point, I wonder: were these Decisions an "attack" against the Economic Agreement? No. Is tomorrow's judgement an "attack" against the Agreement? Neither. I am going to explain it.

But before that, the reference to a third date is still missing: December 2001. The Commission adopted three Decisions concerning the so-called "tax-holidays" from 1993[13]. The fact these measures were declared as State aids, I bring it up again, is it an "attack" against the Agreement? Nor.

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[8] Article 4 (1). *"Within two months of the notification of this Decision, the Spanish authorities shall ensure the aid is granted within the national regional aid areas and ceilings or in accordance with the conditions laid down in the Community guidelines on State aid for small and medium-sized enterprises, in compliance with the Community rules on the accumulation of aid for different purposes and with the limits laid down for certain sectors of activity in industry, agriculture and fisheries."* Let me call your attention on the expression "the aid is granted" only and exclusively understandable from a perspective of compatibility of the analysed regime (once solved, as it was, the reported infringement of the freedom of establishment).

[9] OJ no. 296 30.10.2002 (about the *Norma Foral* 22/1994 from Alava); no. 314 18.11.2002 (about the *Norma Foral* 7/1997 Gipuzkoa), no. 17 22.1.2003 about the *Norma Foral* 7/1996 Bizkaia).

[10] OJ no. 174 4.7. 2002 (about the article 26 in *Norma Foral* 7/1997 Gipuzkoa), no. 279 17.10.2002 about article 26 in the *Norma Foral* 3/1996 Bizkaia) no. 314 18.12.2004 (about article 26 the *Norma Foral* 24/1996 from Alava). They are some fiscal measures for new undertakings that exempt, where appropriate, them partially from the payment of the corresponding Corporate Tax for a period of time (4 years) OJ.

[11] See First Instance Court judgements 6 March 2002, T-127/99, T-129 y 148/99 (Demesa case), Rec. p. II-1275, and. T-92/00 y T-103/00 (Ramondín case), Rec. p. II-1385; and the ECJ judgement 11 Noviembre 2004, C-183/02 P y C-187/02 P (Demesa case) Rec. p. I-10609 and C-186/02 y C-188/02 (Ramondín case), Rec. p. I-10653.

[12] I am referring to the case Commission versus Spain C-485/03 and C-490/03 about a possible failure to fulfil obligations in the Decisions of the Commission 11 July 2001 (see footnotes 8 and 9 above), concerning which the ECJ has announced judgement for 14.12.2006.

[13] Decisions of the Commission 20 December 2001: OJ no. 17 22.1. 2003 (about article 14 in the *Norma Foral* 18/1993 Alava); OJ no.—40 14.2. 2003 (about article 14 in the *Norma Foral* 5/1993 Bizkaia); OJ no.—77 22.1. 2003 (about article 14 in the *Norma Foral* 11/1993 Gipuzkoa). The Decisions concern some fiscal measures that exempt completely from the Corporate Tax payment, where appropriate, for a period of time (10 years).

Where is the conflict, (between the Economic Agreement and State aids) then?

Unavoidably we are going to get into the aforementioned Supreme Court judgement of 9 December 2004.

Let's see: any measure classified as State aid, in general terms, must be authorised by the Commission (i.e. to be declared compatible). In order to be authorised, obviously, the Commission needs to examine it. In this respect, there is an obligation of notification of *new* State aids or its amendments to the Commission that must be observed by the Member States by virtue of article 88 (3) of the EC Treaty and of repeated case-law by the Court. Once the measure is notified, the Commission declares: compatibility or incompatibility.

But we must pay attention, certainly, even to the possibility the Commission declares the examined public measure is not a State aid in the sense of article 87 (1) of the Treaty[14], or it is an *existent* State aid[15].

And in line with the last theory, I throw the following question: does it exist, in case of a public measure which is not a State aid or it is an existing aid the obligation of notification to the European Commission under Community Law?

Article 88 (3) of the Treaty stipulates Member States have the obligation to notify the State aid drafts (*new*) or the amendments of the aids (*existing*) in the sense of article 87 (1) EC Treaty.

As a result, there is no obligation of notification to the Commission for the Member States when a public measure or intervention, for instance, is not a State aid under article 87 (1) of the Treaty.

Let's think, for instance, of a capital increase of a public company which operates in a full competence sector. When such capital increase is based on the principle of a private investor in a market economy, there is no State aid, in the sense of article 87.1 EC Treaty. So, such public capital increase mustn't be examined by the Commission. Neither in case of *existing* State aids.

Therefore, the fact a Member State, in an hypothetical case, notifies to the Commission public measures which are not State aids in the sense of article 87 EC Treaty, just means that State is seeking a reinforcement of legal certainty. No more and no less.

We have come to the point of the analysis of one of the, in my opinion, controversial "elements" of the aforementioned Supreme Court judgement of December 2004. Where can we find it?

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[14] Article 7 (2) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (current article 88) of the EC Treaty (OJ L no. 83 27.3.1999).

[15] About the concept of aid, I refer to article 1 (b) in the Council Regulation (EC) No 659/1999, mentioned in the above footnote.

We should remember it's the first time the Supreme Court states a Basque fiscal measure, *of general nature*, i.e. applicable to all the companies in a fiscal regime, is subject to notification to the Commission under article 87 of the EC Treaty.

The Courts have never before reached that conclusion. In fact, if we analyse the Decision of 1993, I have mentioned above[16], the Commission classifies the fiscal measures as State aids because, while it was examining the selectivity requirement, it was confirmed certain sectors (productions) were excluded from benefiting of the *foral* fiscal measures[17]. So they were not general measures under the legal framework applicable to the analysis.

Continuing the same legal reasoning about the selectivity (material) of the measures subject to the Community Decisions adopted in 2001 aforementioned, we can confirm the Commission concludes certain Basque fiscal measures were aids because they consisted of 45 per cent tax credit only granted to undertakings which made investments of more than 2.500 million pesetas. That is to say the Commission could have the following thoughts: cannot a company investing 2.000 million pesetas under the same legal scope of the *Normas Forales* enjoy the 45 per cent tax credit? As the answer was negative, the Commission stated the existence of discrimination; so, the measure benefits "some undertakings" in the sense of article 87 (1) ECJ. Therefore, it is a State aid. Correct reasoning from my point of view.

We can find in the same line the Commission Decisions in 2001 about tax-holidays and micro tax-holidays aforementioned. Let's recall they were about some fiscal regimes benefiting start-ups (and, in particular, those creating 10 jobs…). Reflection: won't a company, incorporated just the day before the mentioned fiscal regime enters into force, which creates 10 jobs, be able to benefit of the fiscal exception? Answer: no, it will not. Commission's conclusion: there is a discrimination; the measure is selective in the sense of article 87 (1) of the ECJ as it is a benefit just for "certain undertakings". Therefore, it is a State aid (so it should have been notified). It is right.

However, the Supreme Court in its judgement of 9 December 2004 is not in line with the selectivity analysis made so far.

Let's see: let's take as an example the Corporate Tax general tax rate of 32, 5 per cent under the 1996 *Normas Forales*.

To start with, I must remind you the Supreme Court, as we can infer from the reading of the legal foundations 17 and 18 of the judgement[18], considered such measure

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[16] See footnote 5 above.

[17] See III paragraph of the Decision 93/337: *"A further reason why the aid applies to certain firms only is that the following activities are not eligible: wholesaling, food services, hire of machinery, measuring apparatus, transport equipment, personal services, and recreational and cultural services."*

[18] Legal foundation 17: *"From the previous considerations it can be considered,* initially *within the State aid concept (…)"*. Legal foundation 18: *"b)…declaring the annulment (…) because the mandatory*

*might* be classified as a State aid; it didn't consider it *was* a State aid. We are facing, therefore, a provisional analysis.

In my opinion, firstly this is an evidently wrong analysis in the sense, as I have mentioned before, that it should have been determined without any doubts whether they were dealing with State aids or not, in the sense of article 87 (1) of the EC Treaty (which necessarily requires a correct interpretation of the selectivity requirement), and not if they were dealing with *fiscal measures than may be classified* as State aids. And if there are some doubts concerning the State aid notion, here they have, in article 234 of the EC Treaty, the judicial cooperation mechanism with the ECJ. I must insist that, in my opinion, the legal foundations 17 and 18 of the judgement are a *legal craziness* and they are- don't forget- the only reasoning in order to annul some general fiscal measures due to the appreciation of- only and exclusively- a procedural infringement in the approval of these measures committed by the General Assemblies of the Historical Territories of the Basque Country.

In fact, it is literally said by the Supreme Court the general tax rate is annulled (as well as the rest of the fiscal measures) because of, according to the Supreme Court judgement, the lack of the required communication of the measures that may be classified circumstantially evidenced as State aids under article 93 (current article 88), of the Treaty[19].

As I have already set out, a mere lecture of the Treaty (articles 87 and 88) doesn't allow us to confirm the existence of an obligation for the Member States to notify the *supposed, or liable to be,* State aids. I insist, measures which are not fiscal aids in the sense of article 87 (1) of the ECJ do not have to be notified to the Commission[20]. Therefore, the reasoning for the annulment made by the Court doesn't come from the Treaty.

And this aspect of the judgement is the one that, due to the required obligation of notification to the European Commission- in the light of the particular interpretation of the Community law- can be interpreted as a substantial vacuum of the Economic Agreement.

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*notification to the European Commission under article 93 (current article 88) of the Treaty for measures that* circumstantially evidenced *may be State aids has been omitted"*. The underlining is mine.

[19] This reasoning can be found clearer, if possible, specially because of its reiteration, in the Supreme Court writ of dismissal of 4.4.2005 in the motion of dismissal lodged against the judgement of 9 December 2004 (Legal reasoning 6°): "(…) the Courts has considered certain *Normas Forales may* be "State aids", according to the ECJ case-law, and under the application of the regulation in article 93 (current 87-sic-) of the Treaty it was necessary for its approval the notification to the European Community (…)", "(…) the notification or information of the drafts granting or amending *probable* aids is a direct consequence of the regime outlined in articles 87 and 88 of the EC Treaty (…)".

[20] See the Advocate General Mr. Leger's Opinion in the case "Traghetti del Mediterraneo" C-173/05 issued on 11.10.2005, paragraphs from 87 to 89. The Advocate General's thesis is fully accepted by the ECJ in its judgement of 13.6.2006, in the mentioned case, paragraph 41.

In fact, if it happens that, to start with, we have to notify to the Commission the supposed aids- which are all the measures (tax rate) passed by the General Assemblies and applicable to all the undertakings within their scope in the light of the Supreme Court's particular interpretation of the "geographical selectivity" in its judgement- the "attack" against the Agreement would be caused by the (new) imposition for the *foral* Institutions to have the previous authorisation of the Commission in order to adopt and execute their fiscal measures. This fact is simply unthinkable as it "attacks" the own "sovereignty" of the Basque *foral* institutions, at least understood in the way as it has been so far[21].

And, what will happen if the *foral* Institutions haven't got the Commission's authorisation? They will not be able to execute the fiscal measures, where appropriated, adopted as they could commit illegality. Besides, following this Supreme Court's thesis, we could have an added problem. If it's the State (Permanent Representation of the Spanish Kingdom) the only one which is enable to notify to the Commission, what happens if the State is asked to notify a measure passed by the General Assemblies or the Provincial Governments but it doesn't? And this supposition has already happened, to a certain extent, in relation to, for instance, a fiscal measure implemented in Bizkaia. It was about some fiscal incentives for the maritime transport sector. Admitting they were State aids in the sense of article 87 (1) of the EC Treaty (because of their selective nature as they were benefiting just some undertakings in a particular sector), it was intended to get the compatibility Decision from the Commission. The *foral* authorities asked for the notification to "Brussels" via Madrid- because, I stress, "Brussels" doesn't admit (doesn't accept) notifications from infra-state bodies within the Member States. However, this notification was held in Madrid for several months due to some unknown reason for me. Well, just think that this delay could have lasted for one, two, there years and meanwhile, what…?

If, as the Supreme Court states, it is admitted that all measures adopted by an infra-State body, because of the fact they are not applicable in the whole territory of the State, are State aids in the sense of article 87.1 EC Treaty [argument of selectivity used by the Supreme Court in its judgement of 9 December 2004, as "certain undertakings are the beneficiaries" (those companies under the scope of a fiscal legislation different from that of the central State], in the basis of an inexistent community case-law, as it has been pointed out by an Advocate General on 20 October 2005[22]), the authorisation of

[21] By virtue of the First Additional Provision of the Spanish Constitution from 1978 and of article 41(2) of the Basque Country Autonomous Statute (3/1979 Constitutional Law, 18 December). About the possibility of the existence of different Corporate Tax rates within the State, see Constitutional Court judgement 19/1987, 17 February.

[22] In the case C-88/03, Portugal vs. Commission, paragraphs 42 and 43 in its conclusions, in particular the selectivity criterion:

> "42.(…) What principles apply in assessing whether variations in national tax rates adopted solely for a designated geographical area of a Member State fall within the scope of the Community State aid rules?
>
> 43. The Court has never, in its jurisprudence to date, answered this question. (…)"

the Commission is being introduced, or imposed, as a procedural requirement in order to execute legally the fiscal measures adopted by infra-State bodies.

And here we find the real problem. Not even with a direct notification mechanism to the Commission from the infra-state bodies in the Member States, the problem would be solved, because the Commission would have the power to decide those general measures not to be applicable to all the tax-payers of that infra-state body in the case that, after classifying them as State aids, will declare their incompatibility with the common market.

Therefore, it is essential for the infra-state bodies in Member States that general measures adopted under their authority can be classified as general measures (under the Community Law) and not as State aids.

The Supreme Court judgement applies the geographical selectivity criterion stated by the Advocate General Mr. Saggio[23]. I am really pleased to have listened to the Commission representative affirming the Advocate General's opinion has been overcome. It is true. It has been ignored by the "Azores" judgement[24].

The Azores judgement is not- in my opinion, contrarily to some others'- a turning point in the ECJ case-law. The Court itself states it- see paragraph 59 in the judgement- when it expressly sets out the Commission's argument about the selectivity criterion in its Decision concerning the Azores case in 2002- which is precisely in line with the aforementioned thesis by Advocate General Mr.Saggio- is wrong in the light of the Treaty and of the Community case-law.

It can be said, therefore, the interpretation of the Community Law made by the Supreme Court in its judgement of 9 December 2004 and, in particular, of the selectivity criterion- invoking an inexistent *"repeated case-law of the ECJ"*- is, at least, wrong. In fact, there has been no modification; the Azores judgement is not a turning point in its case-law, and the ECJ has expressly accepted it so. For instance, the well-known judgement *"Les Verts"* when finally admitted the action for annulment against measures adopted by the European Parliament[25]. Or after a period during which the free movement of goods was on top of the exclusive rights of industrial property (judgement Hag I)[26], the ECJ changes its jurisprudence and these rights take precedence over the free movement of goods (judgement Hag II)[27]. In the Azores judgement there is no jurisprudential turnabout.

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[23] In its Opinion issued on 1 July 1999 in the joint cases C-400/97 to C-402/97 (General Assembly of Gipuzkoa and others).

[24] ECJ Judgement 6 September 2006, Portugal vs. Commission C-88/03. See, likewise, Commission Decision of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax (OJ L150. 18.3.2006).

[25] ECJ Judgement of 23 April 1986, partí écologiste "Les Verts" vs. European Parliament. Case 294/83.

[26] ECJ Judgement of 3 July 1974, Van Zuylen C-192/77.

[27] ECJ Judgement of 17 October 1990, Hag C-10/89.

By virtue of the stated arguments, when the Supreme Court set out the controversial measures were likely to be State aids, it was absolutely wrong.

Even if it had classified them as State aids, such categorization is not based on any ECJ case-law, up to 2004, about the selectivity criterion, no matter how hard it tries to make us believe it (in particular, in its writ of 4 April 2005 when it defends why it is not correct to repeal the judgement by means of the motion for dismissal).

What is, from my viewpoint, a wrong judgement, unfortunately leads to worse consequences. Why? Because, on the one hand, the beneficiary of the judgement intends to execute it, and, on the other hand, certain neighbouring Autonomous Administrations intend to make use of it in order to prevent any *foral* fiscal regulation which differs from the ones adopted by the central State from entering into force. And then the High Court of the Basque Autonomous Community comes on the stage.

First of all, this is not the forum to get into analysing thoroughly wheter, in the execution proceedings of the Supreme Court judgement, the High Court had necessarily to annul the *foral* provisions adopted in 2005- as they were adopting the same Corporate Tax tax rate(32,5%) as the one annulled by the Supreme Court-.

However, I consider quite appropriate to state some thoughts about the High Court of Justice's argument in order to annul the tax rate (or in other pending proceedings to order preventive suspension): it assumes (for instance, in the writ of 14 November 2005)[28], the existence of an infringement in the legislative procedure of the *foral* fiscal provision.

And I wonder: if a measure is not a State aid, in the sense of article 87 (!) of the EC Treaty, how could it be there has been an infringement of a procedure applicable only to new State aids? In proceedings where the parties don't stand really and fully in contradiction, as it happens in execution proceedings, could it be possible the existence of an infringement of procedural, of article 88 (3) of the EC Treatry? Because, attention! The Azores judgement proves clearly the selectivity criterion as understood in the Supreme Court judgement is not (and it has never been) valid. So, then, which is the criterion of application?

When in 2005 a fiscal *Norma Foral* is enacted, if there is a procedure in 2005, this must be observed but if such procedure legally is not applicable, it is clear it must not be observed: it is simply not applicable.

And the *foral* Institutions are currently defending when they adopt the Corporate Tax tax rates, and some other fiscal measures, that because they are general measures,

[28] See footnote 2 above. Execution procedure 3753/96 concerning, among others, the *Norma Foral* 7/2005, the *Decreto Foral* from Gipuzkoa 32/2005 and the *Decreto Foral Normativo de Urgencia Fiscal* from Alava 2/2004. FJ 4: "(…) the only coherent way of transposing that decision scheme to the present procedure is subsuming directly in the reasoning issued already by the judgement the content of each legal substitution norm which is filling the originated vacuum, and *this presumes the lack of notification which affects identically the new provisions…".* The italics is ours.

as their appropriate reference framework is their territorial scope of application, the notification to the Commission is not mandatory.

The High Court of the Basque Autonomous Community, on the other hand, has suspended preventively these tax rates (32, 5%). In my opinion, with the understanding that the Supreme Court thesis of its judgement of 9 December 2004 must have the priority, the High Court has really admitted the existence of the infringement of procedure (the one detected by the Supreme Court). And, in my humble opinion, such reasoning would be prejudging the fundamental issues of the case (which is asking for the annulment of the appealed provisions due to an infringement of the procedural stated in article 88 (8) of the EC Treaty) to the extent that only measures which are State aids in the sense of article 87 (1) of the EC Treaty (and not always), and never general measures, could infringe a Community procedure.

When in December 2005, a 32,6% tax rate is adopted in the framework of a particular (internal) procedure and if there has been a procedure infringement is analysed, it must be analysed if the infringement has occurred in 2005.

Well, which would be the infringement if the adopted measures are not State aids? And a further step, if in 2007 a new tax rate is adopted, 28 %, 34%- being the State tax rate 35%- or 23%, which infringement of procedure would exist if they are not State aids? Why are they classified as aids? And who has said they are aids?

Perhaps now, after the Azores judgement which shows the Supreme Court judgement up, after a correct reading of articles 87 and 88 of the EC Treaty in the sense they are only referred to aids, which argument will be alleged in the new judicial actions? Which argument will be supported by the Courts?

It cannot be prejudged in the sense there has been an infringement of procedure. The fundamental issue of the case must be analysed in order to confirm (not to assume) that infringement. And in order to get into the fundamental issue of the case, it happens that, after more than a year of judicial conflicts, the High Court believes things about the aid concept itself are not so clear, in particular those about the selectivity element within the concept and, therefore, it would be appropriate to refer a preliminary ruling to the ECJ[29].

And what makes the situation different now? It is not the Azores judgement. The Treaty is the same as in 1957. Nothing has changed at all (concerning this subject). There has not been a jurisprudential turning point because the reading of the judgement obviously doesn't lead to that conclusion. The Azores judgement simply states, or points out, that in the case of fiscal measures adopted by an infra-State body applicable to all taxpayers in a region of a Member State, before the judgement it was thought by the infra-State bodies and by the Member States that those measures were never eligible to be State aids (that's why Decisions were not adopted by the

[29] Joint cases C-428/06 a C-434/06.

Commission up to 2002, even though there were fiscal regimes of infra-State bodies before that date), and now, it could be, in certain cases, they are State aids. When? When the infra-State body, which adopts the fiscal measures, hasn't got sufficient political and financial autonomy. Are we in this case of lack of autonomy? I understand we aren't.

It's the Commission the one who has to reinterpret its whole approach because it's the one who has been contradicted by the Azores judgement; the Commission is the one who has adopted a geographical selectivity criterion, straightforwardly, without analysing anything else. Taking the territory of the State on the whole as the reference framework, it considered (as the Supreme Court) that if a fiscal measure is not applicable in the whole of the territory is a selective measure, in the sense of article 87 (1) EC Treaty, However, the ECJ has said this is a wrong argument.

It is not out of the question the Commission intends, by means of legal engineering, to reinterpret the Azores case-law. In principle, it will not be able to develop its arguments fully in the Gibraltar case any longer, except for the hearing, if there is one[30]. The Gibraltar case is pending at the moment of the First Instance Court. By the way, this case was well-known by the Luxemburg Court at the time of giving its judgement in the Azores case (in which, you should also remember, the Kingdom of Spain, as well as the United kingdom, discussed about the validity of the selectivity criterion supported by the Commission).

I subscribe to Mr. Colson's[31] words when he says the Azores judgement goes further than a judgement of annulment: it is more of a preliminary ruling.

In my opinion, the ECJ, with its judgement in the Azores case, has essentially intended to set out clearly how the Commission, not the States[32], has to interpret the regulations about State aids. It is the Commission the one which has to change the geographical selectivity criterion supported in the Azores and Gibraltar cases.

Once this has been said, where can the Commission try to defend its arguments about geographical selectivity- if it believes they should still be defended- must be applied then? Of course, in the preliminary ruling referred by the Basque Country High Court[33]. There, it has the chance to explain how to interpret the whole of the selectivity issue set out in the Azores judgement (in particular, by means of an interpretation of the autonomy criteria and, particularly, the one referred to the economic autonomy).

I don't know if in future the Commission is going to open a procedure in order to adopt a formal decision concerning the *foral* fiscal measures (general measures to our

[30] Joint cases in the Court of First Instance T-211/04 and T-215/04.
[31] Head Unit of the Commission who took part in the Conference the day before.
[32] I am talking about the political power, because, as it has been said, the interpretation of Community Law, and, in particular, of the concept of aid is competence of the internal Courts of the Member States.
[33] See footnote 28 above.

understanding) because it considers them to be selective as they are adopted by a non-"truly" autonomous infra-State body.

Finally, I regret the preliminary ruling was not referred by the Supreme Court; it had the same arguments as the High Court to have done it. I sincerely think the High Court is really making a huge effort in order to solve the situation.

The truth is we would have liked it to go further: not to have suspended the *foral* provisions and then referring the preliminary ruling, and not the other way round, because, in a way- it is my viewpoint- it has prejudged when it admits the existence of a procedure infringement (which was the foundation for the annulment by the Supreme Court) where it doesn't exist.

I hope, regarding the likely judicial actions against the *foral* fiscal measures adopted in future (obviously lodged by those who have the legal right to do it), the Basque Country High Court takes account of the last events, and even of the variations of the plaintiffs' arguments in their last actions (now it is affirmed the Supreme Court judgement is "provisional" because the Courts admit the Commission has the last word). And I hope all what has happened is useful, at least, for the plaintiffs not to be conferred the *fumus bonus iuris* and, therefore, when they ask for, if appropriate, the application of a preventive measure of suspension, this petition is dismissal. And from that very moment, if it is to be referred a preliminary ruling, it is fine but the taxpayers should be calm as the legal certainty based on the *fumus bonus iuris* is, in any case, on the side of the Basque *foral* Institutions and not on the side of the plaintiffs. Thank you very much.

# State Aids and the Internal Action under Administrative Law[1]

MR. JAVIER MURGOITIO

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## Introduction

In order to adjust my lecture to the short time available and to avoid possible reiterations in[1] the issues tackled by other speakers, I am going to focus on a synthesis of the decisions and criteria of the Chamber, I belong to, that hears the appeals against administrative regulations in the High Court of the Basque Country Autonomous Community, pointing out the features of the consecutive stages and, if possible, the final resolution of each one. I am also quite convinced the limited internal judicial review instance is not the most relevant scope in order to indoctrinate about the concept and policy of State aid, whose more prestigious specialists are in this Conference we are holding at Deusto University.

I am going to start my analysis with a very personal thought about the jurisdictional framework in which the permanent conflict- as I am bound to speak about it- has been

[1] The original version of the speech is in Spanish.

settled. We are talking about a Court within the judicial system of the State of the Autonomies, and outlined, therefore, under article 152 of the Constitution and 34 of the Basque Country Autonomy Statute, as the highest Court of the judicial system in the territorial scope of the Basque Country. At the same time, so far, its judgements have offered the motion to vacate appealing to the Supreme Court, so- and we are about to get into it in relation to the different stages of the permanent conflict about State aids in the last years- it has played the role of a first instance Court.

However, I have experienced that, due to the nature of the litigants- territorial or institutional authorities, from the State or from the Autonomous Communities, entitled of a great political support based on the electorate, or "de facto"-, the Court is subject to a huge undermining stress when facing controversies between administrations and institutions, which some of them belong to its jurisdiction, internal, and some of them don't, external. Parallel speeches, which enter into political or economic controversy, arise and they truly damage the validity of the Court's answer and push the entire network of relations around the Economic Agreement towards a break-up scenery. The internal parties consider the adverse judgements founded on the Court's lack of knowledge and feeling for the applicable legislation, while the external ones blame the suffocating environmental pressure the Court suffers, when the decisions are adverse to their interests. I, humbly, would like to point out the aforementioned parties, on several occasions during the past years and in less favourable contexts, have tried to validate the authority of the Courts, discredited by them in other situations, and not few studies and even reforms adopted by them have been frequently based on the judicial criteria issued when interpreting the Economic Agreement.

That situation requires, it must be said, an extreme political neutrality and impartiality of the judges- articles 117.1 and 127 of the Constitution- but also to overcome the peculiar alienation state of the territorial Court. Nevertheless, except for the adoption of any other formulas, the future reform of the Judicial Power Organic Law and of the Judicial Review Law will probably have this as a consequence, if the possibility of appealing to the Supreme Court for these cases is derogated and, therefore, the intervention of the Supreme Court as a peculiar second instance.

To my understanding, instead of turning the Basque Country Court into the first- and who knows- even the only instance to solve conflicts, it would be more appropriated to give full sense to the institutions, whose principal aim is reaching agreements stipulated under the Economic Agreement- Coordination and Evaluation Committee and Board of Arbitration- in order to place the agreed or judicial solution of controversies about the fiscal regulation in the Basque Country, first in the negotiation field and then in institutions of a wider scope than the Autonomous Community. It could be done either by reformulating indirectly the existing mechanisms to solve these conflicts, or by reformulating them for the solution of a particular case. Concerning this issue, I am just going to bet on the fully constitutionality of the solution that will be finally adopted.

## I

After these introductory issues and focusing on the Court's approaches towards some fiscal provisions adopted in the Basque Country and their classification as State aids, we could distinguish several categories and one of them would be according to the actor pursuing such classification.

Since the reestablishment of the Economic Agreement in 1981, we can distinguish a first period during which the central State itself is the actor "self-acting" against the *foral* legislation before the European institutions. Later the actors were the neighbouring Autonomous Communities and certain social and economic agents operating in them. During this second period, there is a clear and progressive reduction of the actions of the State administration against the *foral* legislation, which fades away from 2000.

The starting landmarks of the first period are the proceedings against the *Normas Forales* of incentives for investments adopted in 1988. The central State raised, originally then, the fact the deductions under the *Normas Forales* 14/1987, 8/1988 and 28/1988 from Gipuzkoa, Bizkaia, and Alava, respectively, had omitted the formal requirement of notification to the European Commission.

The Chamber that hears the appeals against administrative regulations in the High Court of the Basque Country Autonomous Community examined broadly for the first time this issue (see Foundations 5th and 7th of our judgement 17 May 1991) and denied the State's annulment claim based mainly on the compliance of the tiniest procedural requirements which lead the Court not to blame the law-making *Foral* institutions, in particular, for the lack of notification, as there had been previous information requirements from the European Commission to the State.

Later three judgements given by the Supreme Court (7 February 1998, 13 and 22 de October 1998), reversed the aforementioned judgements by the High Court and annulled the questioned *Normas Forales,* adopting a different approach, founded on the 93/337/EEC Decision, 10 May, which was issued during the Supreme Court proceeding and stated those *Normas Forales* infringed article 52 EEC Treaty.

At that moment the Supreme Court said: *"(…) the existence of real discrimination and lessening of the principles of free commercial competition has been proved, which has been solved in relation to the entrepreneurs residing in another Member State in the European Union, different from Spain, and, as they are subject to the Spanish common legislation, they cannot apply the Autonomous Community law, but not in relation to the entrepreneurs within the internal scope of the Spanish fiscal system, as the Spanish undertaking operating in the Basque Country but with domicile out of it, even though they are also residents in the European Union, will not have any refund corresponding to the acknowledged difference in the taxes they pay and will be in a disadvantageous position to compete, not only by comparison with the undertakings subject to the foral legislation but by comparison with the companies from other Member States in the European Union, which operate in the Basque Country, as well.*

*There is no clearer proof, then, of the open discrimination provoked by the Normas Forales regulating the mentioned fiscal incentives and, in the same way, the 28/1998 Norma Foral from Alava, object of this appeal, benefiting the activities of the entrepreneurs residing in the territory in question by comparison with the ones in the rest of the European Union Member States and, therefore, in the rest of Spain.*

*It has made, consequently, the violation of the rules eleven (lessening of the possibilities of commercial competition) and twelve (overall effective fiscal pressure lower than the one in common territory) in article 4 of the 1981 Economic Agreement, clear, which implies, necessarily, the annulment of the whole appealed Norma.*

*The highest Community instances are, therefore, the ones which have stated as discriminatory the questioned Normas and it should be affirmed that the Community legal system rejects the adoption of benefits that foster, to the detriment of others, the establishment of undertakings in a particular territory within the European Union, changing the rules of the game of free commercial competition among them."*

The basis for the annulment of the *Normas Forales* by the Supreme Court wasn't, therefore, their explicit classification as State aids, but a jurisprudential reflection linked clearly to a desideratum, as it's the direct taxation uniformity in the European Union, unreachable so far and subject to the slow path of article 94 EC Treaty, ruled by the guideline which states any fiscal treatment favourable for just a few should be applicable to every economic agent in the European Union, foreigners and Spaniards, regardless their subjective scope of application. The likelihood of violation of one of the Treaty freedoms- the freedom of establishment under article 52 (at present 43)- would become so in a mechanism to unify legislations, in such a way that fiscal measures hindering the free establishment would lead to standardize the direct taxation legislation. On the other hand, in this judgement, and also in the 337/93 Decision, the consideration of the *Normas Forales* as State Aids lies hidden, as the last transcribed paragraph shows, but, in this case, the Supreme Court added into the internal judgement an autonomous categorization the Commission- after getting to kwon and assessing the incentive measures from 1988- hadn't adopted, at least not in a full and consequent way, and as a result the internal Court went without the subordinated and supportive powers conferred on the national judge under article 93.3 of the Treaty. (It is well-known the measures adopted by the 42/1994 Law had been assumed by the Commission in 1995 as an overcoming of the hindrance for the freedom of establishment on which the Decision basically relied)

We could conclude, as a result, that even though the Supreme Court framed the infringement within the article 4 of the Economic Agreement in force at that moment, the classification of the fiscal incentive measures adopted under the Economic Agreement as State aids, incompatible with the common market, started to be thoroughly accepted due to this internal judgement- unconnected at that moment with the policy of articles 87 and 88 of the Treaty- based on the idea, lightly founded in such sentences, that the

fundamental freedoms of the Treaty require necessarily the uniformity of the Spanish direct fiscal legislation in order to avoid discrimination or privileges of some Spaniards compared to others.

The core of this idea, improved formally and substantially- and with the support of most of the judges' thesis in the judgement 96/2002 of the Constitutional Court- is, in my opinion, the fact that gave rise to the judgement of 9 December 2004.

## II

Continuing our peculiar journey through time, the next remarkable procedural landmark was the appeal against the *Normas Forales* promoting economic activity in 1993 and 1995. In this period, the central State's appeals (which will lead to the preliminary rulings C-400-401 and 402 in 1997 referred to the European Court of Justice) and some Autonomous Community's actions came together for the first time and in all the proceedings the notification obligation of the adopted measures to the European institution was openly brought up (tax credits, free depreciation and so on). Skipping some other ups and downs- as the debate about the Autonomous Communities' legitimacy to lodge action which delayed the decision of some of the appeals for some time- the Court itself rejected initially to adopt a role in this issue of State aids, as we can notice, for instance, in the judgement of 9 December 1997 concerning the measures adopted in order to support the economy recovery in 1995.

In this sentence it is said: "*this Court itself has already had a previous chance to set out that "in general terms the "self-executing" or perfect regulations enjoy direct effect, and the Treaties provisions which stipulate mere formal obligations regarding the relations between the States and the Community don't", as the judgement "Costa-Enel" states in relation to article 93, with the qualification of "the last sentence in paragraph 3" we are referring to at the moment. The regulations which stipulated "wide appreciation powers for the Community" are also out of the direct effect, where we could frame jointly articles 92 and 93- Judgement 13 July 1989 in the case 380/87."*

On the grounds of the preceding paragraph, the conclusion is the judicial institutions of a Member State cannot replace the Commission and they cannot decide- so we cannot- whether the fiscal measures within the *Norma Foral* fit in the exceptional cases of article 92.3 or not.

However, this problem seems to be connected with a mere procedural matter or with relations between the States and the Commission, to we referred before, and it becomes necessary to examine to what extent the omission of notification could affect the *Normas Forales* validity, which is the key of this lawsuit.

This judicial Court and Section has also given its opinion about these issues previously- thus in the writ of supersedes 2.684/93, with resolution 18 November

1993, (confirmed by judgement of the Supreme Court 4 May de 1995) saying that: *"…not only the mentioned judgement "Costa-Enel" but the subsequent one 11 December 1973 in the case 120/73, or "Lorenz" judgement, or the recent mentioned one from 21 November 1991, have set out and outlined the direct effect in the last sentence of article 93(3) of the EC Treaty, in the sense that the immediate applicability of the interdiction to implement or execute the aid (which is the content of the last sentence) affects to the whole period during which the interdiction is applicable, so, this way the direct effectiveness affects every aid implemented without being notified, and in case of notification, such effectiveness is maintained during the preliminary stage, and if the Commission starts the contradictory procedure , till the final decision. All this means that not only aids not classified as compatible by the Commission yet, but aids which are within a preventive or contradictory procedure in progress, or hasn't even started due to the lack of notification of the draft to the Community institution as well, are forbidden, but, far from what the plaintiff invokes in this writ, it doesn't mean the Member State's obligation to inform about the aid draft, which is a procedural obligation laid down in a different sentence of article 93 (3), enjoys any "direct effect" and can be alleged to the national Courts and made effective by them with a permanent invalidity sanction".*

Nevertheless, the proceedings related to the 1993 legislation tackled, by means of the interpretative question of article 234 EC Treaty, at least sideways, the subject of State aids, and the Advocate General Saggio issued his known Opinion with the arguments supporting such consideration, dismissing, however, the action due to the voluntary abandonment of the legal representative of the Spanish State in the internal proceedings. It is remarkable the procedural representation of Spain before the European Court Justice, in spite of being the Spanish administration the one which lodged the action to the Court, objected to these arguments. From the different points of views set out in that Opinion, I would like to highlight now, due to its likely repercussion on the debate of nowadays at the end of 2006, that the mentioned Advocate General considered the fiscal autonomy of the Basque provinces to be partial and without a fundamental role in the definition of an economic environment different from that of the undertakings which operate in the rest of the Spanish territory.

After all these happenings, we soon entered into the most recent stage of the judicial controversy about the State aids caused by the implementation of certain measures under the Economic Agreement, when the State as a procedural actor almost disappeared, as a consequence of the "fiscal peace" Agreements in 2000, which caused the abandonment of all the judicial proceedings in both instances, in which the State was involved, even those against the Corporate Tax *Normas Forales* enacted in 1996 that, for the first time, adopted a lower tax rate than the one in the central State's Law, the 43/1995 already then.

Meanwhile, the litigation against the aforementioned Corporate Tax *Normas Forales* enacted in 1996 was not over, as after the State's appeals, some others actions lodged by several economic and institutional agents from the Autonomous Communities

followed, out of which the High Court examined the 3753/1996 one, issuing our judgement on 30 September 1999.

## III

Before analysing such judgement, there is still another important criterion of this Court to be pointed out when giving judgement which, taking as an example now the judgement 29 January 1999 followed by some others, annulled in the basis of internal Constitutional Law some fiscal measures. (i.e. a 45 per cent tax credit for investments). The interest in pointing out these judgements is that they were in connection, from an internal point of view, with the two key points the Community Institutions had in mind to classify specific applications of such regulations as State aids. (Their selective nature due to the full discretion of the *Foral* Treasuries in order to grant the tax credit and to the really high amount of minimum investment required). The reflection, therefore, of such criteria can be found in the judgement 23 October 2002 in joint cases T-269, T-271 y T-272 of the Court of First Instance. The internal Court criterion was essentially substantial and unconnected with any appreciation of specificity or selective nature stemming from the autonomic or regional scope where the measure was applicable, and apparently, the criterion the European Community Court of First Instance as well.

Our sentence said: *"Once examined the regulation in the appealed provision, it can be observed the incentives adopted are limited to new material fixed assets of more than two thousand five hundred million pesetas, establishing so a restrictive element in order to enjoy the fiscal benefit, whose raison d'être is not justified, on the other hand, in the regulation itself, adding a discrimination factor, not only for those companies operating or investing in fixed assets out of the Foral Territory but, even, for those ones which operate or invest in Gipuzkoa and don't reach, however, such amount, with the infringement of the principle of equality laid down in article 4(c) of the Economic Agreement.*

*From a different point of view, the aforementioned Tenth Additional Provision, subject to appeal, states a 45 per cent tax credit of the amount of the investment determined by the Foral Provincial Council, individualizing the benefit not only in relation to the amount but concerning the hypothetical receivers to the discretion of the tax administration itself as well, in contradiction with the legal principle in article 7 of the Taxation Legal Framework Law, according to which the execution of the regulation power and the administrative actions regarding taxation issues are activities subject to the law, and with the principle of certainty of law laid down in article 9 of the Spanish Constitution."*

By means of this example, my intention is to make clear the principles and constrictions which rule the law-making power under the Economic Agreement can lead- and surely will- to disqualify a regulation or an specific application of the law

which constitute and aid or benefit which undermine the possibilities of trade competition, being coincident with its classification as State aid according to Community Law. However, the basis differs from case to case and I believe both presumptions of assessment of validity shouldn't be put together in order to get to conclusions like "if there is an initial taxation difference for the Communitarian foreigners, it will exist for the Communitarians Spaniards as well, so the legal provision is discriminatory." A good example is that article 21 of the 2002 Economic Agreement has overcome the first of the problems, making the *foral* legislation applicable to the non-resident Communitarians (leaving them in the same situation as all the Spaniards with fiscal residence in the *foral* territories), and this doesn't mean that the condition of validity of a *foral* provision is its universal applicability to whom, Spanish or foreigners, are outside its subjective scope outlined by the appropriate allocating factors.

Quite a different question is that, so far, tax reduction measures of a regional basis which are adopted in a European Member State could be considered as distorting of competition, as they come from the same macroeconomic background as the general measures adopted by the central State, although each of the Members still enjoys full law-making freedom in direct taxation. The objection in that sense is based on the origins of the common market and it is a question of verifying if the last 14 years have changed it. Does the ECJ judgement in the case 88/03 really mean a turning point or is it requiring such a full and unreal autonomy to the European regions that its legitimizing criteria are going to turn out illusory?

## IV

Going back to the judgement of 30 September 1999, in relation to the appreciation of State aids, the first thing to be pointed out is the Court thought over its former viewpoints concerning the appreciation of the requirements of a Stated Aid by the national judge:

*"Regarding the first aspect- extension of the "direct effect" of article 93.3 to the present case-, the plaintiff assumes that general provisions which lay down fiscal benefits are affected in their own validity as long as they haven't been notified to the Commission, and in order to found it, reproduces part of the Lorenz judgement 11 December 1973 or the Advocate General Jacobs' Opinion for the judgement 21 Novemeber 1991, concerning the direct effect of the last sentence in article 93.3, or the conclusions in the case C-142/87, judgement 21 March 1990 as well, on which it could be better founded the thesis that even general provisions themselves and not just particular measures of recognition or formally granting an aid- which can be extracted from a literal interpretation of the article- can be considered subject to notification under the consequences applicable directly by national Courts.*

*This seems to be the prevailing doctrine in the Community institutions, and in practice the plaintiff's criterion must be accepted by virtue of the Court's own case-*

*law which, after pre-trial conference with the parties and the public prosecutor, has three pending " preliminary rulings" referred by writs of 30 July 1997, in the ordinary proceeding 2679/1993 and joint cases, brought by the Administration of the State against the Normas Forales adopted by the three Historical Territories in 1993, laying down urgent fiscal measures to foster investment and to promote economic activity (ECJ C-400/97, C-401/97 y C- 402/97), in which, at least secondarily along with the main issue, their likely opposition against article 92.1 of the EC Treaty is allege the to the Court."*

Nevertheless, when considering the referral of a new preliminary ruling, it was rejected on the basis of: *"we have to abide by another of the fundamental principles or assumptions which, on the contrary, detracts from the promotion of such preliminary decisions due to its lack of real utility, as the scholars point out the Community legal system object par excellence is the cross-border flow of persons, goods, capitals and services and the maintenance of a free competition situation which doesn't alter the trade between the Member States, which impose, according to some scholars, the simultaneity of a "an element of Community alien status", the absence of which will lead to an indication of the fact that the discussed question in the process is an internal question and, therefore, subject to the national law"*

In short, the attitude of the High Court of the Basque Country towards the conceptualisation of certain incentives as State aids can be summarized as follows:

– Doubts about the "direct effect" of some aspects of the regulations in article 93 EC Treaty.
– Tendency to assume that the specific fiscal measures applied, and not the general and abstract regulations in the *foral* provisions, are the ones subject to revision under the material and procedural requirements of articles 87 an 88 of the Treaty.
– When those limitations are not respected, the interpretation of the Treaty is not considered clear and doubtless but the attempt to classify the measure as State aid is done by means of a preliminary ruling, as happened in 1997 and currently by the preliminary rulings of 2006.

Precisely, a very different tendency is the one in the judgement of 9 December 2004 by the Supreme Court, which reversals the judgement of 30 September 1999 by the High Court of the Basque Country, about which I am just going to make a couple of remarks.

I would like just to point out the conclusion of its legal foundation 17, when it states: "*From the previous considerations it turns out the fiscal measures regulated in the following articles of the Normas Forales…can be considered, initially, within the concept of "State aids". However, it is still to be examined if they can be considered within the exceptions laid down in article 92 (2) and (3) of the Treaty. (art. 87 now)*

*The mentioned paragraph (2) lays down several cases of certain aids with particular aims that, on the basis of special solidarity reasons, are compatible with Community law. They are the so-called "ex-officio exceptions" and the Commission*

*hasn't got any appreciation ability concerning them as their compatibility is automatic by law, but they are not applicable, of course, to the aforementioned provisions in the Normas Forales as they do not stipulate any social aim or any mitigating mechanism in case of natural disasters or any exceptional circumstances as referred in the European article.*

*The paragraph (3) states the ones that can be considered as "possible exceptions" that require a decision by the European Commission according to the precautionary measures of the article itself. However, in any case, it must be noted that, in the light of the continuous ECJ case-law, the abilities of the national Courts, in case of non-notified aids, must be oriented towards the confirmation of such circumstance, and in case of an affirmative answer, they must annul the corresponding Normas as they have been adopted without observing the notification obligation to the European Commission under article 93 (current article 88). Or, said in other words, the national judge cannot declare about the compatibility of the aid measures with the European Law, in cases that this pronunciation is reserved to the Commission by the Treaty, and he can just state, in order to apply article 93(3) (current article 87) if the adopted measures are liable to be classified as State aids.*

*(…) declaring the annulment, in addition to the already annulled article 26 of the Normas Forales, of the following articles in the same Normas…as the legally, by article 93 (current article 88) of the Treaty, required notification of measures that circumstantially evidenced can be classified as State aids to the Commission has been omitted."*

Although I assume a comment in detail of this judgement will be set out by some of the speakers in this session, and due to the procedural controversy that has arisen, I would really like to make a short remark about the interpretation of that circumstantially evidenced judgement mentioned by the Supreme Court, as I don't believe the Court is referring to a mere indirect judgement, based on presumptions or on incomplete appreciations but to a full judgement, however, provisional and instrumental in order to fulfil the communication requirement to the Commission, which doesn't negatively affect the Commission's subsequent decision as the only one competent institution in State aid issues. The internal Court is not classifying directly these measures but it is pre-judging them in relation to some very limited procedural effects- the previous obligation of notification-. The question of this judgement being well founded or not in the Supreme Court judgement 9 December 2004 shouldn't be mixed with the aforementioned, in the same way the method shouldn't be discredited on the basis of the disagreement on the underlying reason the Court is inspired by.

## V

The last stage to be mentioned today is the period from 2005, when new *foral* provisions regulating the same or very similar Corporate Tax rates as the one annulled

by the mentioned judgement have been adopted. This new provisions have provoked the appeals of several Autonomous Communities. These proceedings, influenced strongly in their approach and possible decision by the former annulment of the 1996 *Normas Forales,* and whose evolution have provoked a strong reaction in the public opinion in the Basque country, haven't finished yet. At the moment, some of these proceedings are pending due to new preliminary rulings referred to the ECJ, which at least partially have been caused by the ECJ judgement of 6 September 2006. It can be assumed that if the ECJ gets into the examination of the issue referred to the Court in those proceedings to be interpreted, the effect of European Community Law on the taxation particularities of the Economic Agreement with the Basque Country can be finally solved, in spite of the fact that no matter the position the Court adopts, very important differences will still exist from an internal point of view in relation to the existence and application of the Economic Agreement.

I must admit a light feeling of frustration in relation to the debate after the round-table of 13 December 2006, with the presence of brilliant scholars coming from our country and from other EU countries at the Auditorium of Deusto University, in which the attention was not fully focus on the future perspectives of this preliminary ruling referred to the ECJ, (the brilliant lecture by Mr.Colson previously in the afternoon has tackled it partially in relation to the ECJ judgement of 6 September 2006) and this was something I would have personally found specially stimulating, due to my responsibility for its referral.

# The Economic Agreement and State Aids: Fiscal Aids in the Supreme Court's Case Law[1]

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Prior to the examination of the Supreme Court's case-law about State aids, and especially in relation to the financial autonomy of the Basque Country, it is suitable to make some remarks about it and its constitutional framework, following the thesis, in this respect, issued in the Supreme Court judgements of 9 December 2004 and 7 February 2006.

## The financial autonomy in the Historical Territories

### *a) Legal regime*

The historic rights and their updating are protected by the First Additional Provision of the Constitutional Law (the Constitutional Court judgement 76/1988, 26 April,

[1] The original version of this speech is in Spanish.

when judging the Historical Territories Law admitted the thesis that supports the traditional charts (*fueros*) are guaranteed institutions by the Fundamental Law).

The basic legislative framework of the Basque Country's taxation system derived from the Constitutional Law comprises, first of all, the Satute of Autonomy of the Basque Country, enacted by the Constitutional Law 3/1979, 18 December, that after stating a general principle- the reaffirmation of the traditional *foral* system- establishes the content of the Economic Agreement and specifies its conditionings and limitations which are aiming at achieving that, without prejudice to the fiscal autonomy of the Basque Country, its taxation system respects the general principles set out in the central State's legislation and also in the Basque legislation.

Secondly, we must bear in mind the Economic Agreement, enacted initially by the 12/1981 Law, 13 May, and after by the 12/2002 Law, 23 May, which states the Historical Territories' authority to establish their own taxation system, conferring legislative power on them in order to regulate most of the direct taxes- Personal Income Tax, Corporate Tax, Wealth Tax and Inheritance and Gift Tax- leaving out the Non-residents Income Tax- in this case, the *foral* legislation is applicable to non-residents with permanent establishment- and being responsible for the levying, administration, settlement, inspection, revision and collection of such taxes and duties. Nevertheless, the regulation, administration, inspection, revision and collection of the import duties and import levies included under Excise Duties and Value Added Tax are stated as exclusive competence of the State, as well as the official inspection of the application of the Economic Agreement. To this it must be added, the legislation in force in the Common Territory has the nature of a default system (First Additional Provision of the Economic Agreement Law).

As we said before, the financial autonomy of the territories is not unconditioned or unlimited. On the contrary, such conditionings are also stated by the Economic Agreement Law, of conventional nature, which sets out the grounds for the exercise of the Basque autonomous fiscal powers and their limitations.

It is essentially admitted the Basque Country's right to the tax collection obtained in its own territory (in line with article 156.2 of the Spanish Constitution), in spite of its obligation to contribute to the State's general expenses by means of the "Quota", by virtue of the principle of inter-territorial solidarity in our Constitution (see article 158). Moreover legislation powers are also conferred, as aforementioned.

On the other hand, articles 3 and 4 of the Economic Agreement Law establish the previsions in order to achieve an effective fiscal harmonization between the taxes collected in the Basque Country and in the common territory of the State. Such harmonisation is unanimously admitted as one of the main purposes of the mentioned Law.

To this respect, the case-law has repeatedly set out the Agreement Law constitutes the intangible core, as stipulated by the Statute, of the content of the *foral* regime and because of this the tax legislation adopted by the *foral* Institutions of the Historical Territories must be subject to that Law.

### *b) Consequences of the connection with the Spanish Constitution and its tax principles*

The constitutional respect to the taxation peculiarities of the Historical Territories implies several consequences that must be taken into account when judging the laws passed by the Historical Territories General Assemblies (*Normas Forales).*

1. First of all, the modulation of the principle of legal reserve. The self-regulation ability that the institutional acknowledgement of the historic rights implies, doesn't mean the *foral* institutions are entitled of legislative power as this is reserved by the constitutional text itself for the State [article 62 (2)] and for the Autonomous Community [article 152 (1) and 153 (a)].

Therefore, the principle of legal reserve and of legality in taxation issues, quite limited in its extent by definition, is even more accurately and specifically constricted in relation to the Historical Territories. That is to say, the exigency of subordination and complementarity of the Regulations in relation to the Law is not required in relation to the Regulations (*Normas Forales*) adopted by the General Assemblies, in the same terms as it is required generally in relation to Regulations in the taxation field. In short, the principle of legal reserve stated in article 31 (1) of the Spanish Constitution is quite adjusted in the case of the *Foral* Territories, that, by virtue of article 8 (1) of the Law regulating the Historical Territories, have a "peculiar" legislative power in subjects of their exclusive competence which is executed by the respective *Norma Foral*.

However, even though legislative power concerning taxation is conferred on the *foral* institutions of the Historical Territories, it is clear the Statute of Autonomy of the Basque Country doesn't create the General Assemblies as legislative chambers and it is also clear they are not entitled to adopt legal norms. The *Normas Forales* are, as a consequence, of administrative nature or, if whish, we could say they are of a hybrid nature as they are administrative norms in formal rank but laws in substance.

Nevertheless, the legislative power of such territories is executed in the legal framework of the Constitution, the Statute of Autonomy of the Basque Country and the Economic Agreement Law, although the limits within this latter law are, sometimes, extraordinarily wide and imply, in fact, some flexibility of the principle of legality in taxation issues, which is possible thanks to the aforementioned First Additional Provision of the Constitutional Law.

And, in any case, as long as there is not a reform of the Constitutional Law which regulates the Constitutional Court in order to make the appeals against the *Normas Forales* to this Court possible, legal regulations adopted by the General Assemblies, of administrative nature, are still subject to the constitutional and judicial review of the jurisdiction for suits under administrative law, making the requirement of protection of the judges and the courts [article 24 (1) SC] and the subjection of the public authorities to the legal framework effective. If such a reform took place, although the constitutional

judgement of unconstitutionality was competence of the Constitutional Court, this fact wouldn't prevent the ordinary Courts from the judgement of the constitutionality or of the observation of the Community Law concerning the compliance of the proceedings related to State aids, by means of the judicial actions against particular administrative acts in application of the *Normas Forales*, with the consequent lodging of the unconstitutionality ruling, in the first case, or the non-applicability of the *Normas Forales* in question in the second case, where appropriate.

Such *foral* legislative power finds another limitation in the European Community Law, which (as it's known) is of direct application and prior to the internal legal system, and the national judges, as Community judges of Common Law, are obliged to safeguard and protect.

Anyways, the conventional nature of the Agreement, reinforced in the currently in force one of 23 May 2002, with no time limit with the aim of providing an stable legal framework which guarantees its continuity under the Constitution and the Statute of Autonomy currently in force, doesn't prevent the *Normas Forales* from being examined in the light of the European law.

2. Secondly, the constitutional principles of autonomy, equality, unity and solidarity must be understood, taking into account the conditions required by the existence itself of the *foral* systems protected by the Constitution, which forces, of course, to establish a careful balance between such principles and the execution of the tax competences of the *foral* territories in the basis of the Constitutional case-law, which breaks when concerning State aids in the *foral* scope.

2.1. The compatibility between equality and financial autonomy (article 156 SC) leads the constitutional case-law to understand that the equality of the Spanish citizens doesn't imply the full fiscal uniformity in the whole of the national territory to be essentially, incompatible with the financial autonomy- remember autonomy is just the ability of each nationality or region to decide when and how to execute its own competences in the framework of the Constitution and the Statute- and even more in the case of the particular *foral* system. The principle of equality forces to guarantee equality in the basic legal positions of the citizens in relation with the taxation obligations, which prevents from the establishment of really privileged tax systems within the national territory.

Therefore, the basic obligation to sustain public expenditure stated in article 31 (1) of the Constitution can enjoy a different treatment in the Historical Territories, as long as the basic equality of all the Spaniards is safeguard and it doesn't imply a really privileged fiscal treatment.

2.2. The unity of the taxation system is of an instrumental nature in respect of the principle of equality of Spaniards and according to the Constitutional case-law is not incompatible with the taxation competences of the Autonomous Communities or with their budgetary and financial autonomy either. (Judgement 19/1987 of the Constitutional Court). And it is precisely the taxation inequity stemming from the

different systems on the whole- and not from a particular tax- what the Economic Agreement Laws of the Basque Country and Navarre are trying to control, establishing harmonization rules, among which the requirement of an overall effective fiscal pressure equivalent to that in force in the rest of the State can be pointed out.

2.3. The solidarity, correctly understood, is not a uniformity requirement and doesn't proscribe any difference. It is specially the verification of remarkable inequities in some parts of the territory compared to others which stands in contradiction with the mentioned principle. (Judgement 64/1990 of the Constitutional Court)

3. The free competition and the freedom of establishment are demands which are not only in the Community Law but in the internal legal system as well [article 139 (2) and 38 SC]. The Constitutional Court has set out the common market relies on two principles: the free movement of persons and goods all over the Spanish territory, which no authority could directly or indirectly hinder, and the equality in the basic conditions of the exercise of the economic activity, without which it is impossible to reach the level of integration in the national market the unity exigency requires. (Judgement 96/1984, 88/1986 and 64/1990 of the Constitutional Court)

Those same principles of free competence and freedom of establishment, essential in the European Union, are the ones to be taken in accordance with the case-law of the European Community Court of Justice and the criterion of the European Institutions in order to distinguish individually the articles within the *Normas Forales* which, after being classified as State aids, are susceptible of affecting the freedoms of competition and establishment.

This last thought introduces the exam of the so-called State aids under the Community Law.

## 2. State aids

State aids granted to certain undertakings or economic activities are a sign of the State interventionism in the economy, whose subsistence turns out to be difficult to be brought into line with the demands of a free market economy and, even, with the principle of equality.

Such aids are, generally, consequence of protectionist policies implemented by the States, being their main objection, to our concern in this lecture, the fact they benefit some companies to the detriment of some other making free competition difficult for the latter. Therefore, the European Union is specially interested in granted State aids and their supervision by the European Commission, restricting so the autonomy of the economic policies of Member States.

The establishment of a regime which guarantees competition is not distorted, as one of the principles on which the European construction relies, implies Competence Community Law legislates not only in order to prevent the distorting activities of

companies but of Member States as well. That's why State aids granted by them must be necessarily subject to control, in case that their granting could distort competition and affect the intra-community trade and, therefore, the common interest pursued by the European Union on the whole, that is, if they are incompatible with the common market.

The regime of "State aids" and its supervision by the European Commission is, therefore, a really relevant issue for the European law, necessary for the achievement of the Treaty's own targets and represents an important limitation for the autonomy of the economic policies of Member States, as they are mainly characterised by the use of public funds in favour of certain undertakings or productions causing, as a result, a distortion in intra-community competition.

### *2.1. State aids concept*

The article 87 of the Treaty states: *"… Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."*

The Commission shall examine whether aids adopted by Member States are to be classified as State aids under the above article, and therefore, they must inform projects granting or altering such aids to the Commission [article 88 (3) EC Treaty]

The ECJ case-law has set out the following elements in the notion of state aids: a) there must be some kind of advantage or benefit for undertakings in the measures; b) such measures must be adopted by the State, i.e., it must be granted by the State and through State resources; c) speciality or specificity in the aid, in the sense that must be granted to certain undertakings or productions; and d) distortion in competition or effect on the community trade- affecting competition or community trade between Member States. Later on we will examine these elements.

Moreover, undertakings, which consider being harm by the granted aids, can claim to the Commission and institute proceedings against it in the national or Community Courts (article 230 EU Treaty). To this respect the ECJ has considered undertakings competing with the benefited ones by an authorised aid by the Commission can question the validity of the authorising decision and, can, even, bring non-contractual liability actions against the Commission and exceptionally against the Council, by virtue of article 288 EU Treaty, in order to claim for any damage caused by the compatibility authorisation of an aid wrongly adopted.

In the same way, when the State or any public authority, referred to in article 87, grants a State aid and omits the notification obligation in article 88 EU Treaty, any competitor can bring an action in order to lay the infringement before the national

Courts. In this respect, the ECJ has specified it is a direct effect article and so the national judicial courts must safeguard the rights of the claimers in relation to the national authorities' possible ignorance of the mentioned article, coming to all the adequate consequences according to the internal law, not only concerning the validity of the acts which execute the aid measures or the recovery of the granted aids which infringed the notification obligation, but the possible provisional measures as well, and, even, the liability of the State for the damages caused in the performance of its duties.

As stated in article 88 EUT and in the Council Regulation 659/1999, when a State fails to observe the procedural obligations, either because it has omitted the compulsory notification of the aid to the Commission, or because the aid has been implemented before the Commission makes a final decision on its compatibility with the common market, or even because the aid has been granted in contradiction to the Commission's Decision, the Commission's right to make a decision in order to abolish the aid implies the ability to require the illegally granted aids. When the Commission says so, the beneficiary company or companies must give back the granted aid, as well as the interests, to the granting authority. In this respect, the ECJ has stated that the beneficiaries are required to meet the ordinary standard of care in order to check that the State aids supervision proceedings, under article 88, has been fully observed by the State.

On the other hand, if there was an incompatibility Decision of an aid issued by the Commission, it could be used before the national Courts and they could order the recovery of the illegally granted aids, as the provisions in article 87 EUT are bound to have an effect in the Member States legal systems.

To continue, let's examine the elements within the state aids concept in the light of the ECJ case-law.

a) They are advantageous or beneficial for undertakings or productions. The EU Treaty classifies as incompatible, and therefore, initially forbidden, any aid granted by a Member State, or through directly or indirectly State resources, favouring certain undertakings or the production of certain goods, when is proved they distort or threaten to distort competition or trade between Member States, regardless of any form-subsidies, fiscal benefits, export subsidies, repayment guarantee, real-state cession, exemption of social security contributions and so on- or of the economic activity involved.

As a consequence, the benefit can be of fiscal nature and it can be said a regulation, which states a reduction of the tax burden for the companies within its subjective scope, is an aid in the sense of article 87 of the Treaty.

Fiscal aids, in their different forms, imply, in short, a favourable treatment for a protectionist position, and that's why they are so restrictive and under the Community control in accordance with the Competence Law.

b) The measure must be adopted by the State, this is to say, granted through public resources, and therefore, its classification as State aid is also obtained when the aid is granted by infra-state territorial bodies- regional or municipal- or, even, by public institutions or government agencies which execute public competences or operate under the State's control.

As a result, the fact that particular aid measures are adopted or granted by territorial or infra-state bodies doesn't exempt the State's liability for the purposes of the Community regulation on "State aids", if they meet the requirements of the article 87 of the EC Treaty, being eligible to be classified as State aids. However, the fact that a measure is applicable in a limited geographical area is not enough in order to be considered selective (Spanish Supreme Court judgement of 9 December 2004, rec. 7893/1993 and 7 February 2006, rec. 2250/1997).

c) The speciality or specificity of the measures as they are favouring certain undertakings or productions. The specificity criterion is sometimes difficult to implement. It aims at distinguishing general measures, that is, the ones that affect the economy on the whole, which are in the fiscal harmonization scope, from specific measures, which are within the scope of articles 87 and 89 of the EU Treaty.

It is clear they must be of selective nature and must be granted in application of a particular measure in respect to a general measure, including, according to the ECJ's case-law, not only aids granted to certain undertakings or to specific productions sectors but to undertakings established in a particular region as well. In short, the application of the selectivity criterion requires examining whether, in the framework of a particular legal system, a national measure can be favourable to certain undertakings or productions in relation to some others which are in a similar legal or factual position.

This issue turns out really complex when it concerns fiscal aids and, therefore, it is necessary to determine when a fiscal measure is selective and so, if the rest elements in article 87 (1) of EUT are met, constitutes a State aid, or when, not being of such nature, it can be classified as a general measure, as a State measure, which favours to an undetermined number of beneficiaries, adopted in use of the competences reserved to Member States in the framework of their economic, industrial or labour market policy. In fact, although a measure is laid out in general terms, addressed to any potential beneficiary, it will be classified as an aid if it can be proved it affects just to a particular economic sector in practice.

As a result, we can clearly affirm that in order to be able to classify a fiscal measure as a State aid, it must be an exception of the application of the fiscal system in favour of certain undertakings in the Member State.

The fact that the beneficiary undertakings are not particular companies identified beforehand, it doesn't prevent from the application of article 87 of the Treaty, as long as they can be identified in the basis of certain elements, the establishment or the operation in a particular territorial scope.

This selective nature of the questioned measures, which objectively benefit the undertakings that potentially can apply them, whose costs may be reduced, is the main element to take into account in relation to the distortion of competition or the effect on trade between Member States, because the beneficiary undertakings export part of their production to the rest of the Member States; in the same way, when these companies don't export, the national production also benefits as the possibilities of companies from other Member States to export their products to that affected market are reduced.

As an initial approach to this problem, it could be said measures applicable in the entire territory of the State are the only ones which shouldn't be classified as specific, while, on the contrary, the ones applicable in a region or municipality, the ones specifically aiming at benefiting certain sector or undertakings or the ones favouring exclusively exported products will be *a priori* subject to article 87 of the EU Treaty.

Nevertheless, we must be aware of the incidence that in the analysis if this issue could provoke the existence of "fiscal systems and subsystems in the same territorial scope". That is to say, the existence of fiscal measures applicable in a certain limited territorial area of the State along with the general system applicable in the rest of the territory (common territory), as a consequence of the assignment of competences in fiscal matters.

Although this issue is only raised and not solved in the mentioned Judgement of the Supreme Court of 9 December 2004, the judgement of the ECJ of 6 September 2006 (Portugal Republic vs. Commission) does tackle it.

d) Finally, it is required distortion in competition or effect on the trade between Member States. The identification between the existence of advantages in a particular sector and the criterion of distortion in competition or effect on the intra-community trade is not always right, or in other words, the existence of a benefit doesn't always provoke a distortion in competition or in the commercial flows between Member States, and when this doesn't happen, we are not facing a "State aid" under the article 87 of the Treaty.

The importance of such aids for the European Community relies on their real impact or on their potential impact on commercial transactions or on the movement and establishment of persons and capitals. Or, said it in other words, the measure must be sufficient or appropriate to cause the effects the provision aims at avoiding.

The Commission has supported a wide interpretation of the expression "distortion in competition" in article 87 EU Treaty and has come to the conclusion public aids *per se* generally distort competition. However the ECJ has required the Commission to examine the likely effects on competition of the aids and sets out in its decisions the results of such examination along with the justification of such conclusions. However, the applicability of the State aids regime is only possible taking into account the real or potential distortion in competition, although, as we mentioned, there must be a link between the aid and the threaten or reality of the distortion. Therefore,

neither a real effect nor a particular level of effect is required in order to apply the State aids regime.

On the other hand, the distortion of competition is relevant in relation to the real or potential effect between companies in the same country or in the framework of the transactions between national companies and competitors from other Member States.

It cannot be considered an advantage distorts competition when the so called "*minimis rule"* is of application, i.e., the rule which establishes the maximum level of State aids not subject to articles 87 and 88 of the Treaty.

Consequently, once it is considered the requirements of article 87 are met, the measure in question must be classified provisionally as State-aid. However, there are some exceptions to the incompatibility between State aids and Community Law in article 89 (2) and (3) of the Treaty. Particularly, paragraph 2 lays out several cases that, in the basis of special solidarity, in which certain aids aiming at specific targets are compatible with the European Law. They are the so called "automatic exemptions", concerning which the Commission has not any authority as the compatibility is by operation of law and they are not applicable, of course, to the aids which are not pursuing social targets or aiming at making good for the damages caused by natural disasters or exceptional occurrences, as the European paragraph states.

Paragraph 3 enumerates the ones that can be considered as "possible exceptions" which require a Commission's decision according to the provision, and so the Commission is authorised to classify some State aids which pursue some specific targets- the economic development of depressed areas, the execution of some important project of Common European interest and so on- as compatible, making use of a wide decision power in order to, finally, authorise, by a qualified majority, State aids which are regarded as compatible with the Common Market.

## 3. Proceedings

It corresponds to the Commission the ability to determine the compatibility of any aid with the Common Market principles. This power is executed by means of the investigation and control system of granted or intended aids by the Member States, according to the terms of article 88 of the EUT.

– Ordinary procedure before the Commission: after the examination of the existing aids in the States by the Commission, if there is any doubt about the Community compatibility of a particular public aid, the Commission gives notice to the parties concerned to submit their observations. If the Commission confirms that, according to the terms of article 87 EUT, the public aid is not compatible with the Common Market or the aid is being abusively misused, it will order the State to abolish or alter it within a period of time to be determined by the Commission.

Afterwards, if the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may refer the matter to the Court of Justice directly.

– Exceptional procedure before the Council: on request of a Member State, the Council may, acting unanimously, in derogation of the provisions in article 87, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market if such a decision is justified by exceptional circumstances. If the Commission has already started the ordinary procedure, the fact that the State concerned has made its request to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said request, the Commission shall give its decision on the case.

Anyways, it must be noticed that in the light of the repeated ECJ's case-law, the powers of the national Courts, in case of non-notified aids, must focus on the confirmation of such element, and if the answer is positive, annul the concerning regulations or administrative acts because of having been adopted without observing the notification obligation to the European Commission laid out in article 93 (current article 88). Or, said it in other words, the national judge is not allowed to asses the compatibility of the aid measures with the European Law, in the cases assigned to the Commission by the Treaty, and the national judge can only decide, in order to apply article 88(3) of the EUT, if the measures are eligible to be within the "State aid" concept. That is, unlike the compliance of the procedure in article 88 EUT, article 87 doesn't have direct effect, which can be alleged before the national Courts.

National judges are competent, therefore, to interpret and apply the concept of State aid to the mere extent of assessing whether a State measure adopted without observing the control procedure stated in article 87 must or not be subject to such procedure. (ECJ judgement 21 November 1991, 1991/330).

From this Community viewpoint, the fact that some aspects of the tax regime laid out in the *Normas Forales* can throw some doubts on the compatibility with the European Law, doesn't imply there is any doubt about the legislative power of the representative Institutions of the Historical Territories, but the essence of the problem is finding out whether the execution of that power has caused a discriminatory result from the European Community Law. And that's because the exercise of the law-making powers of the territorial bodies in the States, whichever political territorial system is in force (centralism, autonomic or complex, included federal States) cannot avoid, as a consequence of the principle of direct effect and primacy of Community Law, the European community regime of "State aids".

Therefore, from the perspective of the Supreme Court, if a certain provision in a *Norma Foral* introduces a "State aid" is required, at least, the communication procedure to the Commission by virtue of article 93 of the Treaty [current article 88 (3)].

With respect of such consideration the Supreme Court issued its judgement of 9 December of 2004, in which the Supreme Court has set out wheteher some fiscal measures were or not within the concept of State aids. The Court could have certainly asked for clarifications to the Commission in order to overcome its doubts, where appropriate, about the classification of those fiscal measures as aids and could have referred a preliminary ruling to the ECJ concerning the nature of some of the measures -in particular, the adoption of a Corporate Tax rate lower than the one in the common territory-, but the truth is it was not obliged to do so and decided not to do it- and none of the parties in the procedure requested it before the judgement either-, inferring that in certain cases it was facing State aids, and consequently it annulled them, as the notification obligation to the Commission hadn't been observed for the aforementioned purposes- article 62 (1) (e) of the 30/1992 Law in relation to articles 87 and 88 of the EU Treaty.

The Supreme Court in the mentioned judgement of 9 December 2004 didn't give judgement about the compatibility, or not, with the Community Law of the *foral* fiscal measures assessed, classified provisionally as State aids as such a decision can only be adopted by the Commission, but, being under the conviction that those measures were eligible to be classified as State aids, and once the omission of the notification obligation to the Commission was confirmed, the Court annulled them only in the basis of procedural reasons.

## 4. A particular case: regional aids of general nature

The Court of Justice has given judgement on several occasions about the incompatibility of sectorial aids with the Community Law, regarding State aids as forbidden under articles 87 and 88 of the EU Treaty. However, there are some doubts whether such prohibition affects regional aids or not.

Although part of the scholars have affirmed the Supreme Court gives a positive answer to these doubts in its judgement of 9 December 2004, when assessing a tax rate and some fiscal benefits in the Corporate Tax of the Basque territories, which are annulled because of the lack of notification to the Commission, the truth is in such judgement the Supreme Court doesn't state expressly, and it couldn't be any other way, the compatibility of the fiscal measures in question with the Community Law or not, and it just classifies them provisionally as State aids for the purposes of article 92 EUT (current article 87 EUT) and annuls them due to procedural reasons, as we have already explained.

Up to the judgement of 6 September 2006 (Portuguese Republic v. Commission), the Court of Justice had never set out the cases when general measures amending fiscal regulations, such as national tax rates reductions limited to a geographical scope, are State aids under article 87 EUT.

Obviously, the selective nature of the measure will be, initially, the key to confirm the adoption of a different tax rate- lower- applicable in a particular geographical area

is within the aforementioned provision, as such measures will only benefit those undertakings which operate in that particular region or territory of the State.

According to the mentioned Court of Justice's judgement, in order to determine the selectivity of a measure adopted by an infra-State body, which seeks to establish in one part of the territory of a Member State a tax rate which is lower than the rate in force in the rest of that State, it should be examined whether that measure was adopted by that body in the exercise of powers sufficiently autonomous vis-à-vis the central power and, if appropriate, to examine whether that measure indeed applies to all the undertakings established in or all production of goods on the territory within the competence of that body.

There are three situations in which the issue of the classification as State aid of a measure seeking to establish, in a limited geographical area, tax rates lower than the rates in force nationally may arise.

- In the first situation, where the central government unilaterally decides that the applicable national tax rate should be reduced within a defined geographic area, the measure is selective.
- In the second situation, which corresponds to a model for distribution of tax competences in which all the local authorities at the same level (regions, districts or others) have the autonomous power to decide, within the limit of the powers conferred on them, the tax rate applicable in the territory within their competence, the measure is not selective because it is impossible to determine a normal tax rate capable of constituting the reference framework.
- In the third situation, when a regional or local authority adopts, in the exercise of sufficiently autonomous powers in relation to the central power, a tax rate lower than the national rate, which is applicable only to undertakings present in the territory within its competence, the measure won't be selective if it can be regarded as having been adopted in the exercise of sufficiently autonomous institutional, procedural and economic powers, in the sense we will examine later.

That is to say, in the latter situation, the legal framework appropriate to determine the selectivity of a tax measure may be limited to the geographical area concerned where the infra-State body, in particular on account of its status and powers, occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate.

In order that a decision taken in such circumstances can be regarded as having been adopted in the exercise of sufficiently autonomous powers, that decision must, first of all, have been taken by a regional or local authority, which has, from a constitutional point of view, a political and administrative status separate from that of the central government- institutional autonomy-. Next, it must have been adopted without the central government being able to directly intervene as regards its content-procedural autonomy-. Finally, the financial consequences of a reduction of the national

tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government- economic autonomy-.

From the aforementioned it is inferred, as the judgement of 6 September 2006 concludes, that in order to consider there is sufficient political and fiscal independence of the central government, as regards the application of Community rules on State aids, it is required that, not only has the infra-State body powers in the territory within its competence to adopt measures reducing the tax rate, regardless of any considerations related to the conduct of the central State, but that it assumes the political and financial consequences of such a measure as well.

Therefore- and this is just a mere personal opinion- accepting the Historical Territories are sufficient institutionally and procedurally independent from the Spanish State, as regards the adoption of general fiscal measures applicable in such territories, the main issue is to determine if they meet the requirement of being economically autonomous in respect to the measure in question, or said it in other words, if the revenue reduction provoked by the application of the measure has by no means a negative effect on the "quota", as laid out in the Agreement Law between the State and the Basque Country.

And this is so because the requirement of economic autonomy implies that a lower tax burden applicable in a particular region mustn't be cross- financed by the central government.

So, taking into account the Basque Country Institution's budgets- Autonomous Community and Historical Territories- are based on the tax revenues of the *Foral* Treasuries- not on the State's- and on the contrary, the Basque Country's institutions must transfer to the State and amount, known as Quota, in compensation for the non-assumed competences by the Autonomous Community of the Basque Country- calculated by applying an attribution rate which comprise such concept and some technical adjustments after which the payable Quota results- as laid out in the Economic Agreement Law, the most relevant element to be determined, as regards the economic autonomy, is if in the calculation of the Quota the hypothetical reduction in the *Foral* Treasuries' revenue will have any effect, reducing the payable amount, unless such autonomy was assessed in the basis of all the existing transfers and economic flows between the Basque Autonomy and the State, which will make the analysis of this issue really difficult.

If such an approach is not the right one, we should set out the fiscal regional- *foral*- measure of general nature in question is compatible with the Community Law. However, this compatibility will not automatically leave out the hypothetical incompatibility of such measures with the constitutional principles which limit the financial autonomy of the Basque Country- unity, equality, solidarity, free competition and freedoom of establishment, which will depend to a great extent of the scope and economic intensity of the fiscal measure as, in order to avoid such incompatibility, it would be essential to have a rational and justified argument and such measures should give a response to situations which lawfully can be considered as different, in accordance with the aforementioned constitutional case-law.

# The Economic Agreement and its compatibility with the European Law from the academic approach[1]

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Good afternoon:

First of all I would like to thank the Basque Studies Institute and, in particular, his director, the professor and collegue at the Faculty of Law, Mr. Santiago Larrazabal, for inviting me to take part in this Conference. My wish is not just mere politeness but sincere thanksgiving for being able to participate here, at least, as a listener to so many experts in the issue we are debating about and, among whom, I am certainly not included.

To my concern as a Community Law Professor, I will try my best to contribute with an academical prospection about the compatibility between the Basque Economic Agreement and the European Comunity Law. I am going to base it not only on the research and observation of the evolution of such compatibility but on my experience at University as well, coming basically from the subject *"Practicum"*, which I teach

[1] The original version of this speech is in Spanish.

to students in their 5th year at the Faculty of Law, and during which we spend part of our time analising and assesing some of the European Comission Decisions as well as some of the European Court of Justice judgements against the *foral* fiscal legislation.

As a preliminary comment, I am going to speak about the Economic Agreement, choosing some of its main features, which will help us to do a better evaluation of its confrontation with the European legislation.

## 1. About the Basque Economic Agreement

The Economic Agreement system is the continuity of a historical tradition aged over 800 years old, according to which the territories that form the Basque Autonomous Community nowadays are unique economic entities by comparison with the rest of Spain, due, specially, to their remarkable fiscal autonomy. Nowadays the fiscal autonomy is unlimited almost in every direct tax, for instance the Corporate Tax or the Personal Income tax. However, there is no capability to legislate the main indirect tax, Value Added Tax and the Excise Duties.

As a matter of fact, up to 1876 the Basque territories' degree of autonomy exceeded beyond the mere fiscal competences and they were real autonomous economic entities aside from the rest of Spain. Once Alava, Bizkaia and Gipuzkoa's traditional charts, *fueros,* were abolished in 1876, the only feature left from the previous system was the fiscal autonomy, which took shape into Economic Agreements[2].

This fiscal singularity presents the most distinct aspect from the rest of the Autonomous Comunities, which are subject to the Common Territory's regime, except for Navarre that, along with the Basque Autonomous Community, enjoys a *foral* direct taxation system. Therefore, the fiscal autonomy in the case of the Basque Autonomous Community is not based on a political and occasional agreement aiming at obtaining a unique fiscal status. Neither the insularity factor nor the distance from the national territory does it justify this pecularity. It is simply due to History and the continuity of the singular scheme of fiscal relations between the Basque territories and the State, which goes back to XII and XIII centuries.

This system of fiscal and financial relations is respected and protected by the First Additional Provision in the Spanish Constitution, which respects the "historic rights" of *foral* territories, named Basque Country and Navarre, and has been updated by article 41 of the Basque Statute of Autonomy (Organic Law 3/1979, December 18).

[2] For further analysis about the Economic Agreement and its evolution: I.ZUBIRI, "El sistema de Concierto Económico en el contexto de la Unión Europea" Círculo de Empresarios Vascos, Bilbao, 2000, pp. 19-66.

At present the Basque Economic Agreement is, as a result, the legal instrument the Historical Territories apply in order to regulate, collect and administrate the taxes within their fiscal systems, particularly, the Corporate Tax and the Personal Income Tax. The characteristics of the current foral system are inferred from the Basque Economic Agreement, enacted by Law 12/2002, May 23, which repeals the previous Agreement from 1981[3].

The Basque Autonomous Community's Economic Agreement system, together with the Foral Community of Navarra Economic Convention, is as unique in the Spanish State as peculiar in the European Union.

## 2. Its confrontation with the Community Law: a complex relation

Why and with respect to which aspects does the controversy between Economic Agreement and the Community Law arise?

Surprisingly, neither the Economic Agreement, in general terms, nor the Historical Territories' legislative capacity, in particular, contradicts in substance the European regulations to harmonize direct taxation.

In this respect, it should be remebered that the European Community Treaty (ECT) requires unanimity to adopt fiscal harmonization regulations regarding indirect and direct taxation, (ECT, articles 94 and 95, 2°). This strict legal and political requirement shows the great awareness fiscal harmonization arises in Europe. In practice, the need of unanimity and the difficulty to be obtained imply that the harmonizing Community power has seldom been implemented and so, with regard to Corporate Tax, there have been just three Directives adopted: the one regulating the merges and acquisitions regime, the one pursuing the elimination of double taxation in dividens paid among parents companies and their subsidaries, both dated in 1990, and the one related to the payment of interests and royalties adopted in 2003. It should be also added an international agreement among the Member Stares in order to avoid the double taxation problems originated by adjustments due to tranfer pricing policies: the so-called Arbitrage Convention from 1990[4].

However, this States' competence, as any other, is limited by the internal effectiveness of the European Community Law regulating close spheres to fiscality, in which the powers conferred by the Community legislation have been widely carried out, namely, the regulation of the fundamental economic freedoms and the interdict of State aids against free competition.

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[3] Official State Gazzete May, 24th 2002.

[4] Respectively, 90/434/CEE and 90/435/CEE Council Directives, 23 July 1990 (OJ L 225, 20 August 1990), 2003/49/CE Council Directive, 3 June 2003 ( OJ, L157 26 June 2003), 90/436/CEE Convention 23 July 1990, (OJ, L 225 20 August 1990.

### *2.1. First problems: the conflict with the Community legislation concerning the freedom of establishment and the free movement of persons*

This firts kind of conflict with the Community Law appeared in 1988, when the Foral Administrations *(Diputaciones Forales)* and the Parlamentary Assemblies *(Juntas Generales)* started to exercise their law-making power, regulating several fiscal incentives in the Corporate Tax Law in order to push the Basque economy which was going through a process of industrial reconversion. In particular, these first laws granted fiscal incentives to those companies that invested in the Basque Country more than 8 million pesetas in new tangible assets, with a depreciation period of five years, an internal financing of 30 per cent and representing at least 25 per cent of the company's fixed assets[5].

At that moment, the Economic Agreement in force, enacted by the Law 12/1981, May 13, adopted some connecting factors in order to determine which taxpayers were under the scope of the *Foral* Corporate Tax, keeping the exclusive capacity to legislate for non-resident taxpayers for the State. Therefore, the fiscal incentives were not applicable to permanent establishments (branches) of non-resident taxpayers operating in the Basque Autonomous Community; in consequence, non-residents should have established a subsidiary in order to benefit from the tax treatment applicable to resident companies.

The European Commission adopted a Decision against the Kingdom of Spain pursuant to which the Corporate Tax regulation in the Historical Territories regarding investments benefits was against the current article 43 of the EEC Treaty, related to the freedom of establishment, because of the exclusion of non-residents taxpayers' permanent establishments residing in any other Member State[6].

It should be pointed out that even though the Commission delivered a judgement about a State aids regime, it did not challenge the precise laws the Historical Territories were passing by nor did it require a comparison with the laws applicable in the scope of Common Territory or in any other Member State. Its accusation was based on the non applicability of the fiscal benefits to the non-resident taxpayers' permanent establishments from any other Member State. Accordingly, the Commission's Decision required the Spanish State, representative of the Historical Territories in the relations with the EC, to amend the Basque fiscal laws.

At first, there was a solution accepted by the Commission that consisted in acknowledging the right of the taxpayers residents in any other Member State to get the reimbursement by the Spanish State administration of the excess of payment made in comparison with the payment due under the scope of the Historical Territories legislation. However, the definitive solution was brought in 2002 by the renewal of the

[5] For further details about the 1988 fiscal measures: J.L. CRUCELEGUI, "Repercusiones del control de las ayudas públicas del País Vasco", Ekonomiaz nº 61, 2006, pp. 232-253.
[6] 93/337/CEE Commission Decision, 10 May 1993, OJ, L134, 3 June 1993.

Economic Agreement, in force at present[7]. Within this legal framework, the application of the *foral* direct taxes legislation is acknowledged to the non- residents taxpayers' permanent establishments in Historical Territories under the same circumstances, as it is applicable to resident companies.

In any case, the respect to the Community regulations about the common markek and, specifically, about the fundamental economic freedoms, stands the first parameter to measure the validity of the exercise of fiscal competence by the Basque *foral* Treasuries. In fact, subsequently, there have been some other fiscal measures compulsorily changed to be brought into line with the fundamental freedoms (thin-capitalization rules or controlled foreign companies regime)[8].

Notwithstanding, the most conflictive aspect of the Community Law from the perspective of the law-making power of the Historical Territories in direct taxation has been the defence of the free market and the State aid policy.

### *2.2. The incompatibility with the Community regulations regarding State aid policy*

The first main clash with the Community Law in this sphere took place in relation to the *foral* Laws, approved in 1993, aiming at pushing the economic activity and granting fiscal benefits for investments[9]. The legal representative of the State acted against these fiscal provisions before the High Court of the Basque Autonomous Community, which referred a question for a preliminary ruling to the ECJ about the compatibility of the *foral* Laws and articles 43 and 87 of the EC Treaty[10].

The preliminary ruling referred by the High Court of the Basque Autonomous Community was not eventually decided by the ECJ as the State's administration dropped the appeal and as a result the case was shelved[11]. Nevertheless, the Advocate General

[7] To this respect, it is important not to forget that at the same time the Spanish state administration was proposing a solution to the Commission in order to solve the discrimination based on the place of fiscal residence contained in the Basque legislation, it was appealing against them to the High Court of the Basque Autonomous Community. This jurisdictional instance dismissed the appeal but the dismissal was appealed to the Supreme Court, which finally annulled the *foral* regulations considering that they were discriminatory for the Spanish companies by comparison with the companies under the scope of the Historical Territories' fiscal regime.

[8] Read to this respect the analysis by I. ALONSO "Las normas fiscales vascas y el derecho europeo de la competencia" Ekonomiaz nº 61, 2006, pp. 256-259.

[9] This regulations contain some provisions granting several fiscal benefits, among which the following ones outstand: exemption of Corporate Tax for a period of 10 years, tax credit of 25 per cent for investments in fixed assets, tax credit of 30 per cent for R & D activities, tax credit of 25 per cent for investments abroad, tax credit of 50 per cent, tax deductible reserve for investments, tax credit of 15 per cent for creation of employment, tax credit of 10 per cent for professional training costs and tax credit of 25 per cent for capital increase.

[10] C-400/97, C-401/97 y C-402/97, Rec. 1997, pp. I-1073.

[11] Writ of the BAHC 2000, February 16th, Re.2000, pg. I-1091. Short after, in July 200, the State's administration and the Basque Autonomous Community came to terms, within the Joint Committee of

in the procedure, Mr. Saggio, had enough time to issue his Opinion on 1 July 1999. Essentially, he concluded that *foral* fiscal laws were eligible to be considered selective State aids as they are applicable just in part of the territory of the Spanish State, the Basque Country, and so they met the requirement of regional selectivity, and they contained more advantageous provisions than the general regime applicable in Spain.

It is obvious that the Advocate General made up his Opinion from Luxemburg, without bearing in mind or not understanding well the origin, the historical evolution and the core of the Economic Agreement: as we have asserted in the introduction, it is not an agreement in order to elude the applicability of Community regulations of free competence or to attract investors but a distribution of competence among different fiscal administrations. In fact, regarding the Corporate Tax, there are five different fiscal systems: the three applicable in the Historical Territories, the one applicable in the *Foral* Community of Navarre and the one of the State, applicable in the Common Territory. As a result, there is not an only general regime in Spain applicable to every Corporate Tax payer.

Anyhow, this litigation points out that the main aspect when one evaluates whether the Basque fiscal legislation regulating Corporate Tax is in line with Community Law lies in the appreciation of the selectivity requirement.

In its 1998 Notice on the application of the State aid rules to measures relating to direct business taxation[12], the Commission settled that measures applicable to all taxpayers in a particular State should be considered as general measures, leaving aside the existing political decentralization in some Member States.

Confining to the Communication literally, every measure applicable in a geographical area smaller than a Member State must be regarded as selective in the sense of article 87 ECT, and consequently, subject to the previous notification and authorisation obligations required. If so, it would be odd to find any fiscal regulation by the Historical Territories out of the State aid concept. Accepting this last conclusion would cause an implicit constitutional amendment[13], as the Spanish State Constitution itself admits the coexistence of 5 different fiscal regimes within the national territory. For that reason, the interpretation of the selectivity of a measure is a significant issue because, beyond the material incompatibility of the fiscal provisions, the political and legal autonomy of the Historical Territories is at risk.

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the Quota (*Cupo*), and agreed, among some other issues, that that State should drop every action against the Basque fiscal laws passed by before 2000, January 31st, and the Basque Autonomous Community, on the other hand, should drop all the appeals to the Supreme Court.

[12] DOUE C384 10th December 1998.

[13] It would be an amendment accepted implicitly by way of article 93 of the Spanish Constitution, according to which the State, by means of Organic Law, was authorized to adhere to the European Communities Treaties, transferring to them, under the establishing legal texts, competences arising out of the Constitution (legislative, executive and judicial). When transferring these competences, the consequences of their exercise were implicitly accepted.

If the conclusions of the Advocate General, Mr. Saggio, had been welcomed by the ECJ, the Historical Territories would have lost their capacity to legislate Corporate Tax issues. Nevertheless, as we mentioned, the court decision wasn't announced so the problem, at least for the time being, was solved.

Subsequently, the European Commission, in its consecutive reactions against the Historical Territories fiscal measures, strong ones specially from 2000, didn't mention, in its value judgements, the Advocate General's conclusions nor did it interpret the selectivity element from a regional point of view, as it could be interpreted according to the literal tenor of its 1998 Communication. On the contrary, at the time of justifying and declaring the incompatibility between the *foral* fiscal measures, the Commission based his decision on the material selectivity criterion, in other words, the one which causes an objective difference between the beneficiaries of the aids and some other entities which cannot opt for them, or the one due to a discretional appreciation by the fiscal administration when it verifies that the requirements are met or when it grants the intensity of the aid. An example would be the 45 per cent tax credit for investments, which requires that the amount of investment exceeds 16 million euros. It is obvious that, including this condition, its objective scope is constrained, as it can only be granted to big enterprises able to make this sort of investment[14].

Moreover, Decisions, by the Court of First Instance as well as by the ECJ, confirming the Commission Decisions about this kind of fiscal measures, did not question the capacity of adopting general provisions applicable in a geographical area smaller than the territory of the Sate in question[15]. Hence, it can be said that the Community justice, even though it has established the incompatibility of the *foral* provisions, has safeguarded the political and legal autonomy of the Historical Territories.

The court Decision on the Autonomous Region of Azores Islands[16] has backed, in an indirect way, up the fiscal self-government of Historical Territories and of some other European regions with similar competences. Formed in Great Chamber, which is not frequent and gives more significance to the decision, the ECJ has settled the conditions to make compatible fiscal provisions adopted by infra-state bodies with the Community regulations on State aids.

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[14] I. ALONSO, op.cit. footnote 7, pp. 264-265.

[15] Read to this respect Court of First Instance Decisions 6 de March 2002 and ECJ 11 November 2004 in relation with the application of tax holidays and a tax credit of 45 percent of the investments made by Ramondín enterprise, against which the Commission reacted in 1997 analysing these incentives and issued the Decision 2000/795/CE considering such incentives as incompatible State aid with the Community regulations and policy of free competence. Respectively, joint cases 92/00 y 103/00, Ramondín, Alava Historical Territory and *Foral* Council Government against European Commission, Rec. 2002, p. II-01385 and joint cases C-186/02 y 188/02, Ramondín, Alava Historical Territory and *Foral* Council Government against European Commission Rec. 2004, p. I-10653.

[16] C-88/03, Portugal against Commission, Judgement of the Court 6 September 2006. The text of the judgement can be read en http://www.curia.europa.eu/es/contente/juris/index.htm

The key question in this case, and of special interest for the Basque Autonomous Community and for Navarre, was the determination of which geographical area, that is, the region or the whole of the national territory, has to be taken into account when evaluating the general or selective nature of fiscal provisions.

The ECJ chose the first option, rejecting so the European Commission's allegation, which in this case sustained the regional selectivity thesis. According to the jurisdictional instance, infra-state bodies can adopt their own fiscal regimes, first of all if they enjoy a political self-government statute recognized constitutionally (institutional autonomy). Secondly, the regional fiscal provisions must be adopted without the intervention of the government of the State (procedure autonomy). Thirdly, the reduction of the public income produced by the adopted fiscal measures must not be offset o cross-subsidised by the State (economic autonomy).

The Basque Autonomous Community and Navarre meet these three principles or requirements but they aren't met in the Azores Island Region because they do not meet the economic autonomy as the ECJ finally judged.

Leaving aside the final judgement and the consequences that can be brought out, what is really relevant is the balance the ECJ keeps between the Community Law and the traditional principle of autonomy of the Member State and the respect for their constitutional framework, admitting this way the existence of the "asymmetrical devolution systems", that is to say, that some infra-state bodies have the taxation power decentralized but not all the rest of their competences[17].

However, from a legal approach, this ECJ judgement does not solve the problem of the likely material incompatibility of the Basque legislation. There are already enough Commission Decisions and judgements from Luxembourg instances to know which aspects of fiscal benefits based on the Economic Agreement are not in line with the Community Law. For this reason, the *Foral* Provincial Councils should notify the drafts of the Laws they propose if there is any discrimination in their scope of application or if they leave any margin of discrimination in the concession of the benefits. Moreover, the obligation of refunding the incompatible State aids, granted from 1993 to 2000[18], is still pending.

At this time of the analysis, we wonder: where does the main cause of the legal insecurity and of the precarious state of company taxation in the Historical Territories lie? It is clear it doesn't lie in Brussels or in Luxembourg because this is not a mere confrontation with Community Law, which could be solved as it has happened in similar cases affecting some other Member States against which the Commission has acted. The main problem is an internal one: it is the permanent litigation precipitated in the

[17] Read comments on this Court Decision by I. ALONSO , op. cit, footnote 7, pp. 268-271.

[18] The ECJ in judgement 14 December 2006 confirmed the Spanish kingdom infringement because of not having recovered the State aids declared incompatibles with ECT articles 87,1 by the Commission (joint cases C-485/03 a C-490/03, Commission versus Spain). The judgement can be read in http://www.curia.europa.eu/es/content/juris/index.htm

beginning by the State Administration and, lately, by the highest representative politicians in the neighbouring Autonomous Communities and even by associations of entrepeneurs coming from these Communities.

## 3. The appeals in the internal scope: the questioning of the fiscal law-making power of the Historical Territories and the caused legal insecurity

In July 1999 when Mr. Saggio issued its Opinion in the preliminary ruling proceeding referred by the High Court of the Basque Autonomous Community, there were several appeals against the 1996 *foral* Corporate Tax Law pending for judicial judgement. In one of them, the Association of entrepreneurs from La Rioja founded his objections mainly on Community Law.

In September 1999, the High Court of the Basque Autonomous Community rejected this objection concluding there was no incompatibility with the Community State aids regulations.

The Association of entrepreneurs from La Rioja appealed against the High Court dismissal to the Supreme Court, which was solved on 9 December 2004, accepting its thesis. Besides considering the *foral* provisions as State aids due to their regional selective nature, coming from the fact that they regulated a more beneficial fiscal treatment than the State's regulations, the Supreme Court annulled them for being a contradiction in terms with ECT article 88 (1) and for the lack of previous notification to the Commission.

It is not the first time the High Court of the Basque Autonomous Community and the Supreme Court reach to complete disparate judgements on the same case. Nevertheless, leaving aside the conceptual and legal opinion that their decisions may deserve, both judicial instances did their duty as Community judges, according to the jurisprudence of the ECJ itself, so, anyway, their independency and their task, which is not an easy one in these cases, must be respected. At present, the decision on the appeal for legal protection, which will be shortly issued by the Constitutional Court, is expected.

Nevertheless, it seems the permanent threaten to the *foral* fiscal legislation, which has been especially intense for the last two years, and the legal insecurity that causes will not end even after a favourable judgement of the Constitutional Court. For this reason, I believe some other ways different from the judicial one must be explored.

## 4. Alternatives for a higher stability and for a peaceful future

### *4.1. Cooperation and mutual confidence*

In this scenario of permanent tension the need for political understanding and cooperation seems to be obvious. The ECT contains the principle of cooperation

among States in article 10[19]. The Spanish Constitution doesn't foresee it specifically although it has been established by the constitutional case-law as the principle which guarantees the fair exercise of the competences attributed to the State and to the Autonomous Communities, between both of them and among the Autonomous Communities, in a way that every entity in the State takes into account the interests of the rest at the time of exercising its competences[20].

### *4.2. A stronger judicial protection of the foral Laws*

Nowadays the *foral* laws *(Normas Forales)* passed by the General Assemblies *(Juntas Generales)* are reviewed in the ordinary jurisdiction. This fact is a legal and procedural anomaly in comparison with the rest of the laws of the same content passed by the central State Parliament, the Parliaments of the *Foral* Community of Navarre and of the other Autonomous Communities, whose revision belongs to the Constitutional Tribunal.

At the end of November 2006, an agreement between the Basque Government and the central State Administration to provide stronger judicial protection to the *foral* laws was reached. According to it, that requires an amendment of the Organic Law of the Constitutional Court, the fiscal provisions of the *Foral* Treasuries can only be judged by the Constitutional Court, leaving them out of the competence of the ordinary Courts. This fact would reduce the active legitimacy of the potential claimants, and as a result the State's and the Autonomous governments directly affected would be, among others, the main legitimated actors.

So far, this stronger procedural restriction hasn't made a good impression on La Rioja Autonomous Community, where some complaints against this amendment have been raised announcing a predictable action to the Constitutional Court.

### *4.3. Participation of the Basque Autonomous Community and Navarre in the ECOFIN Council*

The possibility of participating in four of the EU Council groups was open to the Autonomous Communities roughly a year ago[21]. So this is the time to negotiate with

[19] EU Treaty article 10: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

[20] For a study on the cooperation principle and the Constitucional Court case law, read J.LASO PEREZ, "La cooperación leal en el ordenamiento comunitario" Ed. Colex, Madrid 2000, pp. 117-144.

[21] 9 December 2004 Agreement reached at the Conference for Affairs Related to the EU about the participation of the Autonomous communities in the working groups of the EU Council and about the

the State the participation of a Minister of the Basque Autonomous or of Navarre governments in the Ecofin Council, when proposals of new direct taxation harmonization regulations are going to be discussed. This would include the participation of experts in the subject ECOFIN working groups, as well as in the COREPER.

This would be a way of preserving the *foral* fiscal autonomy in future or, at least, of expressing and fighting directly for their own interest in these matters.

### *4.4. Permanent discussion and communication with the Commission*

Not only at a technical level but at a political as well, it would be advisable to be in permanent connection with the General Directorate of Competence Policy. This communication could be carried out both through the Official representative office of the Basque Autonomous Community in Brussels or through the Autonomous Affairs Commission, within the Permanent Representative Office of the Spanish Kingdom in Brussels, whose rotating members are, since 2005, public officers designated by the Autonomous Communities[22].

It is a question of explaining the fiscal singularity of the Basque Autonomous Community, its political and historical sense, its sensibilities and interests so, the Commission, somehow, understands its peculiar status, similar to the one in some regions of other Member States, and takes notice of it when it settles the last trends in free competition policy[23].

Than you for your attention.

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autonomous representation system in the commissions of the EU Council (see 28 February 2005 Resolution of the Territorial Cooperation State Secretary, published 16 march 2005 in the Official State Gazette-BOE-).

[22] Regarding this new composition, see the 9 December 2004 Agreement reached at the Conference for Affairs Related to the EU about the Autonomous Affairs Commission within the Permanent Representative Office of the Spanish Kingdom in Brussels, published 16 March 2005 in the Official State Gazette (BOE).

[23] In 2005, the Commission published the State aids action plan (2005-2009), main document in which the necessity of carrying out a major review of the aids policy in order to adequate it to the Lisbon Summit challenges and to the new scenery after the latest incorporations. This plan and the measures that will cause are going to determine the extent and the content of the support policies for companies in the Member States.

# The participation of regional institutions in EU bodies dealing with tax regulation[1]

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## EU bodies dealing with tax regulation

In 2004 the European Court of Justice held that the term Member State, for the purposes of the institutional provisions of the Treaty, 'refers only to the government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities irrespective of the powers they have'[2]. The reason being, according to the Court, that to hold otherwise would be to upset the institutional balance of the Community. This statement of the Court reflects the problems faced by regional governments, even those endowed with extensive legislative and administrative powers, in accessing the decision making bodies of the EU. The EU institutional provisions simply do not provide the possibility of extensive regional involvement in key decisions even when the national constitutional

[1] Original version.

[2] Case C-87/02 Commission v Italy [2004] ECR I-5975.

structure respects an internal division of competences between national and infra-state entities.

For the purposes of tax regulation, the key EU bodies concerned are the Council (particularly ECOFIN) along with a wide variety of working groups, the Commission and the European Court of Justice. The type of measures that can be adopted vary between measures of hard law, typically in the form of directives based on unanimity and soft law provisions in the form of guidelines or notices (collectively known as communications for the purposes of this paper). Article 93 EC provides that 'provisions for the harmonisation of legislation concerning turnover taxes, excise duties or other forms of indirect taxation' may be adopted. Article 94 provides that directives may be adopted in matters of direct taxation where measures are required to protect the establishment or functioning of the internal market. Directives are hard law measures adopted following the Community method as laid down in the Treaty involving the preparation of a draft by the Commission and the adoption of the final text by either the Council or the Council jointly with the Parliament. In the case of both Articles 93 and 94 the consultation procedure is followed meaning that both the Parliament and the Economic and Social Committee are consulted on Commission proposals and the Council makes the ultimate decision on the text. Directives require to be implemented by all the Member States according to the choice of form and method chosen by that State in light of its own internal legal order. Where necessary, the European Court of Justice might be called upon to interpret the provisions of the various directives and might also be brought into play in infraction proceedings where a Member State fails to implement the provisions of a directive in its own internal legal order either in accordance with the provisions of the directive or on time.

Much EU activity in the area of tax regulation does not however take the form of hard law measures. For example, the Commission's Guidelines on national regional aid[3] or the Commission's notice on State aid in the field of direct taxation are measures of soft law designed to coordinate rather than harmonise national tax provisions or influence the fiscal policies of the member States. In matters which are politically sensitive there is a preference for soft law measures, sometimes as a prelude to harder legislative measures and sometimes as an alternative to them.

## Fiscal decentralisation in the EU

Tax regulation within the Member States is typically the function of the central government. This is sometimes for historic reasons but also because of the need for a uniform fiscal policy within a State whose central government acts to redistribute resources to ensure some form of equality within the State. There has also been the view that a larger fiscal unit is more capable of withstanding economic shocks and

[3] OJ 1998 C 74/9 as amended OJ 2000 C 258/5.

therefore provides better insurance for the citizens of the State. Whilst there are examples of fiscal decentralisation in the EU, the most common model is not fiscal decentralisation. Nonetheless examples of fiscal decentralisation are found in the EU in Spain and to some extent in Portugal, Finland and UK. In the case of the Basque country and Navarre, for historic reasons, full fiscal autonomy is ensured under the terms of the Economic Agreement. Fiscal autonomy is defined as a situation where the regional authority is responsible for raising the tax which it spends and where there are no fiscal transfers from the central to the regional government. Almost at the other end of the fiscal decentralisation spectrum, is the case of Scotland, where there is provision for a limited tax varying power for income tax only where the Scottish Parliament has the power to raise or lower income tax by up to three pence in the pound[4]. This is a model of an extremely limited fiscal decentralisation (and in fact the tax varying power has never been used). Under devolution, there is no direct link between Scottish citizens and the spending departments of the Scottish Executive. A bloc grant is provided to the Scottish Executive based on the Barnett formula. 'The formula is a way of sharing changes (not the level) in public spending plans between the participating countries of the Union. Scotland receives a population-based share of the total charges in planned spending on analogous programmes in England or England and Wales. Since the formula is based on population shares, it does not necessarily reflect spending needs'[5]. The Azores and Madeira archipelagos of Portugal enjoy regional fiscal autonomy. However the finances of the autonomous regions are coordinated with state finances under the principle of national solidarity. The system governing the Azores and Madeira might usefully be defined as a form of fiscal federalism since a considerable proportion of revenue is raised and spent within the region although there are budget transfers from the central government to ensure national solidarity.

Given this variety of models or regional fiscal powers, it is perhaps not surprising that those (relatively few) regions which do have extensive powers have experienced difficulties in accessing the EU so as to influence policy in the area of tax regulation.

## The Council

The key EU institution in this respect is the Council of Ministers, particularly in its ECOFIN formation when the national finance ministers (in the UK the Chancellor of the Exchequer) meet together both as a policy making forum and as a legislature. Originally the Council of Ministers was composed of a member of each government of the Member States[6]. This formulation excluded representation of the Member State by anyone other than a member of the national government. It was amended by the

[4] Scotland Act 1998 Section 73.
[5] R.MacDonald and P.Hallwood 'The Economic Case for Fiscal Federalism in Scotland' (Glasgow, Fraser of Allander Series) p. 50.
[6] Article 146 of the Treaty of Rome.

Maastricht Treaty under pressure in particular from the German Länder. Membership of the Council is now open to representation of each Member State 'at ministerial level authorised to commit the government of that Member State'[7]. It is therefore possible for a minister from a regional government to attend and vote in the Council of Ministers. However the regional minister must represent the entirety of the State and cannot represent a purely regional interest. He or she must be in a position to commit the Member State to a particular course of action or a particular piece of Community legislation.

National constitutional rules rather than Community law govern the choice of ministerial representation in the Council of Ministers. In the UK it is always the lead UK Minister who decides on the composition of the ministerial team which attends Council meetings. Scottish Ministers have attended Council meetings on a number of occasions when devolved matters are under discussion, for example, the fisheries Council or the Justice and Home Affairs Council, in recognition of the importance of these Council formations to Scottish interests. No Scottish Minister has ever attended or sought to attend ECOFIN since, with the exception of the tax varying power mentioned above, fiscal, economic and monetary policies are specifically reserved to the UK government under the UK devolution settlement[8].

National rules must also determine how a particular Member State determines the stance it will take on any particular aspect of EU policy. National solidarity within the Council must be respected since the Council is not designed for the representation of internal territorial interests. In the UK there have been suggestions that the votes allocated to the UK in the Council might be divided on a proportional basis to the devolved governments but these have been dismissed as being unrealistic politically and, without the agreement of other Member States, unworkable in practice. Within the EU setting therefore the function of a regional Minister in the Council is to represent the agreed UK line even if he or she believes that the UK position is detrimental to the position of the region in question. It is for the regions to persuade and negotiate with other regions and the central government an appropriate national position prior to meetings in Council. Within the Member States there are a variety of fora in which such negotiations take place. In the UK this tends to take place in discussions between officials rather than at the ministerial level although a Joint Ministerial Council (Europe) meets regularly to discuss EU matters of common interest[9].

The Council of Ministers is supported in its work by COREPER, the Committee of Permanent Representatives and a host of Working Groups and Committees. Although some working groups might comprise political representatives, such as that convened by Dawn Primarolo to supervise the operation of the Code of Conduct relating to business taxation and reporting directly to the Council, the majority of the

[7] Article 203 EC.
[8] Scotland Act 1998 Schedule 5 Section A1.
[9] A Trench, 'Devolution: the withering away of the Joint Ministerial Committee' [2004] Public Law 513.

supporting committees, including COREPER, are made up of officials from the civil services of the Member States. Again the mechanisms in place within the Member State will determine how far civil servants working within the devolved regions will be able to participate in these working groups. In the UK, officials working within the Scottish Executive are employed within a unified home civil service. Scottish Executive officials may therefore be called upon to participate in Council working groups as part of the UK team. They will also (or should also) be copied into information on EU matters as a matter of routine whenever an EU matter overlaps with a devolved competence. UKRep, the UK diplomatic representation to the EU works with the Scottish Executive EU Office in Brussels and both form part of the UK diplomatic representation to the EU. In principle this gives Scotland access to the EU institutions although the Scottish Executive EU Office must work in support, rather than against UKRep. In other Member States where there is not this concept of a unified national civil service, it is much more difficult for a region to gain access to Council working groups. The routine exchange of information is less likely to take place, the copying in of documents and correspondence is less likely to happen and officials might be tempted not to involve their regional counterparts into information that might assist them in understanding and influencing EU level developments of concern to them. Within the UK, given that fiscal policy is reserved, Scottish Executive officials are unlikely to become involved in working groups relating to tax regulation or any other aspects of fiscal, economic or monetary policy.

## The Commission

Whereas the function of the Council is to provide a forum in which the Member States' interests are represented, the Commission is intended to be the institution representing the interests of the EU itself. Commissioners are in principle chosen for their independence and their loyalty is to the College of Commissioners. They are accountable collectively to the European Parliament. Neither national nor regional interests should predominate within the Commission. The Commission is responsible for initiating legislative acts, most often in the form of draft directives, in the area of tax regulation. As the guardian of the Treaty the Commission is also responsible for ensuring that Community law is observed. In that respect it has both an educative and an enforcement function.

The Community method of legislating requires that the Commission initiates the legislative procedures. The Commission publishes White and Green papers prior to issuing a draft directive and seeks to engage in wide consultations. There has until recently been no systematic attempt to consult specifically with regional level governments although as part of the Commission's Better Regulation Strategy it has attempted to engage in a systematic dialogue with regions. It is too early to assess whether this systematic dialogue can provide a genuine mechanism for consultation and participation of regional government at an early stage in the Community legislative

process. Regions can also seek to engage in dialogue with the Commission via the Committee of the Regions, another Maastricht innovation. However the Committee of the Regions as such does not have the right to be consulted on matters of tax regulation and its contribution in the Community process is widely recognised as being weak. That said, if regions themselves seek to engage in dialogue with the Commission on matters which affect their interests, the Commission is open for such discussion. However the stronger voice is inevitably that of the Member State and the Commission is unlikely to propose measures which prove unacceptable to the Member States in the Council. Furthermore, in matters of tax regulation, the Commission has to date argued for further centralisation of tax law in Europe and has been resisted by some Member States, including Spain and, perhaps most strenuously, the UK. There is no evidence to date that the Commission favours fiscal decentralisation and regions such as the Basque Country and the Azores have found the Commission to be unsympathetic to the concept of differential tax regimes within a single Member State.

The educative function of the Commission is crucial in areas where Community law is complex or in a period of rapid transition and development. By the use of Communications in various forms, the Commission sets out its interpretation of Community law to act as guidance to the Member States governments and national courts as well as to economic operators. These Communications might take the form of Opinions, Notices, Communications or Guidelines and form part of the large volume of soft law instruments developed at the level of the EU. These Communications are very often in response to the need to clarify the case-law of the Court of Justice when the Court has been called upon to interpret aspects of Community legislation in light of specific factual circumstances. Often the case-law can appear to be confused or contradictory or occasionally it may go beyond the understanding of the legislation both by the Member States and the Commission itself. In these circumstances it is often helpful for the Commission to attempt to codify the principles and interpretations developed by the Court into a more accessible document. Given the nature of the task, neither regional nor national governments are able to influence the Commission as it develops these instruments.

However, the Commission's interpretation of the case-law of the Court might itself be flawed and its interpretation can be challenged in subsequent cases before the European Court of Justice. A good example of this is found in the case brought by the Portugal against the Commision in relation to tax measures adopted by the Azores[10]. Article 17 of the Commission's Notice on State aid in the field of direct taxation was in issue in that case. Article 17 provided that 'only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 87 (1) EC'. The reference framework within which to judge whether some operators could benefit from a scheme against others who could not, according to the Commission,

[10] Case C-88/03 Portugal v Commission judgment of the Court of 6 September 2006.

could only be established in relation to 'normal' tax rates and normal tax rates must be those applied by the central government of the Member State. This interpretation was disputed by Portugal and by the UK intervening in this case. It was the arguments of the UK which won the day in the case and they are worth repeating in full:

> "where, as in this case, the legislature of an autonomous region sets tax rates which apply uniformly across the region concerned but are lower than those applied by decision of the national legislature to other parts of the Member State, the selectivity of the measure cannot be inferred simply from the fact that the other regions are subject to a different level of taxation. Depending on the circumstances, it may be appropriate to determine that selectivity in the context of the region itself and not in the context of the Member State as a whole. Such will be the case whether there is a constitutional system which recognises sufficient fiscal autonomy so that a tax reduction granted by a local authority may be regarded as being decided by an autonomous or devolved region which not only has the power to take that decision but which must also bear the financial and political consequences of it…
>
> Therefore… before classifying regional tax rates which are lower than the national tax rate as State aid, the Commission should have had regard to the degree of autonomy of the regional or local authority that established the reduced rates taking into account a number of factors, such as the fact that jurisdiction in tax matters is part of a constitutional system conferring a significant degree of political autonomy on the region, the fact that the decision to reduce the tax rate is taken by a body elected by the population of the region or accountable to that population, and the fact that the financial consequences of that decision are borne by the region and are not offset by subsidies or contributions from other regions or from Central Government."

The UK argued that its system of devolution, in regard to Scotland and Northern Ireland, would be called into question should the Court not respect these principles. The Commission argued against the UK, rejecting any argument that different circumstances might justify tax reductions. This, according to the Commission, would go against the case law of the Court since the Court had already determined that aid is defined in relation to its effects on undertakings rather than on the aims of the measure concerned.

The Court held that the test to be applied to any measure is whether any scheme was such as to favour certain undertakings or the production of certain goods, irrespective of whether the measure was one taken by a Member State or a regional government. Such measures are selective. However the Court accepted the arguments put forward by the UK that the reference framework might not always be the full territory of the Member State. The fact that different tax rates apply does not necessarily mean that a measure is selective for that reason alone. The Court then set out the parameters (the different circumstances test rejected by the Commission) to test the legality of regional tax variations. The Court held:

> "It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the

result that, by the measures it adopts, it is that body and not the Central Government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate. In such a case it is an area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned."

This statement shows a genuine and perhaps unusual deference by the Court to the constitutional traditions and institutions of the Member States. It also recognises that regional fiscal policy may have a role to play in pursuing the objectives of a regional, as opposed to a central, government. However the Court did not give *carte blanche* to regional governments in pursuing their objectives. Instead, it laid down the criteria to be applied to regional fiscal regimes. The Court established four tests to be applied:

– Whether the measures adopted by the regional government in the exercise of powers that are sufficiently autonomous vis-à-vis the central power: typically the regional government occupies a 'fundamental role in the definition of the political and economic environment in which the undertakings on the territory within its competence operate'. It will have a separate and political and administrative status.
– Whether the measure applies to all undertakings within the region.
– The measure must have been adopted without the central government being able directly to intervene in determining the content of the measure.
– The financial consequences of the measure must be borne by the regional government and not offset by aid or subsidies from other regions or central government.

This case demonstrates that the interpretation of the Commission of the case-law of the Court might not always be an accurate understanding of that case-law and that the Court is ready to refresh its own case-law in light of new arguments. It also demonstrates the absence of a regional voice before the Court. The protagonists in the case were the Member States, Portugal as a party and the UK as intervener and the European Commission. It was the Member States who were required to defend regional interests and not the regions themselves.

The Commission ensures that Community law is enforced by the use infraction proceedings against the Member States for their failure to comply with Community law under the terms of Article 226 EC. This is the case not only in questions of tax regulation but more generally. In such infraction proceedings a Member State cannot rely on the failure of a regional government to defend its own failure to ensure that directives are implemented fully and on time[11]. The responsibility of the Member State

[11] Case C-33/90 Commission v Italy [1991] ECR I-5987 and also, to that effect, the Order of the Court in Case C-180/97 Regione Toscana v Commission [1997] ECR I-5245.

towards the Community exists even where the organs of the central government, according to the State's own constitutional law, are not empowered to compel the regions to implement Community legislation 'or to substitute itself for them and directly implement the directives in the event of persistent delay on their part'[12]. This approach reflects the 'idea that the Community concept of the State is legally indivisible, as in international law, an approach that the Court has consistently held in relation both to infraction proceedings and in cases relating to State liability'[13]. It is up to each Member State to involve the regional governments in relevant cases before the Court of Justice as and when required by national constitutional rules. In the UK where cases may involve a failure on the part of a regional government to comply with Community law and infraction proceedings are brought against the UK it has been agreed that the regional government must be involved in the preparation of submissions and will incur the financial liability for any failure on its part to comply with Community law[14]. Should infraction proceedings be brought against the UK because of the operation by the Scottish Parliament of its tax varying powers, these rules would apply.

The Commission exercises its own decision making power in relation to the application of the State aid rules. Article 88(2) EC provides that it is the task of the Commission to supervise the application of the State aid rules. Where the Commission determines that a measure is incompatible with the common market, it may, having given notice to the Member State concerned, decide that the State must abolish or alter the measure. Where a State does not comply with the decision of the Commission, the Commission may bring the Member State before the European Court of Justice. Where the matter concerns an infraction by a regional government it is the State itself and not the regional government which the Commission must bring before the Court to enforce its decisions[15].

## The European Court of Justice and the Court of First Instance

For the past twenty years or so, regional governments have sought to establish a right, independent of the Member State, to challenge the validity of Community legislative acts before the European Court of Justice. The Court of Justice has repeatedly rejected the claims of the regional governments that they should be equated with the Member States for the purposes of bringing an action for annulment under Article 230EC: the rationale of the Court being that 'it is not possible for the European Communities to comprise a greater number of Member States than the number of

[12] Joined cases 227,228 and 229/85 Commission v Belgium [1988] ECR 1.
[13] R W Davis, 'Liability in damages for a breach of Community law' (2006) 31 European Law Review 69.
[14] Concordat on Co-ordination of European Union Issues, B3.22-25: at http://www.scotland.gov.uk/library2/memorandum/mous-06.htm.
[15] For example see Joined cases C-485/03 to C-490/03 Commission v Spain judgment of the Court of 14 December 2006 not yet reported in the European Court Reports.

States between which they were established'[16]. The Court also held that the annulment action mirrors the infraction procedure where the Member State is held responsible for the failure of regional governments to comply with Community law. Thus even where a Community legislative act affects the national constitutional prerogatives of a regional government the regional government does not have standing to challenge the validity of the Community act in the same way that is open to the Member State.

However where national constitutional law recognises a regional government as having legal capacity or personality it may bring an action for annulment challenging the validity of a decision addressed to it or a 'decision, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern' to it under the terms of Article 230(2) EC. Such actions are heard in the Court of First Instance. The terms of Article 230(2) EC preclude any action for annulment of a directive and for the most part Community legislative acts in the area of taxation are in the form of directives. The Court of First Instance has also held that a regional government cannot challenge the validity of a regulation unless it can show direct and individual concern in the regulation concerned. A regulation empowering the Commission to adopt decisions directed at the governments of Spain, Germany and Greece authorising payment of aid to shipbuilders could not be challenged by the Autonomous Community of Cantabria, even though the decision would adversely impact upon Cantabria. The Court held:

> Reliance by a regional authority of a Member State on the fact that an application or implementation of a Community measure is capable generally of affecting socio-economic conditions within its territorial jurisdiction is not sufficient to render an action brought by that authority admissible[17].

The Court of First Instance applies the tests of direct and individual concern strictly in cases where a regional government seeks to challenge the validity of a measure having general application. The government of the Azores attempted to challenge the validity of a regulation the effect of which was to deprive it of the ability to legislate on fisheries matters which, from the point of view of Portuguese constitutional law, accorded competence to the regional government. The Court of First Instance held that having responsibility for fisheries matters did not create individual concern for the purposes of Article 230EC[18].

In its function of ensuring the correct application of the State aid rules the Commission will address a decision to a Member State even where the alleged violation of the State aid rules is committed by a regional government. In these cases

[16] Joined cases 227,228 and 229/85 *Commission v Belgium* [1988] ECR 1. See also N.Burrows, 'Nemo me impune lacessit: the Scottish right of access to the European courts' (2002) 6 European Public Law 45.
[17] Case T-238/97 *Communidad Autonoma de Cantabria v Council* [1988] ECR II-2271.
[18] The case is discussed extensively in J. Wakefield, 'The plight of the regions in a multi-layered Europe' (2005) 30 European Law Review 406.

the Court of First Instance has recognised that a regional government may have an interest to protect which is separable from the interest of the central government. The Court has recognised that where the Commission's decision impacts on the way in which the regions themselves may exercise their autonomous powers the regional government concerned has standing to bring an action for annulment of the contested decision. The Commission's decisions relating to tax reduction schemes adopted by Alava, Vizcaya and Guipuzcoa have been challenged by the regional governments in cases before the Court of First Instance[19]. Thus the regional government may challenge the validity of the decision in the Court of First Instance but failure to comply with the Commission's decision may lead to infraction proceedings against the Member State in the Court of Justice.

## Concluding remarks

It has not proved easy for regional governments to assert their position within the EU. Existing institutional structures are designed to accommodate the States who are the contracting parties to the treaties. Even very powerful regions endowed with extensive legislative and administrative powers, including tax raising powers, do not have the same voice as Member States, some of whose populations and economic strength by no means matches the size and strength of some regional governments. In some of the Member States this has led to demands for independence. In Scotland, for example, the Scottish National Party, the party of independence, follows the slogan of 'Scotland in Europe' so that Scotland can find an independent voice within the European Union. Its arguments appear much more powerful in the context of a European Union where several of the Member States are much smaller than Scotland in terms of population, in terms of economic performance and in terms of stable and effective government and institutions of civil society. Independence in Europe would allow Scotland full fiscal autonomy (within accepted European parameters). It is inevitable that such demands will grow if the European Union cannot find ways to accommodate the different constitutional structures currently in place in the Member States.

March 2007.

[19] Cases T-227/01, T-230/01, T-228/01, T-231/01, T-229/01, T-232/01 cases pending.

# The participation of Basque Institutions in EU bodies dealing with tax regulation. An approach from the Basque Country[1]

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## Introduction

The fact that the Association for the Promotion and Diffusion of the Economic Agreement *"Ad Concordiam"* and the Basque Studies Institute of the University of Deusto are holding these sessions in the International Conference "Basque Economic Agreement and Europe" is a remarkable sign of the academic and political existing concern in the Basque society about this issue. I could dare say, in general terms, it was difficult to imagine these kind of forums being held twenty years ago, when we accessed to the European Union (1986), not even less years ago, when the fiscal State aids proceedings were not opened by the Commission yet neither the subsequent

[1] The original version of this speech is in Spanish.

[2] The opinions expressed by the author are personal and do not represent necessarily the official ones of the Institution the author represents and do not commit it either.

appeals before the ECJ nor the preliminary ruling referred by the Basque Country High Court in the case of the 1993 *Normas Forales* and the Opinion issued by the Advocate General Mr. Saggio.

Because of obvious reasons, the issue of the participation of regional bodies in the European Union Institutions is not brought up by the central administration of Member States, id est, or it is regarded by Comparative Law as a non-decentralised competence and, therefore, as a central competence, even in decentralised States, or as in the case of the Spanish State there is simply no interest in tackling this issue, as we will realise throughout this speech.

The peculiarity of the Economic Agreement, institution based on the agreement and updating, is specially what has been used as an excuse (and it's still being used), in order to avoid, on purpose, its analysis and subsequent implementation in the European Community process of decision-making, specially if we bear in mind the difficulties in finding parallelisms in Comparative Law. Indeed, the absence of similar legal schemes to distribute taxation power in the constitutional frameworks of the rest of the Member States in the European Union, (there is no record of the participation of any region in the Finances and Economy Council ECOFIN so far) has been a good reason for the different governments, irrespective of their political ideology, which have been in power in the Spanish state since the date of the accession to the European Economic Community (EEC), later European union (EU), to avoid tackling this issue.

The reluctance to the Basque participation in the Ecofin Council is not surprising, if we take into account the difficulties in the progress of the general system of participation of the Autonomous Communities in other Council groups, related to less perceptible issues from the political viewpoint. In addition to a centralist approach in the concept of the State, at least in European affairs (positive conflict of competence when the Basque delegation in Brussels was opened in 1988, no direct participation of the Autonomies until 2005…), in clear contradiction with the decentralisation essence of the 1978 Constitution, public opinion, in general, politicians and public officers, and even, many national and foreigners Public Treasury scholars haven't got enough knowledge (ignorance at times) of not only the Economic Agreement with the Basque Country (or Convention with Navarre) but the content of the First Additional Provision of the Constitution as well.

This practice has provoked, besides, a perverse situation in the Community scene, as not only have the Basque institutions been directly deprived of the right to take part in the Community scope, in clear contradiction or, at least, with incoherency, with the distribution of competences system laid out by the Constitution but, frequently, the internal unwillingness at the time of interpreting the Economic Agreement (with the Basque Country or with Navarre) has been referred to Brussels as well, where the Community authorities haven't often spoke to the persons who defended correctly the Agreement institution and, consequently, the essence of its nature and of the Spanish constitutional legal system.

Although analysing the Economic Agreement is not the aim of this lecture, we need, at least, to mention some of is characteristic features about its position within the constitutional legal framework and the Statute of Autonomy of the Basque Country. Besides, a brief comment on the nature of tax competence in the community scope and on the regulating powers of the Union in this issue will be made.

It is important to stress that most of the issues which are going to be tackled concerning the Institutions of the Basque Country Historical Territories and the Basque Economic Agreement, are also applicable to the *Foral* Community of Navarre, as the Basque Agreement and the Convention with Navarre are the consequence of the common inclusion of *Euskadi*[3] and Navarre within the notion of *Euskalherria*[4]. *Nowadays, the most remarkable formal and substantial difference, and perhaps the only one, between the Basque Agreement and the one with Navarre is the one related to the three taxation powers of the Foral Provincial Councils joint in the Basque Agreement and the only one of the Foral Community of Navarre in the Convention with Navarre*[5]. As Fernando de la Hucha points out in the prologue of "Provincias exentas Concierto-Convenio: Identidad colectiva en la vasconia peninsular (1969-2005) by Mikel Aramburu Urtasun , *the more and more legal proximity between both texts is due to two paradoxical facts: the distance in politic ideology between Euskadi and Navarre and the absolute lack of communication between both legal texts. The fact is whether it upsets somebody or not, Navarre has gone after the amendments of the Basque Agreement, to such extent that the Convention with Navarre is like the Basque one and not the other way round. But, along with it, the Basque Agreement and the Convention with Navarre fit into the State legal system by means of two ordinary laws, whose main defect is they imply an absolute lack of communication among the four foral territories (or of one of them with respect to the other three).*

I would like to note that, throughout this speech, the term region, which is the commonly used one in the community scope, is going to be used to name nations without State, regions, länders, autonomous communities or mere administrative decentralised bodies without authentic legislative power.

## The Economic Agreement: general considerations

I am not going to talk neither about the origin of the Economic Agreement nor about the aspects concerning its legal nature, as I believe these matters must have been tackled sufficiently during these three days and, besides, by experts with more knowledge about them than me. But I would like to underlined that having some ideas,

[3] Translator's Note: Euskadi is the Basque term for Basque Country.

[4] Translator's Note: Historical and national term for the Basque Country.

[5] Aranburu Urtasun, Mikel. "Provincias exentas, Convenio-Concierto: Identidad colectiva en la Vasconia peninsular (1969-2005). page 69. Foundation for the Study of the Historical and Autonomic Law of Vasconia.

at least roughly, about these matters is basic for an appropriate understanding of the institution and of its possible link with other legal systems, either the State one (Spanish Constitution) either the Community one (EU Treaty).

The legal framework within which the Economic Agreement is developed and updated is ruled by two legal provisions, namely the First Additional provision of the Spanish Constitution of 1978 (from now on SC) and the article 41 of the Statute of Autonomy of the Basque Country or Statute from Gernika (from now on SAPB). On the other hand, the 12/2002 Law, 23 May, by virtue of which the Economic Agreement with the Autonomous Community of the Basque Country is approved, and that substitutes the former 12/1981 Law, doesn't stipulate a deadline for its legal force and foresees, where appropriate, legal amendments of its contents, being, therefore, the formal legal instruments by means of which the Economic Agreement is approved.

The First Additional Provision of the SC states that *The Constitution protects and respects the historic rights of the territories with traditional charts (fueros). The general updating of historic rights shall be carried out, where appropriate, within the framework of the Constitution and of the Statutes of Autonomy.*

The Article 41 (1) of the Statute of Autonomy of the Basque Country stipulates that *Tax relations between the State and the Basque Country shall be regulated by the traditional system of the Economic Agreement.*

The Economic Agreement is not the only historic right in force but it can be said that is the most evident, relevant and paradigmatic; and its constitutional dimension goes further than the mere tax and financial content, being together with the Statute of Autonomy, the main instrument of Euskadi to integrate into the State. Besides, the content of the First Additional Provision related to the updating of the *foral* regime becomes fully meaningful with respect to the last Economic Agreement law or the required adaptations of its content, especially after the accession of the Kingdom of Spain in the European Union or because of the technological advances or the changes caused by the globalization.

The article 41 of the SABC lays the foundation of this Institution when it confers the tax legislative and administration powers within the autonomous taxation authority on the Institutions of the Historical Territories and guarantees the harmony and integration of such autonomous authority into the State taxation system. In the same way, when regulating the tax relations between the State and the Basque Country, the intervention of the institutions of the Basque Country is foreseen.

## The competences framework in Community law

The system to distribute competences within the European Union is based on the system of express assignment of competences. So, the competences not expressly conferred on the Union are still kept by the Member States. Anyhow, once the title of

the competence concerning a particular subject is determined, we can distinguish, according to their nature, exclusive[6] competences from shared[7] competences (we could even distinguish a third category of complementary competences).

It is appropriate, anyways, to state that competences expressly conferred on the European Union can be specific, when they are based on a particular and expressly foreseen for a specific subject legal foundation of action, or general, in relation to the ones under articles 94 and 95, by virtue of which, the Council can adopt, by unanimity or by qualified majority, respectively, the harmonising measures which have as their object the establishment and functioning of the internal market. Nevertheless, in favour of a wider flexibility, from the origin of the EC Treaty, there is a clause of lack of foresight in article 308 of the ECT[8]. In addition, there are some other provisions that we could regard as reservations of competences. For instance, the ones in the protocols annexed to the Treaties.

Taxation, in particular, is regulated by articles 90 to 93 of the EC Treaty and they state some stipulations for the Member States with the intention of safeguarding the correct functioning of the common market.

More specifically, the article 93 of the ECJ states that *The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market within the time limit.* In the basis of this article, the Commission has issued some Regulations and Directives in relation with the VAT and with the environmental and energetic taxes.

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[6] In the case of exclusive competences of the Union, the States lose immediately and irreversibly all possibility to intervene in the concerned scope of competence. The attribution is, therefore, full, absolute and definitive, even in the case of inactivity of the Community. To this category of competences, necessarily limited, belong so far the monetary policy and the common commercial policy, (limited to goods at the moment…), the conservation of marine resources, some aspects of the institutional law and some elements of the competition policy. (Martín y Pérez de Nanclares, J.: *El nuevo sistema de competencias en el Proyecto de Constitución Europea. Cuadernos Europeos de Deusto*. N. 30/2004. p. 84).

[7] The shared competences refer to the cases when the Member States and the Union are competent to act. By virtue of the North American federal principle of "pre-emption", the States are entitled to execute their competences as long as the Union doesn't execute them and, on the contrary, in the very moment the State intervenes in the execution of the competence the State is displaced. Most of the community competences belong to this category and an originally shared competence can become, eventually, an exclusive or almost exclusive competence due to an exhaustive intervention of the Community, as, for instance, the abolishment of obstacles for free movement, the common agricultural policy, the competition policies and the common transport policy. (See Martín y Pérez de Nanclares, J.).

[8] Article 308 ECT: *"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."*

Likewise, in the basis of article 94 of the EC Treaty (in Chapter 3. *"Approximation of laws"*), which allows the Council, also by unanimity, to *issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market,* some recommendations and other soft-law have been given concerning taxation on individuals, corporations, capitals and vehicles.

According to all we have said, we must get to the conclusion that taxation is a subject within the exclusive competence of the Member States, so in order to implement Community policy the unanimous agreement of Member States is required. Exceptionally, the clause of lack of foresight of article 308 ECT, which states implicitly the right of veto of any Member State as it requires unanimity, could be used.

## The participation of the regions in the decision-making process

### *The regulation of regional participation in the Teatries*

The European Community was founded in 1957, in the basis of the Treaty of Rome, and implies sharing different portions of sovereignty by the six Member States. Today, almost 50 years later, it is formed by 25 Member States (27 from 1 January 2007). The European Community, today the European Union, was established as a club which only States could join, that is, it was out of place to talk about the Europe of the people or the regions. Nowadays, the EU has the same nature but the regions have got a certain degree of acknowledgement that, among other things, allow them to take part in some particular Institutions and Community bodies. The White Book of Governance, published by the Commission in 2001, is aware of the huge gap between citizens and politicians and of the lack of identification with the European project; in this sense, we believe an increase in regional participation in Community decisions contributes to achieve more transparency and effectiveness, and, in the medium term, to get the political project closer to citizens.

The relevant review of the Treaties, which took place in Maastricht (1992), meant the acknowledgement of the existence of infra-state bodies. i.e., länders, regions, autonomous communities or federal states, depending on the different cases. This shy, positive though, appearance of the regional fact[9] happened at the same time as the establishment of the new European (and worldwide) political order which emerged after the Cold War.

Article 146 of the Treaty of Maasatricht (today article 203 of the ECT, after the Amsterdam review) admitted the possibility of representatives of regions being within it when stating *The Council shall consist of a representative of each Member State*

[9] The Treaty of Masatricht created also the Committee of the Regions, advisory body of heterogeneous composition, which assembles regions, with or without legislative competences, and even some local bodies.

*at ministerial level, authorised to commit the government of that Member State*. The same Treaty sets out, for the first time, the principle of subsidiarity in the European scene.

The Treaty of Amsterdam had a very tiny new contribution to the participation of the regions in the Union. Nevertheless, three of the States of the Union, with the most complex internal structure, Belgium, Austria and Germany, signed a declaration (number 3), on subsidiarity, which stated these principles concerns not only the Member States but also their infra-state entities[10]. Spain kept out of the declaration, what is a good example of the lack of appreciation of the in powered central government at the time for the Autonomous Communities.

The main target of the Treaty of Nice (2001) was to establish a new distribution of decision-making power among Member States that will enable to confront the enlargement process of the European Union towards the East. It didn't achieve its aim and it was answered back right after its ratification by the Member States. So it is shown by Declaration 23, which, in spite of the pretended satisfaction of the Member States, refers to a future Conference to tackle the issue of power distribution and at the same time a deep review of the Treaty, included the distribution of competences between the Union and the Member States[11]. The analysis of the regional issue was, at best, testimonial.

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[10] **Declaration (nº 3) by Germany, Austria and Belgium on subsidiarity**. *It is taken for granted by the German, Austrian and Belgian governments that action by the European Community in accordance with the principle of subsidiarity not only concerns the Member States but also their entities to the extent that they have their own law-making powers conferred on them under national constitutional law.*

[11] **Declaration (23) on the future of the Union**.

*…Having thus opened the way to enlargement, the Conference calls for a deeper and wider debate about the future of the European Union. In 2001, the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc.*

*The candidate States will be associated with this process in ways to be defined.*

*…the European Council, at its meeting in Laeken/Brussels in December 2001, will agree on a declaration containing appropriate initiatives for the continuation of this process.*

*The process should address, inter alia, the following questions:*

- *how to establish and monitor a more precise delimitation of powers between the European Union* and the Member States, reflecting the principle of subsidiarity;
- *the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in* accordance with the conclusions of the European Council in Cologne;
- *a simplification of the Treaties with a view to making them clearer and better understood without* changing their meaning;
- *the role of national parliaments in the European architecture.*

*Addressing the abovementioned issues, the Conference recognises the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.*

*After these preparatory steps, the Conference agrees that a new Conference of the Representatives of the Governments of the Member States will be convened in 2004, to address the abovementioned items with a view to making corresponding changes to the Treaties.*

Not even the new Treaty establishing a Constitution for Europe (EUCT-2004) modifies the possibilities of regions in the Community decision-making process. Irrespective of the definitive in force of the EUCT, very unlikely today, article 203 of the EUT, is still the legal basis which enables the mentioned regional participation.

Far from what happened in the Spanish State, we will describe later, other complexly structured Member States reacted with specific constitutional reforms (Germany and Austria) and legislative (Belgium), making direct participation of the regions possible for the first time. In the United Kingdom case, it was not even necessary to write it out.

Germany amended the Fundamental Law of Bonn in 1992. Since then, its article 23 states the participation of the länders in the Community scope. The possible infringement of the provisions in this article implies that the concerned regulations can be brought to Court and, where appropriate, and be found unconstitutional, which is the highest of the guarantees for the länders. Article 23 designates the Federal Council as the institution thorough which regions participate, being its opinion (in the scope of its competences) respected by the Federal State.

Article 23 itself sets out the participation before the Court of Justice, being possible to transfer the representation to a delegate of the Länder designed by the Federal Council under the coordination of the Federal Government.

Regional participation in Germany can go as far as the so-called *transfer of sovereign rights.*

In the Austrian case, the participation of its Länders also enjoys constitutional acknowledgement, as Austria had amended its Constitution for this purpose, prior to the accession to the EU in 1995 (along with Sweden and Finland). Therefore, in a similar way to Germany, in its article 23, it sets out the obligation to take into account the common attitude of the regions in matters of their competence. The central State has till some room to manoeuvre for purposes of general interest in foreign affairs and integration policies. Even the possibility of transferring the representation in the Council to the Länders can be inferred from the legal text, in co-participation with the representative of the Federal State.

The Austrian constitutional text doesn't say anything, on the contrary, about the access of the Länders to the Court of Justice.

In the Belgium case[12], it was not necessary a reform of the constitutional legal text, as the regional participation was sufficiently regulated by the General Agreement for

*The Conference of Member States shall not constitute any form of obstacle or pre-condition to the enlargement process. Moreover, those candidate States which have concluded accession negotiations with the Union will be invited to participate in the Conference. Those candidate States which have not concluded their accession negotiations will be invited as observers.*

[12] Even before the approval of the Treaty of Maastrich, the Belgian communities and the regions were included in the State delegation in the two intergovernmental Conferences about Political Union and Monetary and Economic Union, whose works finished on the occasion of the European Council in Maastricht.

Cooperation of 8 March 1994, signed by the State, the regions and the communities, by virtue of which a group of different departments concern about foreign affairs policy names the members of the Belgian delegation, who negotiate on an equal footing, being coordinated by the Minister of Foreign Affairs. The prerogatives of information about the processes of negotiation and modification of the Treaties the Federal Parliament enjoys are extended to the Regional Parliaments.

Even the Belgian regional governments can make commitments on behalf of the State within the Union Council, in the cases they are representatives of Belgium. It must be admitted the Belgian case is very peculiar and establishes, in general, a system of international relations in which the internal competence is reflected on the international scene.

With respect to the common attitude of the regions in matters of their competence, the Belgian government must organise a framework of negotiations which allow them to reach such attitude.

## The Spanish legal system in relation to that issue

Neither the Spanish Constitution from 1978, nor the Statutes of Autonomy enacted in the subsequent years, foresee the participation neither the State's nor the Autonomous Communities', in the European Community Institutions. Nevertheless, the texts of the recently enacted Statutes of Autonomy, and the drafts of the ones not in force yet[13], have some provisions in order to articulate such participation. This shows the lack of constitutional provisions is not an obstacle for an appropriate participation of the Autonomous Communities in the Community decision-making bodies.

It can be affirmed that the involvement of regional authorities in the Community affairs can be looked at from two views: one corresponding to the ascending phase of Community Law, in other words the phase of building it up, and another corresponding to the descending phase or phase of application and implementation of the Community Law.

With respect to the descending phase, or the implementation of the Law, the case-law of the Constitutional Court is worthy of note (Judgement 252/1988, 64/1991, 76/1991, 236/1991 y 79/1992): *The accession of Spain to the European Community doesn't alter, in principle, the distribution of competences between the State and the Autonomous Communities. Therefore, the transposition of the Community secondary legislation to internal legislation must fulfil necessarily the criteria laid down by the Constitution and the Statute of distribution of competences*. As a result,

[13] To this respect, the New Political Statute of the Community of Euskadi includes in Title VI (articles 65 to 69) the European and international scope. In particular, article 65.2 states that *"According to the European Community legislations, the Community of Euskadi will have direct participation in the European Union bodies…in those matters related to its competences."*

the execution of Community Law corresponds to the one which holds naturally the competence according to the rules of internal legislation, as it doesn't exist an specific competence for the execution of Community Law. (CCS 141/1993).

With respect to the ascending phase, the evolution in relation to the participation of the Autonomous Communities from the date of the accession of the Kingdom of Spain to the European Communities is characterized by the reluctance of the subsequent Spanish governments to allow the direct participation of the Autonomous Communities in the different Community decision-making bodies. The strongest controversy was due to the opening of a Basque Government Office in Brussels in 1988 which provoked a positive conflict of competence brought up by the central government before the Constitutional Court, which issued its 165/94 judgement on 26 May 1994. This judgement sets out, among other things, and according to *Xavier Ezeizabarrena* in its book *"Los derechos históricos de Euskadi y Navarra ante el derecho comunitario"*, the distinction between international and Community activities, when it states that*…it can be said that when Spain acts in the scope of the European Communities it is acting in a legal structure which differs a lot from the traditional one of international relations. Because the development of the European integration process has created a legal system, the Community one, that can be regarded to a certain extent as "internal" by Member States. In correspondence with the aforementioned, if it is a complex State, as ours is, even when the State (sic) the European communities and not the Autonomous Communities, there is no doubt they hold an interest in the development of the Community dimension*.

The State approach to confront the Autonomous Communities participation challenge has always been centralist and ruled by the idea that the foreign action competence belongs to the general administration of the State. This conception was amended by the 165/94 judgement of the Constitutional Court, which considered that foreign action of the central State was restricted to the contents of the *"ius contrahendi"* or the *"ius legationis"*, that is, the hard core of international relations.

Bearing in mind these picture, we could say the State started to walk slowly in 1988 with the establishment of a Sectorial Conference for matters concerning the European Communities (from now on CMCEC), which, after a first stage of no definition, got formal rank in 1992 as a meeting and discussing forum ruled by the co-operation principle. Out of the works within the CMCEC, there was the Agreement for internal participation in 1994 (from now on AIP), which was nor signed by Euskadi, limiting the participation of the Autonomous Communities to the internal scope of the State and excluding specifically the incorporation of representatives of the Autonomous communities in the Spanish delegations before the EU. In the mentioned Agreement the guidelines of the concept of a common attitude were set but its binding degree for the Central State was very debatable judging by the terms of the Agreement: *the State will take into account in determinant way…the State will acknowledge*. This agreement (AIP) relies on the premise that the general administration of the State keeps for itself all the actions in the Council of Ministers as within its competence in foreign affairs.

In 1997, the CMCEC was regulated by the law for the first time (2/1997 Law, 13 March- from now on LCMCEC-).

However, besides this constriction of the participation concerning the internal scope, the Spanish system of participation lacks constitutional acknowledge in comparison with the German and Austrian systems. It is constructed on a complex system of sectorial conferences with no legal force. Besides, the functioning of the sectorial conferences has been irregular, incoherent and without coordination and the treatment of the European issues is not often a top priority among the rest of the issues in the agenda, so posing these issues is left out.

Some Autonomous Communities, Euskadi among them, intended for years to promote the system of participation of the Communities' representatives in the Council from different approaches. In this way, the Basque Parliament, in its meeting of 20 February 1998 passed by some green papers concerning the Communities' participation in the State delegation in the European Union Council of Ministers. Later, on the 4 March 1998, the Joint Commission (Congress-Senate) for the European Union adopted some green papers referred by the Basque group for the same purposes, asking the State government to establish the scheme of regional participation in the Council of Ministers, which had a response from the Congress on 10 march 1998. Later, in September 1999, the Autonomous Communities adopted a common attitude concerning the basis of the participation of the representatives of the Autonomous Communities in the European Union Council. In September 2000, other green papers for this purpose, supported by the socialist and the nationalist; however, the Popular Party's votes against it prevented it from being passed by.

On the 27 November 2001, the Autonomous Community of Extremadura proposed to the coordinators meeting of the CMCEC a text which allow the Spanish delegation to take a representative of the Autonomous Communities along whenever the Council had to deal with some issue of their competence or interest, calibrating the intensity of such presence according to the nature of the competence, exclusive or shared or, even, if the reason for the presence was just of simple interest. This system, which finally was not successful either, was based on the sectorial conferences for its implementation and development.

Subsequently, the Catalan Parliament adopted the 1589/VI Resolution, 30 October 2002, by virtue of which the referral to the Congress of a Proposal of Law (White papers) on the participation of the Autonomous Communities in the adoption of the Spanish attitude in matters concerning the European Union was agreed.

The lack of political will of the central government, specially from 2001 to 2004, provoked the participation to be almost none until the end of 2004.

With the new government in power after the general elections of 14 march 2004, the system of participation had a new boost which was implemented by the Agreements of the CMCEC of 9 December 2004. According to them, the Autonomous Communities will take part in four of the European Union Council formations, within the State delegation and by means of the existing system of sectorial conferences and the Agreement for internal participation of 1994. The system guarantees a rotation in the

participation of the different Autonomous Communities and implies the participation of public officers in the working Groups within the different formations, forums where decisions are often worked up and really made, as, in many cases, the Council of Ministers just ratifies what has been agreed within the working groups or within the COREPER[14].

The Agreements of 9 December 2004 strengthened, on the other hand, the position of the regional Minister within the Permanent Representation in Brussels adopted in 1997. By virtue of these agreements, the number of Ministers representing the Autonomous Communities should increase from 1 to 3, just two have been designated so far though. These regional ministers within the REPER would be named on the proposal of the Autonomous Communities, reviewing besides the content of the functions to be performed by them.

The fact the participation is limited to four out of the nine formations of the Council can be understood as a first step[15]. This limitation is due, according to the representatives of the State general administration, to the fact these formations gather most of the Autonomous Communities competences and they are the most commonly open to regional participation in the decentralised Member States of the Union. Being these reasons partially true, it is also true some other European regions have taken part in some other formations as well, and in the case of *Euskadi* (and Navarre) there are important competences, as the one acknowledged by the Economic Agreement[16], which being previous to the Constitution itself, hasn't got any means to be heard in the Community scene, with the consequent detriment of the constitutionality block[17].

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[14] According to J.M. Sobrino, in *"El marco comunitario de la participación de las comunidades autónomas en los Consejos de Ministros de la unión Europea",* in *La participación de las Comunidades Autónomas en los Consejos de Ministros de la Unión Europea,* the COREPER enjoys a real delegation of powers: 70 to 75% out of the assessed issues end by agreement and are listed under A as issues approved without debate by the Council of Ministers. So, just 25 or 30 % of the assessed issues by the COREPER require a further debate. Besides, 70% of the subjects finally included in the agenda are agreed in the working groups prior to the COREPER activity, leaving just the remaining 30% for the COREPER.

[15] Article 2.1 of the Agreement on the system of autonomies participation in the formations of the EU Council: *"Direct representation of the autonomies will be implemented initially in the following formations of the European Union Council: Employment, Social Policy, Health and Consumers, Agriculture and Fisheries; Environment; Education, Youth and Culture."* The term *initially*, introduced in the last meeting at the proposal of Euskadi, among others, enables the participation in other formations in a subsequent review of the Agreement.

[16] The Agreement has got a clause which leaves room for a bilateral relation with the State: *III Special Rules. 3. The participation laid out in the present Agreement it is so, without prejudice to the existent bilateral regimes or instruments or the future ones with some Autonomous Communities concerning the treatment of those matters related to the participation in issues related to the European Union which affect exclusively to such Communities or which have some peculiarity for them due to its autonomous or foral specificity.*

[17] We could mention some other competences, as the police (in the Euskadi case), which doesn't fit into the system either or the subjects which can be of reasonable interest for the Autonomous Communities.

Irrespective of the criticism at the restriction to the four mentioned formations, the system itself, based on rotation and the sectorial Conferences, doesn't work nowadays. The accumulation of files in the hands of a few Autonomous Communities, due to a very weak coordination among sectorial Conferences and the limited influence of the CMCEM on them; the unbalanced ability, training and even interest in the participation among the Autonomous Communities; and the shortage of institutionalisation and regulation of the sectorial Conferences, are some of the circumstances which have been pointed out since the enter into force of the Agreements of 9 December 2004.

In order to mitigate these deficiencies to some extent, the CMCEM, in full assembly, approved an interpretative document on 12 December 2006 under the title of "Guide of good practices", which provides certain guidelines in order to improve the functioning of this particular scheme of participation.

In addition to the participation in the Council and in its working groups, and in relation to the European Commission, in 1997 the Committees of the Commission were opened to such participation (Comitology); participation which has varied a lot depending on which committee we are looking at, but, anyways, there is plenty of scope for improvement. Out of more than three hundred existing Committees, only ninety four are open to the participation of the Autonomous Communities and, as you can imagine, the ones related to fiscal matters are not among them.

In relation to the action of the Autonomous Communities before the Court of Justice, they can bring actions up through the State. This participation is regulated by two Agreements of the CMCEC, of 29 November 1990[18] and 11 December 1997[19]. The first of them establishes the participation of the Autonomies on *the principle of reciprocal collaboration, not giving any chance for direct active action to them nor for an obligation of subrogation in the State's position to defend the interests, the Constitution itself impose*[20].

This Agreement doesn't go further than the establishment of particular obligations of information and of the possibility for the autonomous Communities to designate advisors for meeting with the representatives of the state who, finally, will be the ones acting before the ECJ.

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[18] Agreement of 29 November 1990 of the sectorial Conference for matters concerned the European Union in order to regulate the intervention of the Autonomous Communities in the actions of the State in pre-litigation procedurals of the European Commission and in matters related to the European Court of Justice which affect their competences. Resolution of 7 September 1992 of the Sub-secretary of the Department of relations with the Parliament and of the Secretary of Government. SOJ nº 216 8 September 1992, p. 30.853.

[19] Agreement of 29 November 1990 of the sectorial Conference for matters concerned the European Union related to the participation of the autonomous communities in the proceedings before the European Court of Justice. Resolution of 24 march 1998 of the Sub-secretary of the Department of Presidency, SOJ n.79, 2 April 1998, p.11.352

[20] Ezeizabarrena, Xabier; *"Los Derechos históriocs de Euskadi y Navarra ante el Derecho Comunitario". Cuadernos Azpilicueta*, n.19.2003. p. 44.

The modification of the 1997 introduces some advances and derogates partially the previous Agreement of 1990 (in relation to the infringement proceedings and the preliminary rulings), although it is not good enough yet and tends to establish an homogeneous procedure for all the Autonomous Communities, which, bearing in mind the specificities of the Basque historic rights, which the Agreement didn't take into account, was the reason, among others, for *Euskadi* not to sign it.

Some authors, as *Martín y Perez de Nanclares*, claim for the need to introduce some changes in the Treaties in relation to the possibilities of direct action of the regions in the annulment appeal. To that effect, the author states that the maintenance of a restrictive interpretation with respect to the regions won't evidently match with the trend set out by the Court in some other aspects when it has interpreted widely the right of direct action for entities which do not really represent a genuine general interest, for instance, for Federations of industries, professional associations or trade union, lacking, at times, of own[21] legal personality.

## The participation in the Ecofin Council

So far we have studied the legal framework of the Economic Agreement and the possibilities of participation of the Autonomous Communities in the Community institutions in general term from both perspectives, the State and the Community. It has been made clear that, unlike what has been sometimes argued by the central State, the Community legal framework doesn't prevent the integration of the representatives of the Autonomous Communities in the Council of Ministers as it leaves this issue up to each Member State. On the contrary, it provides a channel for participating by virtue of article 203 ECT. In line with this attitude, the European Parliament Resolution of 18 November 1993 even encouraged Member States to make the participation in the Council meetings dealing with matters of their competence easy for the representatives of the regions with legislative competences the participation in the Council meetings dealing with matters of their competence. In the same line, the Committee of the Regions issues its Declaration on the role of regions with legislative powers in the decision-making process (CDR 191/2001) or in the Resolution about the results of the intergovernmental Conference of 2000 and the debate about the European Union Future (CDR 430/2000).

Therefore, it is clear the fundamental institution for Community fiscal decisions is the Council, and, in particular in its Economy and Finances formation (ECOFIN), not only in full assembly but in the COREPER II meetings or in the correspondent working groups, which will be listed later on, as well. As far as the Commission is concerned, it usually plays a discreet role as a booster though its proposals to the Council and it

[21] Martín y Perez de Nanclares, José: *"La posición de las CCAA ante el Tribunal de Justicia de las Comunidades Europeas"*.

can be said the participation in its technical committees may be of importance, as it is within them where the first drafts which will be at disposal of the Member States through the Council are elaborated.

Nevertheless, it is advisable not to forget the existence of forums as OECD[22], where soft-law is regulated, previous step to future regulations by the Member States and the European institutions.

The ECOFIN Council meets monthly, but the subjects in the agenda are previously worked in the Permanent Representatives Committee II (COREPER II), where, differing from the COREPER I, the Permanent Representatives of the Member States meet. The working groups within the ECOFIN have previously worked on the subjects:

D.1 "Financial Issues" Groups:
   a) Own resources.

D.2 Group of Financial Advisors.
D.3 "Financial Services" Group:
   a) Payment Services.
   b) Transfers of Funds.

D.4 "Taxation Issues" Group:
   a) Indirect Taxation (VAT, Excise Duties, Energy).
   b) Direct Taxation (including taxation on savings, interests and royalties).

D.5 "Code of Conduct" Group (Business Taxation):
   a) Subgroup A.
   b) Subgroup B.

D.6 Group of High Level.
D.7 Budget Committee.
D.8 "Fight against Fraud" Group.

Groups D.4 and D.5 are the specific ones for taxation matters.

One of the main excuses of the central government politicians to deny to the Basque institutions the right of participation in the ECOFIN was neither the constitutional legal system nor the Community allowed the Basque presence in it; this reason played a remarkable role in the negotiations prior to the approval of the Economic Agreement in 2002, after a blockage of such negotiations which caused, for the first time in History, a time extension of the Agreement adopted unilaterally by the Spanish Government.

[22] Surprisingly, if we examine all international organizations where problems of direct interest for regions are discussed, we will find out that just a few of the them, mainly from the EU, are concerned about regional participation. Others as UNESCO, OECD, FAO, WHO, ILO are not the target of the claims, which means a self-limitation of the participation demands. Bengoetxea Caballero, Joxerramon. *La Europea Peter Pan. El Constitucionalismo Europeo en la encrujida. IVAP-Oñati 2005*, p. 165.

Indeed, the Basque claim for introducing a guarantee clause of participation of the Basque Institutions in the bodies which elaborate and decide taxation matters was the main reason for the serious controversy which came up during the negotiations.

But it is worth mentioning that the difficult political scene where negotiations were being held had as a cause a long and previous overuse of Court procedures against the Economic Agreement[23], not only before the State Courts but in the several procedures which were initiated by different agents before the GD of Competition of the European Commission and which led to the corresponding Decisions and actions for annulment before the European Court of Justice. In this background, the president of the Basque government made a public statement in defence of the Economic Agreement on 16 July 1999, claiming *for the participation of the representatives of the Autonomous Community of the Basque Country in the European bodies which deal with tax harmonization and free competition issues.*

Due to its specificity (limited to the Basque Country and to Navarre), the competence within the Economic Agreement, as it has been said before, the most singular element of the Historic rights and a fabulous example of the asymmetrical devolution of competences in the Spanish State, has been always assessed, with little success though, in bilateral Committees, as the Joint Committee on the Economic Agreement[24].

As we have analysed before, the Community legal system regulates a good enough basis (article 203 ECT) for proper direct participation of the regions in the different Council formations, being this, therefore, an strictly internal issue. We have also stated that, after a slow twenty years process, the Autonomous Communities have got the acknowledgement of its participation right with the access to 4 of the 9 formations of the Council of Ministers. This scene was unknown at the moment of the negotiations of the last Agreement, but, today, after the Agreements of 9 December 2004 and after more than a year of experience, during which some Autonomous Communities have had the chance to take part in the Council, it seems the participation in the ECOFIN Council is a simple question of political will and in no case of legal impossibility.

Anyways and with the intention to avoid that the representation of the Autonomous Communities was restricted to the four mentioned formations for good, the representation

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[23] Aranburu Urtasun, Mikel. "Provincias exentas, Convenio-Concierto: Identidad colectiva en la Vasconia peninsular (1969-2005). Page 139. Foundation for the Study of the Historical and Autonomic Law of Vasconia: "*Since the Economic Convention of 31 July 1990, the State has acted…against four Foral Laws passed by the Parliament from Navarre. Meanwhile, there has been more or less eighty actions against the Normas Forales of the Historical Territories of the Basque Autonomous Community. Taking into account the great similarity between the regulations of both Communities, this fact is enough to make the political intention of the plaintiff evident.*"

[24] The Agreement sets out two Commissions: the Joint Committee on the Economic Agreement (articles 61 and 62) and the Coordination and Evaluation Committee (articles 63 and 64). On the contrary, the Convention sets out only one Coordination Committee.

of *Euskadi*, among other Autonomous Communities, required during the negotiations of the Agreements of the CMCEC of 9 December 2004, the addition of the term *initially* when stating that *Direct representation of the autonomies will be implemented* initially *in the following formations of the European Union Council: Employment, Social Policy, Health and Consumers, Agriculture and Fisheries; Environment; Education, Youth and Culture*[25] (Article 2.1 of the Agreement).

Moreover, the Agreement includes a clause which leaves room for a bilateral relation with the State: *III Special Rules. 3. The participation laid out in the present Agreement it is so, without prejudice to the existent bilateral regimes or instruments or the future ones with some Autonomous Communities concerning the treatment of those matters related to the participation in issues related to the European Union which affect exclusively to such Communities or which have some peculiarity for them due to its autonomous or foral specificity.*

This clause really follows the terms of the First Additional provision of the LCMCEC: *Those questions related to the participation in matters concerning the European Communities, which affect one Autonomous Community exclusively or which have a peculiarity for it according to its autonomous specificity, will be dealt on any on the parties' initiative or by mutual agreement, by means of bilateral co-operation instruments.*

Therefore, the reality and utility of bilateral channels to give a solution to the Economic Agreement (or others) is clear since the LCMEC and the Agreements of CMEC in 2004 were approved as there was an specific mention of them. These instruments comprise the existing multilateral ones and are in line with the essence of the Constitution, which acknowledges and respects certain specific rights of some Communities and whose updating is guaranteed.

Let's remember the demands of the Basque authorities in order to get some participation in the ECOFIN council, as I believe the general ignorance of the public opinion of the exact terms of the claim, along with the corresponding misleading campaign by part of the media, contributed decisively to build up an atmosphere that made an agreement on rational premises impossible to reach.

As we said before, the claims during the negotiations for the last renewal of the Economic Agreement, whose time limit was about to be met after the agreed twenty years, were posed in a context of high political tension and after a decade full of claims, not only internally[26] but also at the Community level (administrative proceedings of

[25] The underlining is ours.

[26] It is worthy of note that in the case of the Foral Community of Navarre those actions are referred to the Constitutional Tribunal, as it is the one in charge of resolving the action and question of constitutionality against laws, legislative provisions or acts with legal force. It differs from the case of the provisions approved by the General Assemblies of the Historical Territories, which hold the legislative power in taxation issues in the Autonomous Community of the Basque Country, which are of administrative rank and so the actions against them are under the jurisdictional review. This has been

State aids before the European Commission and subsequent actions before the Court of Justice), which challenge the core or essence of the Agreement in the light of one of the possible interpretations of the State aids and taxation, supported both by representatives of the European Commission and by the Opinion of the Advocate General[27] (Saggio). (Opinion issued on 1 July 1999 in the prejudicial ruling referred by the High Court of Justice of the Basque country to the ECJ in joint cases C-400/97, C-401/97, C-402/97 before the ECJ) and, of course, by some neighbouring Autonomous Communities. Besides, the coordination in direct tax issues carried out by the European Commission had the guidelines on State aids and taxation as a result, setting its rules for the assessment of the cases related to fiscal measures of the Member States in relation to Competition law. In addition, the tax package, promoted by the Commissary for taxation, Mario Monti (later he became Commissary for Competition), was adopted, with its three pillars, i.e., savings taxation, the abolishment of withholding tax in origin for capital profits and the Code of Conduct (to the charge of Primarolo Group), which was issued in 1998.

These facts reveal the increasing importance of a proper defence of the competence in taxation, by means of direct participation in the ECOFIN Council and the access to the ECJ, for the Basque Country public institutions.

Even though there were several drafts, the claim of the Basque authorities focused, in an exercise of feasibility, on the participation in the ECOFIN Council when they dealt with tax harmonization and free competition matters (in line with the aforementioned statement of the President of the Basque Government in 1999), or with the contents of the Agreement (in line with the mentioned Agreement reached by unanimity in 1998 in the Joint Commission (Congress-Senate) for European Affairs). Moreover, the Spanish delegation wouldn't be substituted but the Basque representatives would integrate within the Spanish delegation after an agreement between both levels: the central and the Basque autonomous.

The initial version has the following terms:

Due to the specificity the Institutions of the Basque Country hold in fiscal matters and in some other issues within this Economic Agreement and as long as it is bilaterally

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one of the false arguments given to justify the great number of actions against the tax provisions of the Basque Autonomous Community.

[27] In view of the position of the parties and the Spanish State that regards that the consideration of the fiscal competences distribution between the State and the Historical Territories violates the Treaty implies a value judgement on the constitutional structure of the Spanish State, Saggio said he *couldn't t share such position*. The fact the assessed measures are adopted by territorial bodies endowed with exclusive competence according to the national Law appears, as the Commission has said, as a mere formal circumstance which is not sufficient to justify the preferential treatment given to companies in the scope of the Normas Forales. If this was not so, the State could easily avoid the application, in part of its own territory, of the Community provisions in State aids matters simply by introducing some alteration in the internal distribution of competences in certain issues, in order to invoke the "general" nature of the measures concerned within that territory. (Ezeizabarrena, Xavier).

agreed, the State will guarantee by means of the appropriate mechanisms, following the procedure agreed in the Joint Committee of Quota, and without prejudice to the general legislation, the particular and effective way of intervening and participating for the Basque Institutions in those European bodies which deal with the contents of this Agreement.

This clause, which would be extended to the different levels, i.e., the Council, the COREPER and the working Groups, didn't have an answer from the Spanish government, unless we understand as such or the division within the Basque delegation the State intended when it tried to reach to an agreement only with one of the Historical Territories, Alava[28] this time, or the threaten of unilateral time extension, as it happened, in case the agreement was not reached.

Anyways, the most common arguments against the direct participation in the ECOFIN have gone from the traditional ones, already refuted by the case-law, based on the exercise of the competence on foreign affairs by the central State, to the function of arbitrage and integration of the central State administration in relation with the autonomous positions or to the principle of government accountability. In fact, the only possible argument seems to have been of political nature as these don't seem to be the terms of the debate from a legal and constitutional perspective.

Thus, the lack of juridical reasons leads us to conclude that the reason for the denial is of political nature and, with the intention of getting going again the difficult situation due to the lack of agreement and the consequent unilateral prorogue, Basque institutions agreed to get the issue out of the agenda, without giving up such claim or the possibility of posing it in future.

The political and constitutional dimension of the Economic Agreement, which goes further than its strict financial an taxation contents and the positivism some people applies when approaching to it, requires this aspect of the renewal of the Agreement, which was unsolved in 2002, to be taken into account. While this doesn't occur, the balance of competences and territories designed by the Constitution of 1978 is being deeply affected.

Nowadays, and in respect to the organizational aspect of the participation, it is clear that, after the approval and implementation of the agreements CMCEC in 2004, the way of articulating the participation would be similar to that, or even easier, as the agreement should be reached just between two parties (or three, if Navarre would join the agreement once reached) inested of twenty parties (the seventeen Autonomous Communities, the autonomous towns of Ceuta and Melilla and the representatives of the central State administration. The only complexity would derive from the articulation of the participation or presence of the three Historical Territories within

[28] In fact, this fact would have originated a similar situation to the one existing during General Franco's regime when the Historical Territories of Bizkaia and Gipuzkoa were deprived of the Economic Agreement as they were considered treacherous provinces.

the Basque Country. Anyways, and due to the long and positive experience of the representatives both of the Historical Territories and the Basque Country in the achievement of agreements, within the Tax Coordination Committee of Euskadi or the Basque Finances Council, both of internal nature, the fact of designating one or several Basque representatives for their integration in the State delegation shouldn't be a relevant problem.

## Final summary and conclusions

The issue of direct participation of the Basque institutions in the European Union institutions (and in other international bodies) in taxation matters, specially when they deal with issues directly related to the Economic Agreement, is a deservedly question and coherent with the system established by the Spanish Constitution in 1978, whose First Additional Provision protects and respects the historic rights of the *Foral* Territories, being the Agreement the most relevant of them.

Nor the Constitution, nor the Community Treaties reject such participation, on the contrary, as article 203 of the EUT (added in 1992, Maastricht) allows it and several Resolutions of the European parliament and of the Committee of the regions recommend it, seeking for more effectiveness in the development and application of the Community policies and for greater closeness to citizens as to get more identification with the European project. In the same way, the White Book of Governance from 2001 seeks a better management and quality in democracy with the intention that the European construction is more identifiable for citizens. In this scene, the repeated case-law of the Constitutional Court confirms the right of the Autonomous Communities to develop their competences even in the external scope with the only limitation of not jeopardizing the State international commitments.

Even though the Agreements of the CMCEC of 9 December 2004 make direct participation of the Autonomous Communities in the Council possible, the system must overcome certain difficulties which, in addition to the cultural and corporative hindrances existing in certain areas of the central State, are caused by a working method which is based on a system of sectorial Conferences with no strength, organization, perseverance and homogeneity. On the other hand, the absence of a Senate of authentic territorial parliamentary nature makes the appropriate articulation even more difficult.

The participation in the ECOFIN wouldn't need neither multilateral channels, as sectorial Conferences, nor territorial parliaments (similar to the Senate) as there are already bilateral channels, as the Joint Committee of the Economic Agreement, which, on the other hand, are also foresight in the First Additional Provision of the LCMCEC. If we add to all this the Basque Autonomous Community has never had the intention of substituting the Spanish delegation, but, on the contrary, to integrate within it, being co-responsible for the final agreements and acting only in relation to the matters related

to the Agreement, and prior to an agreement with the official delegation, it seems evident that all depends on an specific political moment which clears the storm clouds which appeared during the negotiation of the Agreement in 2001, in order to, once more, be able to update its content by virtue of the First Additional Provision of the Spanish Constitution.

# The present problems of the Economic Agreeement[1]

MR. JOSÉ MARÍA IRUARRIZAGA ARTARAZ

*Provincial Treasure and Finance Deputy for Biscay.*

Good evening:

First of all, I would like to thank Deusto University and, in particular, the Basque Studies Institute and its head, the efforts to organize, in collaboration with the Association for the Promotion and Diffusion of the Economic Agreement *"Ad Concordiam"*, this Conference about the Economic Agreement and its role in the European Community.

In my capacity as President of *"Ad Concordiam"* Association, I would like you to let me say some words about the activities and aims of our Association.

Unfortunately, it is remarkable the ignorance of the Spanish or European Administration and even of our own citizens about our most distinctive legal instrument of self-government.

It is quite frequent to find surveys in which the Basque citizens declare their ignorance about the existence, the origin and the content of the Economic Agreement, in so high percentages that seem it difficult to accept for us.

[1] The original version of this speech is in Spanish.

In fact, the verification of this situation encouraged the *Foral*[2] Provincial Government of Bizkaia *(Diputación Foral de Bizkaia)* to promote in 2000 the foundation of *"Ad Concordiam"* Association, aiming at contributing to the dissemination, the education and the information about any issue related to the Economic Agreement.

This initiative was enthusiastically joined by the Basque Country University and by Deusto University.

Since then *"Ad Concordiam"* Association has been carrying out spreading activities about the Economic Agreement. Activities not only for the non- expert average citizen, but also for the professionals, institutions and associations than somehow are related to the history of the Economic Agreement, to its current content or even to the role that a 130 years old legal instrument can play in the new fields where, now and in future, must show its effectiveness, its financial competences or its taxation powers.

Having realized that people's ignorance about the Economic Agreement is a fact we must tackle, this ignorance becomes a major problem when it is held by the Institutions, which are responsible to decide upon the legality of the decisions and actions performed pursuant to the competences assigned to the Basque Country under the Economic Agreement itself.

And the truth is we are going through a patch when a sort of "crusade" against the Economic Agreement seems to be taking place; a "crusade" coming from the politicians, the entrepreneurs associations and the trade-unions in the neighbouring Autonomous Communities; a "crusade" in every front and using any mean: the Courts of Justice, the European Community Institutions o by letters sent to the President of the Spanish Government himself.

Therefore, we believe our contribution is absolutely necessary in order to strive, as much as we can, against the ignorance of our distinctive self-government legal instrument: ignorance shown off proudly in many of the decisions we are "suffering" lately, standing out, above all of them, the controversial Supreme Court judgement 9 December 2004.

And we are not asking for impunity. We are talking about respect. We are claiming for equal respect and treatment for our Institutions and Tax Administrations to the ones the rest of the Institutions and Tax Administrations in the European Union enjoys.

I understand the contribution of this International Conference is achieving this commendable aim. Along the sessions, we have listened to different points of view when assessing the Economic Agreement or the decisions adopted by its virtue.

Today is the turn of Economic Agreement's future in the European Union, and I would like to pose some question in loud voice:

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[2] Translator's note: *Foral* means: Belonging to the institutional framework with historic roots of the Basque territories. It comes from *Fueros*. *Fueros* were the charters granted to villages, towns and regions by the Spanish monarchs in the Middle Ages and which established their rights and obligations.

May our Economic Agreement be at risk?

Is the reason for this risk the fact that the Economic Agreement itself is discriminatory?

Is it, therefore, not in line with the construction of the European Union?

I am going to try giving a short but clear and convincing answer to these questions.

In my opinion, it's true the Economic Agreement is in jeopardy. Its own legal force is at a serious risk of disappearing, at least in reference to one of the features which make it a unique system: the law-making power.

And this is so because, even though whenever the European Commission has adopted a Decision of incompatibility about certain taxation measures approved by the Historical Territories' Institutions, the incompatibility has been founded in the "material" selectivity of the measure, the truth is, in cases similar to the ones set out here in these three days, the Commission has built up a theory that, if it is successful, can have a permanent effect on the capacity of the infra-state bodies to adopt different taxation measures from those of the State they belong to.

Indeed, in the Azores case, the Commission, following the widely-known thesis constructed in the Opinion by Advocate General Mr. Saggio on the preliminary ruling referred by the Basque Country High Court, in the procedure related to the 1993 *Normas Forales*[3] to foster the investment and promote the economic activity, has stated that the geographical scope of reference to classify a tax measure as selective must always be the whole of the territory of the State in which the decision is adopted.

In this sense, any measure applicable in a limited territory within a State is to be classified as selective, due to the simple reason that it is applicable just in a limited geographical scope and, therefore, favours certain undertakings and productions, precisely the ones which operate in that limited territorial area.

It's as easy as ABC to conclude that, if such a theory succeeded, every *Norma Foral* passed by the Historical Territories would meet the selectivity element required by the concept of State Aids in article 87 of the EC Treaty, in particular, because these provisions are applicable exclusively to those tax-payers under the *foral* taxation system pursuant to the connecting or allocating factors in the Economic Agreement.

This is the reason for the expectation grown in our country about the Azores case, as if the European Court of Justice had followed the Commission's theory in these issues, it would have probably meant the "death certificate" for the *foral* legislative power to outline and regulate their own tax system, as the neighbouring Autonomous Communities have been claiming and the Supreme Court has unfortunately adopted,

[3] Translator's note: *Normas Forales* is the specific term used to name the Laws passed by the General Assemblies of the Basque Country Historical Territories.

in its above mentioned judgement of 9 December 2004, against which we have been striving bravely but unsuccessfully lately.

Luckily the Azores case judgement by the European Court of Justice has been clear and convincing against the Commission's allegations, and so against the argumentation of the 2004 Supreme Court judgement, stating that the reference framework is not necessarily the whole of the particular Member State's territory. Then, a measure which grants a benefit applicable just in a geographical area of the State's territory, it cannot be, just for this reason, automatically classified as selective under the 87 (1) EC Treaty.

Paragraph 58 of the judgement states literally:

> "It is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate.
>
> In such a case it is the area in which the infra-State body responsible for the measure exercises its powers, and not the country as a whole, that constitutes the relevant context for the assessment of whether a measure adopted by such a body favours certain undertakings in comparison with others in a comparable legal and factual situation, having regard to the objective pursued by the measure or the legal system concerned."

In order to avoid the selectivity of the measure, and according to paragraph 62 of the judgement, the measure must have been adopted by an infra-state body in the exercise of powers sufficiently autonomous vis-à-vis the central power, which the Advocate General GEELHOED has matched with three different sort of autonomy: CONSTITUTIONAL, PROCEDURAL and ECONOMIC.

I am not going to get now into the details of the requirements and interpretation of the three sorts of autonomy the European Court of Justice states, as this is a task to be done from now on by the Courts where there are pending proceedings related to the controversial measures.

Nevertheless, what is a clear as crystal is that this judgement has questioned the thesis in the Supreme Court judgement and has thrown some doubts on the issue to the Basque Country High Court, according to the fact that, accepting the continuous request of our defendant in the legal process at last, has decide to use the procedure under article 234 EC Treaty, referring a question for a preliminary ruling in order to get the right interpretation from the only Institution with competence to do it: the Luxemburg Tribunal itself.

I don't think it is going to be a big surprise for anybody if I affirm to be strongly convinced about the compliance of the Economic Agreement with the autonomy test the EC Court requires.

Even more, I believe that if there is any infra-state body which fulfils those conditions for autonomy, that is, exactly, the Basque Country.

As a consequence, I foresee a long and successful life for the Economic Agreement, a future when the Institutions with competence in the Country can exercise their powers in the same conditions, as I mentioned in the beginning, as any other body, infra-state or not, which holds similar powers.

The path won't be easy, without troubles or objections, specially if we pay attention to the latest strong questioning attitudes about the existence itself of the Economic Agreement but I am sure that, sooner or later, we will have right on our sides.

Until that moment comes, I encourage everybody to celebrate every Economic Agreement's anniversary and discuss about its present and future without leaving out the past.

Thank you very much.

# The Future of the Economic Agreement in the European Union[1]

MR. JUAN ANTONIO ZÁRATE PÉREZ DE ARRILUCEA

*Provincial Minister of Treasury, Finances and Budget of the Foral Provincial Government Council for Alava.*

Good evening:

## 1. Thanksgiving

First of all, I would like to thank the organizers of this International Conference about the Basque Economic Agreement and Europe for the invitation to take part in this session and, in particular, the Basque Studies Institute, congratulating all of them on this initiative.

## 2. Approach to the discussed issue

Talking about the relations between the European Union and the Economic Agreement means talking about one of the most topical questions, unfortunately most

[1] The original version of this speech is in Spanish.

controversial and, of course, most important nowadays among all which are related to the agreed law.

Indeed, the main problem, summing up, lies in determining whether the Basque Institutions hold, within the legal framework of the Economic Agreement, their own legislative power in order to regulate and establish their own tax system.

Wondering about this matter may seem quite shocking, as if we read article 1 of the Economic Agreement we notice it is expressly declared that the Institutions of the Historical Territories are able to maintain, establish and regulate, within their territory, their own tax system.

Nevertheless, this general principle which recognizes the Basque Institutions power to legislate is supplemented by several principles which are also set, not exclusively, in the agreed law itself (article 2). In fact, the Economic Agreement states some principles and rules to which the Institutions of the Historical Territories should pay attention when establishing their tax system.

## 3. The need to link the power to establish their own tax system and the general principles and tax harmonization principles

A coordinated reading of both articles (1 and 2 of the Economic Agreement) is the right way to interpret and apply the legislative power scope of the *Foral*[2] Institutions. The general statement about the *Foral* Territories competence to outline their own tax system must be directly linked not only to the principles, stated in general terms, which rule the establishment of their own tax system, but to the provisions about fiscal harmonization, coordination and cooperation with the State under the Economic Agreement as well.

Therefore, just one of the general principles shouldn't be considered on its own, not taking into account the others, as both are directly and closely interconnected, in such a way any construction of one of them leaving the other out will lead necessarily to an incomplete approach and, then, lacking of a solid base.

As a result, considering that the Historical Territories Institutions have a wide law-making competence to legislate their own tax system, leaving aside the principles or considerations the general principles, mentioned above, bring in, is as wrong as thinking that any law passed by the Historical Territories Institutions is not in line with the legislation, if it is not exactly identical to the correlative law applicable in the Common regime territory. Any of these two considerations, when forgetting about part of the content of the Economic

[2] Translators note: *Foral* means: Belonging to the institutional framework of the Basque territories. Translator's note: *Foral* means: Belonging to the institutional framework with historic roots of the Basque territories. It comes from *Fueros*. *Fueros* were the charters granted to villages, towns and regions by the Spanish monarchs in the Middle Ages and which established their rights and obligations.

Agreement, are bound to be unsuccessful as they just provide misunderstanding to the interpretation and the application of the Economic Agreement.

It may seem that the argument above is needless due to the fact that the Economic Agreement seems to have a clear content. However, it has been for ages that its content is being questioned. In my opinion, this questioning is due, exactly, to some attitudes which aim to reinforce one of the principles in detriment of the other, leaving out the real interconnection between them.

## 4. The position of the Council of Alava (*Diputación Foral de Alava*)

The Council of Alava has always believed that the Economic Agreement is a main legal instrument for the self-government and has defended the law-making and the administration powers of the *Foral* Institutions acknowledged by it. That is to say it has always had the opinion that both general principles must be examined and taken into account when outlining the tax system applicable in Alava.

Pursuant to it, precisely, we can assure that the principles aiming at the harmonization and coordination with the State, within the agreement legal text itself, cannot eliminate or eradicate, by any means, the essence of its own legislative power.

From this point of view and because of its strong belief in the legal force of the Economic Agreement, the Council of Alava has acted and appeared, and it will keep on doing it, in every situation where it has been required in order to defend and support its legal force and effectiveness. Hence, it will always defend the performance of its competences, legislative as well as administrative ones, which stem from it.

However, he has also defended at the same time, and it will keep on doing it, the necessity of performing its competences, legislative and administrative one, with the highest responsibility, observing the general principles as well as the harmonization, coordination and cooperation ones with the State, which are part of the Economic Agreement itself. We believe that the best way to defend the Economic Agreement is exercising the competences in it with responsibility, emphasizing not only the general principle of legislative power but the other ones which constrict the scope of the former as well.

## 5. Reference to the European Union in the Economic Agreement

The fact of the matter is, especially focusing on the issue of this session, trying to find out how to coordinate the Economic Agreement and the European Union. A partial answer to this question can be found in the Economic Agreement itself, which sets, precisely among the general principles the Historical Territories tax systems should be in accordance with, the submission to the International Agreements or Treaties signed and ratified or adhered to by the Spanish State.

In particular, there is a specific mention to the European Union when it declares that the tax system of the Historical Territories shall comply with the International Agreements to avoid double taxation and with the fiscal harmonization rules in the European Union.

Accordingly, the General Taxation Framework *Norma Foral,* passed by the General Assembly in Alava last year, when regulating the tax system legal sources, includes specifically this reference in the Economic Agreement and expressly points that the provisions of the European Union and of any other international or supranational organization with competence in taxation issues will be of application as a legal source.

Accordingly, from a formalistic view, the Economic Agreement solves out the relation between the taxation regulations in force in the European Union and the legislative power of the *Foral* Institutions, so no controversy should be raised about it.

Nevertheless, from a different perspective, the truth is that the legal power, itself, of the *Foral* Territories has been called into question.

## 6. Supreme Court Judgement 9 December 2004

A good example is the Supreme Court Judgement 9 December 2004. In my opinion, this judgement is based on a wrong reasoning of the Economic Agreement. And the reason why it is wrong is because it does not balance correctly the two principles, mentioned above: the general principle of the competence of the *Foral* territories to regulate their own tax system and the principles which rule its establishment and the provisions about fiscal harmonization, coordination and cooperation with the State, all of them under the Economic Agreement. Its error derives from the annulment of some articles in the Corporate Tax *Norma Foral* arguing that they differ in content from the articles concerning the same issues in *Common Regime* Territory.

This Supreme Court Judgement 9 December 2004 is not only full of obvious mistakes about taxation issues, but it is on a different track from the Supreme Court previous case-law as well. The case in it implies some ignorance of the Economic Agreement, whose competences are really undermined.

## 7. About the Azores case

Nevertheless, and short after the mentioned judgement, the European Court of Justice, in its judgement about the known as "the Azores case", sets a theory which can cast light on the relations between the European Union and the Economic Agreement.

Starting from the general principle that the European Union Treaty forbids selective State aids, i.e. aids which benefit certain undertakings or productions, however, it is envisaged that these benefits are not State aids if they are justified by the nature or structure of the tax system.

In this sense, the European Court of Justice argues that in order to classify a measure adopted by an infra-state body as selective, in particular, a reduced, or different from the State's, tax rate in a particular taxation, is necessary to examine if the measure has been adopted by a body with autonomous power from the central government. It must be examined if the measure is applicable to every undertaking or production under the infra-state body's geographical jurisdiction.

Specifically, the European Court of Justice sets three different parameters to be met by an infra-state body in order to adopt a different tax rate from the one applicable in the rest of the State. These parameters are as follows:

a) the infra-state body holds a political and administrative status separate from that of the central government.
b) the measure must be implemented without direct intervention of the central government.
c) the financial consequences of the adopted measures are borne exclusively by the autonomous body and they aren't offset by the central government.

## 8. About the applicability of the Azores case to the Basque Country

Bearing in mind the European Court of Justice judgement, the Foral Council of Alava feels quite contended rightly as if this thesis is to be applicable in the Basque Country, the Economic Agreement will be perfectly fitted in the European Union, a target we have always tried to achieve.

In fact, the conditions imposed by the ECJ are fully applicable to our territory, in such a way that the conclusion would be the recognition of whatever has always been supported by the *Foral* Institutions: they have legislative power to enact general provisions in order to regulate their own taxation system.

However, setting the application of this theory to the Basque Country is still pending. That is, the application of the Azores argumentation and parameters to the Basque Country hasn't been confirmed yet. If so and from that very moment, we could start a new phase characterized by the public and open acknowledgement, among the European Institutions, of the compatibility and feasibility of the Economic Agreement within the European Union.

While we are waiting for the ECJ decision, I think we have to be cautious and be consistent supporting and defending the Economic Agreement in any required field. Along with this defence of the agreement, ways of reinforcing it should be sought.

## 9. The reinforcement of the Economic Agreement: "*Blindaje*"[3]

Among the measures aiming at reinforcing the Economic Agreement, we can find the so-called, probably not too correctly, "blindaje" of the Economic Agreement.

I believe this expression not to be too appropriate because, as I mentioned before, the competences under the Economic Agreement must be performed with responsibility and respecting not only the general principle of competence of the *Foral* Institutions but the principles which constrict it as well. As a consequence, there is nothing to be *"armour-plated",* if the competences are executed in the right way. Or to see it from a different view, an irresponsible performance of the competences will never be defended *(armour-plated)*, nor should be.

When in the Provincial Council of Alava we use the expression "*blindaje*", we are referring to something as simple and basic as this: if the rest of the Institutions in Spain, which pass by tax legislation, can do it within a certain constitutional framework, why cannot the Basque Country *Foral* Institutions enjoy the same legal framework or regime?

Or to say in other words, What is the real sense of the different legal treatment between the legal provisions of Basque Country *Foral* Institutions (*Normas Forales*) and the legal provisions of the Spanish Institutions (*Leyes*), when both are regulating their own taxation systems exercising their own competences?

Ultimately, I think it doesn't make much sense that, within the Spanish State, the legal provisions, which regulate the different taxes and make the citizens pay taxes, enjoy a different legal regime depending on which Institution adopts them.

## 10. About the Corporate Tax reform

You are likely to agree on my previous thoughts, but, at the same time, you may be wonder about what we are going to do specifically about the Corporate Tax in the three *Foral* Provincial Councils.

As it's well known, the Supreme Court judgement 9 December 2004 annulled certain articles of the Corporate Tax Law *(Norma Foral).* As I have said before we cannot agree with its content as its starting point is an assumption difficult to accept for the Provincial Council of Alava. This assumption is a mere comparison between the Common Territory legislation and the Historical Territories legislation and declare

[3] Translator's note: "Blindaje", literally meaning "armour-plated" or "bullet-proof", has become quite a popular term in the current literature about Economic Agreement to express in general termes the necessity of *effective measures of defence* against the several "attacks" from different "fronts". Though depending on the context and the point of view of the different authors (researchers, judges, politicians…) its meaning can differ considerably.

that the existence of any founded difference implies and leads to the annulment of the *foral* provision.

After this Supreme Court judgement, the *Foral* Provincial Councils in the Basque Country have made several decisions in order to defend the Economic Agreement, that as a consequence of the judicial review, have provoked a legal framework within which the certainty of law is clearly diminished.

At the moment, the *Foral* Provincial Council of Alava considers that, along the defence of the agreed text, legal certainty is a principle, a value, tax-payers ask for currently. Therefore, we believe this principle must be specifically taken into account when making decisions regarding the Corporate Tax.

The statement above shouldn't make one think being cautious is an indication of submission to the thesis about a constrained power of the *Foral* Institutions to regulate the Corporate Tax. By no means, caution and responsibility can be associated with dereliction of duty.

It is just a question of pointing out a fundamental principle in any taxation system at present. It is a question, in a particular moment, in this specific moment, of considering giving the tax-payer what they are requiring and having the right to do it more important than adopting measures that could prove a so-called "different" execution of the legislative power.

Let us now look at this: a year ago, there was a debate about the Corporate Tax rate to be adopted for 2006 fiscal year in the Basque Country. In this debate there were two attitudes: on one hand, a tax rate in the interval from 32,5% (tax rate which had be annulled by the Supreme Court judgement 9 December 2004) to 35% was regarded the right tax rate to be approved (tax rate in force in the Common Territory). On the other hand, a tax rate below 32,5% was regarded to be the appropriate one. As you all know, the three Historical Territories finally adopted the 32,6% tax rate.

A year later, in the *Foral* Provincial Council we assume that it would be difficult to explain the proposal of a different tax rate from the one considered to be reasonable a year ago, i.e., it would be difficult to explain the adoption of a tax rate different from the 30%. And it would be difficult for the simple reason that we should answer the question about the differences in the situation from last year to this that make the considered right 30 % tax rate not to be valid anymore.

For that very reason, the responsible execution of the legislative competence, along with the principles which must rule its performance, and specially, as I have pointed before, the legal certainty principle, make me affirm that facing the Corporate Tax reform, one must be, currently, very cautious.

Moreover, in my opinion a mayor reform of the Corporate Tax must be implemented at the right time, after an assessment of all the required premises. Among them, let's name:

a) The issue of the "blindaje"[4] of the Economic Agreement.
b) The applicability of the "Azores case" to the Basque Country.
c) The mayor reform of the Corporate Tax adopted by the Common Territory institutions.
d) The adoption of the IAS.

All the above premises must be combined with a detailed research of the needs of our companies and our economy. And as a result, the legal measures to be adopted will rise, measures which won't be necessarily identical to those in the Common Territory, among which a different tax rate, a different taxation scheme or different tax incentives could be included.

To give a good example of this, the three *Foral* Provincial Councils have just passed by a draft of the Personal Income Tax *Norma Foral* to be sent to the General Assemblies. This draft contains a tax scheme which differs partially from the one in the Common Regime Territory and, besides, proposes, just to mention an example, a marginal tax rate 2% higher than the one in force in the Common Territory.

¿Why has a Personal Income Tax like this been outlined? Because the three *Foral* Provincial Councils, executing their competences under the Economic Agreement, have considered, after the required analysis, this to be the most appropriate tax regulation according to fiscal equity, financial sufficiency and coordination with the Common Territory.

We will also take this approach facing the Corporate Tax reform. Approach that must have as special points of reference, as I have mentioned before, the legal certainty and the caution principles, which does not mean the abandonment of the legislative capacity by the Historical Territories.

Finally, I would like to point out the fact that the *Foral* Provincial Council of Alava will keep on defending the legal force and effectiveness, to its complete extent, of the Economic Agreement, as an identity signal and as the foundation of our self-government.

Thanks a lot for your attention.

[4] See note 2 above.

# Amendments of the Economic Agreement[1]

MR. JUAN MIGUEL BILBAO GARAI

*Treasury and Finance Secretary. Basque Government.*

## Introduction

First of all, I would like to congratulate "Ad Concordiam" Association and the Basque Studies Institute, belonging to Deusto University, on the organization of this International Conference about the Basque Economic Agreement and Europe. The organizers have managed to get together well-known experts on European issues such as regional taxation State Aids policy, fiscal harmonization and Economic Agreement. Therefore, it has been possible to tackle, during these three sessions, the real questions and problems about the Economic Agreement in the European Union legal framework.

I am going to focus my speech on the several amendments that, in my opinion, should be made to the in force 12/2002 Law, 23 May, by virtue of which the Economic Agreement with the Basque Autonomous Community is approved.

[1] The original versión of this speech is in Spanish.

The legal text is divided into three sections:

– Section 1 is about taxes and it includes the taxation relations, the connecting or allocation factors in order to distribute the legislative and the levying competence of each tax. There are 47 articles in it which distributes competence about taxes and taxpayers between the State and the Basque Country.
– Section 2 is about the financial relations (articles 48 to 60). It regulates the general principles about the Quota (*cupo*) and the consumption adjustment for Value Added Tax and for Excise Duties. This Section is implemented by the Quota Law renewed every five years.
– Section 3 (articles 60 to 67). It is about the composition and functions of the Economic Agreement Committees and Board of Arbitration between the Basque County and the State, i.e., Coordination and Evaluation Committee, the Board of Arbitration and the Joint Committee on the Economic Agreement.

The in force Economic Agreement legal text was enacted in 2002 and it's been five years since then. It is well-known tax systems are immersed in a variable environment, subject to economic and political pressures. Therefore, they change continuously in order to adjust to the features of the environment they are operating in.

The Second Additional Provision in the Economic Agreement states: *"In the event of a reform of the State tax legal system affecting the taxes object of agreement, or an alteration in the distribution of the regulatory competences affecting the scope of indirect taxation, or new tax figures or payments on account, both Administrations shall by mutual agreement proceed to adapt the present Economic Agreement to any modifications made in the aforementioned legal system. The corresponding adaptation of the Economic Agreement shall specify the financial effects thereof."* The Economic Agreement itself foresees, therefore, the possibility to adjust its legal text to essential amendments made in the State legal system, by mutual agreement and subsequent approval of the Law.

If we pay attention to the evolution of the former Economic Agreement from 1981 to 2002, we can observe there was up to five Law approving several modifications and adjustments of the Economic Agreement.

It is to be pointed out that up to now, December 2006, there have not been important alterations in the State tax legal system; however it is necessary to propose and tackle several amendments of the in force legal text, basically as a result of the approval of Community Directives an Regulations, affecting the European Union tax systems. This updating of the Section 1 in the Economic Agreement is absolutely necessary in order to avoid its obsolescence and fulfil the legal vacuum provoked by the evolution of taxation systems. The lack of updating of the Economic Agreement legal text leads to its impoverishment and makes its application to taxation relations resulting of daily legal and economic activities.

The passing through the stages of parliamentary procedures in order to adapt the Economic Agreement should be conducted at the same time as the Quota Law for the

period 2007-2011, currently being negotiated between the State Administration and the Basque Administration.

The main issues to deal with in a nearby future reform of the Economic Agreement legal text are:

## 1. Amendments due to the implementation of the Savings Directive

The aim of the Council Directive 2003/48/EC of 3 June 2003, on taxation of savings income in the form of interest payments, is to enable savings income in the form of interest payments made in one Member State to beneficial owners who are individuals resident in another Member State to be made subject to effective taxation in accordance with the laws of the latter Member State. This aim makes the effective taxation of the interest payments in the beneficial owner's Member State of residence for tax purposes feasible.

The Directive stipulates an automatical communication information obligation at least once a year with reference to all interest payments made during that year by the paying agent in any Member State. Moreover, it stipulates that, in view of structural differences, Austria, Belgium and Luxembourg cannot apply the automatic exchange of information at the same time as the other Member States, during a transitional period. In exchange these three Member States should apply a withholding tax up to 35 % to the savings income covered by this Directive and should transfer 75% of their revenue of this withholding tax to the Member State of residence of the beneficial owner.

The beneficial owner can avoid, in these countries, the levying of the withholding, if he presents to his paying agent a "certificate of residence" issued by the competent authority of his Member State of residence for tax purposes.

Ultimately, the Directive stipulates an automatic exchange of information system among all Member States. However, during a transitional period, the three Member States, Austria, Belgium and Luxembourg instead of providing information should apply a withholding tax to the savings income.

The Directive affects the Economic Agreement in the sense that the *Foral* Provincial Councils must guarantee the effective taxation of, at least, part of the savings income payments made in any other Member State to individuals with residence for tax purposes in Spain: the amount paid specifically to the individuals with fiscal residence in the Basque Country. In order to do so, the *Foral* Provincial Councils must obtain the information about this kind of payments made to their residents in any other EU Member State.

In the context of the coexistence of the two mentioned systems- the exchange of information and the application of a withholding tax- the Council Directive 2003/48/EC has consequences for the *Foral* Provincial Councils related to both:

1. The *Foral* Provincial Councils must take part in the automatic exchange of information procedure in both ways: as a transmitter and as a receiver of information.

The proposal to the Spanish Treasury Department is to reach an agreement in the Joint Committee on the Economic Agreement in order to establish the *Foral* Provincial Councils' direct participation in the automatic exchange of information procedure under the Council Directive 2003/48/EC. We have proposed to the Treasury to categorize the *Foral* Provincial Councils as "competent authority" for the purposes of the Directive and to notify this category to the European Commission.

2. The *Foral* Provincial Councils must have a share in the revenue transferred to the Spanish State by Austria, Belgium an Luxemburg, as a consequence of the withholding tax applied to the saving income payments made by the paying agents operating in those countries to the beneficial owners residents of the Spanish State for tax purposes (75% of the withholding tax).

Obviously, the consideration of the withholding taxes applied to the income of individuals with fiscal residence in the Basque territory, as payments on account of the Personal Income Tax (first regulated by the Normas Forales of taxation measures in 2004, with effect from 1 January 2005) impacts on the Foral Provincial Councils, diminishing its fiscal revenue.

Even though tax-payers won't do it (the withholding tax is the penalty for the opacity of the income obtained), they can state and deduct in their personal income tax returns some withholding taxes which haven't been collected by *Foral* Provincial Councils but by the tax administrations in Austria, Belgium and Luxemburg. The 75% of them will be transferred to the Spanish State, along with those corresponding to the fiscal residents in the rest of the State, not being feasible to distinguish the ones corresponding to the fiscal residents in the Basque Country from the ones corresponding to the fiscal residents in the rest of the State due to the opacity of the beneficial owners.

Therefore, a fiscal deficit for the Foral Provincial Councils is provoked and it should be balanced attributing to the Basque Country a percentage of the transferred revenue to the Spanish state.

The proposal made to the Spanish Treasury Department requires an agreement, reached by the Joint Committee of the Economic Agreement, on the Basque Country's share of the received transfers by the Spanish State under article 12 of the Council Directive 2003/48/EC. We propose to apply the same attribution rate (6,24%) as the one fixed in the methodology for determining the Quota.

The last legal amendments related to this Directive are the ones which enable the *Foral* Provincial Councils to issue the residence certificates referred to in article 13 of the Directive, at the request of the individual with residence for fiscal purposes in the Basque territory. The aforementioned article states an exception to the withholding tax when the beneficial owner presents to his paying agent a "residence certificate"

drawn up in his name by the competent authority of his Member State of residence for tax purposes.

## 2. Agreement on an allocating factor in the Excise Duty on Coal

The 22/2005 Law, 18 November, which implements in the Spanish legal system the Council Directives about restructuring the Community framework for the taxation of energy products and electricity, about the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and about the taxation of the across borders contributions to pension funds within the European Union (Official Gazette of the Spanish State, 277, 19 November 2005), *regulates a new excise duty, the Excise Duty on Coal, which is not under the category of Excise Duty on Manufacture.*

Indeed, according to the Economic Agreement, the Duty on Coal, as it is under the category of Excise Duties, it is from the very moment of its implementation an agreed tax. In fact, article 33 (1) Economic Agreement stipulates: *"Excise Duties are agreed to be taxes subject to the same rules in terms of substance and form as those established at any given time by the State."* Nevertheless, it is necessary to agree on the allocating factors to distribute the legislative and the levying competences of this new excise duty between the State's administration and the Basque Administration.

Hardly any revenue is going to be collected from this duty. Most of the coal consumption is enjoying of an exemption or a no-subjection clause, but the formalities in the tax compliance (quarterly tax return or annual report of activities) require the agreement on the allocation criteria to distribute competences. The taxable event of this duty is the supply of coal for consumption to the purchaser or the self-consumption of coal. The tax rate is 0,15 per gigajoule gross calorific value.

When tackling the allocating factor, we have asked the Spanish Treasury department to take into account overall the cost of tax compliance for taxpayers and the simplicity for the tax administrations. Our proposal is to adopt the same criterion as the one under the Spanish law in order to allocate competence for the entrance in the Territorial Register. From the point of view of the administration and its levying competences, it seems to us the most compatible with the State's regulation.

Therefore it would be competence of the *Foral* Provincial Councils the levying of the Excise Duty on Coal in regard to the operations corresponding to establishments registered in the *Foral* Provincial Councils administrative registers, meaning that:

i) The place of consumption is the Basque Country, in regard to purchasers of Community product.
ii) The place of storage is situated in the Basque Country, in regard to retailers of Community product.

iii) The fiscal domicile is situated in the Basque Country, in regard to retailers without warehousing installations.
iv) The producing unit is situated in the Basque Country, in regard to coal producers and extractors.

So in order to agree on the competences about this new Excise Duty with the State, we have made a proposal of amending article 33 of the Economic Agreement, adding a new paragraph with the aforementioned allocating points.

## 3. Amendments due to the new special VAT regime for Groups of Entities

By the 36/2006 Law, 29 December, of measures to prevent fiscal fraud, it has been implemented a new special VAT regime, known as Group of Companies. The Law draft did not regulate it initially but it was introduced by a parliamentary amendment in the Senate proceeding. The new regime will not be in force until 1 January 2008 and it requires a regulation provision whose draft is still pending.

The main aim of this new special regime is basically that these groups of entities, defines in a similar way as the fiscal corporate groups under the Corporate Tax Law, enjoys a so-called tax consolidation system which entitles the dominant company to fill in the VAT returns, payable on outputs or recoverable/or pending of compensation on inputs, corresponding to every tax-payer in the Group.

The VAT payable or recoverable/or pending of compensation is calculated exclusively taking into account the operations carried out with "third" companies out of the Group, leaving out the intra-group activities carried out by the in-grouped companies. As a result, an automatic intra-group compensation is applicable in order to avoid the payments of the VAT payable by some companies in the group which corresponds to the VAT recoverable by some others in the same group. However, the companies in the Group must fulfil their VAT formal obligations.

On the other hand, the new special regime includes a "wide" form of application which requires complex accounting records in order to control the costs of the intra-group activities.

Articles 27, 28 and 29 of the Economic Agreement stipulate the VAT allocating factors to distribute competence between the State and the Basque Country, the rules for the determination of the place of the transactions and the rule for the distribution of the competence to levy the tax either exclusive to one administration or shared between both administrations according to the relative volume of operations in each territory. Besides, the rules to determine the VAT inspection competences are stipulated.

Obviously the Economic Agreement hasn't got any criterion or rule regarding this new special regime for groups of companies which operate in both territories (State and Basque Country).

Our understanding is that an amendment of article 27 in the Economic Agreement is required in order to include the new regimen allocating factors and to avoid any artificial loss of VAT revenue for the Basque administration due to the application of this new special regime by Basque companies.

The proposal would imply that dependent companies with fiscal domicile in the Basque country and volume of operations exceeding 25 per cent are excluded of the scope of this new special regime and so apply individually the general VAT rules.

The implementation of this new VAT regime is from the tributary perspective quite complex. We will have to wait and see which kind of companies apply the regime and to check if VAT transfers from one administration to the other are consequently provoked.

## 4. Amendments of the Excise Duty on Certain Means of Transport regulating competence

The 25/2006 Law, 17 July, amends, in article, 4 the 21/2001 Law, 27 December, which regulates fiscal and administrative measures regarding the new financing system for the Common Regime Autonomous Communities and the Cities with Autonomy Statute. The amendment of article 43 in 21/2001 Law which regulates the extent of the regulating competence increases the competence of the Common Regime Autonomous Communities to approve a higher tax rate in the Excise Duty on Certain Means of Transport than the one approved by the State. So far the increment was up to 10 per cent, this new Law allows a maximum of 15 per cent of increment.

Regarding the Excise Duty on Certain Means of Transport, article 33 (3) of the Economic Agreement states that:*"…, the competent institutions of the Historical Territories may increase the tax rate by up to a 10 per cent of the rates laid down at any given time by the State".*

This means the application of these measures in the Basque Country, in such a way the *Foral* Provincial Councils are able to increase the Excise Duty on Certain Means of Transport tax rate up to a 15 per cent of the rates approved by the State requires necessarily a modification of the Economic Agreement.

## 5. New VAT and Excise Duty on Manufacturing cooperation agreements

Even though these cooperation agreements don't require the Economic Agreement legal text modification, they do require the amendment of the agreements reached by the Joint Committee on the Quota, 17 December 1992, which formally are placed on the Record 2/1992, Annex II "Agreement on the application in the Spanish State of the EEC Regulation No. 218/1992 concerning Administrative Co-operation within the Sector for Indirect Taxation (VAT)" and Annex III "Agreement on Administrative Co-operation concerning Excise Duty on Manufacturing" in Record 1/1997, 27 May 1997.

## 6. Updating of the business turnover amount which allocates exclusive competence to the administration of the fiscal domicile

The proposal is made by virtue of the Additional Provision Sixth (updating at least every 5 years). In 2007 it's been five years since last time business turnover amount, which establishes exclusive competence or shared competence, was updated (from 500 million pesetas to 6 million euros in may 2003 when the Economic Agreement in force was enacted).

To set the new amount two could be the guidelines of reference.

i) The definition of small enterprise approved by the European Commission from 1 January 2005, business turnover 10 million euros.
ii) The business turnover amount stipulated in the common territory Corporate Tax Law to establish the scope of the special SME regime, 8 million euros (in force from 1 January 2005).

## 7. Agreement concerning the so-called professional diesel

By article 4 of the 36/2006 Law, 29 December, of measures to prevent fiscal fraud, has amended the 38/1992 Law, 28 December, regulating Excise Duties, adding a new article 52.Bis in which the right of partial refund of the paid or liable Excise Duty on Hydrocarbons regarding the gas oil which had been used as motor fuel for the vehicles stated in the new article. It refers to the so-called "business use" gas oil.

After some negotiations within the working groups in the State's Treasury Department, it has been agreed to apply the fiscal domicile of the haulier as the allocating factor to refund the Excise Duty.

Therefore, we have proposed to add a Transitional Provision to the Economic Agreement as follows:

***Transitional Provision Eighth***

Partial refunds concerning the Excise Duty on Hydrocarbons due to the application of a reduced tax rate for gas oil used as motor fuel with commercial purposes, authorised by COUNCIL DIRECTIVE 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, will be carried out by the administration correspondent to the fiscal domicile of the beneficiary of these refunds.

## 8. Exceptional refund of the Excise Duty on hydrocarbons to farmers and cattle-raisers

The First Additional Provision in the 44/2006 Law, 29 December, regulating the improvement of the protection of consumers and users, acknowledges the exceptional

refund right of the paid or levied Excise duty on Hydrocarbons by the farmers or cattle-raisers when purchasing gas oil which had paid the tax rate regulated in the epigraph 1.4 of the Tariff 1 in article 50 (1) of the 38/1992 Law, 28 December, regulating Excise Duties and which had occurred within the period from 1 October 2005 to 30 September 2006.

The application of the criterion stipulated in article 33 (2) Economic Agreement is not efficient in cases which the allocating factor is the fiscal domicile of the farmer or cattle-raiser beneficiary of the refund, so we have proposed an addition of a transitional provision to the Economic Agreement as follows:

> "The exceptional refunds of the Excise Duty on Hydrocarbons for farmers and cattle-raisers as a consequence of the measures adopted in order to mitigate the increment of the supplies in the production process concerning the agricultural sector, will be carried out by the administration correspondent to the fiscal domicile of the beneficiary of these refunds."

## Conclusion

All the aforementioned amendments of the Economic Agreement are mainly measures of fiscal policy of a non-political nature. It could be said they are not really relevant. Perhaps the most important one due to its likely effect on the revenue of the Basque Country is the special VAT regime of Groups of Companies.

Nevertheless, the agreement and adoption of them would provoke an improvement and updating of the legal text of the Economic Agreement which would avoid distortions in the joint application of the different taxation systems coexisting in the Spanish State. Besides, lack of legal regulation and obsolescence in the legal text will also be saved for the economic agents.

Therefore, it will contribute to a future consolidation of the Economic Agreement.

# *Iconographic Appendix*

# *Anexo Iconográfico*

*From left to right: Mr. Dali Bouzoraa, Mr. José Gabriel Rubí, Mr. Santiago Larrazabal y Mr. Franco Roccatagliata.*
*De izquierda a derecha: D. Dali Bouzoraa, D. José Gabriel Rubí, D. Santiago Larrazabal y D. Franco Roccatagliata.*


*From left to right: Mr. Ronald McDonald, Mr. Niilo Jääskinen, Mrs. Lourdes Alegría, Mr. Ricardo Borges, Mr. Fernando de la Hucha.*
*De izquierda a derecha: D. Ronald McDonald, D. Niilo Jääskinen, Dña. Lourdes Alegría, D. Ricardo Borges, D. Fernando de la Hucha.*


*From left to right: Mr. Jean Louis Colson, Mrs. Gemma Martínez, Mr. Joxerramon Bengoetxea*
*De izquierda a derecha: D. Jean Louis Colson, Dña. Gemma Martínez, D. Joxerramon Bengoetxea*


*From left to right: Mr. Ignacio Sáenz-Cortabarria, Mr. Juan Pedro Quintana, Mr. Iñigo Ocariz, Mr. Javier Murgoitio, Mrs. Beatriz Pérez*
*De izquierda a derecha: D. Ignacio Sáenz-Cortabarria, D. Juan Pedro Quintana, D. Iñigo Ocariz, D. Javier Murgoitio, Dña. Beatriz Pérez*

*From left to right: Mrs. Noreen Burrows, Mr. Alberto Atxabal, Mr. Mikel Antón*
*De izquierda a derecha: Dña. Noreen Burrows, D. Alberto Atxabal, D. Mikel Antón*


*From left to right: Mr. Juan Antonio Zárate, Mr. José Mª Iruarrizaga, Mr. Santiago Larrazabal, Mr. Juan Miguel Bilbao*
*De izquierda a derecha: D. Juan Antonio Zárate, D. José Mª Iruarrizaga, D. Santiago Larrazabal, D. Juan Miguel Bilbao*

**Comité Organizador**

Sr. D. Santiago Larrazabal Basañez, Director del Instituto de Estudios Vascos de la Universidad de Deusto.
Sr. D. José Gabriel Rubí Cassinello, Presidente de la Junta Directiva de la Asociación para la Promoción y Difusión del Concierto Económico AD CONCORDIAM.
Sr. D. Mikel Antón Zarragoitia, Director de Asuntos Europeos del Gobierno Vasco.
Sr. D. Alberto Atxabal Rada, Profesor de Derecho Financiero y Tributario de la Universidad de Deusto y Secretario de la Junta Directiva de la Asociación para la Promoción y Difusión del Concierto Económico AD CONCORDIAM.
Sra. Dña. Gemma Martínez Bárbara, Jefa del Servicio de Política Fiscal del Departamento de Hacienda y Finanzas de la Diputación Foral de Bizkaia.

**Colaboran**

Ilustre Colegio de Abogados del Señorío de Bizkaia.
Colegio Vasco de Economistas.
Asociación Española de Asesores Fiscales. Delegación del País Vasco.
Academia Vasca de Derecho.
Dirección de Asuntos Europeos del Gobierno Vasco.
Instituto de Estudios Europeos de la Universidad de Deusto.

# ÍNDICE

# PROGRAMA DEL CONGRESO

**Primera Jornada, martes, 12 de diciembre de 2006**

*Fiscalidad regional: modelos comparados*

16:00 Inauguración del Congreso.

16:30 Primera ponencia: «Fiscalidad regional en la UE». Sr. D. Dali Bouzoraa, Director Técnico del *International Bureau of Fiscal Documentation* – Amsterdam.

17:15 Segunda ponencia: «Marco normativo general de la UE: políticas de armonización de la imposición directa e indirecta, desde la constitución de las Comunidades Europeas hasta nuestros días». Sr. D. Franco Roccatagliata, Administrador de la Unidad de Análisis y Coordinación de Políticas Fiscales. Dirección General de Fiscalidad y Unión Aduanera de la Comisión Europea.

18:00 Descanso.

18:30 Mesa redonda: «Modelos de fiscalidad regional en Europa».

18:30 Finlandia (Islas Aland): Sr. D. Niilo Jääskinen, Magistrado del Tribunal Administrativo Supremo de Finlandia.

18:50 Portugal (Islas Azores y Madeira): Sr. D. Ricardo Borges, Abogado especialista en Derecho Fiscal y Profesor de la Facultad de Derecho de la Universidad de Lisboa.

19:10 Reino Unido (Escocia): Sr. D. Ronald McDonald, Catedrático de Política Económica y Director del Programa de Doctorado del Departamento de Economía de la Universidad de Glasgow.

19:30 Comunidad Autónoma Vasca y Comunidad Foral de Navarra: Sr. D. Fernando de la Hucha Celador, Catedrático de Derecho Financiero y Tributario de la Universidad Pública de Navarra.

20:00 Debate.

**Segunda Jornada, miércoles, 13 de diciembre de 2006**

*Concierto Económico y ayudas de Estado*

16:15 Primera ponencia: «Reflexiones sobre la reciente Sentencia del Tribunal de Justicia de las Comunidades Europeas en el Caso 'Azores». Sr. D. Jean Louis Colson, Jefe de la Unidad de Servicios Financieros de la Dirección General de la Competencia de la Comisión Europea.

17:00 Segunda ponencia: «El criterio de la selectividad en relación con la fiscalidad regional directa y las ayudas de Estado en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas». Sr. D. Joxerramon Bengoetxea, Profesor de la Universidad del País Vasco, Director Científico del Instituto Internacional de Sociología Jurídica de Oñati y ex-Letrado del TJCE.

17:45 Descanso.

18:15 Mesa redonda: «Concierto Económico y ayudas de Estado».

18:15 Sr. D. Ignacio Sáenz Cortabarria, Abogado especialista en derecho de la competencia que defiende los intereses del Gobierno Vasco y las Diputaciones Forales ante los Tribunales internos y comunitarios.

18:35 Excmo. Sr. D. Juan Luis Ibarra, Presidente de la Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia del País Vasco.

18:55 Excmo. Sr. D. Juan Pedro Quintana Carretero, Magistrado del Gabinete Técnico del Tribunal Supremo. Sala Tercera.

19:15 Sra. Dña. Beatriz Pérez de las Heras, Catedrática de Derecho Comunitario Europeo y Directora del Instituto de Estudios Europeos de la Universidad de Deusto.

19:35 Debate.

**Tercera Jornada, jueves, 14 de diciembre de 2006**

*El futuro de la autonomía fiscal de las regiones en la Unión Europea*

16:15 Primera ponencia: «La participación de las instituciones regionales en los órganos de la UE en relación con la fiscalidad». Sra. Dña. Noreen Burrows, Catedrática Jean Monnet de Derecho Europeo y Decana de la Facultad de Derecho y Ciencias Económicas y Sociales de la Universidad de Glasgow.

17:00 Segunda ponencia: «La participación de las instituciones vascas en los órganos de la UE en relación con la fiscalidad. Una visión desde Euskadi». Sr. D. Mikel Antón Zarragoitia, Director de Asuntos Europeos del Gobierno Vasco.

17:45 Descanso.

18:15 Mesa redonda: «El futuro del Concierto Económico en la Unión Europea».

18:15 Ilmo. Sr. D. José Mª Iruarrizaga Artaraz, Diputado Foral de Hacienda y Finanzas. Diputación Foral de Bizkaia.

18:35 Ilmo. Sr. D. Juan José Mujika Aginagalde, Diputado Foral de Fiscalidad y Finanzas. Diputación Foral de Gipuzkoa.

18:55 Ilmo. Sr. D. Juan Antonio Zárate Pérez de Arrilucea, Teniente de Diputado General. Diputado Foral de Hacienda, Finanzas y Presupuestos. Diputación Foral de Álava.

19:15 Ilmo. Sr. D. Juan Miguel Bilbao Garai, Viceconsejero de Hacienda y Finanzas. Gobierno Vasco.

19:35 Debate.

20:00 Clausura del Congreso.

# ÍNDICE DE PONENCIAS

# Fiscalidad regional en Europa: sus modelos y sus retos en el marco de las ayudas de Estado[1]

DALI BOUZORAA[2]

*Director Técnico, Internacional Bureau of Fiscal Documentation, Amsterdam*

## 1. Introducción

En la práctica, la organización de los gobiernos, incluyendo sus relaciones fiscales y sus acuerdos constitucionales e institucionales, varía considerablemente de un país a otro. El factor más importante que determina la distribución de las competencias legislativas en materia tributaria entre los diferentes niveles de gobierno es que el modelo de Estado sea federal, centralizado o regional[3].

La combinación de unidades gubernamentales que se pueden encontrar en Europa están compuestas generalmente de tres subsectores: (i) gobierno federal o central;

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[1] Versión original de la ponencia en inglés.

[2] Ponencia escrita con la colaboración de TIAGO CASSIANO NEVES. Asociado Senior de Investigación, International Bureau of Fiscal Documentation, Amsterdam.

[3] En referencia a los Estados federales y centralizados, es importante recordar que estas categorias son simplificaciones y que la realidad constitucional puede que desafíe a una categorización tan simple. Ver *Frans Vanistendael, Legal Framework for Taxation, Tax Law Design and Drafting, volumen I. Capítulo 2.*

(ii) gobiernos estatales, provinciales, cantonales o regionales; (iii) gobiernos locales o municipios.

En varios países europeos, hay una tendencia hacia la constitución de un Estado federal o incluso países, que fueron con anterioridad Estados centralizados, tales como Bélgica, Francia, Italia, España y los Estados Unidos, se encuentran todos ellos, con diferente grado de intensidad, en el proceso de organizar sus competencias políticas y fiscales en un nivel intermedio de gobierno[4]. En consecuencia, el grado de descentralización fiscal en estos diferentes niveles subnacionales de gobierno también difiere entre los distintos Estados.

Entre dichos niveles subnacionales de gobierno encontramos a las regiones. El término se utiliza, especialmente, en referencia a las regiones con algún tipo de reivindicación histórica o idiosincrasia en relación al resto del territorio y con diferentes grados de descentralización. Se pueden indicar como ejemplos: (i) Escocia, Gales e Irlanda del Norte en el Reino Unido; (ii) las islas regionales de Cerdeña y Sicilia en Italia; iii) el País Vasco y Navarra en España, o (iv) la provincia finlandesa de Äland.

En la Unión Europea la competencia legislativa para regular todos los elementos de un tributo y su recaudación no esta atribuida en muchos casos a un nivel de gobierno específico sino que se encuentra distribuida entre varios niveles de gobierno. Esto hace que sea extremadamente difícil y delicado tratar el tema de la fiscalidad regional en Europa, sus modelos y los retos desde la perspectiva de las ayudas de Estado.

## 2. La distribución asimétrica de las competencias legislativas en materia tributaria

Las competencias legislativas en materia tributaria se pueden repartir de diferentes maneras a través de los diferentes niveles subnacionales de gobierno. Primeramente, se puede hacer una distinción entre los distintos tipos de impuestos, tales como tributos sobre ingresos, sobre la riqueza, sobre el valor añadido, especiales y sobre el consumo. Podemos realizar una segunda distinción en relación a los elementos de cualquier tributo, en concreto las entidades o las personas sometidas al impuesto, el tipo de contribuyentes, la base imponible, el tipo impositivo y las normas de gestión y de recaudación.

[4] Esta tendencia se debe en gran parte al incremento de la importancia de la prestación de servicios por parte de los niveles mas bajos de gobierno. Básicamente, hay varios argumentos a favor de la prestación de servicios por los niveles inferiores de gobierno: (i) los niveles mas bajos de gobierno tienen más probabilidades de conocer mejor las preferencias de los ciudadanos y su disposición a pagar por los servicios públicos. Ellos son elegidos y se responsabilizan ante su electorado y probablemente estén mejor informados sobre las políticas a aplicar que el gobierno central; (ii) las políticas diseñadas de manera centralizada son seguramente menos flexibles y responden en menor medida a las condiciones locales, bien porque se adoptan regulaciones de tratamiento igualitario para todas las localidades o porque las autoridades centrales prefieren simplemente políticas relativamente uniformes; (iii) la descentralización podría proteger a los ciudadanos de un uso excesivo de las potestades tributarias de los poderes centrales como resultado de la competencia tributaria.

El modelo más frecuente es aquél en el que el gobierno central se reserva el control sobre la determinación de los sujetos sometidos a tributación, la base imponible y las normas procedimentales, pero la competencia para determinar los tipos impositivos se comparte con otros niveles de gobierno. Por ejemplo, en varios países europeos, se imponen los recargos en uno o más de los impuestos nacionales en beneficio de los gobiernos locales. En algunos casos, además de la potestad para establecer los tipos tributarios, parte de la competencia legislativa en relación a la base imponible también pertenece a los gobiernos regionales o locales. En otros supuestos, los niveles federales y regionales de gobierno tienen atribuidas competencias tributarias paralelas sobre el mismo tributo.

La distribución de las competencias legislativas tributarias en los Estados centralizados es bastante simple porque solamente hay dos niveles significativos de gobierno: el central y el local[5]. La distribución de la competencia legislativa en un Estado federal, por otra parte, es mucho más compleja por naturaleza porque hay por lo menos un nivel añadido de gobierno (el gobierno regional) lo suficientemente fuerte como para gestionar un relevante y moderno sistema tributario.

**Ejemplos de descentralización fiscal en Europa:**

En Alemania, el Gobierno federal, en teoría, comparte su competencia legislativa tributaria con los gobiernos de los Estados. Este poder paralelo se ve limitado, sin embargo, por otra previsión constitucional que establece que los gobiernos estatales pierden sus competencias legislativas tributarias cuando el gobierno federal ha legislado en una materia impositiva.

En Suiza, la confederación y los cantones comparten efectivamente la competencia legislativa tributaria en relación a los impuestos directos sobre los ingresos y sobre la riqueza. Los conflictos entre ciertos tipos de legislación tributaria se resuelven mediante la armonización de las regulaciones tributarias en conflicto.

Los cantones suizos por lo tanto disfrutan de una fuerte autonomía fiscal debido a la alta proporción de impuestos en sus ingresos, a la capacidad de establecer tipos tributarios y de recaudar mediante sus propios procedimientos. Los länders alemanes, a pesar de la amplitud de sus fuentes de ingresos y de sus obligaciones, no tienen autonomía en asuntos fiscales. En este área, el Estado central prevalece sobre ellos garantizando la solidaridad financiera y la homogeneidad al impedir que los länders puedan establecer sus tipos tributarios y establecer que los ingresos tributarios sean equitativamente repartidos.

[5] El gobierno local, en la mayoría de los casos, es demasiado pequeño para gestionar cualquier impuesto de peso, por lo que la competencia para establecer los tributos mas importantes reside en el gobierno central. El problema en estos Estados centralizados, es que, en la medida que aumentan las necesidades de financiación de los gobiernos locales, la proliferación de diferentes tipos de tributos locales también aumenta, produciendo efectos enfermizos en la carga impositiva y en la sistemática del régimen fiscal.

En un sistema federal o regionalizado, la clave reside en cómo distribuir la competencia legislativa tributaria en relación a los impuestos mas relevantes a la vez que se mantiene una unión económica integrada. Esto nos lleva a la cuestión de determinar cuáles son los tributos más apropiados para ser utilizados por los diferentes niveles de gobierno.

A este respecto, la doctrina sobre federalismo fiscal[6] nos ofrece valiosas perspectivas sobre la forma en que se comporta el gasto y cómo deberían ser atribuidas las responsabilidades para la obtención de ingresos (tales como los tributos) entre los diferentes niveles de gobierno para alcanzar un elevado nivel de bienestar general.

Según ésta, los principios para la asignación de los impuestos a los diferentes niveles de gobierno exigen que:

i) Los impuestos sobre base imponibles altamente deslocalizables debieran de ser atribuidos a los niveles más altos de gobierno, con la finalidad de evitar decisiones de localización provocadas por razones fiscales, mientras que a los niveles inferiores debiera de atribuirse la tributación de las bases imponibles estáticas.
ii) Las bases imponibles que son muy irregulares entre unas jurisdicciones y otras debieran centralizarse para reducir desequilibrios y potenciales distorsiones en su asignación; y
iii) La arbitrariedad regional en la asignación de tributos a una jurisdicción en concreto debería provocar la centralización.

Pero estos son principios generales, lejanos en ocasiones de las dificultades y el consenso que surgen de una realidad política particular. Además, la doctrina sobre el federalismo fiscal ha dirigido también su atención a los factores que distorsionan la competencia tributaria inter-jurisdiccional derivada de la descentralización fiscal. El argumento que subyace es el que los gobiernos locales o regionales en su avidez para atraer actividad económica a través de nuevas empresas o puestos de trabajo pueden tener la tentación de establecer tipos impositivos por debajo de sus niveles de eficiencia. Pero de nuevo, el riesgo de que se produzcan efectos adversos sobre la competencia fiscal es una cuestión en debate y está en cierta manera fuera del alcance de esta intervención[7].

## 3. La autonomía fiscal de los gobiernos subcentrales a vista de pájaro

Como se ha indicado antes, la autonomía fiscal forma parte de un acuerdo institucional, lo mismo que la asignación de las obligaciones y de los ingresos, que marca

[6] *Wallace E. Oates, «Taxation in a Federal System: The Tax-Assignment Problem», Public Economics Review, junio 1996, Vol. 1, pag. 35-60.*

[7] Sin embargo, solamente considere el ejemplo de una empresa en concreto, que se aprovecha de las diferentes normas tributarias en vigor en cada uno de los Estados para organizar sus asuntos de una forma mas rentable desde un punto de vista tributario. Si esto se permite hacer, bajo ciertas circunstancias, a nivel de la UE, debería de permitirse asimismo a nivel regional.

el campo de actuación de los diferentes niveles de gobierno y no es sorprendente que haya grandes diferencias en la manera en que se reparten las responsabilidades fiscales entre los diferentes niveles de gobierno en los países miembros de la UE[8].

El reparto está en parte ligado al sistema de gobierno y, en concreto, a si un país es un Estado federal (Austria, Bélgica, Alemania, Suiza) o unitario. Sin embargo, esta diferenciación no está claramente establecida. España e Italia se podrían clasificar en ambos grupos, ya que son Estados unitarios con algunas características de un Estado federal. España, por ejemplo, tiene tres niveles de gobierno (central, regional y local) e incluso entre ellos hay diferencias. Los países nórdicos (Dinamarca, Finlandia, Islandia, Noruega y Suecia) también tienen algunas características especiales.

Estas diferencias se pueden comprender mas fácilmente utilizando la Tabla 1, que describe brevemente los variados niveles de autonomía en la Unión Europea.

Tabla 1. **Nivel de autonomía regional en la Unión Europea**

| | Nivel de autonomía | | | | Observaciones |
|---|---|---|---|---|---|
| | **Alto** | **Medio** | **Bajo** | **Inexistente** | |
| **Estados federales** | | | | | |
| Alemania | Lander | | | | Los länder tienen capacidad normativa en todas las áreas no reservadas exclusivamente al Gobierno federal |
| Austria | Lander | | | | Los länder son responsables de la ejecución de determinadas leyes federales |
| Bélgica | Regiones | | | | Tributación como responsabilidad compartida. Autonomía fiscal limitada |
| **Estados regionales** | | | | | |
| Italia | | Regiones de estatuto especial | Regiones «ordinarias» | | Sistema fiscal e igualitarismo fiscal todavía muy centralizado en el nivel estatal |
| España | Territorios Históricos (País Vasco y Navarra) | Comunidades Autónomas | | | Competencias asimétricas de las Comunidades Autónomas. La Constitución atribuye poderes tributarios a las autonomías pero permite al Estado limitarlos |

…/…

[8] *Taxing Powers of State and Local Government, OECD Tax Policy Studies No. 1, 1999.*

…/…

| | Nivel de autonomía | | | | Observaciones |
|---|---|---|---|---|---|
| | Alto | Medio | Bajo | Inexistente | |
| **Estados regionalizados** | | | | | |
| Francia | | | Regiones (formadas por varios departamentos) | Estado central | Las competencias de las regiones incluyen ayudas directas e indirectas a las empresas |
| Portugal | | Regiones de Madera y Azores | | Estado central | |
| Reino Unido | Escocia | Gales e Irlanda del Norte | | | Competencias normativas y administrativas asimétricas entre Escocia, Gales e Irlanda del Norte, incluyendo autonomía fiscal. Especial status para Gibraltar |
| **Estados centralizados** | | | | | |
| Dinamarca | | | | Estado central | El status especial de Groenlandia y de las islas Faroe es diferente del de los condados y municipios |
| Suecia | | | | Estado central | Reducido nivel de autonomía de las regiones |
| Finlandia | Provincia autónoma de Aland | | Consejos regionales | Estado central | Äland goza de un completo gobierno regional. Las regiones tienen autonomía fiscal limitada |
| Grecia | | | | Estado central | Las regiones son una simple subdivisión del Estado |
| Irlanda | | | | Estado central | Muy bajo nivel de autonomía para los niveles descentralizados de gobierno |
| Luxemburgo | | | | Estado central | Las competencias estatales incluyen todos los campos relacionados con el interés nacional, incluidos los impuestos |
| Holanda | | | | Estado central | Los poderes administrativos permanecen en el gobierno central. Reducidas competencias de las provincias y municipios |

Sin embargo, la autonomía regional puede implicar diferentes niveles de autonomía fiscal ya que dicha autonomía se puede financiar mediante impuestos, subvenciones, transferencias por servicios y tasas (o préstamos). Por lo tanto, otra manera usual de comparar y valorar la autonomía fiscal es atender al alcance de los recursos y obligaciones que quedan bajo el control de los gobiernos regionales y locales.

De hecho, hay también grandes diferencias en la forma en la que los países de la Unión Europea financian sus gastos en los niveles subnacionales de gobierno[9]. Por ejemplo:

- En Bélgica, las regiones se apoyaban fundamentalmente en impuestos cedidos hasta la reforma del 2001, que incrementó las competencias fiscales de las regiones.
- En Austria, una parte importante de los ingresos de los gobiernos locales procede de la imposición compartida.
- Para los länders alemanes, la subvenciones generales del gobierno federal son pequeñas y los recursos provenientes del reparto de ingresos tributarios (donde la autonomía tributaria local es escasa) es la fuente más importante de ingresos.
- Las transferencias a los gobiernos locales son relativamente altas en el Reino Unido y en los Países Bajos, lo que indica que su sistema de financiación de los gobiernos locales está relativamente centralizado.
- En Italia, las reformas de los noventa han reducido fuertemente la dependencia de los gobiernos locales de las transferencias del central y han ampliado su autonomía a la imposición de tributos[10].

Por ejemplo, en el periodo de 1985 a 2004, el porcentaje que los niveles de gobierno comparten del total de los ingresos tributarios en países seleccionados de la OCDE (que incluyen países de la UE) varió significativamente (tabla 2) con un aumento significativo de los ingresos tributarios asignados a los niveles más bajos de gobierno[11].

Tabla 2. **Impuestos por niveles de gobierno**

| | Gobierno federal o central | | Gobierno de los estados o Länder | | Gobierno Local | | Fondos de la Seguridad Social | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** |
| **Países federales** | | | | | | | | | | |
| Australia | | | 81,4 | 68,1 | 14,9 | 29,0 | 3,7 | 3,0 | – | – |
| Austria | | 0,2 | 48,9 | 54,6 | 13,1 | 8,5 | 10,7 | 9,4 | 27,2 | 27,3 |
| Bélgica | 1,6 | 1,3 | 62,7 | 34,0 | – | 23,8 | 4,7 | 5,3 | 31,0 | 35,7 |

…/…

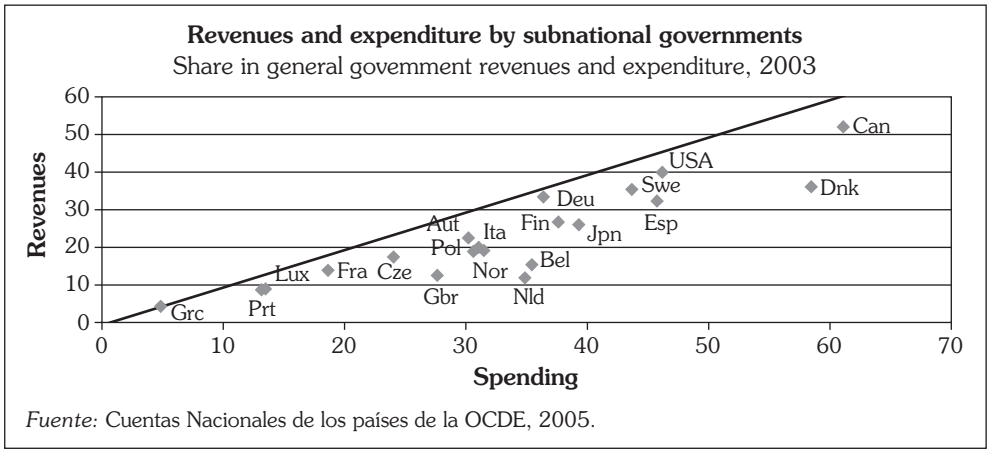
[9] *Recent Tax Policy Trends and Reforms in OECD Countries, OECD Tax Policy Studies No. 9.*
[10] Aparentemente ahora se está dando marcha atrás en esta tendencia.
[11] Informe de la OCDE de 2005 sobre la autonomía fiscal de los gobiernos subcentrales.

…/…

| | | | Gobierno federal o central | | Gobierno de los estados o Länder | | Gobierno Local | | Fondos de la Seguridad Social | |
|---|---|---|---|---|---|---|---|---|---|---|
| | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** | **1985** | **2003** |
| Canadá | | | 41,2 | 44,8 | 36,0 | 37,9 | 9,3 | 8,6 | 13,5 | 8,7 |
| Alemania | 1,0 | 0,9 | 31,6 | 30,2 | 22,0 | 21,6 | 8,9 | 6,8 | 36,5 | 40,5 |
| México | | | 87,7 | 79,9 | 0,4 | 2,2 | 0,6 | 1,0 | 11,3 | 16,9 |
| Suiza | | | 33,2 | 34,1 | 26,1 | 24,2 | 18,0 | 16,2 | 22,7 | 25,5 |
| Estados Unidos | | | 42,1 | 38,8 | 20,2 | 20,2 | 12,6 | 14,7 | 25,2 | 26,4 |
| *Media sin ponderar* | 1,3 | 0,8 | 53,6 | 48,0 | 16,6 | 20,9 | 8,6 | 8,1 | 20,9 | 22,6 |
| **Estados Unitarios** | | | | | | | | | | |
| Dinamarca | 0,8 | 0,3 | 68,4 | 61,5 | | | 28,4 | 35,7 | 2,5 | 2,5 |
| Italia | 0,6 | 0,3 | 62,3 | 53,4 | | | 2,3 | 16,9 | 34,7 | 29,5 |
| Portugal | | 0,9 | 70,6 | 60,3 | | | 3,5 | 5,8 | 25,9 | 33,0 |
| España | | 0,4 | 47,8 | 37,0 | | | 11,2 | 28,2 | 41,0 | 34,4 |
| Suecia | | 0,7 | 54,1 | 55,0 | | | 30,4 | 32,7 | 15,6 | 11,6 |
| Reino Unido | 2,7 | 1,2 | 69,4 | 75,5 | | | 10,2 | 4,8 | 17,8 | 18,5 |
| *Media sin ponderar* | 1,4 | 0,7 | 64,2 | 61,4 | | | 12,3 | 13,4 | 22,9 | 24,9 |

*Fuente:* OECD Revenue Statistics 1965-2004.

Figura 3. **Decentralisation ratios in OECD countries, 2004**




*Fuente:* Cuentas Nacionales de los países de la OCDE, 2005.

Además, los siguientes ratios de descentralización demuestran el estado actual de la descentralización financiera medido en participaciones de los gobiernos subcentrales en el total de los ingresos tributarios y en gasto de los países de la OCDE.

Sin embargo, la autonomía fiscal no se refiere solamente a la discrecionalidad de un nivel de gobierno para decidir en qué gastar el presupuesto disponible, sino también a su discrecionalidad para diseñar y recaudar impuestos para financiarlo. Este diseño o capacidad para desviarse del marco nacional en el nivel regional o local básicamente depende de en qué medida el gobierno subcentral tiene autoridad constitucional para decidir sobre los elementos de los impuestos específicos. En este campo es posible encontrar una amplia gama de modelos.

**El modelo español de descentralización fiscal:**

La Constitución española de 1978 omite cualquier referencia a la forma del Estado (por ejemplo, no describe a España como un Estado centralizado, federal o regional). La Constitución establece el conocido como sistema de autonomía opcional (principio dispositivo). Según éste, algunos grupos de provincias, siempre que tengan en común características históricas, culturales y económicas tienen el derecho de decidir si quieren convertirse en Comunidades Autónomas[12]. Si así lo deciden, tiene que decir entonces de qué asuntos quieren ser responsables. La Constitución no atribuye en realidad competencias de una manera explicita a las Comunidades Autónomas, pero les deja la posibilidad de asumir competencias en relación a un grupo de materias que aparecen listadas en la Constitución[13]. Sin embargo, el Estado es responsable de regular las condiciones básicas para asegurar la igualdad entre todos los nacionales en el ejercicio de sus derechos y el cumplimiento de sus obligaciones y se le asigna competencia exclusiva para la «coordinación de la economía»[14]. Debería tenerse en cuenta que la Constitución establece que la legislación del Estado será, en todo caso, de aplicación supletoria a las de las Comunidades Autónomas.

En resumen, la Constitución española confiere competencias tributarias a las Comunidades Autónomas[15] pero habilita al Estado a limitarlas a través de una ley especial. La limitación más importante es la prohibición de doble tributación, que impide que los impuestos de las Comunidades sean similares a los del Estado y a los de las entidades locales. Además, el Tribunal Constitucional ha interpretado a menudo estas limitaciones de manera muy amplia, haciendo casi imposible para las Comu-

…/…

[12] Art. 143 de la Constitución. La idea de la Constitución fue que a algunas Comunidades con experiencias de autogobierno se le debería dar la oportunidad de convertirse en las Comunidades Autónomas de acceso rápido desde un inicio, mientras que el resto tendrían que empezar con un acceso más lento. Las de la vía rápida fueron Cataluña, el País Vasco y Galicia. El reconocimiento de los derechos históricos del País Vasco y de Navarra implica un nivel de autonomía mucho mayor, especialmente en asuntos fiscales.

[13] Art. 148 y 149 de la Constitución.

[14] Art. 149 de la Constitución.

[15] Art. 133 a 157 de la Constitución.

…/…

nidades la introducción de nuevos tributos. Por lo tanto, a pesar de las disposiciones constitucionales que garantizan a las Comunidades tanto la potestad de establecer impuestos como la autonomía financiera, los límites establecidos por el Estado han desembocado en un sistema en el que las potestades tributarias han permanecido en la mayoría de los casos en manos de este último. Desde un punto de vista fiscal, se pueden distinguir dos tipos de autonomías: las autonomías del régimen de territorio común y las del régimen foral (País Vasco y Navarra).

En relación a las denominadas autonomías de régimen común, deberá tenerse en cuenta que las relaciones fiscales entre el gobierno central y las autonomías de territorio común están regidas esencialmente por un sistema de autonomía fiscal limitada. En Julio de 2001, el gobierno central y las autonomías alcanzaron un nuevo acuerdo para establecer un nuevo sistema de financiación basado en los principios de suficiencia, autonomía y solidaridad. El nuevo esquema ha sido extendido al periodo 2002-2006 y se tiene la pretensión de asegurar que el incremento en la descentralización fiscal no ponga en peligro la consolidación de los objetivos nacionales. Además de los provenientes de las tasas por servicios que se prestan a los contribuyentes y de los préstamos, las fuentes de ingresos de las autonomías de territorio común incluyen los siguientes tributos:

– Impuestos cedidos con capacidad normativa: IRPF, Impuesto sobre el Patrimonio, Impuesto sobre Sucesiones y Donaciones[16], Impuesto sobre Transmisiones y Actos Jurídicos Documentados e Impuestos sobre el Juego.
– Impuestos cedidos sin capacidad normativa: IVA (45%), Impuestos Especiales (40 %), Impuestos sobre el Tabaco (100 %) e impuesto sobre la electricidad (100%)[17].
– La participación en el resto de ingresos del sistema general impositivo del Estado también se proporciona a través del un fondo de garantía.

En relación con las autonomías del sistema foral, hay que resaltar que el País Vasco y Navarra encuentran su cobertura legal en un acuerdo económico con el gobierno central, que se denominan Concierto Económico y Convenio Económico, respectivamente. En términos generales, estas autonomías comparten con el Estado casi todos los impuestos. A cambio, estas regiones tienen que contribuir al Gobierno central mediante el denominado «cupo», cuya determinación esta ligada a los gastos generales que el Gobierno Central efectúa en estas Comunidades[18].

[16] La legislación de estos tributos se promulga a nivel del gobierno central con cierto poder de decisión cedido a las autonomías (por ejemplo, establecer tipos impositivos en el Impuesto sobre Transmisiones en la transmisión de propiedad inmobiliaria).

[17] Las autonomías de territorio común tiene garantizada una transferencia en bloque del gobierno central igual a un determinado porcentaje de los impuestos recaudados en su territorio.

[18] En relación al Modelo español: ver entre otros: *«Fiscal Federalism in Spain: The Assignment of Taxation Powers to the Autonomous Communities», Violeta Ruiz Almendral, European Taxation Noviembre 2002; «Autonomous Communities Taking Advantage of the Mechanism to Ensure the Neutrality of VAT», Violeta Ruiz Almendral Vat Monitor, Setiembre/Octubre 2003; «The Asymmetric Distribution of Taxation Powers in the Spanish State of Autonomies: The Common System and the Foral Tax Regimes», Violeta Ruiz Almendral.*

En conclusión, no se puede decir que exista un único modelo. Además, la imagen y el papel de las regiones en Europa no está nada claro ya que, desde un punto de vista institucional, la Unión Europea fue y permanece constituida por Estados. Un marco de la UE basado en Estados puede por tanto afectar a la capacidad de los mismos para luchar por tener modelos de descentralización fiscal más amplios, especialmente en un área como la de las ayudas de Estado

## 4. Las restricciones de la Unión Europea en materia de impuestos

Las consecuencias prácticas de la coexistencia de 27 sistemas impositivos diferentes pueden producir un fuerte desequilibrio debido a las asimetrías entre las regiones, su potestad para recaudar impuestos e incluso sus competencias para legislar en materia impositiva.

El problema tiene su origen en que el marco de la Unión Europea está pensado básicamente para sus Estados Miembros, ignorando en gran medida los niveles inferiores de gobierno como son las regiones. Esto supone un riesgo para las regiones y los Estados, que a pesar de que todavía constituyen importantes centros de atención dentro de la UE, han visto como sus autonomías y su capacidad para hacer políticas se ha reducido considerablemente como consecuencia de dos procesos complementarios: (i) la cesión de diversas competencias hacia arriba al nivel supranacional de la Unión Europea; y (ii) la cesión hacia abajo debido a las presiones de los procesos de descentralización y de cesión principalmente a nivel regional.

Dejando a un lado la política monetaria centralizada, el modelo de la Unión Europea considera, por lo tanto, a los Estados Miembros como formalmente autónomos en relación a la política fiscal[19]. El Tratado UE contiene un número de propuestas para un futuro desarrollo federal pero el principio de cooperación intergubernamental en materia fiscal ha sido respetado en la mayoría de las ocasiones.

Además, en aquellas áreas que no son de competencia exclusiva de la UE el principio de subsidiariedad debe ser aplicado[20].

Entre las políticas y actividades comunes de la UE, el Art. 3.1 del Tratado de la UE incluye:

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[19] El Tratado UE establece sus objetivos en el Art. 2, que incluyen: (i) el establecimiento de un Mercado Común; (ii) el establecimiento de una Unión Económica y Monetaria y (iii) la puesta en marcha de Políticas o Actividades Comunes.

[20] Este principio, que está inspirado en la teoría del federalismo fiscal pretende contribuir al mantenimiento del respeto a las identidades nacionales de los Estados Miembros y a garantizar sus competencias y tiene como objetivo implicar a los ciudadanos en la mayor medida posible en los procesos de decisión. En resumen, la subsidiariedad limita la actuación de la Comunidad e implica que la regla general la constituyen las competencias nacionales o de nivel inferior de los Estados, siendo la excepción las competencias de la Comunidad.

– la prohibición, entre los Estados Miembros, de derechos de aduana y de restricciones cuantitativas a la entrada y salida de las mercancías, así como de cualesquiera otras medidas de efecto equivalente;
– un mercado interior caracterizado por la supresión, entre los Estados Miembros, de los obstáculos a la libre circulación de mercancías, personas, servicios y capitales;
– un régimen que garantice que la competencia no será falseada en el mercado interior y la aproximación de las legislaciones nacionales en la medida necesaria para el funcionamiento del mercado común.

Históricamente, la Unión Europea ha hecho frente a los obstáculos fiscales existentes a través de la integración positiva (armonización o cooperación fiscal entre los Estados Miembros) o de la integración negativa (eliminación de las regulaciones discriminatorias de ciertos elementos de los sistemas fiscales de los Estados Miembros). Una tercera vía para eliminar obstáculos en materia de fiscalidad se ha llevado a cabo a través de las normas de ayudas de Estado, que están diseñadas para asegurar el no falseamiento de la competencia en el mercado interior[21].

Las medidas de armonización (la denominada integración positiva) no ha sido la herramienta más importante para la eliminación de los obstáculos fiscales existentes en el ámbito de la fiscalidad directa[22]. De hecho, el artículo 94 del Tratado de la UE, fundamento legal para las Directivas «filial-matriz», de fusiones, de intereses y royalties y de asistencia mutua, en vigor actualmente, requiere unanimidad para la aprobación de las mismas. Este requisito difícil de cumplir puede que explique bien la falta de éxito de una serie de propuestas de muy diversa naturaleza en materia de tributación directa, especialmente si se compara con impuestos indirectos tales como el IVA.

Como se ha mencionado con anterioridad, los Estados Miembros son en principio libres para establecer sus propias legislaciones tributarias pero existen una serie de limitaciones a su libertad de acción. De hecho, las legislaciones tributarias que van en contra de las libertades fundamentales contenidas en el Tratado UE no pueden ser mantenidas en vigor salvo que sean justificadas de acuerdo con el propio Tratado, que es interpretado de manera muy estricta por el Tribunal de Justicia de las Comunidades Europeas (TJCE). Este proceso no es el resultado del Derecho Comunitario establecido por la acción conjunta de la Comisión Europea, el Consejo y el Parlamento, sino el efecto de la conocida como integración negativa. Básicamente, la integración negativa equivale a la interpretación de las libertades fundamentales que realiza el TJCE con miras a abolir los obstáculos del mercado interno creados por las regulaciones

[21] Es difícil de creer que los padres fundadores del europeismo pronosticasen un resultado desequilibrado en fiscalidad directa (por ejemplo, la combinación de legislación comunitaria insuficiente, una jurisprudencia que va demasiado lejos y un control centralizado de las ayudas de Estado), aunque éste sea el estado actual de la cuestión.

[22] Los artículos 90 a 93 son la base legal en el Tratado de la UE para la armonización impositiva en la imposición indirecta. Para la imposición directa, no existen normas expresas para la armonización. Esto explica el éxito de las medidas de armonización positiva en el ámbito de la imposición indirecta.

fiscales nacionales y los ejemplos de las áreas de impacto de la integración negativa son numerosos, tales como la tributación de los accionistas, exenciones y reducciones para los no residentes, la imposición de salida, las perdidas transfronterizas y, recientemente, el régimen de transparencia fiscal internacional.

El otro campo en el que la evolución ha dado lugar a la eliminación de los obstáculos fiscales ha sido la regulación de ayudas de Estado[23]. La ayuda de Estado es una forma de intervención del Estado utilizada para promover una actividad económica concreta. Teniendo en cuenta que las restricciones en política de competencia no son un «monopolio» de las empresas, los gobiernos cuando conceden ayudas públicas a las empresas deberían ser evaluados de idéntica manera. En este sentido, el Tratado de la UE considera incompatible con el mercado interior cualquier ayuda (incluyendo los impuestos dejados de recaudar) concedida por un Estado, que falsee la competencia y afecte el comercio entre los Estados Miembros.

Para que una medida concreta sea considerada como una ayuda de Estado incompatible (en forma de ingresos tributarios dejados de ingresar), es necesario, en términos generales, que dicha medida: (i) produzca una ventaja selectiva (por ejemplo, favoreciendo a ciertas empresas o la producción de ciertos bienes); (ii) tenga que ver con recursos estatales; (iii) afecte al comercio o a la competencia intracomunitaria; y (iv) no este justificada por la naturaleza del sistema[24].

En el «Comunicado de la Comisión sobre la aplicación de las normas sobre ayudas estatales a la fiscalidad directa de las empresas» hecho público en Noviembre de 1998, la Comisión de la UE ofrece una explicación general sobre la aplicación de las cuatro condiciones a las medidas fiscales y menciona explícitamente como selectivas o específicas las siguientes regulaciones:

- Medidas fiscales sectoriales, cuya aplicabilidad se limite a ciertos sectores de la actividad empresarial (por ejemplo, astilleros navales, el carbón y el acero, etc.).
- Medidas fiscales horizontales, que están limitadas a ciertas actividades dentro de la empresa pero que afectan a todas las entidades indiscriminadamente (por ejemplo, inversiones en I+D, medio ambiente, formación y creación de empleo, etc.); y
- Medidas fiscales regionales o locales, cuya aplicación esta limitada a ciertas áreas dentro de un Estado Miembro.

Desde la perspectiva de las regiones, el problema reside, por lo tanto, en la ausencia de directrices para determinar el lugar que las autonomías y las regiones ocupan

[23] La Comisión Europea está facultada en virtud de los Art. 87-89 para enfrentarse a las ayudas de Estado que distorsionan la competencia y por lo tanto son incompatibles con el mercado común.

[24] Para más detalles sobre la aplicación de dichas normas en asuntos fiscales, véase: «Comunicado de 1998 de la Comisión sobre la aplicación de las normas sobre ayudas estatales a la fiscalidad directa de las empresas» y el «Informe de 2004 sobre la puesta en practica del Comunicado de 1998 de la Comisión sobre la aplicación de las normas sobre ayudas estatales a la fiscalidad directa de las empresas».

en el marco institucional tributario de la Unión Europea, especialmente en lo que se refiere a las ayudas de Estado. ¿Puede un sistema tributario regional desviarse del sistema impositivo central sin violar los criterios de selectividad de las normas de ayudas de Estado?

## 5. ¿Cómo influye la tributación europea en la tributación regional?

La cuestión reside entonces en cómo influyen los límites constitucionales europeos antes mencionados en la capacidad de las regiones para diseñar, imponer y recaudar impuestos. En otras palabras, ¿puede haber en el modelo de la UE una coexistencia de 27 diferentes sistemas tributarios nacionales además de diferencias regionales dentro de cada uno de esos sistemas?

Por ejemplo, imagine que a una región concreta (i) se le permite establecer sus propios tipos tributarios aplicables a bases imponibles que se determinan conforme a la regulación nacional; o (ii) puede simplemente desviarse en la base imponible aplicable en el resto de un concreto Estado Miembro, a través del establecimiento de una exención sobre ciertos ingresos o de la ampliación del ámbito de aplicación de cierto incentivo fiscal.

Una posible solución es considerar que solamente las medidas fiscales que están abiertas a todos los agentes económicos que operan dentro de un Estado Miembro (y no solamente a agentes que operan en una región) pueden tener en principio la categoría de medidas generales. En este sentido, solamente las medidas cuyo ámbito de aplicación se extendiera a la totalidad del territorio del Estado escaparían del criterio de especificidad. Sin embargo, si dicha afirmación fuese cierta en todas las situaciones, entonces *prima facie* todas las variaciones impositivas nacionales limitadas a una área geográfica de un Estado miembro, tales como las que se derivan de la autonomía regional, entrarían en la categoría de selectivas geográficamente.

Hasta la reciente decisión del caso Azores[25], el TJCE y la Comisión Europea han tratado este tema brevemente, con resultados bastante duros para las autonomías regionales.

Por ejemplo, el Abogado General (AG) Saggio en los casos acumulados C-400/97, C-401/97 y C-402/97[26] indicó que *«el hecho de que las medidas en cuestión fueran adoptadas por autoridades regionales con competencia exclusiva en virtud de la legislación nacional (…) es meramente una cuestión de forma, que no es suficiente para justificar el tratamiento preferencial reservado a las empresas que aplican las leyes provinciales. Si éste no fuera el caso, el Estado podría fácilmente evitar la*

[25] TJCE, 6 de setiembre de 2006, caso C-88/03, Republica Portuguesa contra la Comisión de las Comunidades Europeas.

[26] Debe tenerse en cuenta que no hubo resolución definitiva de la cuestión prejudicial, ya que los procedimientos fueron suspendidos con posterioridad.

*aplicación, en parte de su propio territorio, de las normas del Derecho Comunitario sobre ayudas de Estado simplemente haciendo cambios internos en la asignación competencial en ciertas materias, originándose por tanto la naturaleza general, para ese territorio, de la medida en cuestión».*

Por otra parte, la Comisión de la UE ha adoptado una posición bastante limitativa en relación a la autonomía fiscal en el Informe de 2004 sobre la aplicación de las normas sobre ayudas estatales a la fiscalidad directa de las empresas. Más recientemente, la Comisión ha hecho también referencia a párrafos contenidos en las conclusiones generales del AG Saggio en su cuestionamiento del sistema tributario de Gibraltar.

Pero esta postura no tiene en cuenta el hecho de que varias autonomías europeas tienen sus raíces en la historia y que no son creaciones artificiales de los Estados Miembros para eludir las normas de ayudas de Estado. Por lo tanto, países como el Reino Unido, Portugal y España han presionado a la Comisión Europea para que tenga en cuenta el grado de autonomía de la autoridad regional o local, antes de calificar los tipos impositivos regionales (que son inferiores al tipo impositivo nacional) o las desviaciones en relación al sistema tributario nacional como ayudas de Estado.

Así que se necesitaba una respuesta a cuál debe ser el término de comparación, teniendo en cuenta los diferentes grados de autonomía que se pueden encontrar en la UE, al considerar si un tipo impositivo nacional limitado a un área geográfica concreta o una variación en la base «favorece a ciertas empresas o la producción de ciertos bienes». Y el punto de inflexión en la materia de fiscalidad regional y las normas de ayudas de Estado lo ha originado, en parte, la reciente decisión sobre el caso Azores.

## 6. Los parámetros de descentralización marcados en el caso Azores

En su sentencia del caso Azores, el Tribunal de Justicia de las Comunidades Europeas estableció que la autonomía fiscal regional no origina selectividad *per se*, justificando de esta manera la existencia de autonomía fiscal regional en Europa.

Específicamente el TJCE mantuvo que:

> No puede excluirse que una entidad infraestatal cuente con un estatuto jurídico y fáctico que la haga lo suficientemente autónoma del Gobierno central de un Estado Miembro como para que sea ella misma, y no el Gobierno central, quien, mediante las medidas que adopte, desempeñe un papel fundamental en la definición del medio político y económico en el que operan las empresas. En tal caso, es el territorio en el que la entidad infraestatal que ha adoptado la medida ejerce su competencia, y no el territorio nacional en su conjunto, el que debe considerarse pertinente para determinar si una medida adoptada por dicha entidad favorece a ciertas empresas, en comparación con otras que se encuentren en una situación fáctica y jurídica comparable, habida cuenta del objetivo perseguido por la medida o el régimen jurídico de que se trate.

> El argumento de la Comisión de que este análisis es contrario al texto del Tratado y a la jurisprudencia reiterada en la materia no puede ser acogido.

Con la finalidad de situar mejor la decisión del TJCE es tal vez importante revisar los antecedentes del caso. En el año 2000, las autoridades portuguesas notificaron (como requiere el Derecho Comunitario) a la Comisión Europea un esquema tributario mediante el que se adaptaba el sistema impositivo nacional a las características especificas de la Región Autónoma de Azores[27]. Las medidas, aprobadas por el parlamento de la Región de Azores, incluían, en concreto, una reducción en el tipo del IRPF del 20% (15% para 1999) y una reducción del tipo impositivo del Impuesto sobre Sociedades de un 30% para los contribuyentes de la región.

Teniendo en cuenta la regulación sobre las ayudas de Estado, la Comisión Europea respondió a la notificación portuguesa con el inicio de un procedimiento de investigación específicamente en relación a la parte del esquema relativa a las reducciones de los tipos del IRPF y del IS. Conforme a la investigación, la Comisión clasificó como ayuda de Estado las reducciones impositivas para residentes de las Azores (Decisión/2003/442/EC). Después de examinar el esquema, a la luz de las directrices sobre ayudas regionales nacionales, la Comisión, sin embargo consideró que tales ayudas cumplían los requisitos para ser consideradas como compatibles con el Mercado común, en virtud de lo dispuesto en el Art. 87.3, letra a) del Tratado UE, esto es, *«las ayudas destinadas a favorecer el desarrollo económico de regiones en las que el nivel de vida sea anormalmente bajo o en las que exista una grave situación de subempleo»*[28].

Sin embargo, la Decisión de la Comisión introdujo una advertencia diferenciando entre los sectores financieros y no financieros. De hecho, en relación a las empresas dentro de los sectores financieros, la Comisión declaró que tales reducciones impositivas en el Impuesto sobre Sociedades *«no estaban justificadas por su contribución al desarrollo regional»* y, por tanto, las reducciones impositivas no entraban en la categoría de ayudas nacionales de carácter regional permitidas en virtud de lo dispuesto en el Art.87.3.a) (esto es, ayuda regional) o de cualquier otra disposición contenida en el Tratado UE. El razonamiento fue que la existencia de desventajas reales regionales tiene muy poca relevancia para las actividades con movilidad, tales como los servicios financieros y las compañías que se dedican a actividades del tipo de la prestación de servicios «intra-grupo» o de los «centros de coordinación». En consecuencia, se le ordenó a Portugal que recuperase la ayuda que se había otorgado a las empresas que realizaban actividades financieras o de servicios «intra-grupo». Debido a que la legislación portuguesa no recoge un régimen especial para los servicios «intra-grupo», la

[27] Las Azores, un archipiélago de nueve islas portuguesas en la mitad del Océano Atlántico (a 1.500 km de Lisboa y a 3.900 km de Norteamérica) es una de las dos regiones autónomas portuguesas (siendo la otra Madeira), que posee su propio estatuto político y administrativo y que tiene su propio gobierno regional y parlamento legislativo (elegido por sufragio universal).

[28] La ayuda nacional para la región de Azores estaba, en este caso, justificada debido a su contribución al desarrollo regional y al hecho de que era proporcional al coste adicional que se intentaba compensar.

Decisión tuvo impacto fundamentalmente en las instituciones financieras que se beneficiaron de los tipos impositivos reducidos.

A pesar de que la Decisión de la Comisión tuvo impacto exclusivamente en las empresas financieras que realizaban sus actividades en Azores, se podría decir que el argumento relativo a la selectividad regional limitaba planes futuros para posibles divergencias entre el sistema fiscal de la parte continental de Portugal y el sistema fiscal aplicable a las dos autonomías, en concreto Madeira y Azores. Portugal por tanto recurrió al TJCE y cuestionó la Decisión de la Comisión en base a tres fundamentos, siendo el primero de ellos el más relevante para el asunto que nos ocupa. El argumento más importante fue que los tipos reducidos no eran medidas de carácter selectivo sino generales, debido a que el marco de referencia a tener en cuenta debería de haber sido la región y no la totalidad del territorio portugués[29]. La Comisión, por otro lado, alegó que la selectividad de una medida debe de ser determinada por referencia al marco nacional y que el grado de autonomía de la Región Autónoma de Azores estaba de hecho limitado.

En sus conclusiones generales hechas públicas el 20 de Octubre de 2005, el Abogado General (AG) Geelhoed resaltó que ya que el TJCE nunca había resuelto esta específica cuestión, a saber la autonomía regional y las ayudas de Estado, el Tribunal tenía la responsabilidad de establecer los principios que son de aplicación. A estos efectos, el Abogado General distinguió tres escenarios diferentes, dependiendo de modelo de descentralización adoptado por un Estado concreto:

– En una primera situación, si un gobierno central de un Estado Miembro de la UE unilateralmente decide que el tipo impositivo nacional debe ser reducido en un área geográfica determinada, el Abogado General considera que tal medida debería ser claramente considerada como selectiva.
– En una segunda situación, si todas las autoridades regionales y locales tienen potestades independientes para determinar el tipo impositivo para su jurisdicción geográfica, tanto si tiene en cuenta el tipo impositivo «nacional» como si no, el Abogado General considera que la medida no es selectiva en el marco de la regulación de ayudas de Estado[30]; y
– En una tercera situación, en la que un tipo impositivo inferior se determina por una autoridad local y es aplicable exclusivamente dentro del territorio de esa autoridad local, el Abogado General considera que la naturaleza selectiva de la medida depende de si el tipo impositivo inferior es adoptado por decisión de una autoridad local que es «verdaderamente» autónoma (es decir, institucionalmente,

[29] Como era de esperar, el Reino Unido y España intervinieron en el asunto en apoyo de Portugal.
[30] Esta situación se corresponde básicamente con un modelo de distribución de competencias tributarias en el que todas las autoridades locales del mismo nivel (regiones, distritos y otras…) tienen capacidad autónoma para decidir, dentro de los límites de las competencias que se les atribuyen, el tipo impositivo aplicable en el territorio de su competencia. En este caso una medida no es selectiva porque es imposible determinar el tipo impositivo normal que constituiría el marco de referencia.

procedimentalmente y económicamente autónoma) respecto del gobierno central del Estado miembro de la UE o no.

Por «verdaderamente» autónoma, el Abogado General se refiere a tres parámetros de una autonomía estatal, en concreto la autonomía institucional, la autonomía procedimental y la autonomía económica.

– Por institucionalmente autónoma, el Abogado General se estaba refiriendo a entidades infra-estatales con su propio estatuto constitucional, político y administrativo independiente del gobierno central.
– Por procedimentalmente autónoma, el Abogado General se estaba refiriendo a la independencia de la entidad infra-estatal en el procedimiento para el establecimiento del tipo impositivo y sin ninguna obligación por parte de la autoridad local de tener en cuenta el interés del Estado central.
– Finalmente, por económicamente autónoma, el Abogado General se estaba refiriendo a aquella situación en la cual la reducción de ingresos tributarios (producida por una disminución impositiva) es objeto de subvenciones cruzadas o financiada por el gobierno central, de tal manera que las consecuencias económicas de tales decisiones fiscales no son en último termino soportadas por la propia región.

El Abogado General concluye finalmente que cuando una autoridad local decide establecer un tipo impositivo menor que el nacional y lo hace en ejercicio de su autonomía (tributaria) de carácter institucional, procedimental y económica, tal decisión no puede ser calificada como «selectiva» desde la perspectiva de la política de ayudas de Estado.

La sentencia del TJCE de 6 de setiembre de 2006 recogió básicamente la opinión del Abogado General. Con la finalidad de examinar una medida adoptada por un ente infra-estatal en ejercicio de sus competencias suficientemente autónomas en relación al poder central, el TJCE tomó como referencia los tres diferentes escenarios, dibujados en las conclusiones generales del AG. De una forma mas refinada (pero sin desviarse de las conclusiones del AG), el TJCE consideró que el ejercicio de potestades suficientemente autónomas requiere autonomía constitucional (es decir, un estatus político y administrativo independiente), autonomía procedimental (es decir, inexistencia de intervención directa del gobierno central) y autonomía financiera (es decir, el coste de las reducciones fiscales se ve soportado por la propia autonomía y no compensado mediante ayudas o subvenciones).

La diferencia entre las conclusiones generales del AG y la decisión final del Tribunal reside estrictamente en el asunto de la autonomía procedimental. El TJCE no hizo ninguna referencia a *«la obligación por parte de la autoridad local de tener en cuenta el interés del Estado central al determinar el tipo impositivo»* y este elemento que falta puede jugar un papel muy importante a la hora de evaluar las autonomías, ya que es mediante el cual la capacidad de legislar esta limitada por los parámetros del interés nacional[31].

[31] El «cuarto» parámetro podría de hecho poner en peligro o hacer el análisis más complejo, en relación con aquellos supuestos en los que la libertad de los entes infra-estatales para legislar se ve limitada constitucionalmente por principios de solidaridad, cargas fiscales máximas o mínimas o restricciones similares.

Al aplicar este conjunto de principios, dibujados por el Abogado General, al escenario Azores, el TJCE comenzó resaltando que Azores ha sido denominada como «región autónoma» y que esta región tiene la capacidad, en ciertas circunstancias, de ejercitar sus propias competencias fiscales y el derecho de adaptar la normativa fiscal nacional a las especificidades regionales. Sin embargo, el TJCE puso de manifiesto que la reducción en los ingresos tributarios, resultante de tipos impositivos más bajos, se compensa mediante un mecanismo de financiación, en forma de transferencias financieras compensatorias del Estado central. A este respecto, el TJCE consideró que la decisión del gobierno de la Región Autónoma de Azores de ejercitar su competencia para reducir los tipos no fue económicamente autónoma a la vista de las transferencias presupuestarias hechas por el gobierno central.

En conclusión, el TJCE consideró que el marco legal relevante para determinar la selectividad de los tipos reducidos era la totalidad del territorio portugués y que tales reducciones no estaban justificadas por la naturaleza o la estructura general del sistema tributario de Portugal.

## 7. ¿Pero existen las «verdaderas autonomías?

Teniendo en cuenta los parámetros marcados por el TJCE, parece que el asunto de la selectividad regional desde la perspectiva de las ayudas de Estado recibió un nuevo *input* bien merecido. Sin embargo, la decisión del TJCE en el caso Azores suscita la cuestión de si la distinción entre una entidad autónoma infra-estatal y una entidad infra-estatal no «verdaderamente» autónoma es una distinción clara, es decir, fácil de aplicar en la práctica. Básicamente, ¿existen tan siquiera las «verdaderas autonomías» al amparo de los principios dibujados por el TJCE?

Como hemos mencionado anteriormente, no se puede decir que exista un único modelo de autonomía en Europa. Por lo tanto, una valoración de los diversos modelos de descentralización puede resultar probablemente insuficiente. Va a ser inevitable, por tanto, que surjan las cuestiones interpretativas sobre si una región específica cumple los criterios de ser institucional, procedimental y económicamente autónoma y una aclaración o actualización por parte de la Comisión en este sentido sería, en consecuencia, muy bien recibida.

Por ejemplo, la tercera condición establecida por el TJCE (a saber, si la reducción de ingresos tributarios es objeto de subvenciones cruzadas o de compensación por parte del gobierno central) es un criterio muy complejo de evaluar en la práctica. En realidad, la interpretación de este criterio puede ir desde (i) una compensación estricta (compensando euro a euro la disminución de ingresos consecuencia de la desviación fiscal); (ii) medidas amplias de compensación presupuestaria, y (iii) una «compensación» amplia e inconexa a través de elementos tales como un sistema común de seguridad social o la ejecución de la política de defensa y de asuntos exteriores por el gobierno central. Tampoco está totalmente claro si la compensación

debe proceder en exclusiva del Estado central o si cabe a efectos de este criterio que otra entidad infra-estatal la realice.

Auque es comprensible que la Comisión esté preocupada de que la regionalización en materia impositiva pueda posibilitar que se efectúen cambios en los sistemas tributarios generales y de esta manera se eluda la política de ayudas de Estado, en concreto los limites estrictos marcados para las ayudas regionales, tal preocupación no debería de subsanarse a costa del proceso de descentralización fiscal de la UE, un modelo adoptado por ciertos Estados de la UE para mantener y garantizar la unidad de sus propios territorios o para reconocer las realidades históricas.

Además, los cuestionamientos venideros pueden ofrecer una buena oportunidad para revisar este asunto o la política de ayudas de Estado y la fiscalidad regional. Una de esas oportunidades va a llegar en breve en el, actualmente en curso, caso Gibraltar (territorio en el extranjero perteneciente a Reino Unido que es parte de la Unión Europea), en el que la Comisión Europea se opone a las reformas del sistema impositivo de las empresas al concluir que son incompatibles con las normas sobre ayudas de Estado de la UE[32].

**El caso Gibraltar:**

El 30 de Marzo de 2004, la Comisión Europea «apretó los frenos» de las reformas propuestas en el sistema de imposición de las empresas de Gibraltar, que pretendían tener efectos desde el 1 de julio de 2004.

Según la reforma prevista, (que se podría decir que se desvía del «benchmarking» con otros sistemas impositivos de la UE), las empresas domiciliadas en Gibraltar estarían sometidas a un impuesto sobre las nóminas anual (por empleado) y al impuesto sobre la utilización de los inmuebles afectos a actividades. Como tal, se le requeriría a cada empresario en Gibraltar que pagase un impuesto sobre las nóminas de la totalidad de sus trabajadores, tanto a tiempo completo como parcial, que estén contratados en Gibraltar y además un impuesto sobre la utilización de los inmuebles afectos a actividades equivalente al porcentaje de lo que les correspondería por aplicación de los tipos generales aplicables a los bienes inmuebles en Gibraltar. Un interesante (y controvertido) aspecto de la reforma es que la acumulación del impuesto sobre las nóminas y del impuesto sobre la utilización de los inmuebles afectos a actividades nunca podría superar el 15 % de los beneficios (lo que probablemente supondría que una empresa en un paraíso fiscal sin ninguna presencia física en Gibraltar no pagaría ningún impuesto). El proyecto incluye otros elementos tales como una tasa de inscripción aplicable a todas las empresas de Gibraltar y una tributación adicional o impuesto penalizador sobre los beneficios generados por ciertas actividades enumeradas.

…/…

[32] Este caso sin embargo presenta otras cuestiones adicionales además de las ayudas de Estado regionales.

> .../...
>
> En su escrutinio de los planes de reforma, la Comisión consideró que una serie de elementos de las propuestas de reforma podrían fácilmente otorgar una ventaja a las empresas de Gibraltar. Lo primero de la lista (es decir lo primero que se cuestionó) fue la selectividad regional, en el sentido de que el sistema propuesto proporcionaría una ventaja a las empresas de Gibraltar comparadas con las de Reino Unido. Básicamente, el tipo impositivo para las empresas en Gibraltar se establecería en un 15 por 100, en vez de en un 30 por 100 que es el tipo impositivo establecido legalmente para las empresas en el Reino Unido.

La esencia de la postura de la Comisión en la selectividad regional de las propuestas de reforma impositiva de Gibraltar, es que proporcionan, en general, un nivel de tributación inferior al que es aplicable en el Reino Unido y que esta diferencia supone una ventaja selectiva para las empresas que operan en Gibraltar. Según la Comisión, una distinción basada exclusivamente en el sujeto que decide la medida impediría totalmente la efectividad del artículo 87 del tratado UE, que pretende dar covertura a las medidas a que afecta teniendo en cuenta exclusivamente sus efectos sobre la competencia y el comercio comunitario. La Comisión, al formar su opinión sobre la selectividad regional, incluso hizo referencia a la ya mencionada controvertida posición del Abogado General Saggio en las conclusiones generales sobre los asuntos relativos a la región vasca. Además, la Comisión puso de manifiesto que la utilización de un criterio puramente institucional para diferenciar «una ayuda» de «las medidas generales» originaría inevitablemente diferencias de tratamiento en la aplicación de las normas sobre ayudas a los Estados Miembros, según si habían adoptado un modelo centralizado o descentralizado de distribución de la competencia tributaria[33].

Sin embargo, es posible que la aceptación por el TJCE de nuevos parámetros para determinar la selectividad regional juegue un importante papel en las discusiones a futuro sobre este asunto.

Otra región donde los parámetros establecidos por el TJCE van a ser merecedores de atención en el futuro es el País Vasco. Como se ha mencionado con anterioridad, el territorio vasco es una Comunidad Autónoma con el status de región histórica dentro de España y su autonomía institucional y económica representa con mucha probabilidad uno de los niveles más altos de autonomía que se puede encontrar en los Estados Miembros de la UE.

[33] Raymond H.C. Luja. «*State Aid Reform 2005/09: Regional Fiscal Autonomy and Effective Recovery*», *European Taxation*, Diciembre 2005.

**El Modelo Vasco:**

La Constitución Española diseña un sistema cuasi-federal donde coexisten tres niveles de gobierno: central, regional y local. En general, el área autónoma del País Vasco se beneficia de un régimen especial tributario, dentro del marco nacional legislativo de España. En virtud de dicho régimen especial, los parlamentos de las diferentes regiones que conforman el País Vasco (Álava, Gipuzkoa y Bizkaia) tienen competencia para adoptar y modificar ciertos tributos dentro de ciertos límites obligatorios. El reconocimiento por la Constitución Española de los derechos históricos del País Vasco se plasmó en la necesidad de acordar los pormenores del funcionamiento del sistema financiero y tributario y el Concierto Económico entre el País Vasco y España sirvió a este propósito. El Concierto Económico encarna el modelo de descentralización fiscal español, que implica un nivel máximo de autonomía tributaria. A la inversa, estas regiones deben contribuir al gobierno central por medio del denominado «cupo» que se encuentra ligado a los gastos generales que el gobierno central realiza en estos territorios[34].

En resumen, en virtud del Concierto Económico, al País Vasco se le da el derecho de tener su propio sistema tributario, que incluye la mayor parte de las competencias para regular y administrar los principales impuestos, incluyendo los impuestos tanto de personas físicas como jurídicas (el IVA por ejemplo está excluido). El acuerdo incluye, no obstante, un bloque de disposiciones con la finalidad de garantizar un nivel adecuado de armonización entre los sistemas regionales y el sistema del territorio común. En su virtud, el sistema impositivo (regional) respetará, sin embargo, (i) el principio constitucional de solidaridad; (ii) la estructura general del sistema impositivo español; (iii) la coordinación, armonización fiscal y cooperación con el Estado español; y (iv) los acuerdos internacionales firmados por el Estado español (es decir, los Tratados de doble imposición y de la Unión Europea).

Además, cuando elaboren su legislación tributaria las entidades infra-estatales deben (i) adecuarse a la Ley General Tributaria en cuanto a terminología y conceptos; (ii) mantener una presión fiscal efectiva global equivalente a la existente en el resto del Estado; (iii) respetar y garantizar la libertad de circulación y establecimiento de las personas y la libre circulación de bienes, capitales y servicios en todo el territorio español, sin que se produzcan efectos discriminatorios, ni menoscabo de las posibilidades de competencia empresarial ni distorsión en la asignación de recursos; y (iv) utilizar la misma clasificación (que en territorio común) de actividades (…) industriales, comerciales (…)

## 8. Conclusión

La autonomía fiscal ha estado y seguirá estando (quizás incluso más) presente en el paisaje político y social de algunas de las regiones europeas más importantes y las normas de ayudas de Estado puede que tengan un papel limitado a la hora de abordar

[34] En el caso del País Vasco, la competencia en materia tributaria se ejercita por los órganos de gobierno (Diputaciones Forales) de las tres provincias locales: Álava, Bizkaia y Gipuzkoa. Sus Haciendas regulan, exaccionan y administran todos los impuestos del País Vasco (descentralizados).

dicha autonomía fiscal. Teniendo en cuenta los parámetros establecidos por el TJCE, parece que el asunto de la selectividad regional a la luz de las normas de ayudas de Estado de la UE recibió un nuevo *input* bien merecido.

Tal vez el resultado en relación a la selectividad regional puede reforzar la necesidad de desarrollar medidas adicionales para frenar la (potencial) competencia fiscal de las entidades infra-estatales (bajo la así denominada «sombra» de la autonomía fiscal). No obstante, se puede decir que el resultado del caso Azores ha sido «un rayo de esperanza» para las «verdaderas» autonomías europeas. ¡Si es que existen en realidad!

# Fiscalidad Comunitaria e Impuestos Directos. Marco general, evolución y límites comunitarios al poder tributario de los distintos niveles impositivos nacionales

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## 1. Introducción

### *1.1. El ordenamiento fiscal europeo*

¿Existe una *fiscalidad comunitaria* o, mejor dicho, un sistema de normas fiscales de origen comunitario que pueda calificarse, en el sentido más amplio del término, como «*ordenamiento fiscal comunitario*»?

Si partimos de la premisa de que un *ordenamiento fiscal europeo* supondría la existencia de un conjunto orgánico de impuestos europeos, superpuesto al de los Estados

[1] El autor quiere dar las gracias a su amigo Javier Muguruza –durante mucho tiempo colega en la Comisión Europea– por la traducción de esta ponencia en buen castellano y por sus comentarios técnicos.

miembro y fruto del ejercicio de una competencia plena en materia fiscal de las Instituciones de la Unión, la respuesta a la pregunta es clara: una fiscalidad europea derivada de un ordenamiento de tal tipo –particularmente en materia de impuestos directos– ni existe, ni podrá nunca existir a la luz de las vigentes disposiciones del Tratado constitutivo de la Comunidad Europea (Tratado CE), y sus sucesivas revisiones.

En efecto, los Tratados –pilares sobre los que se asienta la construcción europea– no atribuyen a las Instituciones comunitarias potestades normativas directas en materia fiscal. Por consiguiente, éstas no pueden crear nuevas figuras tributarias porque no pueden ni definir sus bases imponibles o los modos de determinación de su carga fiscal, ni asegurar su recaudación.

No obstante, esto no significa que el papel de la Comunidad carezca de relevancia en materia de fiscalidad. No olvidemos que el propio Tratado CE contiene disposiciones previstas para evitar toda discriminación fiscal sobre las importaciones y exportaciones de bienes; que atribuye a la Comunidad la potestad para establecer impuestos agrícolas y tasas sobre el carbón y el acero; que las accisas (impuestos especiales) han sido objeto de armonización comunitaria; o que la fiscalidad de las entregas de bienes y prestaciones de servicios tiene su origen en normas comunitarias, a través de un sistema armonizado de imposición sobre el valor añadido.

Ahora bien, por otro lado también es cierto que, aun cuando, como en el caso del IVA, una parte del impuesto recaudado por los Estados miembro está destinada a proveer fondos al presupuesto comunitario, las Instituciones comunitarias no disponen de competencias directas de inspección y recaudación, ni pueden llevar a cabo una política económica efectiva a través de su propio presupuesto que les permita adaptar sus instrumentos fiscales a su capacidad de gasto.

Los límites jurídicos de las Instituciones comunitarias y las razones políticas que los han configurado impiden, hoy por hoy, que la Unión Europea pueda parecerse a un Estado federal. Las limitaciones en materia de recursos financieros disponibles no contribuyen precisamente a alcanzar un sistema fiscal homogéneo a nivel europeo. Como se puede constatar fácilmente, los sistemas fiscales de la UE difieren sustancialmente entre sí, tanto en el nivel como en la estructura de los impuestos[2].

Puede por lo tanto afirmarse que el concepto de *fiscalidad comunitaria* corresponde, más que a un verdadero y propio ordenamiento, a un «*sistema de normas europeas de carácter fiscal que tienen una incidencia sobre la estructura y la evolución de las fiscalidades nacionales de los Estados miembro a fin de alcanzar los objetivos de la construcción europea*»[3].

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[2] Véase el documento de la Comisión europea *Structures of the Taxation systems in the European Union: 1995-2004;* http://ec.europa.eu/taxation_customs/taxation/gen_info/economic_analysis/tax_structures/index_en.htm.

[3] P. Dibout, «Fiscalité et construction européenne: un paysage contrasté», *Revue des Affaires Européennes*, 1995, 2, 5.

Sin embargo, estas constataciones aparentemente restrictivas del papel de la Comunidad en el ámbito de la política fiscal, no nos deben sorprender. El poder impositivo, como fuente de recursos e instrumento de política económica, constituye un elemento esencial de la soberanía de los Estados. Por eso, es razonable que una prerrogativa de este género sea calificada de irrenunciable por los Estados, que, como tal, sea celosamente defendida por ellos, y que cualquier intento de la Comunidad por ampliar sus competencias en este ámbito sea fuente de intensos debates y de resoluciones denegatorias.

Por último, puede observarse que la política fiscal comunitaria nace, en el Tratado CE, esencialmente como una política *negativa*, funcionalmente destinada a prevenir las medidas que puedan obstaculizar las libertades fundamentales de circulación en el seno de la Comunidad (para mercancías, personas, servicios y capitales) y el derecho de establecimiento. El Tratado CE, de manera explícita, prohíbe toda discriminación frente a los bienes y servicios producidos en otros Estados miembro y por esta vía favorece el intercambio comunitario.

### *1.2. Las disposiciones de fiscalidad directa contenidas en el Tratado CE*

La fiscalidad no se incluye entre las funciones principales de la Comunidad reseñadas en el artículo 2 del Tratado CE.

Más aún, en el ámbito fiscal, sólo la abolición de los aranceles aduaneros se incluye entre las acciones explícitas enumeradas en los artículos 3 y 4, encomendándose a la Comunidad realizar las acciones necesarias para alcanzar dichos objetivos, sin exceder de su ámbito competencial.

Si se exceptúan las normas relativas a la Unión aduanera, la única disposición relevante del vigente Tratado CE, de carácter específicamente fiscal, se encuentra en el Capítulo 2 del Título VI de la Tercera parte (artículos 90 a 93), justo a continuación de las normas sobre competencia. Una localización bastante alejada formal y conceptualmente de los *principios comunitarios* enunciados en la Primera parte.

En el Tratado CE se encuentran otras referencias a la temática fiscal (artículos 23, 58, 175, 293).

Examinando con mayor detalle las normas fiscales del Tratado CE puede observarse que el artículo 90[4] establece una prohibición, de carácter general, de las *discri-*

[4] Artículo 90 TCE: *Ningún Estado miembro gravará directa o indirectamente los productos de los demás Estados miembro con tributos internos, cualquiera que sea su naturaleza, superiores a los que graven directa o indirectamente los productos nacionales similares. Asimismo, ningún Estado miembro gravará los productos de los demás Estados miembro con tributos internos que puedan proteger indirectamente otras producciones.*

*minaciones fiscales* en detrimento de los productos importados de otros Estados miembro. No se trata más que de la recepción en el Derecho comunitario de los principios fijados también en otros ámbitos del Derecho internacional, como el Tratado GATT. El artículo 91[5] es su corolario natural: la prohibición de sujetar las mercancías importadas a un gravamen superior al de los productos internos debe acompañarse de una simétrica prohibición de subsidiar los productos destinados a la exportación mediante la concesión de devoluciones fiscales superiores al importe de los impuestos nacionales efectivamente satisfechos.

Como se ve es una regulación inspirada eminentemente en disposiciones aduaneras, y por lo tanto, en una imposición que se configura más como un instrumento de política comercial que como una herramienta de política fiscal propiamente dicha.

Únicamente el artículo 93[6] ofrece una redacción en clave *positiva*, pero este artículo sólo se ocupa de *fiscalidad indirecta* y es la base de la armonización comunitaria en materia de IVA e impuestos especiales. Todavía no existe en el Tratado CE una disposición equivalente al artículo 93 para la imposición directa. Cuando las Instituciones Comunitarias han intervenido, de forma más o menos directa, sobre las legislaciones fiscales nacionales reguladoras de la fiscalidad sobre la renta, lo han hecho en base al artículo 94[7], un precepto que no se ocupa explícitamente de la fiscalidad sino que trata de la aproximación de las disposiciones de los Estados miembro que incidan directamente en el funcionamiento del mercado interior.

La acción comunitaria amparada en el ámbito del artículo 94 –base jurídica, como se acaba de señalar, de las escasas Directivas en materia de fiscalidad directa– ha encontrado muchas dificultades para desarrollarse, entre otras razones, porque las distorsiones derivadas de la coexistencia de regímenes fiscales distintos en los Estados miembro no constituyen, *per se*, una violación de los principios comunitarios. Para proponer un proyecto de Directiva que armonice algún aspecto de la fiscalidad directa, ha sido necesario que la Comisión demostrase que dicha distorsión constituía un *obstáculo* real para el funcionamiento del *mercado común*. Además, la exigencia de unanimidad para la aprobación de las disposiciones fiscales hace casi imposible su adopción. Como es fácil

[5] Artículo 91 TCE: *Los productos exportados al territorio de uno de los Estados miembro no podrán beneficiarse de ninguna devolución de tributos internos superior al importe de aquellos con que hayan sido gravados directa o indirectamente.*

[6] Artículo 93 TCE: *El Consejo, por unanimidad, a propuesta de la Comisión y previa consulta al Parlamento Europeo y al Comité Económico y Social, adoptará las disposiciones referentes a la armonización de las legislaciones relativas a los impuestos sobre el volumen de negocios, los impuestos sobre consumos específicos y otros impuestos indirectos, en la medida en que dicha armonización sea necesaria para garantizar el establecimiento y el funcionamiento del mercado interior…*

[7] Artículo 94 TCE: *El Consejo adoptará por unanimidad, a propuesta de la Comisión y previa consulta al Parlamento Europeo y al Comité Económico y Social, directivas para la aproximación de las disposiciones legales, reglamentarias y administrativas de los Estados miembro que incidan directamente en el establecimiento o funcionamiento del mercado común.*

de imaginar, lograr el apoyo simultáneo de los 27 Estados miembro a una proposición de Directiva comunitaria en materia fiscal, resulta dificilísimo.

## 2. Límites a la soberanía tributaria nacional: marco general

### *2.1. El papel del Tribunal de Justicia de las Comunidades europeas (TJCE) en el marco de la fiscalidad directa: las libertades del mercado interior y la no-discriminación*

Si, pese a lo expuesto, finalmente la fiscalidad ha podido asumir en el proceso de integración comunitaria un papel más importante del que inicialmente le había sido conferido por los redactores del Tratado de Roma, ha sido debido, principalmente, a la acción del TJCE, apoyado en gran medida por los órganos jurisdiccionales nacionales que han sometido a su veredicto un sinfín de problemas evidenciados con la puesta en marcha del mercado único.

De hecho, la contradicción de una Europa unida en el ámbito comercial, pero fraccionada en (hoy) veintisiete regímenes fiscales distintos, ha suscitado multitud de conflictos, muchos de los cuales han tenido que resolverse ante los tribunales, y en un número muy significativo ante el Tribunal de Justicia quien, en una tarea nada sencilla, ha alcanzado muchas veces soluciones muy razonables.

El principio de *no-discriminación* o *igualdad de trato*, tal y como ha sido elaborado por la jurisprudencia comunitaria, no sólo prohíbe las discriminaciones evidentes por razón de nacionalidad, sino también cualquier otra forma de discriminación disimulada que, por cualquier vía, desemboque en un resultado equivalente.

Este es un primer límite «constitucional» importante al poder tributario de los Estados miembro. Tal y como el Tribunal ha venido repitiendo en sus decisiones en materia de fiscalidad directa: *aunque, en el estado actual del Derecho comunitario, la materia de los impuestos directos no está incluida, como tal, en la esfera de competencia de la Comunidad, no es menos cierto que los Estados miembro deben ejercer las competencias que conservan respetando el Derecho comunitario*[8].

### *2.2. Los remedios del Tratado CE frente a las medidas fiscales generales contrarias al buen funcionamiento del mercado interior*

Algunas *medidas fiscales generales* de los Estados miembro pueden obstaculizar el buen funcionamiento del mercado interior.

[8] TJCE, C-279/93 (*Schumacker*), parágrafo 21.

El Tratado CE dota a la Comunidad de medios de actuación destinados a eliminar los diferentes tipos de falseamiento de la libre competencia que impidan el buen funcionamiento del mercado.

Frente a tales medidas, el Tratado ha previsto la posibilidad de armonizar las disposiciones fiscales de los Estados miembro, de acuerdo con lo estipulado en el artículo 94 (Directivas del Consejo aprobadas por unanimidad).

Como ya hemos dicho, hasta ahora han sido escasos, aunque muy importantes, los procedimientos de armonización transnacional aprobados bajo esa base jurídica:

– la asistencia mutua entre las autoridades competentes de los Estados miembro en el ámbito de los impuestos directos (Directiva 77/799/CEE);
– el régimen fiscal común aplicable a las fusiones, escisiones, aportaciones de activos y canjes de acciones realizados entre sociedades de diferentes Estados miembro (Directiva 90/434/CEE);
– el régimen fiscal común aplicable a las sociedades matrices y filiales de Estados miembro diferentes (Directiva 90/435/CEE);
– el régimen fiscal común aplicable a los pagos de intereses y cánones efectuados entre sociedades asociadas de diferentes Estados miembro (Directiva 2003/49/CE);
– la fiscalidad de los rendimientos del ahorro en forma de pago de intereses (Directiva 2003/48/CE).

Por otra parte, determinadas disposiciones generales vigentes o previstas en los Estados miembro que pueden falsear la competencia y provocar distorsiones, también pueden ser eliminadas en virtud de los artículos 96[9] y 97 (consulta de la Comisión con los Estados miembro interesados en su caso; y Directivas del Consejo adoptadas por mayoría cualificada).

### *2.3. Aplicación de las normas sobre ayudas estatales a las medidas relacionadas con la fiscalidad directa*

La problemática concreta de las ayudas de Estado será analizada en detalle en otras ponencias de este Congreso. Por esta razón, me limitaré a exponer los elementos esenciales del marco comunitario, simplemente para situar en el contexto mi análisis previo.

[9] Artículo 96 TCE: *En caso de que la Comisión compruebe que una divergencia entre las disposiciones legales, reglamentarias o administrativas de los Estados miembro falsea las condiciones de competencia en el mercado común y provoca, por tal motivo, una distorsión que deba eliminarse, procederá a celebrar consultas con los Estados miembro interesados. Si tales consultas no permitieren llegar a un acuerdo para suprimir dicha distorsión, el Consejo, a propuesta de la Comisión, adoptará, por mayoría cualificada, las directivas necesarias a este fin. La Comisión y el Consejo podrán adoptar cualesquiera otras medidas apropiadas previstas en el presente Tratado.*

El artículo 87, parágrafo primero, del Tratado CE[10] establece como principio básico la incompatibilidad con el mercado común de las *ayudas publicas a las empresas*. Esta prohibición general queda aliviada por una serie de excepciones, indicadas en los parágrafos siguientes del mismo artículo, que benefician a ciertas formas de ayudas consideradas *compatibles*, o sea, útiles desde el punto de vista comunitario, por su carácter social o porque contribuyen al desarrollo de las regiones europeas más pobres.

Este artículo habla de *ayudas otorgadas por los Estados (…) bajo cualquier forma.* Entre las distintas formas de ayudas públicas, las medidas de carácter fiscal han merecido una atención especial por parte de la Comisión europea. Este particular interés se justifica, cuando menos, por su importancia cuantitativa, pues las medidas de carácter fiscal representan aproximadamente el 30% del total de las ayudas revisadas por la Comisión.

Es imposible elaborar un inventario exhaustivo de todos los casos en los que una medida fiscal puede calificarse como ayuda. La forma que adopta una ayuda de carácter general depende de la evolución de los métodos impositivos y de la ingeniería fiscal.

Las distorsiones de la libre competencia derivadas de las ayudas fiscales estatales están sujetas a un régimen de autorización previa de la Comisión europea, bajo control del juez comunitario. El concepto de ayuda es un concepto objetivo respecto del cual la Comisión no dispone de ningún margen de discreción. En aplicación del parágrafo 3 del artículo 88, dichas distorsiones están sometidas a un procedimiento de notificación obligatoria a la Comisión. Los Estados miembro no pueden aplicar sus proyectos de ayuda fiscal sin su autorización. La Comisión examina la compatibilidad de las ayudas con el mercado común, no en función de su forma, sino de sus efectos. En caso de que estime que las ayudas son incompatibles, podrá exigir al Estado miembro su modificación o su supresión. Y si las ayudas ya se hubieran hecho efectivas en contra de lo dispuesto en las normas de procedimiento, la supresión supone, en principio, que sus beneficiarios quedan obligados a devolverlas al Estado miembro.

Las disposiciones del Tratado carecen de efecto directo, por ello la competencia se atribuye de forma exclusiva a la Comisión, que es la única que puede ejercitar este control.

Ciertamente, la soberanía fiscal de los Estados miembro puede verse comprometida, o al menos reducida, por la obligación de retirar una medida fiscal proyectada que sea contraria al artículo 87, ya sea como consecuencia del acatamiento inmediato de la Decisión de la Comisión, o de la posterior sentencia condenatoria del Tribunal

[10] Artículo 87, parágrafo 1, TCE: *Salvo que el presente Tratado disponga otra cosa, serán incompatibles con el mercado común, en la medida en que afecten a los intercambios comerciales entre Estados miembro, las ayudas otorgadas por los Estados o mediante fondos estatales, bajo cualquier forma, que falseen o amenacen falsear la competencia, favoreciendo a determinadas empresas o producciones.*

de Justicia que ponga fin a un procedimiento promovido de conformidad con el artículo 88, parágrafo 2, a instancias de la propia Comisión o de otro Estado miembro.

## 3. Evolución de la fiscalidad comunitaria y nuevos límites a la soberanía tributaria nacional

### *3.1. El «enfoque global» y la coordinación de las políticas fiscales*

A partir de 1996 la Comisión europea puso de manifiesto su intención de modificar la estrategia «*armonizadora*» que en materia fiscal había seguido hasta ese momento. Aquella estrategia, basada en el Artículo 94 del TCE y en el correcto funcionamiento del mercado único, piedra angular de la integración europea, había supuesto un importante freno para el proceso de armonización fiscal comunitaria, no obstante sus prometedores éxitos a comienzos de los años 90.

Según la Comisión, la fiscalidad ya no se podía seguir considerando un elemento *a parte* del proceso de integración económica europea. Sólo situándola en el contexto de las demás políticas comunitarias, y respetando escrupulosamente el principio de subsidiariedad, podría avanzarse de forma significativa. A falta de modificaciones en el cuadro institucional por lo que concernía al ámbito fiscal –como hubiera sido, por ejemplo, el paso de la regla de unanimidad a la de la mayoría cualificada– que hubieran permitido actuar de modo más expeditivo en la adaptación de las legislaciones nacionales que obstaculizaban la plena realización del mercado único, a la Comisión no le quedó más remedio que dirigirse a los Estados miembro solicitándoles que alcanzaran un nivel mayor de aproximación de sus respectivas políticas fiscales.

Comenzó así la nueva estrategia de «*coordinación*» de las políticas fiscales de los Estados miembro que aún hoy se mantiene.

En el primer documento comunitario de análisis[11], la falta de coordinación de los sistemas tributarios –o peor aún, la competencia, en ocasiones desleal o perniciosa, entre los Estados– se identificó como una causa de distorsiones en el mercado único y como un elemento que contribuía a generar desempleo. Se encontraba una contradicción en la existencia de una política económica capaz de eliminar obstáculos monetarios, pero estéril en lo que se refiere a la eliminación de las barreras fiscales. La Comisión se mostraba por ello especialmente contraria a la erosión de los ingresos fiscales de los Estados miembro, máxime en un momento en el que todos ellos estaban realizando importantes esfuerzos para satisfacer los criterios de Maastricht en materia de disciplina presupuestaria.

Si bien es verdad que el mercado único es incompatible con la doble imposición, no lo es menos que también es incompatible con la no-imposición. Resultaba pues

[11] *La política fiscal en la Unión europea*, SEC(96)487 de 20 de marzo de 1996.

palpable la necesidad de alcanzar un acuerdo que permitiera, al menos, una imposición efectiva mínima de las rentas derivadas de la actividad empresarial y del capital.

En 1997 el Consejo de Ministros de Economía y Finanzas (*Ecofin*) alcanzó un acuerdo de carácter político –calificado de histórico– sobre un *paquete* de medidas fiscales para luchar contra al competencia fiscal perniciosa. Entre los elementos incluidos en este paquete había un *código de conducta sobre la fiscalidad de las empresas* y, en paralelo con él, una *comunicación de la Comisión en materia de ayudas de Estado de carácter fiscal*. El Código de conducta constituía el elemento clave del paquete, en cuanto instrumento idóneo para prevenir las distorsiones económicas y la erosión de las bases imponibles en el seno de la Comunidad.

### *3.2. El Código de conducta: su forma legal*

El *Código de conducta* en materia de fiscalidad empresarial fue aprobado inicialmente el 1 de diciembre de 1997 por una resolución del Consejo de la UE[12], y quedó definitivamente adoptado seis años más tarde, tras intensas y laboriosas negociaciones a nivel político[13]. Fue, sin duda, el producto más innovador de aquel paquete fiscal.

Desde un punto de vista puramente formal, el Código constituye una *medida atípica*. De hecho, se formalizó mediante una «resolución», que es un instrumento que no tiene una previsión explícita en el TCE[14]. Por otra parte, esta resolución fue adoptada no sólo por el Consejo sino también por «*los representantes de los Gobiernos de los Estados miembro, reunidos en el seno del Consejo*». Era una fórmula bastante críptica, en principio, probablemente, destinada sólo a poner de relieve que el Código de conducta afecta a una competencia primaria de los Estados miembro. No es un instrumento jurídicamente vinculante sino un *gentlemen agreement* («acuerdo

[12] *Resolución del Consejo y de los representantes de los Gobiernos de los Estados miembro, reunidos en el seno del Consejo relativa a un Código de conducta sobre la fiscalidad de las empresas*. Anexo I a las *Conclusiones del Consejo Ecofin sobre la política fiscal*, en DO C 2 del 6 de enero de 1998, p. 1.

[13] Véase el comunicado de prensa de la Comisión europea, IP/03/787 de 3 de junio de 2003.

[14] El artículo 249 del TCE establece que *para el cumplimiento de su misión, el Parlamento Europeo y el Consejo conjuntamente, el Consejo y la Comisión adoptarán reglamentos y directivas, tomarán decisiones y formularán recomendaciones o emitirán dictámenes*, sin hablar de la 'resolución', la cual se utilizó para el código de conducta. En sus conclusiones al asunto *NIPFO*, el Abogado General La Pergola define de forma eficaz el término 'resolución': *las Resoluciones son uno de esos actos atípicos (no menos importantes) a los que el Consejo y la Comisión recurren en ocasiones –desde la óptica, sin embargo, de una creciente integración entre los ordenamientos jurídicos de los Estados miembro– para expresar su voluntad política, precisando los elementos de acuerdos de principio alcanzados en el seno de la Institución con el fin de evitar que dichos acuerdos puedan ser cuestionados. En otras palabras, las Resoluciones (sobre todo las del Consejo) sólo constituyen, por principio, compromisos políticos, si bien simultáneamente anuncian su ulterior desarrollo mediante las formas jurídicamente eficaces que contempla el artículo* [249] *del Tratado*; Conclusiones del Abogado General Antonio La Pergola de 30 de septiembre de 1997, asunto C-4/96 (*NIFPO Ltd y otras*), punto 56.

entre caballeros»). Puede definirse como un compromiso político formal de los Gobiernos de los Estados miembro.

Por ello, las resoluciones pueden encuadrarse entre las medidas comunitarias conocidas como de '*soft-law*'[15]. Estos instrumentos no son *per se* obligatorios, aunque tienen su propia naturaleza jurídica y pertenecen al ordenamiento jurídico comunitario, por lo que, incluso sin la fuerza vinculante de los actos jurídicos típicos, pueden afectar al comportamiento de los Estados miembro y de las propias organizaciones europeas[16].

Es cierto que la naturaleza comunitaria del Código ha sido cuestionada por una parte importante de la doctrina. Sin embargo, el Código se ha considerado como parte del *acquis communautaire*[17], en el ámbito de la legislación fiscal, en las negociaciones para adquirir la condición de Estado miembro, tanto en las mantenidas para las recientes ampliaciones de la Unión Europea como en las que se hayan de mantener en el futuro[18].

Por otra parte, no es necesario explicar que según el artículo 230 del Tratado CE[19], como el Código de conducta no tiene ningún efecto jurídicamente vinculante, en principio el Tribunal de Justicia de las Comunidades Europeas no tiene sobre él ningún poder de verificación legal.

Por lo que se refiere a su contenido, el Código incrementa la lista –realmente muy corta– de medidas comunitarias adoptadas en estos últimos veinte años en el campo de la fiscalidad empresarial[20], y se superpone –al menos parcialmente– a las disposiciones comunitarias vigentes en materia de ayudas de Estado.

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[15] Para un análisis más amplio del concepto de *instrumentos no legislativos o medidas no vinculantes* ('soft-law') en la política fiscal comunitaria, véase el punto 4.3. de la comunicación de la Comisión *Política fiscal en la Unión Europea – Prioridades para los próximos años*, COM (2001) 260 final del 23 de mayo de 2001, en DOCE 284 del 10 de octubre de 2001.

[16] Constituye prueba relevante de ello el punto J del Código de conducta, en el que la Comisión Europea se compromete *a revisar o a volver a revisar cada uno de los regímenes fiscales vigentes y de los nuevos proyectos de los Estados miembro,* teniendo en cuenta la nueva (y más estricta) interpretación de las normas en materia de ayudas estatales de origen tributario.

[17] Que constituye, para los nuevos Estado miembro, el cuerpo de la legislación de la UE vigente al momento de la adhesión.

[18] Véase el anexo de la decisión del Consejo sobre la Asociación para la adhesión de Turquía a la UE, en el que se contienen los principios y las condiciones para alcanzar la condición de Estado miembro, y donde se señala explícitamente como una *prioridad a corto plazo* la necesidad de comprometerse a cumplir con los principios del Código de conducta sobre la fiscalidad de las empresas y de asegurarse de que la legislación futura cumpla igualmente con los principios del Código. Decisión del Consejo (2006/35/CE) de 23 de enero de 2006, en DOCE L 22 del 26 de enero de 2006, p. 42.

[19] Artículo 230, primer parágrafo, TCE: *El Tribunal de Justicia controlará la legalidad de los actos adoptados conjuntamente por el Parlamento Europeo y el Consejo, de los actos del Consejo, de la Comisión y del BCE que no sean recomendaciones o dictámenes, y de los actos del Parlamento Europeo destinados a producir efectos jurídicos frente a terceros.*

[20] Véase el régimen fiscal común aplicable a las fusiones, escisiones y aportaciones de activos, introducido por la Directiva 90/434/CEE; la Directiva 90/435/CEE para las sociedades matrices y filiales de los

En razón a esta parcial superposición y a la posible confusión que tal situación puede generar, conviene que nos detengamos sobre este tema, con el ánimo de aclarar las complejas relaciones entre el Código de conducta y el derecho comunitario de la competencia.

No obstante, antes de abordar este tema, y por seguir un orden lógico, interesa conocer un poco mejor el Código de conducta y sus objetivos políticos. Así será más fácil entender sus efectos sobre las legislaciones fiscales, tanto nacionales como regionales.

### *3.3. El Código de conducta: sus objetivos políticos*

El Código de conducta pretende luchar contra la *competencia fiscal perniciosa*. Pero, ¿qué es exactamente la *competencia fiscal* y cuándo es *perniciosa*? La Resolución del Consejo de 1 de diciembre de 1997 trata de contestar a estas preguntas. Ahora bien, siendo ella misma resultado de un difícil compromiso, deja sin respuesta algunos problemas de interpretación.

La Resolución del Consejo pone de relieve los efectos positivos de la *competencia leal* entre los sistemas impositivos de los Estados miembro y reafirma que las empresas, cuando actúan en el Mercado único, tienen derecho a beneficiarse de las libertades fundamentales del Tratado CE[21] sin encontrar obstáculos. Sin embargo, inmediatamente a continuación, el Código señala que *… la competencia fiscal puede desembocar también en medidas fiscales que entrañen efectos perniciosos.*

La fiscalidad directa es una competencia propia de los Estados miembro, pero, incluso en este campo, los poderes legislativos nacionales deben ejercerse dentro del respeto del Derecho comunitario. Por consiguiente, los Estados miembro no son del todo libres para adoptar las medidas fiscales que consideren más convenientes para ellos. El condicionante más importante es la prohibición de cualquier forma de discriminación basada sobre la nacionalidad[22]. Pero, naturalmente, también las normas del Tratado CE sobre el derecho de la competencia, y en especial las que se refieren a

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Estados miembro; el Convenio relativo a la supresión de la doble imposición en caso de corrección de los beneficios de empresas asociadas («convenio arbitral» 90/436/CE) y la más reciente Directiva 2003/49/CE del Consejo relativa a un régimen fiscal común aplicable a los pagos de intereses y cánones efectuados entre sociedades vinculadas de diferentes Estados miembro.

[21] Libre circulación de los trabajadores y de los capitales, libre prestación de servicios y derecho de establecimiento.

[22] *… en el estado actual del Derecho comunitario, la materia de los impuestos directos no está incluida, como tal, en la esfera de competencia de la Comunidad, no es menos cierto que los Estados miembro deben ejercer las competencias que conservan respetando el Derecho comunitario*, TJCE, sentencia del 14 de febrero de 1995, asunto C-279/93 (*Schumacker*), punto 21; véase también la sentencia de 11 de agosto de 1995, asunto C-80/94 (*Wielockx*), punto 16; sentencia de 27 de junio de 1996, asunto C-107/94 (*Asscher*), punto 36; sentencia de 15 de mayo de 1997, C-250/95 (*Futura*), punto 19; sentencia de 28 de abril de 1998, asunto C-118/96 (*Safir*), punto 21; sentencia de 16 de julio de 1998, asunto C-264/96 (*I.C.I.*), punto 19.

ayudas de Estado (artículos 87 y 89 del TCE), constituyen un límite relevante a los poderes de los Estados miembro.

La Resolución aprobatoria del Código de conducta menciona expresamente que el Código, por su naturaleza de compromiso político, no influye en los derechos y obligaciones de los Estados miembro ni en el equilibrio de las respectivas competencias entre éstos y la Comunidad tal y como se derivan del Tratado. Por consiguiente, el Código de conducta no tiene ninguna función de armonización. Más concretamente, el Código de conducta no sirve para reducir las diferencias en la imposición que grava a las empresas –establecidas en los distintos Estados miembro– que actúan en el Mercado único. Estas diferencias –que pueden calificarse como «naturales»– derivan del hecho de que los impuestos sobre las empresas son una competencia cuasi-exclusiva de los Estados miembro.

El Código tampoco pretende limitar las distorsiones de la competencia derivadas de la aplicación a las empresas de distintos regímenes fiscales nacionales y regionales, al menos no como un objetivo directo. Respetuosamente, reserva este objetivo a la disciplina comunitaria sobre ayudas de Estado prevista en los citados artículos 87 y siguientes del Tratado CE, a los que el Código, ni pretende sustituir, ni podría hacerlo.

Para comprender mejor los objetivos del Código de conducta conviene retroceder en el tiempo y leer la *Comunicación* de la Comisión[23] que está en el origen de la varias veces citada Resolución del Consejo.

En ese Documento se precisa que, en general, el fenómeno de la competencia fiscal debe considerarse, de por sí, como positivo en cuanto que es generador de ventajas para los ciudadanos y fuerza la rebaja del gasto público. Ahora bien, según la Comisión, «*una competencia ilimitada en lo que se refiere a los factores móviles puede imprimir a los sistemas impositivos un sesgo contrario al empleo*»[24] y en ese contexto, puede dificultar la disminución de la presión fiscal.

Una competencia de esta naturaleza, además, reduce el campo de maniobra para lograr otros objetivos de la Comunidad tales como la protección del medio ambiente, la tutela del *modelo social europeo,* las políticas de ahorro energético etc. En definitiva, la competencia fiscal puede obstaculizar los esfuerzos adoptados por los Estados miembro para reducir los déficit presupuestarios. Por eso, el eliminarla, aunque no constituya un objetivo necesario *per se*, es un medio para acomodarse a los criterios de Maastricht y a los del Pacto de Estabilidad y Desarrollo. Por esta razón, «*la integración del mercado, sin la consiguiente coordinación fiscal, está restringiendo cada vez más la libertad de los Estados miembros para adoptar la estructura fiscal más apropiada, ampliando las bases fiscales y reduciendo los tipos*»[25].

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[23] Comunicación de la Comisión al Consejo «*Hacia la coordinación fiscal en la Unión europea. Paquete de medidas para hacer frente a la competencia fiscal perniciosa*», de 1 de octubre de 1997; COM(97)495.
[24] COM(97)495, *cit.*, punto 3, p. 2.
[25] COM(97)495, *cit.*, *ibid*.

Los Estados tienen unas necesidades de gasto que no se pueden reducir fácilmente (o al menos no se pueden reducir sin detrimento de los servicios prestados al ciudadano). Por eso, la competencia fiscal que generan los regímenes fiscales particularmente generosos[26] produce como consecuencia lógica el desplazamiento de la presión fiscal de los Estados miembro desde las formas de actividad económica más fácilmente deslocalizables (principalmente el capital) hacia las bases imponibles derivadas del factor trabajo (integradas tanto por los salarios de los empleados como por los rendimientos empresariales) que son, por definición, los factores menos móviles. El Código de conducta constituye, por lo tanto, la reacción lógica frente a las consecuencias de la notable diferencia que existe hoy en día entre la movilidad de los trabajadores y la de los capitales, dentro del Mercado único.

El Consejo de la Unión Europea no podía ignorar que, desde un punto de vista económico, una atribución de factores de producción dictada esencialmente por criterios de beneficio fiscal era del todo ineficiente. Máxime cuando, además, tales medidas son adoptadas por los Estados miembro con el único objetivo de atraer bases imponibles prevenientes de sus vecinos, de los demás socios comunitarios.

El Código de conducta se propuso poner remedio a este fenómeno, estableciendo unos límites a la competencia fiscal allí donde no se había podido actuar a través de la vía clásica de la armonización de las legislaciones fiscales comunitarias. La propia Comisión, vista la imposibilidad de seguir avanzando en el proceso de armonización –tras el bloqueo que siguió a los lamentables acontecimientos del inicio de la década de los noventa– ya había anunciado pragmáticamente el paso de la *armonización* a *la coordinación* de las políticas fiscales nacionales, como un posible remedio para salir del impasse[27].

La propia atipicidad del Código constituye la razón principal de su elección como instrumento idóneo, impuesta obviamente por la dificultad casi insuperable de alcanzar acuerdos por unanimidad sin pasar por complicados compromisos. Recordemos que en materia de fiscalidad, el acuerdo unánime de todos los Estados miembros es premisa indispensable de cualquier acto comunitario[28].

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[26] Aunque tales medidas sean compatibles con las disposiciones en materia de ayudas de Estado.

[27] La Comisión subraya que «*toda propuesta de intervención comunitaria en materia de fiscalidad ha de ajustarse plenamente a los principios de subsidiariedad y proporcionalidad*». Más que la armonización como un fin en sí mismo se requieren medidas que proporcionen una defensa más eficaz contra «*la pérdida de soberanía fiscal que han venido experimentando los Estados miembros en beneficio de los mercados …*». Comisión Europea, «*La fiscalidad en la Unión europea, informe sobre la evolución de los sistemas tributarios*»; COM(96)546 de 22 de octubre de 1996, punto 6.2, p. 13.

[28] Para la fiscalidad directa, la base jurídica viene dada por el artículo 94 TCE («*… aproximación de las disposiciones legales … que incidan directamente en el establecimiento o funcionamiento del mercado común*») que requiere la aprobación unánime del Consejo.

La decisión de insertar el Código de conducta en un paquete integrado por medidas fiscales bastante distintas unas de otras responde a la misma lógica de alcanzar más fácilmente un consenso unánime. La presentación ante los Estados miembros de un *paquete* de medidas para ser aprobadas simultáneamente permite que sus eventuales vetos entrecruzados se anulen recíprocamente. La composición del referido

En la intención de sus autores y en la de los Estados miembro que lo han suscrito, el Código de Conducta permite hacer frente a los problemas citados, manteniendo una cierta competencia entre las legislaciones nacionales y salvaguardando, por lo tanto, el irrenunciable (para los Estados miembro) principio de la soberanía fiscal nacional.

### *3.4. El Código de conducta: sus contenidos esenciales*

Como ya se ha señalado, el elemento clave del Código es la definición de *medida fiscal perniciosa,* concepto que se elabora de una forma pragmática, a través de una serie de ejemplos relacionados en sus apartados A y B[29].

Deben calificarse como potencialmente perniciosas aquellas medidas fiscales que determinan un nivel efectivo de imposición netamente inferior a los niveles generalmente aplicados en el Estado miembro concernido, y que tienen, o que potencialmente pueden tener, una incidencia sensible en la localización de la actividad empresarial en el territorio de la Comunidad. Tal nivel de imposición puede venir fijado por el tipo impositivo, por la forma de determinar la base imponible, o por cualquier otro elemento de la obligación tributaria.

El Código establece una serie de criterios que deben tomarse en consideración al valorar las medidas que entran en su ámbito de aplicación, sean o no perniciosas, en función de sus posibles repercusiones dentro de la Comunidad. El ámbito de las medidas fiscales a las que se aplica el Código abarca tanto las disposiciones legislativas o reglamentarias como las simples prácticas administrativas.

Dentro del catálogo de medidas fiscales desleales entran, fundamentalmente, las medidas reservadas a los no residentes y las medidas concebidas para las transacciones efectuadas con no residentes, aisladas completamente de la economía nacional de forma que no inciden sobre la base imponible nacional, aplicables incluso aunque no exista una presencia efectiva del beneficiario en el territorio del Estado miembro que las establece, y que se conceden separándose de los principios generalmente reconocidos a nivel internacional (por ejemplo, las que se conceden en contra de los principios

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«paquete Monti», de hecho, estaba concebida para que cada Estado miembro encontrase útil para su propio sistema económico y/o fiscal la aprobación de al menos una de las medidas propuestas por la Comisión, pero de forma que, para obtenerla, debiera prestar su conformidad al lote completo de medidas integradas en el paquete.

[29] «*A. Sin perjuicio de las competencias respectivas de los Estados miembros y de la Comunidad, el presente Código de conducta, que atañe a la fiscalidad de las empresas, se refiere a las medidas que influyen o pueden influir de manera significativa en la radicación de la actividad empresarial dentro de la Comunidad … Las medidas fiscales a que se refiere el presente Código son disposiciones legislativas o reglamentarias y prácticas administrativas.*

*B. … deben considerarse potencialmente perniciosas y, por consiguiente, afectadas por el presente Código las medidas fiscales que impliquen un nivel impositivo efectivo considerablemente inferior, incluido el tipo cero, al aplicado habitualmente en el Estado miembro de que se trate…*».

acordados en el seno de la OCDE en materia de precios de transferencia) o con falta de transparencia.

Al aprobar el Código, los Estados miembros se comprometieron, por una parte, a no introducir nuevas medidas fiscales perniciosas (*standstill – statu quo*), y por otra, a revisar su propia normativa interna y sus prácticas administrativas vigentes, y a modificarlas, en lo necesario, para eliminar cualquier medida perniciosa (*rollback – desmantelamiento*) en el plazo más breve posible. Pero además, también se obligaron a intercambiarse recíprocamente información sobre las medidas fiscales vigentes –o las proyectadas– siempre que pudieran entrar en el ámbito de aplicación del Código, y a institucionalizar un grupo encargado de convalidar las medidas fiscales anteriores y a supervisar las informaciones referentes a las mismas, y a promover la adopción de los principios del Código y la eliminación de medidas fiscales perniciosas en los países terceros y en los territorios en los que no es de aplicación el Tratado.

En particular, los Estados miembro que tienen territorios dependientes o asociados, o que tienen responsabilidades particulares o prerrogativas fiscales sobre otros territorios, se comprometieron, en el ámbito de sus respectivas normas constitucionales, a garantizar la aplicación de tales principios en dichos territorios[30].

La convalidación de las medidas que pudieran entrar en el ámbito de aplicación del Código corresponde a un grupo específico que se instituyó en 1998 por el Consejo de Ministros ECOFIN[31]. Dicho grupo, tras una primera fase de intensa labor, previó la emisión con periodicidad regular, de una serie de informes en los que había de reflejar su opinión con respecto a los regímenes fiscales analizados.

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[30] Merece la pena recordar que en abril de 1998, bajo el impulso de los Estados miembro de la Unión Europea, la OCDE aprobó un documento sobre la competencia perniciosa en materia fiscal, y que en el curso de la reunión del G8 y los líderes de los grandes países manifestaron su empeño en profundizar en el análisis de los efectos de la competencia fiscal dañina sobre la economía mundial. Los análisis de la OCDE –que se distinguen de los comunitarios no sólo por el espectro geográfico más amplio en el que se basan (base mundial), sino también porque se centran principalmente sobre la actividad financiera– establecen una serie de orientaciones encaminadas a hacer frente a la cuestión de los regímenes preferenciales perjudiciales en el ámbito de la OCDE, a fijar una lista de paraísos fiscales a nivel mundial, y a instituir un foro sobre prácticas fiscales perjudiciales, encargado de velar por la implantación de las recomendaciones formuladas en 1998; OECD, *Towards Global Tax Co-operation, Progress in Identifying and Eliminating Harmful Tax Practices*, Paris, 2000.
Si bien la paternidad del primer proyecto organizado de lucha contra la competencia fiscal dañina debe ser reconocida a la Comisión europea, por el documento que presentó en marzo de 1996 al Consejo Ecofin informal de Verona –SEC (96)487–, no se puede ocultar que la actividad desarrollada en paralelo por la OCDE ha actuado como un acelerador de la actividad comunitaria, como lo reconoce el primer documento del Grupo de Alto nivel que elaboró el borrador del paquete fiscal («*… de nombreux représentants ont souhaité la poursuite d'actions spécifiques visant à restreindre ou à mettre fin à la concurrente déloyale dans ce domaine, parallèlement aux travaux entrepris par l'OCDE*»; V. COM(96)546, punto 3.15).

[31] Conclusiones del Consejo de 9 de marzo de 1998 referentes a la implantación del grupo «*Código de conducta*» (imposición sobre las empresas), in *DOCE*, C 99 de 1 de abril de 1998, p.1. El grupo, que se reunió por primera vez el 8 de mayo de 1998, eligió como Presidenta a la señora Dawn Primarolo, Subsecretaria de Finanzas (exactamente: *paymaster general*) del Tesoro británico, adoptando por tanto la denominación informal de «Grupo Primarolo» que aun hoy se mantiene.

En su primer informe preliminar[32], tras haber examinado casi 300 regímenes de beneficios fiscales, identificó 66 como *perniciosos* por corresponderse con los criterios establecidos en el Código de conducta.

La aprobación de este primer informe por parte del Consejo resultó una tarea muy laboriosa, que requirió un año de negociaciones para alcanzar un acuerdo[33]. Dicha aprobación no se produjo hasta el Consejo Ecofin de noviembre de 2000, en el que se hicieron renovados votos de implementar el paquete fiscal íntegro, conforme a la voluntad manifestada por los Jefes de Estado de los países de la UE con ocasión del Consejo europeo de Santa Maria da Feira, celebrado en el mes de junio de ese mismo año.

Aunque no podemos ignorar las frecuentes disputas entre los Estados miembro –e incluso entre éstos y la propia Comisión– sobre el ritmo y la manera de desmantelar los regímenes fiscales que no responden a las reglas de la sana competencia fiscal, sí debemos constatar los significativos efectos derivados de la puesta en vigor del Código de conducta. Desde 1998 hasta la actualidad, la disposición de los Estados miembro a introducir beneficios fiscales potencialmente perniciosos a los ojos del Código se ha frenado significativamente, y las escasas medidas introducidas han sido, en todo caso, objeto de un cuidadoso análisis previo por parte del grupo de control del Consejo.

Varios Proyectos de ley han sido comunicados en trámite preventivo, para ser examinados por el Grupo, y muchas medidas susceptibles de entrar en el ámbito de aplicación del Código han sido retiradas antes de la fecha límite prevista o se encuentran en vías de su gradual eliminación[34].

### *3.5. El Código de conducta: dificultades para su aplicación y los conflictos de competencia*

Según las conclusiones del Consejo Ecofin del 1 de diciembre de 1997, hubiera debido ser suficiente un plazo de dos años para el desmantelamiento de las medidas

[32] Documento del Consejo SN 4901/99 del 29 de noviembre de 1999. Contra lo que suele ser habitual en los trabajos de los grupos del Consejo, el informe, que fue asumido y aprobado por el Ecofin de 28 de febrero de 2000, ha sido hecho público y se puede consultar entre los documentos disponibles en el sitio internet del Consejo de la Unión Europea. Los informes posteriores no han sido publicados por el Consejo. Esta falta de transparencia –que se puede considerar injustificada– ha sido objeto de severas criticas por parte del Mediador europeo (V. comunicado emitido por la Oficina del *ombudsman*, EO/02/17 de 1 de julio de 2002).

[33] El informe tenía que haberse aprobado en el Consejo Europeo de Helsinki, en diciembre de 1999, junto con las demás medidas del paquete, pero la excusa del parón en aquella ocasión fue la propuesta de Directiva sobre la imposición mínima del ahorro, que provocó un brusco frenazo al conjunto de medidas que integraban el paquete.

[34] Comunicación de la Comisión al Consejo y al Parlamento europeo «*Primer informe anual sobre la aplicación del Código de conducta en materia de fiscalidad de las empresas y ayudas estatales de carácter fiscal*»; documento COM(1998)595 final del 25 de noviembre de 1998.

consideradas perniciosas. La Resolución precisaba que, en todo caso, «*… a partir del 1 de enero de 1998, el desmantelamiento efectivo tendrá que llevarse a cabo en el plazo de cinco años, aunque pueda justificarse un plazo más largo en circunstancias particulares, que deberá evaluar el Consejo.*».

Con posterioridad[35], el Consejo Ecofin modificó el calendario de desmantelamiento de las medidas fiscales perniciosas, estableciendo que ninguna empresa podría comenzar a beneficiarse de tales regímenes fiscales después del 31 de diciembre de 2001, aunque se previó una excepción para los regímenes fiscales que se hubieran beneficiado de una Decisión precedente de la Comisión Europea –adoptada en materia de ayudas de Estado– que hubiese previsto una duración más larga[36]. Por otra parte, también se previó que el Consejo podría autorizar –informando previamente al Grupo Primarolo– la prórroga de los efectos de determinados regímenes fiscales, ya calificados como perniciosos, más allá de la fecha límite prevista del 31 de diciembre de 2005.

En marzo de 2003 –en aplicación de las conclusiones del Ecofín celebrado al inicio de aquel mismo año[37]– el Consejo avaló finalmente el informe del Grupo Primarolo, sancionando como perniciosas 66 medidas. Casi al mismo tiempo, los Estados miembro presentaban sus listas de disposiciones legislativas modificadoras de los regímenes fiscales cuestionados, a fin de acomodarse a las decisiones del Consejo. Más aún, para alcanzar un compromiso aceptable en el momento de la aprobación final del paquete fiscal[38], se procedió a una postrera modificación de las reglas del juego. En efecto, se concedió una prórroga para el desmantelamiento de seis regímenes fiscales (que ya habían sido considerados perniciosos por el Grupo Primarolo) que, en determinados casos, se alargó hasta el final de 2011 (e incluso hasta más tarde en determinadas circunstancias).

El caso de los Centros de Coordinación belgas[39], por su complejidad y por el contencioso que de ellos se ha derivado al generar un conflicto interinstitucional entre el Consejo y la Comisión, merece una atención especial.

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[35] Conclusiones del Consejo Ecofin de 26 y 27 de noviembre de 2000. Comunicación emitida por el Consejo UE del 27.11.00, n. 453.

[36] Para estos regímenes está establecido que la empresa se podría beneficiar de dichas medidas fiscales hasta el 31 de diciembre de 2002 o –si ya disfrutaba de tal régimen a 31 de diciembre de 2000– hasta el final de diciembre de 2005 (esto es, al menos por cinco años, a fin de no penalizar a todas aquellas empresas que hubieran entrado en el régimen fiscal derogado en período no sospechoso, permitiéndoles amortizar el costo de adaptación al mismo).

[37] V. Comunicación emitida por el Consejo UE del 21.1.2003, n. 15.

[38] Comunicación emitida por el Consejo UE del 3.6.2003, n. 138.

[39] Los Centros de Coordinación fueron implantados mediante Real Decreto de 30 de diciembre de 1982, n. 187. En un principio, Bélgica previó una exención fiscal durante diez años para los rendimientos obtenidos por los Centros que contrataran un número mínimo de empleados (centros de naturaleza administrativa, preparatoria o auxiliar o de centralización financiera), a favor de las empresas a las que pertenecieran. Más tarde, al poco de su implantación, a raíz de las actuaciones de la Comisión Europea en el ámbito de su actividad de control de las medidas que pudieran incluirse entre las ayudas de Estado (ex

En julio de 2003 el Consejo autorizó a Bélgica la aplicación, hasta el final de 2005, de su régimen fiscal de Centros de Coordinación, en los casos en los que la autorización se hubiese concedido con anterioridad a aquella fecha. Este régimen estaba considerado *compatible con el mercado común* en el sentido del artículo 88, párrafo 2, tercer apartado del Tratado CE[40].

Ahora bien, según la Comisión, dicha prórroga violaba una anterior Decisión definitiva *negativa* de la propia Comisión, adoptada el 17 de febrero de 2003, en el ámbito de sus competencias exclusivas en materia de ayudas de Estado[41].

La Comisión, en consecuencia, presentó recurso ante Tribunal de Justicia solicitando la anulación de la Decisión del Consejo.

El Tribunal, por Sentencia de 22 de junio de 2006, anuló la citada Decisión del Consejo, argumentando su evidente «exceso de poder». Según el juez comunitario: «… *si el Estado miembro afectado no dirige ninguna petición al Consejo, al amparo de dicha disposición, antes de que la Comisión declare la ayuda incompatible con el mercado común, el Consejo deja de estar autorizado para ejercer la facultad excepcional que le confiere la referida disposición para declarar la ayuda compatible con el mercado común*»[42].

Sin embargo, la Comisión no pudo celebrar durante mucho tiempo tan importante afirmación del principio de inviolabilidad de sus poderes soberanos en materia de ayudas de Estado. En efecto, Bélgica también había presentado, casi simultáneamente, un recurso al Tribunal de Justicia. Obviamente no contra la Decisión del Consejo de julio de 2003, sino contra la Decisión adoptada antes por la Comisión, en febrero del mismo año. Pues bien, el Tribunal de Justicia, mediante otra Sentencia dictada el mismo día[43], anuló parcialmente la Decisión de la Comisión porque dicha Institución comunitaria no había tenido en cuenta *la confianza legítima* de los

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artículo 87), el referido régimen fiscal fue objeto de importantes limitaciones y modificaciones. Actualmente el elemento caracterizador del régimen fiscal de los Centros de Coordinación cuestionado consiste en la determinación de la base imponible del Impuesto sobre Sociedades por un procedimiento de forfait (conforme al método del *cost plus*).

[40] Decisión del Consejo del 16 de julio de 2003, 2003/531/CE, *relativa a la concesión de una ayuda por parte del Gobierno belga en favor de los centros de coordinación establecidos en Bélgica*, en *DOCE*, L 184 de 23 de julio de 2003, p. 17.

Artículo 88, apartado 2, TCE «… *A petición de un Estado miembro, el Consejo podrá decidir, por unanimidad y no obstante lo dispuesto en el artículo 87 o en los reglamentos previstos en el artículo 89, que la ayuda que ha concedido o va a conceder dicho Estado sea considerada compatible con el mercado común, cuando circunstancias excepcionales justifiquen dicha decisión* …».

[41] Cfr. la carta de aviso del procedimiento de infracción, publicada en el *DOCE*, C 147 del 20 de junio de 2002, p. 2 y la Comunicación IP/03/1032 del 16.7.2003.

[42] TJCE, sentencia del 22 de junio de 2006, asunto C-399/03 (*Comisión v Consejo*), pendiente de publicación en el *Rep.*, punto 24; cfr. también TJCE, sentencia de 29 de junio de 2004, asunto C-110/02, (*Comisión v Consejo*), en *Rep.* pág. I-6333, puntos 31-35.

[43] TJCE, sentencia de 22 de junio de 2006, asuntos acumulados C-182/03 e C-217/03 (*Bélgica y Forum 187 Asbl v Comisión*), pendiente de publicación en el *Rep.*

contribuyentes[44]. Para el Tribunal, los Centros de Coordinación que tuvieran solicitada una renovación de la autorización pendiente de resolución a la fecha de notificación de la Decisión de la Comisión «*tenían razones para depositar una confianza legítima en la concesión de un período transitorio razonable para poderse adaptar a las consecuencias*» derivadas de la citada Decisión.

Entendía el Tribunal que la Comisión, con tal actuación, había violado el principio de igualdad. Se había creado así, de hecho, una injustificada discriminación entre los Centros de Coordinación cuya autorización se hubiera concedido poco antes de la adopción de la Decisión (que podrían disfrutar de los efectos del régimen fiscal peculiar hasta el 31 de diciembre de 2010), y aquellos otros Centros de Coordinación con autorización concedida después de la notificación de la decisión impugnada –en situación sustancialmente comparable– a los que no se concedería ninguna medida transitoria, pese a que ningún interés público inderogable lo impedía.

### *3.6. La articulación entre el Código de conducta y la normativa comunitaria en materia de ayudas de Estado*

Como acabamos de ver al examinar el caso de los Centros de Coordinación, las discrepancias entre las disposiciones comunitarias en materia de ayudas de Estado y los acuerdos adoptados entre los Estados miembro y la Comisión en el marco de la aplicación del Código de Conducta, han dado pie a un buen número de litigios ante el Tribunal de Justicia. Quedan todavía muchos asuntos pendientes de resolución. Sin embargo, al margen de la interpretación jurisprudencial, que puede establecer principios generales a partir de los hechos concretos que está llamada a resolver, es oportuno, en esta sede, intentar un análisis más general de la relación entre estos dos instrumentos normativos.

Sin querer negar la evidente similitud entre ambos instrumentos, hay que señalar, de entrada, que el Código de conducta sobre la imposición de las empresas, y la dis-

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[44] Según el Abogado General Léger, *el principio de protección de la confianza legítima … constituye el corolario del principio de seguridad jurídica, que exige que la legislación comunitaria sea clara y su aplicación previsible para los justiciables …* Renunciando a dar una definición exhaustiva, el Abogado general sostiene que se da la violación cuando se cumplen determinadas condiciones: *… En primer lugar, debe existir un acto o un comportamiento de la Administración comunitaria que pueda haber generado esta confianza … Además, la persona afectada no debe poder prever el cambio de la línea de conducta adoptada anteriormente por la Administración comunitaria … Por último, es preciso que el interés comunitario perseguido por el acto impugnado no justifique que se perjudique la confianza legítima del interesado. Este último requisito concurre cuando la ponderación de los intereses existentes demuestra que, en las circunstancias del asunto, el interés comunitario no prima sobre el de la persona afectada en que se mantenga una situación que podía considerar legítimamente estable*»; conclusiones del Abogado general, de 9 de febrero de 2006, en los asuntos acumulados C-182/03, C-217/03 y C-399/03, *citados*.

ciplina comunitaria en materia de ayudas de Estado prevista en los artículos 87 y siguientes del Tratado CE, persiguen objetivos diferentes, tienen una eficacia jurídica distinta, y se proponen alcanzar acuerdos de voluntades muy desiguales.

Aún así, y no obstante lo dicho hasta ahora, es incontestable que las medidas fiscales contempladas por el Código de conducta pueden ser objeto de examen en cuanto potenciales ayudas de Estado de carácter fiscal, y no solo en el plano teórico pues, de hecho, un buen número de las medidas fiscales incluidas en la lista elaborada por el Grupo Primarolo con la ayuda de la Comisión Europea ha sido objeto efectivamente de un análisis profundo por parte de los servicios comunitarios de la competencia. Y ello no es nada que no estuviese ya previsto en la Resolución de 1 de diciembre de 1997, que en el punto J ya evidenciaba que «*parte de las medidas fiscales a que se refiere el presente Código podría entrar en el ámbito de aplicación de lo dispuesto en los artículos [87 a 89] del Tratado sobre ayudas otorgadas por los Estados*»[45].

Es obvio que el análisis que aborda la Comisión respecto de las ayudas de Estado que comportan una reducción de la carga tributaria de las empresas en materia de fiscalidad directa, es un acto autónomo, basado en criterios distintos de los adoptados en el Código de conducta a fin de establecer si una medida fiscal debe o no considerarse perniciosa. Ahora bien, como por otra parte ha confirmado la propia Comisión[46], en los casos concretos sí se ha confirmado la voluntad de actuar en completa sintonía. Sin ninguna duda, entre ambos análisis pueden darse resultados convergentes en el sentido de que las medidas fiscales perniciosas entran casi automáticamente entre las ayudas de Estado, aunque la regla no sirve siempre en el sentido inverso.

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[45] El punto J del Código de conducta precisa aún más que «*sin perjuicio de lo previsto en el Derecho comunitario ni de los objetivos del Tratado, el Consejo toma nota de que la Comisión se compromete a publicar para mediados de 1998 las directrices para la aplicación de las normas sobre ayudas de Estado a las medidas relacionadas con la fiscalidad directa de las empresas, tras presentar un proyecto a los expertos de los Estados miembros en el marco de una reunión multilateral; el Consejo toma nota asimismo de que la Comisión se compromete a velar escrupulosamente por que se apliquen con todo rigor las normas relativas a las citadas ayudas teniendo en cuenta, entre otras cosas, los efectos negativos de dichas ayudas que queden de manifiesto al aplicar el presente Código. Asimismo, el Consejo toma nota de que la Comisión tiene intención de estudiar o de volver a estudiar cada uno de los regímenes fiscales vigentes y de los nuevos proyectos de los Estados miembros, para garantizar la coherencia e igualdad de trato en la aplicación de las normas y la persecución de los objetivos del Tratado*».

[46] Las declaraciones del Comisario Europeo para la Competencia de la época, Mario Monti, no dejan lugar a dudas sobre la complementariedad de la doble acción comunitaria: «*J'ai demandé aux services de la Commission chargés de la concurrence d'examiner toutes les affaires d'aides d'État à caractère fiscal relevant de la fiscalité des entreprises, de façon à permettre à la Commission de respecter avec diligence l'intégralité de ses obligations institutionnelles, notamment sur la base de sa communication du 11 novembre 1998* [véase nota siguiente] *concernant l'application des règles relatives aux aides d'État aux mesures liées à l'imposition directe des entreprises. Cette mission de la Commission a été soulignée dans les travaux ayant abouti à la résolution du Conseil du 1er décembre 1997 relative au code de conduite* »; Comunicado de prensa IP/00/182 de 23.2.2000.

Como ha observado la Comisión en su Comunicación sobre las ayudas de Estado concedidas a la imposición sobre las empresas[47], «*la calificación de medida fiscal perniciosa con arreglo al código de conducta no afecta a que la medida también pueda ser considerada ayuda estatal. Por el contrario, el análisis de la compatibilidad de las ayudas fiscales con el mercado común deberá hacerse teniendo en cuenta, entre otras cosas, las consecuencias de estas ayudas que pondrá de manifiesto la aplicación del código de conducta*».

Y un poco más adelante, en el mismo Documento, que es un compendio en el que la Comisión recoge sus líneas maestras en materia de ayudas de Estado de naturaleza fiscal, precisa aún más que «*para que la Comisión las pueda considerar compatibles con el mercado común, las ayudas estatales que se utilicen para impulsar el desarrollo económico de determinadas regiones han de ser proporcionadas y adecuadas a los objetivos buscados. Los criterios empleados a la hora de examinar las ayudas de finalidad regional permiten tener en cuenta, en el examen de las ayudas fiscales, otras posibles implicaciones de estas ayudas*» en particular los efectos de las ayudas subrayados por la aplicación del código de conducta[48].

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[47] Comunicación de la Comisión europea «*relativa a la aplicación de las normas sobre ayudas estatales a las medidas relacionadas con la fiscalidad directa de las empresas*», (98/C 384/03), punto 30, en *DOCE* n. C 384, de 10 de diciembre de 1998, p. 3.

[48] *Ibidem*, punto 33. La *selectividad* de una medida fiscal por razón de su aplicación limitada a un determinado territorio es una cuestión bastante controvertida. La Comunicación de la Comisión europea de 1998 dejaba un cierto margen a la interpretación, ligado a la justificación de la *naturaleza y estructura* del sistema, argumento de origen jurisprudencial: «*para aplicar el apartado 1 del artículo [87] a una medida fiscal, resulta especialmente pertinente el hecho de que esta medida establezca una excepción a la aplicación del sistema fiscal a favor de determinadas empresas del Estado miembro. Por lo tanto, conviene determinar, en primer lugar, el régimen común aplicable. A continuación, debe examinarse si la excepción a este régimen o las diferencias en el mismo están justificadas por la naturaleza o la economía del sistema fiscal, es decir, si derivan directamente de los principios fundadores o directivos del sistema fiscal del Estado miembro en cuestión. De no ser así, seran constitutivas de ayuda estatal*». Comunicación 98/C 384/03, *cit*., punto 16.

En materia de política fiscal regional es de destacar la trascendencia de una reciente afirmación del Tribunal de Justicia, que en su decisión de 6 de septiembre de 2006 (C-88/03, *Portugal v Comisión*, pendiente de publicación en el *Rep.)*, en los puntos 56-59, ha precisado la forma de determinar el cuadro de referencia conforme al cual ha de valorarse la selectividad de una medida fiscal con respecto del régimen «ordinario»: «*… el marco de referencia no debe necesariamente coincidir con el territorio del Estado miembro considerado, de tal modo que una medida que conceda una ventaja en sólo una parte del territorio nacional no pasa por este simple hecho a ser selectiva en el sentido del artículo 87 CE, apartado 1. No puede excluirse que una entidad infraestatal cuente con un estatuto jurídico y fáctico que la haga lo suficientemente autónoma del Gobierno central de un Estado miembro como para que sea ella misma, y no el Gobierno central, quien, mediante las medidas que adopte, desempeñe un papel fundamental en la definición del medio político y económico en el que operan las empresas. En tal caso, es el territorio en el que la entidad infraestatal que ha adoptado la medida ejerce su competencia, y no el territorio nacional en su conjunto, el que debe considerarse pertinente para determinar si una medida adoptada por dicha entidad favorece a ciertas empresas, en comparación con otras que se encuentren en una situación fáctica y jurídica comparable, habida cuenta del objetivo perseguido por la medida o el régimen jurídico de que se trate …*».

En uno de los documentos de trabajo de sus Servicios, en el que se hace balance sobre el adelanto de los trabajos del Código de conducta[49], la Comisión se esforzó por poner en evidencia los posibles puntos de divergencia entre los dos procedimientos, señalando, en concreto, que de los 66 regímenes fiscales considerados perniciosos por el Grupo Primarolo, siete de ellos –reglamentariamente notificados a los servicios de la Comisión– no fueron considerados por ésta ayudas de Estado, o si lo fueron, se consideraron compatibles con las reglas del Mercado común.

En realidad solamente en 43 de las 66 medidas enumeradas por el Grupo de trabajo del Consejo –en cuanto que medidas vigentes en el territorio de los Estados miembro– resultaron de aplicación las disposiciones en materia de ayudas de Estado previstas en el artículo 87 y siguientes del Tratado CE.

No es ajena a ello otra importante diferencia entre el Código de conducta y las disposiciones del Tratado CE, que radica en sus diversos ámbitos geográficos de aplicación. Además de los regímenes ubicados fuera del ámbito de aplicación territorial de las disposiciones del Tratado, quedan también excluidas del ámbito de aplicación de las disposiciones en materia de ayudas de Estado las medidas fiscales que, entrando en la definición de régimen aplicable a la generalidad de las empresas, no satisfacen uno de los cuatro elementos imprescindibles constitutivos de ayuda de estado: la selectividad.

Por sí mismo, el Código de conducta, en cuanto simple acuerdo político, no puede derogar las disposiciones del Tratado CE. La diferencia de naturaleza entre las dos disposiciones, es decir entre el Código y las obligaciones derivadas de la disciplina comunitaria en materia de ayudas de Estado, no permite establecer entre ambas una regla de preeminencia, al menos a nivel de intervención. Los acuerdos y las obligaciones derivadas de los dos instrumentos se aplican acumulativamente[50]. Ello comporta para los Estados miembro la obligación de respetar siempre las reglas más restrictivas, y poco importa que deriven del Tratado mismo o que sean acordadas entre los Estados miembro en el ámbito de su *gentlemen's agreement*.

## 4. Notas finales

En la práctica se puede constatar que ha existido una influencia recíproca entre los dos instrumentos. Un influencia que ha permitido al Consejo y a la Comisión converger en soluciones coherentes y compatibles.

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[49] Comisión europea, «*Questions liées au processus de démantelement prévu par le Code de conduite (fiscalité des entreprises)*», SEC (2000) 1539, de 19 de septiembre de 2000.

[50] En su decisión de 30 de abril de 2002, asunto T-195/01 (*Gobierno de Gibraltar v Comisión*), el Tribunal de Primera Instancia de la CE sostuvo que la notificación al Grupo Primarolo no pudo de ningún modo sustituir a la notificación formal a la Comisión prevista en las disposiciones comunitarias en materia de ayudas de Estado.

El mecanismo de control puesto en práctica por el Consejo para seguir el cumplimiento del Código de conducta es lento por naturaleza y está sujeto a un procedimiento arbitral y de mediación política que lo hace extremadamente frágil. Muy distinta es la forma en la que se hace valer el poder de la Comisión en materia de ayudas de Estado, que puede ser rápida y extremadamente eficaz. Resulta por ello evidente que la acción de control ejercida frente a un gran número de medidas perniciosas por parte de los servicios de la Competencia, indudablemente, ha favorecido el éxito del Código de conducta, dotándole de una parcial fuerza vinculante –incluso en el plano jurídico– que por sí mismo no tenía.

En honor a la verdad hay que decir también que, de forma fortuita, se ha dado una circunstancia en el plano político-administrativo que ha favorecido las sinergias entre los diferentes servicios de la Comisión. El Prof. Monti, que a finales de 1998 era el Comisario europeo de la Fiscalidad, en el siguiente quinquenio pasó a ser el Comisario de la Competencia, y hubiera sido difícil de imaginar que el «padre putativo» del *paquete fiscal* –del que el Código de conducta constituye el elemento más significativo–, una vez convertido en máximo responsable de los servicios de la Competencia, hubiera abandonado a su suerte el progreso político de algo de lo que él había sido el principal artífice.

La Comisión, por otra parte, ha mostrado una cierta flexibilidad (que el Tratado le permite) al aplicar las reglas en materia de ayudas de Estado, buscando una aplicación racional, basada en la buena fe de los perceptores y en la esencia de las líneas claras –guía en la materia antes de 1998– para evitar el reembolso de las ayudas ilícitamente entregadas a las empresas. Se puede afirmar que la política «del palo y la zanahoria» adoptada por los diversos Servicios de la Comisión, en estratégica armonía, ha dado finalmente sus frutos.

Un comentario final sobre los últimos desarrollos del Código de conducta.

Al examinar a los nuevos Estados miembro, el Grupo de «Ampliación» del Consejo (integrado por representantes de los 15 Estados miembro pre-ampliación), siguiendo las sugerencias de la Comisión fue particularmente severo en el análisis de las medidas fiscales que pudieran entrar en el Código de Conducta. Tanto es así que más de la mitad de las medidas analizadas (en total unas 50) fueron consideradas perniciosas[51].

Los efectos de la competencia fiscal en la Europa ampliada están todavía por evaluar. De un lado es evidente que la actividad más fácilmente deslocalizable tratará (si no lo ha hecho ya) de establecerse en los lugares donde la presión fiscal es menor[52]. Por otro lado, un desvío importante de empresas y de capitales hacia los nuevos Estados miembro contribuirá al reequilibrio de su economía nacional permitiéndoles acercarse a la media comunitaria.

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[51] El Consejo no ha hecho pública la relación de tales medidas fiscales.

[52] Hoy en día no puede ignorarse que la fiscalidad es uno de los parámetros que una empresa analiza en primer lugar al tiempo de adoptar una decisión de producción o de localización.

Todo ello, a largo plazo, tendrá seguramente un efecto no despreciable sobre las políticas en materia de ayudas de Estado. Como ya se ha señalado pueden considerarse compatibles con el mercado común «*las ayudas destinadas a favorecer el desarrollo económico de regiones en las que el nivel de vida sea anormalmente bajo*» (Artículo 87, apartado 3, letra a, TCE[53]). Por ello, las ayudas con finalidad regional pueden desempeñar un papel eficaz, aunque ocurre que están concentradas en las regiones más desfavorecidas[54]. En consecuencia, habida cuenta de la metodología adoptada por la Comisión para determinar la intensidad de las ayudas admisibles ex artículo 87, 3, letra a), TCE[55], parece probable que, al menos en un primer momento, los nuevos Estados miembro sean los principales beneficiarios. Por lo que concierne a los novísimos Estados miembro (Bulgaria y Rumania) todo su territorio será, por norma, susceptible de admitir ayudas de finalidad regional.

Es evidente que la acción del Código de conducta, por su naturaleza, se limita a combatir los regímenes particulares adoptados por los Estados miembro, pero –como ocurre en definitiva con las propias reglas en materia de ayudas de Estado– resulta impotente frente a las estructuras fiscales nacionales que, en su integridad, buscan presentarse como un irresistible polo de atracción para las empresas (a veces no necesariamente de su efectiva actividad) transfronterizas[56].

Como ya se ha señalado, y como observaba la Comisión en su Comunicación en materia de ayudas de Estado de naturaleza fiscal[57], frente a las medidas fiscales de *carácter general* que obstaculizan el correcto funcionamiento del Mercado Interior, el Tratado CE no ofrece la posibilidad de proceder al alineamiento de las legislaciones fiscales de los Estados miembro sobre la base del artículo 94, a través de la adopción

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[53] Esta excepción ha sido objeto de interpretación por parte del Tribunal de Justicia, que ha precisado que «*el uso de las palabras «anormalmente» y «grave» en la excepción recogida en la letra a) muestra que ésta es sólo aplicable a las regiones en que la situación económica sea muy desfavorable en relación al conjunto de la Comunidad*»; TJCE, sentencia de 14 de octubre de 1987, (*Alemania v Comisión*) asunto 248/84, *Rep.* p. 4013, punto 19.

[54] «*… los límites de ayuda admisible deben reflejar la gravedad relativa de los problemas que dificultan el desarrollo de las regiones de que se trata. Además, las ventajas que las ayudas ofrezcan de cara al desarrollo de una región desfavorecida deben compensar con creces el falseamiento de la competencia a que den lugar …*; Comisión europea, «*Directrices sobre las ayudas de Estado de finalidad regional para el período 2007-2013*», (2006/C 54/08), in *DOCE*, C 54, del 4 de marzo de 2006, p. 13, punto 5.

[55] «*… la Comisión considera que las … condiciones* [del Articulo 87, 3, letra a] *se cumplen cuando la región, que constituye una unidad geográfica de nivel II de la NUTS* [unidades territoriales con finalidades estadísticas], *posee un producto interior bruto (PIB) por habitante – medido en paridad de poder de compra (PPC) – inferior al 75 % de la media comunitaria. El PIB por habitante de cada región, así como la media comunitaria que ha de emplearse en el análisis, serán determinados por la Oficina Estadística de las Comunidades Europeas»; «Directices …», cit.*, punto 16.

[56] Piénsese, por todos, en el caso de determinadas planificaciones fiscales –hoy «comunitarizadas»– que permiten los *network* de Convenios bilaterales sobre doble imposición suscritos por Malta y Chipre con países terceros o, aún más sencillo, en los (*law*) *flat rates* recientemente adoptados (o en curso de adopción) en diversos nuevos Estados miembro.

[57] Comunicación 98/C 384/03, *cit.*, punto 6.

de las oportunas Directivas. La disparidad entre las disposiciones generales que pueden falsear la competencia y provocar distorsiones puede (*rectius*: debe) ser eliminada sobre la base de los artículos 96 y 97 del Tratado CE, conforme a los que, en lo necesario y previa consulta a los Estados miembro por parte de la Comisión, el Consejo puede establecer «*… a propuesta de la Comisión, (…), por mayoría cualificada, las directivas necesarias a este fin …*», pero todavía no se ha recurrido, en materia fiscal, a este instrumento. Hoy por hoy, *soberanía*, *subsidiariedad*, e incluso, por qué no, *oportunidad*, desvían el objetivo hacia una coordinación de las políticas fiscales nacionales que induzca a los Estados miembro a un espontáneo alineamiento de las legislaciones fiscales nacionales.

Dejo a los demás oradores, más competentes que yo, el hacer una evaluación jurídica del posible impacto del reciente caso Azores sobre los regímenes tributarios descentralizados que disfrutan de autonomía fiscal (originaria o derivada). No obstante, basándome en lo que les he expuesto, permítanme cuestionar que estemos en el momento idóneo para relanzar una política de competencia entre los sistemas tributarios. Muy al contrario, entiendo que lo que estaríamos sería en el momento de lanzar un nuevo Código de conducta que asegure una equitativa competencia fiscal entre las *medidas generales* de cualquier Estado soberano o entidad territorial autónoma.

# Las Islas Äland, un área fiscal sin competencias tributarias

NIILO JÄÄSKINEN[1]

*Juez miembro del Tribunal Supremo Administrativo de Finlandia.*

## 1. ¿Qué es Äland?

El archipiélago de las Islas Äland está situado en el mar Báltico entre Suecia y Finlandia. Äland consta de más de 6.500 islas. Solo unas sesenta de ellas se encuentran habitadas todo el año. Nueve décimas partes de los 26.500 habitantes viven en la isla mayor, Äland. La población de Äland es en un 95% suecoparlante. Así constituye una relevante minoría dentro de la minoría suecoparlante de Finlandia[2].

Äland es una sociedad próspera. Su PIB se sitúa en el 154.5 mientras que el de Finlandia es del 115 (EU-25=100). Económicamente Äland es sumamente dependiente de la pesca, turismo, servicios y agricultura.

Desde 1954, Äland ha tenido su propia bandera, la bandera nórdica con una cruz azul, amarilla y roja. Äland dispone de sus propios sellos de correos desde 1984 y el vi-

[1] Versión original de la ponencia en inglés.

[2] Para más información acerca de Äland http://www.Äland.ax/Älandinbrief/.

gente Estatuto de Autonomía transfirió la competencia sobre los servicios postales y de radio y televisión a Äland. Recientemente Äland ha obtenido también su propio dominio de Internet «.ax» que sustituye a «.fi» en todo lo que concierne a Äland. Los habitantes de Äland tienen pasaporte finlandés, pero el término «Äland» se incluye en los pasaportes expedidos en las islas Äland a nombre de personas con ciudadanía regional de Äland.

Äland consolidó su población sueca durante los primeros años de la Edad Media. Desde el siglo XIII, Äland fue considerado política, jurisdiccional y eclesiásticamente como una parte de Finlandia, que a su vez formaba parte del reino de Suecia. Como consecuencia de la Guerra de Finlandia de 1808 y 1809 entre Rusia y Suecia, Finlandia, Äland incluido, se anexionó a Rusia. El Gran Ducado de Finlandia se constituyó dentro del Imperio Ruso en un Estado autónomo con su propia constitución, sistema legal y Administración.

## 2. Antecedentes de la autonomía de Äland[3]

Después de la revolución rusa de febrero de 1917, un movimiento popular que aspiraba a la reunificación con Suecia emergió entre los habitantes de Äland. Después de que Finlandia hubiera declarado su independencia en Diciembre de 1917, la Rusia soviética, Suecia, Francia y Alemania reconocieron su independencia en enero de 1918 sin reservas en lo que se refiere a sus fronteras internacionales. Sin embargo, en 1919, Suecia reclamó que la cuestión de la soberanía sobre Äland debería ser decidida en la Conferencia de Paz de Versalles, que decidió remitir la cuestión de las Islas Äland a la reestablecida Liga de Naciones en 1920. Mientras tanto, el Parlamento finlandés había adoptado el primer Estatuto de Autonomía de Äland en 1920. El Estatuto tenía como finalidad el mantenimiento del carácter sueco de las islas mediante el establecimiento de un sistema regional de autogobierno.

El Comité de la Liga de Naciones reconoció, en sus Resoluciones de 24 y 27 de junio de 1921, la soberanía de Finlandia sobre las Islas Äland. Finlandia, sin embargo, asumió garantizar el derecho de los habitantes de Äland a mantener su lengua, cultura y costumbres suecas. Este acuerdo se dirigió a evitar cualquier cambio en el carácter étnico de Äland como resultado de la inmigración desde partes del país de habla finlandesa. Después de que Finlandia hubiera aprobado las estipulaciones referentes a los derechos de voto, tributación y propiedad, incluidas en la resolución de la Liga de Naciones de 27 de junio de 1921, se celebraron las primeras elecciones a la Asamblea Legislativa de Äland y las autoridades regionales previstas en el Estatuto de Autonomía fueron constituidas en 1922.

Un nuevo Estatuto de Autonomía fue aprobado en 1951. Amplió el ámbito de la autonomía y se introdujo una ciudadanía regional especial como condición al ejercicio del derecho del voto en las elecciones locales y al derecho a adquirir suelo en propie-

[3] Cf N Jääskinen, «The case of the Äland Islands – Regional Autonomy versus the European Union of Status», en S Weatherill and U Berniz (eds) *The Role of Regions and Sub-national Actors in Europe*, Hart Publishing 2005, 90-92.

dad en Äland. El derecho de establecimiento en Äland fue también condicionado a la ciudadanía regional.

Una reforma de la legislación relativa a la autonomía de Äland fue realizada en la década de los ochenta, y un nuevo Estatuto fue adoptado por el Parlamento finlandés y la Asamblea Legislativa de Äland en 1991. El nuevo Estatuto amplió la autonomía y definió con detalle el ámbito competencial de los poderes legislativo y ejecutivo de Äland y las materias en las que la competencia corresponde al Estado de Finlandia.

## 3. La arquitectura constitucional de la autonomía[4]

En virtud del Estatuto de Autonomía, los ciudadanos de Äland están representados por el «*Lagting*», o Asamblea Legislativa, que elige el «*Landskapsstyrelse*», Gobierno Regional de Äland.

De conformidad con la Sección 75 de la Constitución de Finlandia, las previsiones específicas del Estatuto de Autonomía de Äland determinan el procedimiento legislativo para su aprobación. El Estatuto de Autonomía no goza formalmente de promulgación constitucional. Sin embargo, de acuerdo con el propio Estatuto, éste puede ser modificado, interpretado, revocado o limitado únicamente mediante decisiones coherentes del Parlamento de Finlandia y de la Asamblea Legislativa de Äland. En el Parlamento de Finlandia la decisión deberá adoptarse siguiendo el procedimiento establecido para la modificación de Leyes Constitucionales, y en la Asamblea Legislativa de Äland con una mayoría de al menos dos terceras partes de los votos emitidos. En consecuencia, desde un punto de vista jerárquico el Estatuto de Autonomía puede ser comparado a la propia Constitución. Desde un punto de vista político, el Estatuto goza del carácter de un acuerdo bilateral entre dos partes.

El Estatuto sienta las bases de la autonomía de Äland. Concreta las competencias respecto de las que la Asamblea Legislativa de Äland goza de capacidad de aprobar leyes. En el resto de materias, se aplica la normativa general del Estado como en cualquier otro lugar de Finlandia.

El reparto de las competencias legislativas entre el Estado y Äland es mutuamente exclusiva. Por tanto, la legislación estatal en competencias reconocidas a Äland no resulta de aplicación incluso aunque la Asamblea Legislativa de Äland no haya ejercido su competencia en la materia en cuestión.

Conforme al Estatuto de Autonomía, las competencias administrativas están vinculadas a las competencias legislativas. En relación con el poder judicial la competencia pertenece al Estado. Esto significa que la última instancia, el Tribunal Supremo y

[4] Cf Jääskinen (nota 2 anterior) 92-94, S Palmaren, «The Autonomy of the Äland Islands in the Constitucional Law of Finland», in L Hannikainen and F Horn (eds), *Autonomy and Demilitarisation in International Law: The Äland Islands in a Changing Europe*, Kluwer Law International 1997, 85-98.

el Tribunal Supremo Administrativo de Finlandia, en su caso, son los últimos intérpretes de la legislación regional de Äland.

La división de las competencias normativas ha sido establecida mediante la identificación exhaustiva de las materias sometidas a la competencia de Äland (28 materias) y las que permanecen bajo la autoridad del Estado (42 materias). Mediante un procedimiento de control *ex ante*, previsto en el Estatuto de Autonomía, se asegura que Äland no sobrepasa sus competencias a la hora de aprobar nueva normativa. El Presidente de la República goza de un derecho de veto de la legislación regional para el caso de que incurra en un exceso competencial o de que amenace a la seguridad interior o exterior de Finlandia.

Los poderes presupuestarios de Äland residen en la Asamblea Legislativa. Al aprobar los presupuestos, la Asamblea Legislativa debe esforzarse por asegurar, al menos, los mismos estándares de beneficios sociales para la población de Äland que rigen en cualquier otra parte del país.

Se adquiere la ciudadanía regional de Äland por nacimiento, cuando el padre o la madre posea dicha ciudadanía regional. Los ciudadanos finlandeses que se establezcan en Äland pueden solicitar la ciudadanía regional después de cinco años de residencia ininterrumpida en Äland. La ciudadanía regional es necesaria para:

– Votar o ser candidato en las elecciones a la Asamblea Legislativa o en las elecciones locales.
– Adquirir y mantener propiedades inmobiliarias en Äland.
– Ejercer el comercio o una profesión en Äland.

Las restricciones respecto del derecho de propiedad han sido impuestas a efectos de mantener la tierra en posesión de la población local.

Äland no goza de competencias en materia de tratados internacionales. Los acuerdos internacionales suscritos por Finlandia son de aplicación también en las Islas Äland. Si un acuerdo internacional afectara a la autonomía de Äland, incluyendo cuestiones que se refieran a competencias legislativas asumidas por Äland, resulta necesario, sin embargo, el consentimiento de la Asamblea Legislativa previamente a su entrada en vigor en Äland. En consecuencia, Finlandia no puede asegurar de antemano la entrada en vigor de tales acuerdos internacionales en lo que se refiere a Äland. Idéntico sistema se aplica a los tratados que transfieren competencias de los órganos de Äland a la Unión Europea.

## 4. El sistema fiscal[5]

La Asamblea Legislativa tiene competencias normativas sobre un impuesto adicional sobre la renta obtenida en las Islas, un impuesto provisional sobre la renta ex-

[5] La Oficina del Primer Ministro finlandés ha publicado un interesante estudio elaborado por Bertil Roslin en el que se comparan los sistemas económicos de varios regímenes autonómicos europeos. El estudio in-

traordinaria, impuestos sobre el comercio y el juego, las bases de las deudas tributarias recaudadas por Äland y las tasas municipales. Estas últimas supusieron en Äland una media del 16,78 por ciento de las rentas imponibles en 2006. En relación con el resto de impuestos directos o indirectos las competencias corresponden al Estado.

El presupuesto de Äland para 2006 alcanzó los 274,1 millones de euros. Äland recibe una contribución anual (*la cuantía de ecualización*) del Estado para cubrir los costes de la autonomía. El importe se calcula multiplicando el presupuesto de ingresos del Estado por un determinado índice (*la base de ecualización*) que actualmente alcanza el 0,45 por ciento. La contribución anual en 2005 fue de 181,8 millones de euros. Además, una transferencia extraordinaria puede ser realizada a favor del Parlamento de Äland para grandes gastos extraordinarios cuya incorporación al presupuesto puede no haber sido prevista por razones justificadas. Esta transferencia extraordinaria solamente puede ser realizada para sufragar gastos que corresponden a la competencia de Äland.

Si los ingresos por el Impuesto sobre la Renta y el Patrimonio Neto recaudados por el Estado en Äland durante el ejercicio fiscal superan el 0,5 por ciento del total estatal, el exceso debe ser devuelto a Äland. El importe de esta devolución fiscal fue de 20,5 millones de euros en 2004. El objetivo de esta devolución es el de ajustar la participación de la contribución de los ciudadanos de Äland al presupuesto de Finlandia a la proporción que representan en la población total del Estado.

Äland tiene derecho a una subvención especial del Estado en los casos en que desordenes económicos afecten especialmente a las Islas y en caso de desastres naturales, accidentes nucleares, vertidos de petróleo u otros incidentes similares. Afortunadamente, no ha sido necesaria la utilización de estos mecanismos hasta el momento.

Inicialmente la intención fue la de que Äland financiara los costes de la autonomía. Sin embargo, las figuras de imposición que fueron atribuidas a la competencia legislativa de Äland perdieron su relevancia económica ya desde antes de la Segunda Guerra Mundial. El Estatuto de Autonomía de 1990 eximió al presupuesto de Äland de la obligación de respetar la estructura presupuestaria de gastos del presupuesto de Finlandia. Sin embargo, Finlandia no es partidaria de descentralizar competencias en imposición sobre la renta o imposición indirecta.

Según opinión generalizada en Äland, el sistema impositivo finlandés no está estructuralmente adaptado a las necesidades de la economía de Äland especialmente en lo relativo al sector marítimo y al de servicios financieros.

Se afirma también que el actual sistema de igualación fomenta el gasto al no asumir la Asamblea Legislativa de Äland la responsabilidad de la recaudación de los in-

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cluye las Islas Feroe, Groenlandia, Isla de Man, Jersey, Guernsey, Gibraltar, Escocia, Tirol Sur, la comunidad germano-parlante de Bélgica, Cataluña, Islas Baleares y Äland. Vid. B. Roslin, «*Europeisk självstyre I omvandling*», Statsradets kanslis publikationsserie 11/2006, Helsinki 2006. Lamentablemente el estudio solo está disponible en lengua sueca. Las cifras utilizadas en este trabajo provienen del trabajo de B. Roslin.

gresos fiscales de los ciudadanos de Äland. Sin embargo, el vigente sistema de financiación proporciona a la autonomía una base financiera estable que es menos volátil que la propia economía regional de Äland. En este escenario, es de reseñar que la interacción entre la transferencia de igualación, basada en los gastos del presupuesto corriente del Estado, y la devolución fiscal que se calcula dos años más tarde, representa un estabilizador automático contracíclico de la economía regional de Äland.

## 5. Äland en la Unión Europea[6]

En la incorporación de Finlandia a la Unión Europea le fue otorgado a Äland un status especial. Según el artículo 299 (5) TCE, el Tratado se aplica a las Islas Äland de acuerdo con las estipulaciones previstas en el Protocolo nº 2 del Acta de Adhesión de 1994. Según el Protocolo, los Tratados se aplican en Äland con ciertas excepciones. Estas excepciones se justifican, en la exposición de motivos del Protocolo, con una referencia a la especial situación de que Äland goza bajo las leyes internacionales. El texto del Protocolo ha sido también incorporado como Protocolo nº 8 al Tratado constitutivo de la UE.

La primera excepción consiste en que las previsiones del Tratado CE no excluirán la aplicación de las vigentes normas sobre restricciones del derecho de las personas físicas que no gocen de la ciudadanía regional, así como de las personas jurídicas, a adquirir propiedades inmobiliarias en Äland sin autorización de las autoridades competentes de Äland. Las mismas excepciones se aplican al derecho de establecimiento y al de prestación de servicios. Las normas de Äland que se benefician de la excepción deben haber estado en vigor el 1 de enero de 1994 y su aplicación debe realizarse sin efectos discriminatorios (artículo 1 del Protocolo nº 2 del Acuerdo de Adhesión de 1994). Esta limitación asegura la aplicación de las restricciones relacionadas con la adquisición de la propiedad inmobiliaria por los que carecen de la ciudadanía regional de Äland, aprobadas en la Resolución de 1921 del Consejo de la Liga de Naciones.

## 6. La excepción de carácter fiscal en Äland[7]

La segunda excepción incluida en el Protocolo está basada en las necesidades económicas derivadas de la situación geográfica de Äland. De acuerdo con el artículo 2 del Protocolo, el territorio de Äland está excluido de la aplicación de las normas de la Comunidad Europea relativas a la armonización de la normativa de los Estados

[6] Cf Jääskinen (nota 2 anterior) 94-101, N Fagerlund «*The special satus of the Äland Islands in the European Unión*», en L Hannikainen and F Horn (eds) (nota 3 anterior) 189-256. Sobre las negociaciones del Protocolo de Äland en el Acta de incorporación de 1994, ver A. Kuosmanen, «*Finland´s Journer to the Europe Union*», Instituto Europeo de Administración Pública EIPA 2001, 257-266, 269.

[7] Cf Fagerholm (nota 5 anterior) 210-226.

Miembros sobre los impuestos sobre el volumen de ventas y sobre los impuestos especiales y otras figuras de imposición indirecta. Sin embargo, esta excepción no afecta a los recursos propios de la Comunidad y no se aplica a las disposiciones comunitarias sobre impuestos sobre el capital. Así, Äland goza de un status fiscal comparable al de los Departamentos de Ultramar franceses.

La excepción se propuso asegurar el mantenimiento de las ventas libres de impuestos en el tráfico marítimo por ferry hacia y desde Äland, incluso después de junio de 1999 en que las ventas libres de impuestos desaparecieron en el tráfico interno de la Unión Europea, lo que se consideró imprescindible para mantener los lazos de transporte entre el relativamente aislado archipiélago y Finlandia y Suecia. Cerca del 70 por ciento del PIB regional de Äland se genera a través de la cadena de valor que incluye el transporte marítimo, el turismo y los servicios financieros relacionados. El mantenimiento de las ventas libres de impuestos en los ferrys se asumió como la forma más efectiva de asegurar el bienestar económico de Äland. Ejemplos de otras islas en la región del Mar Báltico, por ejemplo Gotland, habían demostrado que la prosperidad económica no era posible sin servicios efectivos de transporte proporcionados por operadores privados, no por las autoridades públicas.

Äland permanece así excluida de la armonización de la imposición indirecta comunitaria. Äland no tiene ningún otro especial status referente a la imposición directa o la unión aduanera. Durante las negociaciones de adhesión, Finlandia asumió un compromiso verbal de no permitir que Äland se convirtiera en un paraíso fiscal. Incluso el texto del Protocolo de Äland exige que la excepción fiscal no genere distorsiones de la competencia[8].

La excepción fiscal de Äland se ha llevado a la práctica mediante el establecimiento de una frontera fiscal virtual entre Äland y la Unión Europea. Ello ha generado desventajas competitivas para otros sectores económicos de Äland distintos a la navegación y el turismo. Como se ha mencionado antes, la competencia normativa sobre esta cuestión está atribuida al Estado y Finlandia no es partidaria del establecimiento de un sistema de imposición indirecta diferente para Äland y, por ello, no utiliza la excepción para otros fines distintos del mantenimiento de las ventas libres de impuestos en los ferrys de Äland y el aeropuerto de Mariehamn.

## 7. El futuro del status fiscal de Äland

La cuestión de la competencia fiscal ha sido desde hace mucho tiempo la manzana de la discordia entre Äland y Finlandia. El asunto ha sido estudiado por varios grupos

[8] El ya derogado esquema de seguros cautivos de las Islas Äland ha sido considerado como competencia fiscal desleal por la Comisión. El esquema se basaba en beneficios fiscales otorgados por las autoridades de Äland a ciertas actividades aseguradoras en relación a la parte del Impuesto sobre las empresas correspondiente a la imposición municipal de Äland.

de trabajo pero ambas partes nunca han alcanzado un acuerdo acerca de la cuestión de si Äland es o no un contribuyente neto a las finanzas del Estado finlandés.

En Äland, ha habido un amplio y creciente apoyo a la asunción de competencias fiscales. En parte, ello ha sido motivado por las aspiraciones de convertir Äland en una especie de «Isla de Man» del Mar Báltico. Este concepto de «Äland paraíso fiscal» supondría beneficios fiscales para las bases fiscales móviles, especialmente los servicios financieros. Las autoridades finlandesas se han opuesto con firmeza a este tipo de desarrollo, en el que ven una invitación a una competencia fiscal desleal y posibles problemas de orden público, teniendo en cuenta la proximidad de Rusia con el amplio sector ilegal de su economía. Parece complicado aceptar como esta situación podría ser compatible con la continuidad de Äland formando parte de la Unión Europea.

Recientemente, sectores políticos de Äland, que no apoyan el concepto de «Äland paraíso fiscal», también se han mostrado más interesados en la asunción de competencias normativas fiscales por Äland. Esto se explica por el fracaso de Finlandia para proteger su sector marítimo contra la competencia de países de salarios reducidos. Los navieros de Äland representan alrededor del 20 por ciento del sector en Finlandia y emplean el 40 por ciento de los marinos finlandeses. Además, Äland ha demandado infructuosamente la creación de un registro marítimo especial con beneficios fiscales y sociales. Los políticos de Äland piensan que esto demuestra que no es posible conseguir un sistema fiscal adaptado a sus necesidades económicas especiales sin que Äland disponga de la capacidad normativa en la materia. Sin embargo, las posibilidades de Äland para utilizar los beneficios fiscales como instrumentos de política económica pueden resultar reducidas, dado que Äland dispone de un amplio sector público con servicios de protección social, salud y educación. La cobertura de estas necesidades mediante ingresos sobre la renta en sustitución de la transferencia de igualación y de la devolución fiscal podría revelarse problemática.

# Las regiones autónomas de Madeira y Azores: normativa fiscal regional en Portugal tras la sentencia Azores del Tribunal de Justicia Europeo (C-88, de 6 setiembre de 2006)[1]

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## 1. Las regiones autónomas de Azores y de Madeira

Portugal está compuesto de dos regiones autónomas, siendo ambas archipiélagos situados en el Océano Atlántico.

[1] Versión original de la ponencia en inglés. Este breve artículo se corresponde con la trascripción de la intervención que tuvo lugar en la Conferencia sobre «Modelos de fiscalidad regional en Europa-Portugal (Azores y Madeira)» en el Congreso Internacional sobre el Concierto Económico y Europa (Concierto Económico, fiscalidad regional y ayudas de Estado), organizado por el Instituto de Estudios Vascos de la Universidad de Deusto, en Bilbao, y por la Asociación para la Promoción y Difusión del Concierto Económico, AD CONCORDIAM, que tuvo lugar en esa ciudad del 12 al 14 de diciembre de 2006. Es descriptiva e informativa mas que doctrinal y de carácter investigador y por lo tanto carece de notas al pie de especial relevancia.
El 19 de febrero de 2007 la esperada nueva Ley para la Financiación de las Regiones Portuguesas fue publicada (*Lei orgánica no. 1/2007* en el *Diário da Republica*, 1ª Série nº 35-19 de febrero de 2007,

Las Azores[2] es un archipiélago situado a unos 1.500 km. de Lisboa y a unos 3.900 km. de la costa este de Norte América, compuesto de nueve grandes islas y de ocho pequeños islotes con una extensión de unos 600 km$^2$. La población en su conjunto es de unos 240.000 habitantes. La industria pesquera, debido a la inmensa zona económica exclusiva de 1.1 millones de kilómetros cuadrados, y el turismo, que se beneficia de los orígenes volcánicos de las islas y a su espectacular paisaje, son algunas de las principales actividades.

El archipiélago de Madeira[3] está situado al norte de las Azores, siendo las islas de Madeira y Porto Santo las únicas habitadas. La población total es de unos 250.000 habitantes. Además, el archipiélago está compuesto por las islas desérticas y por las islas salvajes, todas ellas deshabitadas. Madeira es un destino turístico de talla mundial, sector que aporta la mayor parte de su Producto Interior Bruto. Sin embargo, el Centro Internacional de Negocios de Madeira[4], también conocida como la Zona Libre de Madeira (ZLM), representa en la actualidad sobre el 20 por ciento del Producto Interior Bruto del archipiélago.

## 2. Un breve enfoque constitucional sobre las Regiones Autónomas de Azores y de Madeira

Las autonomías regionales proceden de la nueva Constitución Portuguesa de 1976 *(Constituição da República Portuguesa – CRP*), poniendo punto final a los 48

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páginas de 1229 a 1238, accesible on line en http://www.dre.pt) y la antigua (*Lei orgánica no.* 13/1998 de 24 de febrero, modificada por la *Lei Orgánica* 1/2002, de 29 de junio) derogada.

El presente artículo tiene en cuenta estas modificaciones normativas así como el pronunciamiento de Tribunal Constitucional portugués no. 11/2007 (procedimiento no. 1136/2006), de 12 de enero de 2007, sobre la constitucionalidad de esta nueva ley, disponible on-line en http://www.tribunalconstitucional.pt/tc/home.html. Un nuevo régimen de ayudas de Estado para la zona libre de Madeira (MFZ) fue solicitado por el gobierno portugués a la Comunidad Europea (EC) para el periodo 2007-2013. Este artículo contiene información actualizada hasta el 25 de mayo de 2007. Ya que la conferencia gira en torno al caso Azores (C-88/03) y aunque no se me solicitó que expresase mi opinión personal sobre el mismo –ante la presencia de oradores mas cualificados en este evento–, he decidió añadir unos pocos comentarios a mi intervención, aprovechando fundamentalmente la profundización en la comprensión y las reflexiones que he obtenido de mi asistencia a este congreso tan interesante y de tan alto nivel. En particular, tuve la sensación de que existía demasiada unanimidad sobre lo razonable y justa que resulta la sentencia sobre el caso Azores, probablemente porque sirve –correctamente me atrevería a añadir– a las pretensiones vascas. Aunque estoy de acuerdo en que el caso Azores es verdaderamente favorable al modelo vasco de Concierto Económico, rechazo la idea de que la sentencia del caso Azores no pueda ser criticable en relación al asunto exacto que se encontraba en litigio: el modelo portugués de regiones autónomas. Sin embargo, me gustaría dejar constancia clara de que incluso si el Tribunal de Justicia Europeo hubiera juzgado el caso en un sentido diferente del que expongo más abajo, el modelo vasco de Concierto Económico estaría igualmente salvaguardado.

El autor desea agradecer al profesor Santiago Larrazabal Basañez y al Comité Organizador por la amable invitación y la excelente bienvenida a Bilbao.

[2] Ver: http://en.wikipedia.org/wiki/Azores

[3] Ver: http://en.wikipedia.org/wiki/Madeira

[4] Ver: http://www.sdm.pt

años de dictadura del *Estado Novo,* consecuencia del golpe de Estado del 25 de abril de 1974.

Las Azores y Madeira forman en su integridad parte del territorio portugués (art. 5.1 de la CRP) aunque Portugal respeta los regímenes organizativos y de funcionamiento de las autonomías (art. 6.1 de la CRP). Las regiones tienen sus propios órganos y Estatutos político-administrativos –un parlamento y un gobierno sometido a sus propias elecciones regionales (art. 6.2 231 y 232 de la CRP)– pero estos están enmarcadas dentro de la soberanía e integridad del Estado (art. 255.3 de la CRP).

Los estatutos y las leyes electorales de las regiones son redactados por los parlamentos regionales; sin embargo, son discutidos y aprobados por el parlamento nacional (art. 226 de la CRP). La autonomía legislativa de las regiones se limita a asuntos definidos en sus Estatutos y si no se adopta legislación específica por la región en materias de su competencia se aplica la legislación nacional (art. 228 de la CRP).

La actividad legislativa regional esta sometida a la firma o al veto del Representante de la Republica (art. 230 y 233 de la CRP) y los parlamentos regionales pueden ser disueltos por el presidente de la República (art. 234).

Portugal es por lo tanto un Estado unitario con autonomías regionales, que, sin embargo, se encuentran sometidas a la Constitución y a la ley nacional.

## 3. Marco legal rector de las Regiones Autónomas

El marco legal que rige las regiones autónomas está compuesto por un bloque de diferentes leyes.

En la cúspide, nos encontramos con la CRP y sus principios fundamentales. La Ley Regional de Finanzas (*Lei de Finanças das Regiões Autónomas*) establece las relaciones financieras entre las regiones autónomas y el Estado. El grado de autonomía regional se desarrolla en los Estatutos[5]. En un peldaño inferior de la pirámide normativa, los decretos legislativos regionales, en desarrollo del marco legal establecido por la Ley Regional de Finanzas, adaptan el sistema fiscal nacional a las especificidades de las regiones[6].

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[5] *Estatuto da Região Autónoma de Madeira –Ley no.13/91, de 5 de junio*, modificado por la *Ley* no. *130/99, de 21 de agosto,* y por la *Ley* no. *12/2000, de 21 de junio*; *Estatuto da Região Autónoma dos Azores*– Ley no. 39/80, de 5 de agosto, modificada por la Ley no. 9/87, de 26 de marzo, y por la Ley 61/98, de 27 de agosto.

[6] *El Decreto Legislativo Regional no. 2/2001/M, de 20 de febrero,* modificado por *Decreto Legislativo Regional no. 29-A/2001/M, de 20 de diciembre, Decreto Legislativo Regional no. 30-A/2003/M, de 31 de diciembre, Decreto Legislativo Regional no. 21-A/2005/M, de 30 de diciembre*, y por el *Decreto Legislativo Regional no. 3/2007/M, de 9 de enero*, han adaptado el Impuesto sobre Sociedades en el caso de Madeira. *Decreto Legislativo Regional no. 6/2000/M, de 28 de febrero*, modificado por *Decreto Le-*

Como consecuencia de estas adaptaciones, los tipos continentales del IVA reducido, intermedio y normal del 5%, 12% y 21% pasan a ser en las regiones insulares del 4%, 8% y 15%. El tipo general en el Impuesto sobre Sociedades (IS) aplicable en territorio peninsular portugués es del 25% (aunque tipos más bajos del 20% y del 15% son de aplicación con ciertos requisitos bajo los regímenes simplificados de tributación para pequeñas empresas y de tributación en la zona interior) mientras que los de Madeira son del 22,5% o del 17,5%, dependiendo de las actividades, y el de Azores es del 17,5%.

Para los ingresos de 2006, las horquillas de tributación en el Impuesto sobre la Renta de las Personas Físicas (IRPF) van desde un mínimo de 10,5% (para ingresos de menos de 4.451 euros) a un marginal máximo del 42% (para ingresos superiores a 60.000) en territorio peninsular portugués. Madeira, con un tipo mínimo el 8,5% (para ingresos inferiores a 4.451 euros) a un marginal máximo de un 41 % (para ingresos superiores a 60.000 euros), no difiere demasiado de los tipos aplicables en la parte continental. Sin embargo, las Azores con un mínimo del 8,4% (para ingresos inferiores a 4.451 euros) y un marginal del 33,6% (para ingresos superiores a 60.000 euros) disfruta en comparación de tipos impositivos significativamente más bajos.

Finalmente, existe un Decreto-Ley que transfiere competencias fiscales a la región autónoma de Madeira (Decreto-Ley 18/2005, de 18 de enero). El alcance de estas competencias abarca en apariencia todas las posibles ya que queda a la voluntad del «*Gobierno Regional de Madeira ejercitar la totalidad de las competencias previstas en la Constitución y en la ley en relación a su propia recaudación tributaria, llevando a cabo todos los actos necesarios para su administración y gestión. (Art. 1.2)*». En la práctica dicho alcance no está totalmente claro.

Por un lado, es dudoso que el Gobierno de Madeira pueda emitir «*rulings*» vinculantes para un contribuyente en concreto ni instrucciones de carácter general y, en el supuesto de que así lo haga, se duda de que éstas pueden entrar en colisión con los

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*gislativo Regional no. 13/2001/M, de 10 de mayo*, regula la deducción por reinversión para los contribuyentes del Impuesto sobre Sociedades de Madeira.

*El Decreto Legislativo Regional no. 3/2001/M, de 20 de febrero,* modificado por *Decreto Legislativo Regional no. 29-A/2001/M, de 20 de diciembre, Decreto Legislativo Regional no. 30-A/2003/M, de 31 de diciembre, Decreto Legislativo Regional no. 21-A/2005/M, de 30 de diciembre*, y por el *Decreto Legislativo Regional no. 3/2007/M, de 9 de enero*, han adaptado el Impuesto sobre Sociedades en el caso de Madeira. *Decreto Legislativo Regional no. 5/2000/M, de 28 de febrero*, modificado por *Decreto Legislativo Regional no. 14/2001/M, de 10 mayo*, regula la deducción por reinversión para los contribuyentes del Impuesto sobre la Renta de las Personas Físicas.

En las Azores la adaptación se hace mediante un único instrumento: *Decreto Legislativo Regional no. 2/99/A, de 20 de enero,* modificado por *Decreto Legislativo Regional no. 33/99/A, de 30 de diciembre, Decreto Legislativo Regional no. 4/2000/A, de 18 de enero, Decreto Legislativo Regional no. 40/2003/A, de 6 de noviembre, y Decreto Legislativo Regional no. 3/2004/A, de 28 de enero.*

Madeira también ha adaptado a su especificidad regional los incentivos fiscales nacionales concedidos a través de un régimen contractual mediante *Decreto Legislativo Regional no. 18/99/M, de 28 de junio,* modificado por *Decreto Legislativo Regional no. 17/2006/M, de 23 de mayo.*

«rulings» o las instrucciones emitidas por las autoridades nacionales. Por otra parte, el Gobierno de Madeira ya ha invocado su autonomía en relación a la actividad de recaudación de los tributos en el sentido de no publicar los morosos de la Hacienda regional en la lista general de morosos tributarios, como exige el art. 64.5 y 6 de la *Lei Geral Tributaria* (aprobada por el Decreto-Ley no. 398/98, de 17 de diciembre, y modificada en esta materia por el artículo 57 de la Ley no. 60-A/2005, de 30 de diciembre, de Presupuestos para 2006). El Ministro de Finanzas ya ha anunciado su postura a este respecto, indicando que si el Gobierno Regional de Madeira persiste en su actitud la Dirección General de Tributos accederá a pesar de todo a los datos del los morosos de ámbito regional y los publicará.

## 4. Las competencias constitucionales de las regiones autónomas (en materia fiscal y presupuestaria)

Las regiones autónomas tienen las siguientes competencias constitucionales, en materia fiscal y presupuestaria:

- Aprobar el Plan Regional, el presupuesto y las cuentas y participar en el diseño de los planes nacionales (Art. 227.1, letra p) de la CRP).
- Participar en la definición de las políticas fiscales y presupuestarias nacionales (Art. 227.1, letra r) de la CRP).
- Ejercitar sus propias competencias fiscales, de acuerdo con la ley (en la práctica de acuerdo con la Ley Regional de Finanzas) y adaptar el sistema nacional tributario a las especificidades regionales dentro del marco legal del Parlamento de la Republica (en la práctica de acuerdo con la misma Ley Regional de Finanzas) (Art. 227.1, letra i) de la CRP).
- Derecho a los ingresos tributarios recaudados o generados en su jurisdicción, al amparo de los Estatutos Regionales y de la Ley Regional de Finanzas, así como el derecho a la participación en los ingresos tributarios del Estado, en virtud del principio de solidaridad, así como de otros ingresos cedidos, asignándolos a sus gastos, según los Estatutos Regionales y la Ley Regional de Finanzas (Art. 227.1, letra j) de la CRP).

## 5. La antigua Ley Regional de Finanzas

La Ley Regional de Finanzas detalla los derechos de las regiones autónomas a los ingresos tributarios recaudados o generados en sus jurisdicciones.

Esto afecta, por ejemplo, al IS atribuible a la actividad de la región, al IRPF correspondiente a los residentes en las regiones, con independencia del lugar en que realicen su actividad (¡!), y también al IS e IRPF de los no residentes sometidos a tributación con una retención final sobre los ingresos generados en la región (¡!¡!), refiriéndonos

exclusivamente al ámbito de la imposición directa (ver artículos 12 y 13 de la antigua Ley y 16 y 17 de la nueva Ley).

Esta Ley también define algunos principios rectores de la adaptación del sistema tributario nacional a las especificidades regionales (ver artículo 32 de la antigua Ley) que han sido ahora ampliados con la finalidad de abarcar también la capacidad tributaria *per se* de las regiones (ver articulo 45 de la nueva ley: (i) coherencia entre el sistema nacional y los sistemas regionales; (ii) legalidad regional (exigiendo que un Decreto Ley Regional del parlamento de la Región se utilice con esta finalidad); (iii) equidad entre las regiones; (iv) flexibilidad (los sistemas tributarios regionales pueden o bien crear impuestos aplicables solo en las regiones o adaptar los sistemas nacionales a las especificidades regionales); (v) suficiencia (los ingresos tributarios deberían cubrir los gastos públicos regionales); (vi) eficiencia funcional (la creación de incentivos a la inversión en las regiones y el fomento del desarrollo económico y social se considera como deseable).

Las regiones tienen competencias legislativas para crear (ver Art. 35 y 36 de la antigua Ley y art. 47.3 y 48 de la nueva Ley): (i) contribuciones de mejora sobre la propiedad inmobiliaria que incrementa en valor debido a las obras públicas e inversiones públicas regionales; (ii) contribuciones especiales para compensar el incremento de gasto regional debido a actuaciones privadas llevadas a cabo sobre bienes públicos o sobre el medio ambiente regional; (iii) recargos de hasta un 10% sobre los impuestos en vigor en las regiones.

Las regiones también tienen competencia legislativa (y reglamentaria) para la adaptación del sistema tributario nacional. Ejemplos de esta competencia son (ver el Art. 37 de la vieja Ley y el 49 de la nueva Ley): (i) las deducciones tributarias especiales en los supuestos de reinversión de beneficios comerciales, industriales y agrícolas; ii) las zonas libres de impuestos de Madeira y de Santa María (Azores); (iii) la reducción de hasta un 30% sobre los tipos impositivos generales en el IS, IRPF, IVA e Impuestos Especiales; (iv) la posibilidad de establecer incentivos fiscales condicionados o temporales, de manera acordada, en relación a los impuestos nacionales y regionales (aunque de nuevo esto tiene que ser ejercitado *sub lege*, en virtud del marco establecido en el Estatuto de Incentivos Fiscales) *(Estatuto dos Benefícios Fiscais-EBF).*

Por último, las regiones tienen competencias administrativas y derechos (ver Art. 39 y 40 de la antigua Ley y 51, 52 y 53 de la nueva Ley): (i) para actuar como parte activa en la relación tributaria, teniendo derecho a los impuestos regionales y nacionales recaudados en las regiones; (ii) para crear servicios de asesoramiento, liquidación y recaudación; (iii) para regular dichos servicios; (iv) para utilizar los servicios tributarios del Estado en las regiones a cambio de una cuota; (v) para utilizar la Secretaria Regional de Finanzas en sustitución del Ministerio Nacional de Finanzas en la concesión de los incentivos fiscales que sean de específico y exclusivo interés de una sola región; (vi) para que el Ministerio Nacional de Finanzas dé audiencia a los gobiernos regionales a la hora de conceder incentivos fiscales que afectan a más de una región.

## 6. La constitucionalidad de la nueva Ley Regional de Finanzas

Como se ha comentado, una nueva Ley Regional de Finanzas ha sido recientemente publicada, el 19 de febrero de 2007, derogando la anterior.

La constitucionalidad de esta nueva Ley ha sido analizada por el Tribunal Constitucional portugués como consecuencia del recurso presentado por un grupo de parlamentarios nacionales que pertenecen al Partido Social Demócrata (ahora en la oposición del gobierno nacional pero, sin embargo, ha sido el partido gobernante en Madeira con mayorías absolutas desde 1978, donde ha ganado más de 40 elecciones distintas, y donde su Presidente se ha convertido en el Presidente que más tiempo lleva gobernando en un gobierno elegido democráticamente). La cuestión en juego consistía en que se supone que la nueva Ley Regional de Finanzas producirá un descenso significativo en 2007, en comparación con el 2006, en las transferencias económicas del Estado a Madeira (unos 34.000.000 euros menos), así como una reducción de su recaudación por IVA (unos 3.790.000 euros menos) y del fondo de cohesión para las regiones más remotas (un 50 por 100 menos), mientras que se incrementarán ligeramente dichas transferencias a las Azores.

El razonamiento legal del recurso se centró en el hecho de que la nueva Ley, al reducir el grado de autonomía financiera de las regiones, infringió los Estatutos de las regiones autónomas, que, en virtud de los art. 280.1 letra c) y 281.1, letra d) de la CRP, prevalecen sobre otras leyes de rango inferior al constitucional, incluso aunque gocen de un status reforzado, como es el caso de la Ley Regional de Finanzas. Esta contradicción equivaldría a la ilegalidad o incluso a la inconstitucionalidad de la misma, en la medida que la regulación estatutaria que es contravenida tiene rango directo constitucional y dicha contradicción supondría una violación del principio constitucional de jerarquía, que hace prevalecer a los Estatutos por encima de otras leyes.

Además, se alegó que los principios, propios de un Estado democrático de Derecho, de confianza en el imperio de la ley y el régimen autonómico insular contenidos en los artículos 2, 9 y 6 .1 de la CRP, fueron violados, ya que los titulares de las entidades regionales habían sido elegidos en octubre de 2004 hasta 2008, y este cambio de la legislación en el ínterin podría poner en peligro el cumplimiento de sus programas de gobierno debido a la ausencia de medios de financiación.

No obstante, se aportaron razonamientos legales más detallados y otros argumentos contra regulaciones específicas y ciertas cuestiones técnicas de la nueva Ley, concretamente a la luz del principio de solidaridad de los artículos 225.1, 227.1, j) y 220.1 de la CRP.

El Tribunal Constitucional consideró que carecía de competencia para analizar, en una supervisión de la constitucionalidad a priori, la ilegalidad de la Ley Regional de Finanzas con respecto a los Estatutos, incluso si esto suponía una violación indirecta de la CRP. Consideró que sólo se permitia que se pronunciase sobre la violación directa e inmediata de las normas Constitucionales por la Ley Regional de Finanzas.

Con argumentos de peso, el Tribunal Constitucional decidió que había ciertamente un cambio de política pero no de un grado que infringiera el principio de confianza en el imperio de la ley o que pusiera en riesgo las autonomías financieras. Alegó, en concreto, que el principio de solidaridad es una calle de dos direcciones, que puede ser también aplicado desde las regiones a la parte continental de Portugal, y que el principio de prohibición al Estado para que garantice la deuda regional es compatible con el de solidaridad, a pesar de ser contrario al anterior principio de la vieja Ley, que permitía al Estado garantizar dicha deuda.

El asunto relativo a si la recaudación de los impuestos debería llevarse a cabo a través de la Administración del Estado o mediante servicios de la administración regional, y si la transferencia a este sistema regionalizado debería ser regulada por un Decreto-Ley del Estado, y solamente con posterioridad al mismo podría ser organizado por las instituciones regionales, también fue considerado como compatible con la CRP.

De los 13 jueces cuatro emitieron un voto reservado parcial, a saber: (i) con relación con la prohibición de que el Estado garantice la deuda regional (que en última instancia viola, a su juicio, la idea de unidad del Estado, y que entra en contradicción con situaciones similares tales como que el Estado garantice subvenciones a las entidades locales y a las empresas); (ii) en relación con la confianza en el principio del imperio de la ley (ya que el presupuesto regional del 2007 había sido elaborado teniendo en cuenta la antigua Ley Regional de Finanzas, en vigor en aquel momento, y que había entrado en vigor el 1 de enero de 2007, y la nueva ley afecta a ese presupuesto y a sus previsiones de ingresos y de compromisos con carácter retroactivo); y (iii) en relación con que la previsión de regionalización de la recaudación de tributos se hiciera mediante Decreto –Ley nacional– y no mediante el ejercicio por las regiones de su propia competencia legislativa.

Merece la pena poner de manifiesto que el Presidente del Gobierno Regional presentó su dimisión debido a la aprobación de esta nueva Ley Regional de Finanzas y provocó de nuevo elecciones regionales. El 6 de mayo de 2007, el *Partido Social Demócrata* de Madeira ganó una vez más las elecciones generales con una arrolladora mayoría (64,2 por 100).

## 7. Principales novedades introducidas por la nueva Ley Regional de Finanzas

Se observan dos diferencias principales en relación con la regulación tributaria en la nueva Ley Regional de Finanzas en comparación con la antigua. La primera desarrolla ahora los principios rectores de la creación de tributos por las regiones y prevé un mecanismo para resolver la transferencia a las regiones de los servicios tributarios del Estado.

En virtud del artículo 47.1 de la nueva Ley, los Parlamentos Regionales pueden crear impuestos:

– Aplicables exclusivamente en la región.

– Siempre que se respeten los principios de la Ley Regional de Finanzas
– Que no se superpongan a asuntos ya regulados en los impuestos nacionales, incluso en el supuesto de exenciones o de exclusiones de tributación.
– Que no se superpongan a asuntos que pertenezcan al ámbito de aplicación de los impuestos nacionales, incluso si no están previstos en los tributos existentes.
– Cuya aplicación no obstaculice el tráfico de bienes y servicios en el territorio nacional.

Estos tributos cesan en su aplicación en el caso de que tributos similares de ámbito nacional sean creados con posterioridad (Art. 47.2 de la nueva Ley Regional de Finanzas).

Como se ha indicado previamente en el apartado 6 anterior, la transferencia de atribuciones y competencias tributarias a las regiones, en el supuesto de que la descentralización y regionalización de los servicios del Estado se considere como beneficiosa, debe de ser definida por medio de Decreto-Ley del gobierno nacional (Art. 62.1). Hasta que el Decreto-ley sea publicado, la Administración del Estado prestará servicios efectivos a los poderes tributarios de las regiones, incluyendo el asesoramiento y la recaudación de los tributos (Art. 62.2).

## 8. La Zona Libre de Madeira y la Zona Libre de Santa María (Azores)

Ambas regiones autónomas tienen Zonas Libres pero mientras la de Madeira es aparentemente aplicable a todo el archipiélago, la de Azores es aplicable exclusivamente en una isla. Sin embargo, y a pesar de que ambas Zonas Libres existen formalmente, en la práctica solamente existe la de Madeira, y no hay en la actualidad régimen de ayudas de Estado aprobado por la Comisión Europea o solicitado para Santa María.

Aunque recientemente se ha estado discutiendo entre la comunidad empresarial sobre la modernización de la Zona Libre de Azores, parece que el gobierno regional no apoya la idea, posiblemente ante el temor de que pueda incrementar artificialmente el PIB de la región, poniendo en peligro su estatus de Objetivo 1, y los inherentes fondos europeos, como parece que ha ocurrido con Madeira.

Los incentivos fiscales aplicables en la Zona Libre de Madeira se regulan mediante leyes nacionales, en concreto los artículos 33 y 34 del EBF, y consisten en:

– Exención del IS y del IRPF en cuanto a los ingresos de fuente extranjera derivados de las actividades llevadas a cabo en el ámbito institucional de la ZLM por entidades establecidas allí (para las entidades registradas antes de 2000; para la entidades registradas entre 2003 y 2006 es de aplicación un tipo de tributación reducido del 1, 2 o 3 por cien).
– Exención en el IS y en IRPF de los dividendos, intereses, royalties y tasas por servicios pagados por entidades establecidas en la ZLM (en la mayor parte de los casos exclusivamente si se pagan a no residentes).

– Exención del Impuesto sobre Actos Jurídicos Documentados para operaciones llevadas a cabo en la ZLM.
– Exención del impuesto local que graba la propiedad sobre aquellos bienes inmuebles que estén directamente afectos al ejercicio de la actividad de las entidades establecidas en la ZLM.
– Exenciones en el impuesto local que grava las transmisiones de propiedad y en el Impuesto sobre Actos jurídicos Documentados para las transmisiones de locales comerciales utilizados por las entidades asentadas en la ZLM y para las transmisiones de participaciones en dichas entidades.

En la actualidad, el Gobierno portugués ha solicitado por la ZLM un nuevo régimen de ayudas de Estado a la Comisión Europea para el periodo 2007-2013. Se espera que sea aprobado brevemente, siguiendo el modelo del nuevo Régimen de la Zona Especial de las Islas Canarias[7]. Las principales características de este nuevo régimen deberían incluir unos tipos impositivos en el IS del 3 por 100 (2007-2009), 4 por 100 (2010-2012) y 5 por 100 (del 2013 en adelante), todavía vinculados a la creación de empleo, y una ampliación de la vigencia de la ZLM del 2011 al 2020.

En el ambiente tradicional de enfrentamiento entre la legislación nacional y los intereses de Madeira (ver los apartados 3 y 6 anteriores), comenzó a exigirse en 2005 un pago especial a cuenta del IS (*Pagamento Especial por Conta-PEC*) a las entidades de la ZLM, a pesar del hecho de que la mayoría de estas empresas están totalmente exentas del pago de impuestos. Mediante la Ley de Presupuestos para 2006, el Art. 98 de la Ley del IS especificó que el pago a cuenta para las empresas con ingresos exclusivamente exentos era la cantidad mínima de 1.250 €. Además, se aplicó este artículo con carácter retroactivo al año 2005, estableciendo que el ingreso hasta 31 de diciembre de 2006 de dicha cantidad extinguiría los procedimientos tributarios de incumplimiento relativos a la falta de pago.

Este parece ser un sistema extraño de generar ingresos con escaso soporte legal y totalmente contradictorio con la práctica anterior (antes de la Ley de Presupuestos para 2006) además de inconstitucional, en concreto vulnerando la forma en que el principio de capacidad económica debería aplicarse en el caso de una exención en el IS (antes y después de la ley de Presupuestos para 2006). Así mismo, el Art. 103.3 de la CRP es muy claro al establecer la prohibición de retroactividad en el ámbito impositivo. No solo esto sino que el PEC puede suponer una violación de la ayuda estatal aprobada por la Comisión Europea, en el sentido de que se introduce un pago a cuenta, posterior y unilateral al Estado, de una exención previamente aprobada por la Comisión Europea. Ya existen algunas decisiones judiciales de carácter preliminar del Juzgado de lo tributario de Madeira declarando que este PEC no puede ser aplicado ya que existe *fumus bonus iuris* de la violación del principio de capacidad económica y del principio de confianza en el imperio de la ley (ya que es ilógico y sorprendente

[7] Ver: http://www.zec.org

para aquellos que creyendo estar exentos de IS se encuentran con que tienen que hacer pagos a cuenta del mismo…).

## 9. Algunos breves comentarios sobre la sentencia del Tribunal de Justicia de las Comunidades Europeas en el caso Azores[8]

Este caso, como es por todos conocido, afecta a la anulación de la Decisión 2003/442[9] de la Comisión Europea que catalogaba las reducciones en el tipo del IS de los contribuyentes domiciliados en la región autónoma portuguesa de Azores como una ayuda de Estado incompatible con el Art. 87.3, letra a) (esto es, ayuda regional) o con otras excepciones contenidas en el Tratado de la UE, en la medida en que eran de aplicación al sector financiero. Actividades deslocalizables, tales como servicios financieros y servicios intra-grupo, eran consideradas como no merecedoras de dichas reducciones, debido a la presunción de su escasa contribución al desarrollo regional y a su desproporcionalidad en relación a las desventajas que pretenden compensar.

La opinión del Gobierno Portugués de que la reducción del IS no era selectiva sino una medida de carácter general, pero el ser el territorio de referencia no la propia región sino la totalidad del territorio portugués, fue rechazada.

Para fundamentar esto, el Abogado General (AG) Geelhoed introdujo una diferenciación, que fue seguida por el Tribunal de Justicia de las Comunidades Europeas, entre tres niveles de autonomía, siendo los dos últimos: (i) aquél en el que una autoridad regional o local tiene potestades autónomas para establecer el tipo de gravamen en su ámbito geográfico de jurisdicción, tanto teniendo en cuenta el tipo impositivo «nacional» como no teniéndolo (medida no selectiva con respecto a la regulación de las ayudas de Estado); y (ii) aquél en el que se determina un tipo impositivo más bajo que el tipo impositivo nacional por una autoridad local y es aplicable solamente dentro del territorio de dicha autoridad local (la naturaleza selectiva en este caso depende de que la autoridad local no sea autónoma del gobierno central desde un punto de vista institucional, procedimental y económico).

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[8] Una buena descripción de los hechos y una precisa evaluación de algunas de las implicaciones del caso Azores puede encontrarse en Neves, Tiago (2006), «Regional selectivity: A fine day of sun for the European «true» autonomies» en Talk Tax Blog (http://worldtax.blogspot.com/2006/09/regional-selectivity-fine-day-of-sun.html), 10 de setiembre de 2006. Sin embargo, estoy en cierto desacuerdo con la conclusión a la que se llega en este Blog, cuando indica que «el resultado del caso Azores puede denominarse como un buen día de sol para las «autenticas» autonomías europeas», como si en cierta manera se diera a entender que la región autónoma de Azores no es una auténtica autonomía.

[9] Decisión de la Comisión Europea 2003/442 de 11 de diciembre de 2002 en relación con la parte del esquema que adapta los sistemas de tributación nacionales a las características específicas de la Región Autónoma de Azores que se refieren a la reducción de los tipos de ingresos y el Impuesto sobre Sociedades BO 2003 L 15, p. 52.

En primer lugar, tengo ciertas dificultades en entender la diferencia entre (i) y (ii), en el sentido de que el criterio a utilizar me resulta demasiado formal, a no ser que se presuma la existencia de algún tipo de «autonomía económica», como es definida en el segundo último caso, en las «potestades autónomas» del primero. Dicho de otro modo, si el gasto fiscal de una autoridad local o regional se ve compensado por una transferencia del Estado o por una subvención del gobierno central, no debiera de ser relevante si el tipo impositivo se fija dentro de una horquilla predeterminada como en el supuesto (ii), o no, como en el supuesto (i). De hecho las restricciones presupuestarias pueden limitar efectivamente la capacidad de una autoridad local o regional para fijar su propio tipo impositivo, con independencia de la existencia de «márgenes de referencia legales».

En segundo lugar, es difícil de entender que la autonomía institucional (es decir, un status político y administrativo independiente de naturaleza constitucional) y la autonomía procedimental (es decir, inexistencia de intervención directa por el gobierno central en el procedimiento de determinar el tipo impositivo y la exoneración para la autoridad local de tener en cuenta el interés de dicho gobierno) no sean suficientes. Estas diferenciaciones pueden generar serios problemas constitucionales en los Estados Miembros ya que algunos modelos de integración regional, en concreto aquellos con menor autonomía financiera, están ahora en una situación menos segura en caso de escrutinio a la luz de la regulación de las ayudas de Estado. Favorecerán a los sistemas federales o cuasi-federales, que son los que se encuentra con mayor probabilidad en Estados Miembros más grandes (por ejemplo, Alemania), a costa de los Estados Miembros más pequeños (por ejemplo, Portugal).

En relación con esta cuestión, merece la pena resaltar que el AG se ha atrevido incluso a decir, en el párrafo 70 de sus conclusiones generales: *«A mi juicio, el hecho de que las reducciones de impuestos controvertidas se adoptaran al amparo del citado principio de solidaridad nacional excluye por sí mismo el concepto de verdadera autonomía de procedimiento, entendida en el sentido que he descrito. La misma idea del citado principio obliga más bien a los gobiernos regional y central a cooperar para garantizar la redistribución en el conjunto del territorio portugués.»*

En tercer lugar, es difícil de entender que la prioridad de las regiones más remotas recogida en el Art. 229. 2, el principio de cohesión económica y social de los artículos 2 y 3.1, letra (k) y el principio de solidaridad del Art. 2, todos ellos del Tratado UE, no jueguen ningún papel aquí. Si el tipo del IS puede ser reducido por Azores para todos los sectores de actividad, con excepción del financiero, entonces una de las pocas áreas en la que las dificultades de ser una zona remota (aislamiento geográfico, clima difícil y dependencia económica de un número reducido de productos) probablemente afectarán a Azores en menor medida, y en la que una región remota puede intentar competir y hacerse un sitio en el campo internacional y en el de la UE –beneficiándose en gran medida de la libertad de movimiento de capitales en la UE, que se extiende a terceros países, según el artículo 56 del tratado UE– queda excluida desde un inicio.

De nuevo, esto puede generar problemas de constitucionalidad en los Estados Miembros con regiones ultra periféricas o con diferentes grados de desarrollo regional, ya que la diversidad puede requerir la existencia de un principio de solidaridad y de transferencias compensatorias del Estado, que pueden de ahora en adelante ser puestas en duda por las instituciones de la UE.

Imaginemos libremente por un momento que la UE fuese un Estado, que tiene su propio presupuesto, compuesto por varias regiones (los Estados nacionales). ¿No compensarían en cierta manera los fondos estructurales de la UE y las subvenciones, guiados por los principios de preferencia de las regiones ultra periféricas, cohesión económica y social y solidaridad las decisiones de gasto presupuestario de los Estados? Probablemente, la UE, vista como un (super)-Estado regional no sería compatible con los criterios aportados por ella misma, y ahora establecidos, sobre la «autonomía verdadera»…

En cuarto lugar, es obvio que los Estados unitarios que carecen de autonomía regional (presumo que este es el supuesto de Luxemburgo y Estonia, por ejemplo) puede que también traten de manera diferente en los Presupuestos del Estado a las regiones o comunidades locales más necesitadas. Esto puede inducir a los Estados a intentar burlar el criterio de «autonomía económica», mediante la asignación de más recursos nacionales a las regiones a través de sus propios presupuestos, a costa de la transparencia. Por ejemplo, Portugal podría decidir patrullar por sus aguas territoriales más lejanas con mayor intensidad o dar más incentivos al turismo en las zonas de escasa población (fijando su objetivo efectivamente en Azores de una manera positiva).

En quinto lugar, me quedé un poco asombrado por el hecho de que la existencia de distorsión en la competencia en el comercio dentro de la Comunidad o entre los Estados se supusiera con tanta facilidad en el conjunto de la discusión. Solamente existe en Azores un puñado de instituciones financieras portuguesas y creo que han estado allí durante mucho tiempo antes de que se produjese la reducción de tipos impositivos. No tengo conocimiento de ningún banco extranjero que haya trasladado sus operaciones a Azores. En otras palabras, no existe ninguna prueba en absoluto de que se haya producido distorsión en la competencia. Quiero creer que Portugal defendió el caso Azores por una cuestión de principios y no basándose en intereses bancarios particulares. Y la razón por la que no ha habido distorsión de la competencia es que el tipo efectivo del IS del régimen de Azores (22,4 por 100 en 2000 y, en la actualidad, 17,5 por 100) es todavía mas alto que el tipo nominal o efectivo de los centros neurálgicos financieros tales como Irlanda o Luxemburgo, sin las ventajas propias de estas regiones (mano de obra anglo o franco parlante, ubicación central y un fuerte secreto bancario en el supuesto de Luxemburgo).

Por último, pero no por ello menos importante, resulta en cierta medida extraño asumir que Portugal, en términos de política económica, toleraría una distorsión de la competencia dentro de su Estado o un paraíso fiscal dentro de sus propias fronteras, ya que es mucho más probable que el tipo impositivo de Azores afecte a la localización

de las instituciones financieras domésticas en mayor medida que a las de la UE. Esto puede que sea un síntoma de que Portugal, en si misma, no considera el tipo impositivo de Azores, en la medida en que se aplica al sector financiero, con probabilidades de eliminar los obstáculos y los costes adicionales del estatus de ultra periférico.

En conclusión, creo que, por una parte, Portugal podría haber hecho más para invertir la carga de la prueba de que las medidas de Azores no respetaban la normativa de ayudas de Estado, y que, por otra parte, el hecho de que el sector financiero y los «nubarrones» de la competencia fiscal perjudicial estaban cerniéndose sobre este asunto pueden haber tenido una influencia decisiva en la postura de la Comisión Europea, del Abogado General y del Tribunal de Justicia de las Comunidades Europeas.

Una palabra de advertencia para los tiempos que se avecinan: la amplia conceptuación de la especificidad regional adoptada por la Comisión Europea, el AG Geelhoed y el Tribunal de la UE puede propiciar que se produzcan estragos si es adoptada por la Organización Mundial de Comercio en relación con la Comisión Europea en lo que a las políticas de ayudas de Estado se refiere. Verdaderamente, la Comisión Europea está probablemente abriendo la puerta a un caballo de Troya –al que más tarde se impedirá expulsar en virtud de los principios *pacta sunt servanda* y *venire contra factum propium* del Art. 27 de la Convención de Viena sobre el Derecho de los Tratados– yendo mucho mas allá de lo internacionalmente aceptado como especificidad regional.

No hay una disciplina específica para subvenciones en el sector servicios (ver Arts. II. 2 y XV del Acuerdo General sobre el Comercio de Servicios). Sin embargo, el artículo 2. 1, letra b) del Acuerdo sobre Subvenciones y Medidas Compensatorias (Acuerdo SCM) indica: «*Cuando la autoridad otorgante, o la legislación en virtud de la cual actúe la autoridad otorgante, establezca criterios o condiciones objetivas que rijan el derecho a obtener la subvención y su cuantía, se considerará que no existe especificidad, siempre que el derecho sea automático y que se respeten estrictamente tales criterios o condiciones. Los criterios o condiciones deberán estar claramente estipulados en una ley, reglamento u otro documento oficial de modo que se puedan verificar.*»

La nota al pie 2 del Acuerdo SCM clarifica: «*Criterios o condiciones objetivas, como se utiliza aquí, significa criterios o condiciones que sean imparciales, que no favorezcan a determinadas empresas con respecto a otras y que sean de carácter económico y de aplicación horizontal; cabe citar como ejemplos el número de empleados y el tamaño de la empresa.*»

Adicionalmente, el Art. 2.2 del mencionado Acuerdo enfatiza: «*Se considerarán específicas las subvenciones que se limiten a determinadas empresas situadas en una región geográfica designada de la jurisdicción de la autoridad otorgante. Queda entendido que no se considerará subvención específica a los efectos del presente Acuerdo el establecimiento o la modificación de tipos impositivos de aplicación general por todos los niveles de gobierno facultados para hacerlo.*»

En otras palabras el régimen de Azores es respetuoso con el criterio de especificidad de la Ley de la Organización Mundial del Comercio, centrándose en la autonomía institucional y procedimental (en un sentido limitado, no como el de Geelhoed), ya que no favorece a ciertas empresas en relación a otras y corresponde al establecimiento o al cambio de los tipos impositivos aplicables con carácter general efectuado por un nivel de gobierno con competencia para hacerlo[10]. No obstante, no es acorde con la regulación de ayudas de Estado de la Comisión Europea ya que, para que así fuese, tendría que favorecer a ciertas empresas (las no financieras) frente a otras (las financieras) en cuanto a la aplicación del tipo impositivo del IS. La Comisión Europea, el AG Geelhoed y el Tribunal de las Comunidades Europeas habrían alcanzado probablemente una conclusión diferente en el caso Azores si hubieran recurrido al Acuerdo SCM de la OMC para llenar el vacío legal de lo que se entiende por selectividad regional en relación con la política de ayudas de Estado de la Comisión Europea.

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[10] Para un análisis sobre la compatibilidad de la ZLM con la Ley de OMC, que origina problemas mucho más complejos, ver: Borges, Ricardo Henriques da Palma/Mota, Pedro Infante (2005) ««WTO and Direct Taxation [Portugal]» in AAVV (2005), WTO and *Direct Taxation*, Linde Verlag, Vienna, [Org: Michael Lang, Judith Herdin, Ines Hofbauer], pp. 603-606.

[11] Estos libros y artículos proporcionan un punto de inicio para los que quieran profundizar en la materia de las regiones autónomas portuguesas. Referencias mas detalladas se proporcionan en cada una de estas publicaciones.

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# El fundamento económico de la autonomía fiscal escocesa: con o sin independencia[1]

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**Resumen**

Esta ponencia contiene un análisis de las implicaciones tributarias, de gasto público y económicas que la autonomía fiscal tendría para Escocia. Por «autonomía fiscal» nos referimos a que el gasto del gobierno y del parlamento escocés estaría financiado por los tributos recaudados en Escocia o por el endeudamiento público de la Hacienda escocesa. Las transferencias de ingresos a Escocia calculadas según la fórmula Barnett cesarían. Se presentan dos tipos de autonomía fiscal: una formando parte del Reino Unido y otra con Escocia como un país independiente. Con independencia, Escocia adquiriría la potestad de emitir su propia moneda, si no fuera así los beneficios económicos de la autonomía fiscal para Escocia no diferirían significativamente entre los dos acuerdos constitucionales. Se argumenta que el actual sistema de subvención en bloque es ineficiente porque no requiere que el gobierno escocés mantenga un equilibrio entre los beneficios del gasto

[1] Versión original de la ponencia en inglés.

público y el esfuerzo de su financiación. Con incentivos deficientes, los que adoptan las decisiones políticas tienen pocas probabilidades de esforzarse para aumentar la eficiencia de la prestación de bienes suministrados públicamente o para intentar lograr el equilibrio correcto de la prestación de bienes y servicios entre los sectores público y privado, ni para impulsar el crecimiento económico en Escocia. Además, como la carga impositiva derivada de las deficiencias en la política de incentivos y de gasto del sector público escocés no es una cuestión fácilmente apreciable para el electorado escocés, éste es poco proclive a penalizar electoralmente a sus representantes. Si se introdujese la autonomía fiscal, los esquemas de estímulo tanto para el electorado escocés como para sus representantes en Edimburgo cambiarían radicalmente. Confiaríamos en que a asuntos tales como la prestación de un buen servicio con un coste ajustado en la política del gasto público, el equilibrio entre el gasto público y su coste en términos de impuestos más elevados y el impulso del crecimiento económico, se les diera mucha más relevancia que la que tienen en la actualidad con el vigente sistema de incentivos.

## Introducción I: antecedentes y algo de política

En un trabajo anterior (Hallwood y MacDonald 2004 y 2005), argumentamos que una serie de impuestos (pero no todos) que se encuentran en la actualidad bajo el control de Westminster deberían ser descentralizados a favor del Gobierno y del Parlamento escocés en el marco de un sistema de federalismo fiscal dentro del Reino Unido. El Informe de la Comisión Steel (2006) está de acuerdo con nosotros en su mayor parte y a nosotros nos parecen correctos muchos de sus razonamientos. Sin embargo, hay una cuestión en concreto sobre la que discrepamos. Esta es su rechazo a la autonomía fiscal –la transferencia de todo el gasto y de todos los impuestos a Escocia– como un mero paso político en el camino hacia una Escocia independiente. Mientras que el razonamiento de la Comisión Steel sobre este asunto está fundamentalmente basado en consideraciones de carácter político, creemos que merece la pena examinar la parte económica de la autonomía fiscal y esta es la finalidad de esta ponencia.

La principal cuestión que nos parece obvia es que la autonomía fiscal es como el federalismo fiscal pero ¡aún mejor! Con esto queremos decir que los incentivos económicos generados por la autonomía fiscal, tanto para el electorado escocés como para sus representantes electos en Edimburgo, son incluso más perceptibles que en un sistema de federalismo fiscal porque ellos mismos tendrían que soportar el coste impositivo total de todas y cada una de las libras que gastara el gobierno escocés. Esta fuerte restricción presupuestaria no es tan intensa en el sistema de federalismo fiscal, que presentamos en nuestro trabajo anterior, ya que preveíamos que algunas transferencias fiscales de Westminster continuasen. Con la autonomía fiscal ya no sería así. En realidad, Edimburgo podría tener que hacer transferencias a Westminster como pago de los servicios públicos (tales como defensa) prestados por la Unión para el conjunto del país. También es cierto, tal y como señaló la Comisión Steel, que la autonomía fiscal pondría fin a las transferencias de equidad, destinadas a igualar las

cargas impositivas, entendidas como un porcentaje de los ingresos regionales per capita. Pero desde el punto de vista escocés, esto podría no suponer una desventaja en sí mismo, especialmente si los ingresos impositivos procedentes del petróleo del Mar del Norte persisten en los altos niveles de los últimos años.

Una de las cuestiones clave que analizamos en nuestro trabajo anterior es que el diseño de un acuerdo de federalismo fiscal que sea efectivo y digno de credibilidad se fundamenta principalmente en asegurar que se aplique una dura política de restricción presupuestaria cuando se produzca la descentralización de las potestades tributarias. Si dicha política no es de aplicación, o, si a pesar de serlo, se puede eludir fácilmente, el federalismo fiscal no lograría el necesario control de los políticos, aunque pudieran conseguirse otros objetivos de la descentralización fiscal. Nuestro parecer en esta materia es que la autonomía fiscal origina automáticamente duras restricciones presupuestarias y es, por lo tanto, un sistema mejor de descentralización fiscal que el federalismo fiscal. En esencia, en un acuerdo de autonomía fiscal es el mercado, en concreto el de capitales, más que el acuerdo institucional o legal, el que origina una fuerte disciplina presupuestaria.

Asimismo, nos gustaría comentar las ventajas que la autonomía fiscal añadiría al proceso democrático tanto en Escocia como en la Unión. Creemos que el electorado escocés es lo suficientemente inteligente como para conocer sus preferencias y emitir su voto. Un nuevo sistema de autonomía fiscal supondría una cosa pero la independencia de la Unión sería algo muy diferente. Como la autonomía fiscal implicaría descentralizar más impuestos a Escocia que los que se descentralizarían con un sistema de federalismo fiscal, creemos que el sistema de autonomía fiscal en un sentido positivo es el más democrático, al menos desde la perspectiva de la democracia local. El impulso de ésta última, como se puede constatar, se está convirtiendo en una cuestión de creciente interés en el Reino Unido en estos últimos años.

Un «argumento de democracia» parecido puede ser utilizado contra los que mantendrían el sistema actual de subvención en bloque como un bastión ante los políticos de ideología socialista en materia de impuestos y de gasto público, que utilizarían sus nuevas competencias tributarias simplemente para elevar los impuestos. Pero, de nuevo, este es un asunto que el electorado, que tiene el poder de la urna electoral, debe determinar al decidir a los políticos que elige.

## Introducción II: el contexto económico

Nuestra argumentación principal es que la gran brecha actual existente entre lo que se gasta y los impuestos que se recaudan en Edimburgo –conocida como «desequilibrio vertical» o «desviación fiscal»– es ineficaz porque no aporta los incentivos necesarios para que Edimburgo haga un uso eficiente de sus ingresos públicos. La idea clave del estudio de las finanzas públicas es que los que deben adoptar las decisiones (el electorado escocés como rector y el ejecutivo y el parlamento escocés como sus agentes) adoptarían

decisiones más eficientes relacionadas con la utilización del dinero público, si tuvieran que soportar los costes que supone. Esto sugiere que el gasto público en Edimburgo debería estar mas directamente relacionado con los impuestos que se recaudan en Escocia y ser menos dependiente de la subvención en bloque que se recibe de Westminster. En este momento la asignación a Escocia de ingresos adicionales se basa en una subvención no condicionada conocida como la *formula Barnett*[2]. La opinión de que esta fórmula favorece a Escocia ya que atribuye un nivel más alto de ingresos per capita a Escocia que a muchas otras regiones del Reino Unido es bastante generalizada. Prescindir de la formula Barnett supondría probablemente menores flujos de financiación pública de Westminister a Escocia[3]. Sin embargo, un nuevo sistema de financiación pública, uno de federalismo fiscal como nosotros analizamos en nuestro anterior trabajo (ver Hallwood y MacDonald 2004 y 2005) o un sistema de autonomía fiscal como analizaremos aquí, podría producir una mejora en la asignación de recursos a largo plazo y la oportunidad de fomentar el crecimiento y en última instancia generar ingresos públicos adicionales. El incremento de la eficiencia depende en gran parte de la reacción de los políticos en el nuevo escenario impositivo y de ingresos. Cuanto mayor sea la transparencia y la responsabilidad que les exija el sistema, más probabilidades tendrán de dar una respuesta positiva. En nuestra opinión, un sistema de autonomía fiscal sería el de mayor transparencia para el electorado escocés porque el vínculo entre el gasto público y la necesidad de recaudar impuestos en Escocia estaría todo lo claro que puede estar.

Algunos de nuestros argumentos en esta ponencia son similares a los de nuestro trabajo anterior, ya que la diferencia entre federalismo fiscal y autonomía fiscal es cualitativa, aunque la autonomía fiscal implica un mayor grado de independencia fiscal que la que exige el federalismo. Como explicamos en el anterior trabajo, el federalismo fiscal supone que una parte considerable de los impuestos que se recaudan en Escocia se cedan a Westminster y sean directamente devueltos por Westminster a Escocia. Los impuestos clave incluidos en tal cesión podrían ser el IRPF, el IVA y el Impuesto sobre Sociedades. Nosotros hacíamos este razonamiento en base a la teoría económica del federalismo fiscal (para consulta ver Oates 1999)[4]. Con la autonomía fiscal otras fuentes impositivas, tal vez todas ellas, serían transferidas al parlamento escocés. En mucho mayor grado, los asuntos fiscales escoceses, tanto lo que se refiere al gasto como,

[2] La formula Barnett se utilizó por primera vez en 1978. En 1979 la Hacienda presentó un informe de evaluación de necesidades en el que se concluye que esta formula favorecía en términos generales a Escocia (y a Irlanda del Norte) y, a pesar del hecho de que Barnett se supone que debe actuar como fórmula de convergencia (igualando el gasto per capita en todas las regiones de Reino Unido), en realidad, simplemente ha consagrado el diferencial favorable que existía en 1979.

[3] Ver Gallacher y Hinze (2005) para un reciente debate sobre la formula Barnett y su utilidad como formula de financiación para el parlamento escocés.

[4] El Reino Unido se define normalmente como un Estado «unitario» más que «federal». Sin embargo, a menudo se reconoce que cualquier grado de descentralización fiscal en un Estado unitario origina una serie de características federales. Cuando nos referimos a «federalismo fiscal» nos referimos a la descentralización de impuestos y de gasto público y no a una definición legal nueva de la estructura política del Reino Unido.

especialmente, lo que se refiere al ingreso, serían responsabilidad del gobierno y del parlamento escocés. En esta ponencia, se consideran dos formas de autonomía fiscal –la autonomía fiscal completa es aquella en la que todo el gasto y todos los impuestos, incluido el IVA, se transfieren a Edimburgo. Esta forma de autonomía fiscal es coherente con que Escocia sea independiente, como apuntamos en nuestro trabajo anterior, y, como se confirma en el Informe Steel, este tipo de autonomía fiscal no existe dentro de un Estado-Nación. Nosotros nos referimos a la autonomía fiscal como un estadio inferior a la autonomía fiscal total y ésta consiste en (potencialmente) la descentralización o transferencia de todos los impuestos salvo el IVA.

Un nuevo sistema de autonomía fiscal dentro del Reino Unido no exigiría necesariamente cortar por completo todas las transferencias fiscales entre Escocia y el resto del Reino Unido –más bien depende del contenido del nuevo acuerdo político que se alcance. Sin embargo, es muy probable que una Escocia independiente –que tenga verdadera autonomía– dejaría de tener relaciones formales fiscales con el resto del Reino Unido. Si fuese éste el caso, los vínculos residuales entre Escocia y el resto del Reino Unido solamente se producirían mediante los mecanismos fiscales de la Unión Europea.

En el supuesto de autonomía fiscal dentro del Reino Unido, Westminster continuaría prestando algunos servicios públicos a la Unión en su conjunto, por ejemplo, defensa y diplomacia. Si Escocia tuviera que pagar por estos servicios, las transferencias fiscales entre Westminster y Escocia continuarían. Asimismo, las transferencias fiscales para equilibrar la equidad en el gasto público podría ser que continuasen. En este sistema, una Escocia fiscalmente autónoma bien podría seguir utilizando varias de las estructuras administrativas que ya están en funcionamiento, por ejemplo los sistemas de pensiones y los del IRPF. Escocia probablemente haría transferencias fiscales a Westminster en pago de la utilización de estas estructuras administrativas. Normalmente se esgrime que los flujos de equidad fluyen del sur al norte en el Reino Unido bien porque Escocia se lo merece, o, porque necesita ser sobornada con la generosidad sureña para permanecer en la Unión (ver McLean y McMillan, 2002). Por supuesto, también se podría argumentar que las transferencias de equidad se han efectuado de Escocia a Westminster desde el descubrimiento de petróleo en el Mar del Norte. De todas formas, el flujo de equidad y la existencia de superávit o déficit en el presupuesto de Escocia no son asuntos cruciales a los efectos de la descentralización fiscal.

Nuestro razonamiento aquí, y en nuestros anteriores trabajos sobre federalismo fiscal, es que un sistema fiscal más eficiente para Escocia podría finalmente hacer crecer tanto la economía escocesa y la base imponible impositiva que no seria necesario recibir transferencias de equidad desde Westminster, hasta el extremo de que el flujo de equidad se produciría, en realidad, desde Escocia hacia allí. El éxito irlandés con su política fiscal, especialmente la política impositiva, es por el momento ejemplo paradigmático de lo que una pequeña economía abierta –tal y como es la de Escocia– puede hacer con un sistema fiscal que le permite afinar sus políticas fiscales para fomentar el crecimiento económico. Un argumento que nos convence bastante es el

de que si se requiriese al gobierno y al parlamento escocés para que sean responsables de la recaudación tributaria, que financia los gastos del sector público en Escocia, ambos estarían más preocupados de fomentar el crecimiento empresarial y económico en Escocia, que lo que aparentemente están en la actualidad. No se debe pensar que la idea de la correcta correlación entre el gasto público y las decisiones tributarias sea nueva. En realidad, Adam Smith en 1776 destacó que:

> «… aquellos servicios públicos que son de una naturaleza tal que no generan ningún tipo de ingreso para su mantenimiento, pero cuyas ventajas se producen casi en exclusiva en un lugar o distrito concreto, siempre están mejor financiados por ingresos locales o provinciales, bajo la gestión de la Administración local o provincial, que si dependen de los ingresos generales del Estado… Si las calles de Londres debieran de ser iluminadas y pavimentadas a costa de la Hacienda general, ¿Habría alguna probabilidad de que estuvieran tan bien iluminadas y pavimentadas como están en la actualidad o incluso a un coste tan reducido?»[5].

El actual sistema de subvención en bloque desde Wetsminster está lejos de producir este equilibrio entre los gastos y los impuestos con, creemos, desafortunadas consecuencias a largo plazo para la economía escocesa. El contenido político del Acta escocesa (1998) ha interferido en el camino de lo que debería ser económicamente razonable. Por ejemplo, Hallwood y MacDonald (2005) demuestran que el Reino Unido tiene uno de los mayores desequilibrios verticales de Europa, con solamente el 14 % de los ingresos recaudados transferidos a los niveles sub-centrales de gobierno.

Desde nuestro punto de vista, el vigente régimen de subvención en bloque deja a la elección de Edimburgo, dentro de las limitaciones administrativas establecidas por Westminster, en qué gastar dicha subvención de entre todo el espectro de servicios públicos que presta el gobierno. Se gasta la totalidad de la subvención, ya que no hay un beneficio aparente para Escocia, o si lo hay es mínimo, en devolver la parte de subvención no gastada a Westminster. Este sistema incentiva escasamente al gobierno escocés o al parlamento para optar por el equilibrio adecuado entre la prestación de servicios públicos y privados en Escocia –esto es, para lograr la correcta dimensión relativa de los sectores público y privado. Datos recientes sobre el peso del sector público en Escocia subrayan este aspecto. Por ejemplo, en el tercer cuatrimestre de 2005 el empleo en el sector público en Escocia representó un 23,4 % del total de las personas escocesas en activo (las cifras comparativas para la totalidad del Reino Unido eran de un 20,2 %), lo que supone un aumento de entorno al 1% desde que co-

[5] Smith también se cuestionó si era justo que ciudadanos de fuera del área a la que afecta un beneficio, estuvieran pagando por los beneficios que disfrutaban otros: *«El gasto, además, en vez de ser costeado con un impuesto local soportado por los habitantes de cada calle, parroquia o distrito concreto de Londres, estarían, en este caso, sufragados a costa de los ingresos generales del Estado, y, consecuentemente, serían recaudados mediante impuestos soportados por todos los habitantes del Reino, de los cuales la mayor parte no obtendrían ningún tipo de beneficio de la iluminación y pavimentación de las calles de Londres».*

menzó la descentralización. Sin embargo, estas grandes cifras disfrazan algunas diferencias notables entre las subdivisiones. Por ejemplo, el empleo en los denominados *quangos* (organizaciones no gubernamentales cuasi – autónomas) se ha incrementado en un 40% desde la descentralización y el empleo en los departamentos centrales del gobierno escocés se ha elevado en más o menos un 18% desde la llegada de aquélla. En la mente del electorado escocés tales cambios son seguramente un asunto de gran importancia. Algunos en Escocia consideran que el sector público es demasiado grande y aniquila a la empresa privada. Otros están a favor de un sector público mayor. Sin embargo, el actual sistema de financiación del sector público en Escocia hace, en gran medida, que este importante debate sea discutible. ¿Cuál sería la utilidad de sostener un debate como este si Westminster –bajo la rígida fórmula Barnett– establece en gran medida el nivel de gasto público escocés?

## 1. Esquema del resto de la ponencia

El esquema del resto de esta ponencia es el siguiente. En la próxima Sección, analizaremos brevemente los argumentos a favor de la transferencia tanto de impuestos, como de las decisiones de gasto, a los que tienen capacidad de decisión en cada nivel de gobierno. Estos argumentos están relacionados con el fomento de la eficiencia en el uso de los recursos existentes (eficiencia en la asignación) y con el impulso del crecimiento económico. En la Sección 3, continuamos exponiendo las distintas restricciones al presupuesto gubernamental en el marco de diferentes sistemas económico-político-financieros. Dichos sistemas son el «sistema Barnett» que opera en la actualidad, un sistema de federalismo fiscal que discutimos en Hallwood y MacDonald (2004 y 2005), un posible sistema de autonomía fiscal dentro del Reino Unido, y, finalmente, un sistema de autonomía fiscal fuera de la Unión. La toma de conciencia de que el gobierno opera con restricciones presupuestarias y de que no dispone de recursos ilimitados para el gasto público, subraya la necesidad de gestionar eficientemente el gasto gubernamental y la imposición tributaria. La Sección 4 ofrece una discusión general sobre asuntos importantes relacionados con la puesta en práctica de varias formas de descentralización fiscal, y, en la Sección 5, estimamos qué tipo de figuras impositivas podrían descentralizarse bajo los diferentes sistemas de descentralización fiscal. Después de analizar estos argumentos, pasaremos a la Sección 6 para discutir los beneficios de que Escocia emita su propia moneda que, presumiblemente, solamente sería posible con el estatus de independencia. Consideramos, sin embargo, que la emisión por parte de Escocia de una moneda independiente le produciría muy poco beneficio y, tal vez, un coste neto. En la Sección 7, se establecen las conclusiones.

## 2. La Teoría del Federalismo Fiscal

La teoría del federalismo fiscal se centra en la prestación de servicios financiados por impuestos a escala regional, así como en el sistema de recaudación adecuado de

dichos impuestos en este mismo nivel de gobierno. Los principales rasgos que caracterizan el diseño del sistema que comentamos son: la eficiencia, fuertes restricciones presupuestarias, crecimiento económico y cohesión social.

### *2.1. Eficiencia*

El principio básico en la teoría tradicional del federalismo fiscal es que el gobierno sub-central debería tener capacidad para prestar bienes y servicios que satisfagan las preferencias y circunstancias particulares de sus electores. El presupuesto clave del federalismo fiscal es que la prestación de servicios públicos debería ser asignada al nivel más bajo de gobierno, haciendo coincidir geográficamente los costes y los beneficios más significativos. De esta manera, la eficiencia y el bienestar económico que se generan son mayores que los que se obtienen con un mecanismo más uniforme de asignación de recursos.

Es mucho más probable que se adopten las decisiones más racionales, cuando la población de una región tenga tanto que enfrentarse con los costes como que disfrutar de los beneficios del gasto público. En el marco de un argumento de este tipo, los servicios que son candidatos ideales para ser prestados de forma centralizada, porque sus beneficios se extienden por todo el país (o hay economías de escala) son asuntos exteriores, defensa e infraestructuras interregionales como transporte y telecomunicaciones. Pero muchos otros servicios públicos implican prestaciones que se circunscriben al ámbito local –tales como el cuerpo local de bomberos, las infraestructuras viarias y el gasto en sanidad y educación por mencionar unos pocos. Por supuesto que la prestación eficiente de estos bienes y servicios puede garantizarse también a través de un sistema, en el que las compañías del sector privado tengan que participar en un competitivo proceso de ofertas para efectuar dicha prestación[6]. En realidad, si una única compañía del sector privado es la que entrega los bienes o presta los servicios a un número lo suficientemente grande de agrupaciones sub-centrales, éstas puede que se beneficien de la economía de escala[7].

[6] Ver Tanzi, 1999.

[7] La idea de que una unidad prestadora de servicios adopte tanto las decisiones sobre los costes como sobre los servicios a prestar tiene una larga trayectoria en la teoría económica. Hace ya tanto tiempo como en 1956, Charles Tiebout propuso la idea de una única unidad aplicable incluso, tal vez y especialmente, cuando las unidades familiares y las empresas tenían capacidad de elección. Es decir, las unidades familiares y las empresas podían elegir la unidad de prestación de servicios concreta que preferían para que les proveyera de los bienes y servicios. La distribución sería la adecuada siempre que cada una pagase el coste total de los bienes y servicios prestados. Este razonamiento sobre la unidad prestadora de servicios –pagar por lo que obtienes (en un mundo de economías familiares y empresas tanto con movilidad geográfica como sin ella)– es importante por dos razones principales. En primer lugar, porque la cantidad de bienes y servicios públicos prestados no será ni demasiado grande ni demasiado pequeña. Cuando el coste y el beneficio de las últimas unidades de bienes o servicios públicos prestados sea el mismo, la producción está en el nivel correcto. Si el coste de las últimas unidades (es decir, el coste marginal) es mayor que el beneficio marginal, hay un exceso de prestación de servicio público. Cuando el coste

### *2.2. Restricciones presupuestarias fuertes y ligeras*

El principio de igualación o compensación, logrado mediante la subvención en bloque, suscita una controversia de carácter moral debido a la ausencia de restricciones presupuestarias estrictas sobre el gasto público. Si una región cuenta con que la cuantía de la subvención en bloque que recibe está relacionada con la magnitud de sus desequilibrios presupuestarios, el aliciente para reducir sus desequilibrios fiscales se pone en peligro: la región en cuestión se encuentra en un escenario de restricción presupuestaria ligera o débil. Este es el peligro del sistema actual, en primer lugar, porque la subvención en bloque no se ajusta de manera apropiada a la baja para reflejar el descenso de población de Escocia. En segundo lugar, porque una vez otorgada la subvención en bloque, quedan muy pocas medidas para fomentar la reducción del gasto del gobierno (y el déficit presupuestario).

El «nuevo federalismo fiscal» (Oates 2004) adopta el punto de vista de la opinión de los ciudadanos. Se basa en que los políticos y los funcionarios civiles no se comportan necesariamente como deberían para lograr el objetivo de maximizar el bienestar del electorado; más bien, lo que les preocupa es su propio provecho y –por razones de satisfacción personal–, tener el control de un presupuesto elevado es mejor que tener el de un presupuesto reducido. Este razonamiento monolítico (o Leviatán) sobre el sector público es influyente y exige que el federalismo fiscal actué como una limitación en el comportamiento de un gobierno cuyo único objetivo es el de maximizar los ingresos[8]. La cuestión es cómo correlacionar de manera más estrecha las decisiones de los políticos y burócratas (los agentes) con las del electorado (el rector). Desde esta perspectiva de la opinión pública, la competencia fiscal horizontal entre las diferentes jurisdicciones reduce el margen para el despilfarro gubernamental, y, por tanto, una mayor descentralización fiscal debería limitar el tamaño del sector público. Y lo que es más, debido a esta combinación de efectos beneficiosos, el aumento de la competencia fiscal no implicaría necesariamente una reducción en la prestación de servicios públicos[9].

El federalismo cooperativo (la coordinación de los sistemas impositivos entre las unidades federales, algo parecido a lo que ocurre ahora entre Edimburgo y Westminster) puede estar más al servicio de los intereses gubernamentales que de los de sus

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marginal es menor que el beneficio marginal todavía hay margen para aumentar la prestación. Es por esta razón que nosotros defendemos la descentralización de algunos impuestos para facilitar la aplicación de la regla del impuesto marginal (explicada más adelante). En segundo lugar, porque los costes impositivos están en una relación de proporcionalidad correcta con los beneficios y los impuestos no producen distorsiones, ya que no afectan negativamente a las decisiones de localización de las unidades familiares ni de las empresas. Además, si los costes varían de unas regiones a otras se refuerza la defensa del federalismo fiscal. Donde existen diferencias de coste interregional, los gobiernos sub-centrales pueden aprovechar éstas para mejorar el bienestar –prestando más servicios públicos de bajo coste y menos de aquellos que tienen un coste elevado.

[8] Ver Buchanan y Brennan, 1980.

[9] Estudios empíricos sobre la hipótesis Leviatán han producido resultados controvertidos. Ver, por ejemplo, Oates (1985), Grossman (1989) y Ehdaie (1994).

ciudadanos[10]. En términos generales, el experto constitucional Ronald Watts (1996) se manifiesta en contra de un exceso de federalismo cooperativo, ya que hay «algún valor democrático en pugna entre los gobiernos para servir a sus ciudadanos mejor».

Un ejemplo de restricción presupuestaria ligera o débil en Escocia puede ser el de que los bajos niveles medios de salud física de los escoceses se utilizan como fundamentación para que haya un mayor gasto público en sanidad en Escocia, soportado por una subvención inmensamente mayor que la que le correspondería procedente de Westminster. Sin embargo con una fuerte restricción presupuestaria sobre el gasto público, el gobierno y el parlamento escocés puede que se sientan motivados para tratar el deficiente nivel de salud en Escocia de otra forma, iniciando una política de medidas preventivas dentro del gasto sanitario. Medidas fiscales relevantes podrían incluir educación pública sobre las causas de una salud deficiente impartida en las escuelas e impuestos más elevados en los productos de consumo más perjudiciales para la salud.

Sin embargo, los beneficios de pasar a un sistema de restricciones presupuestarias más fuertes puede que queden en nada, salvo que el gobierno central pueda comprometerse con credibilidad al respecto de dichas restricciones presupuestarias. Este es el asunto conocido como «falta de congruencia temporal». A no ser que el gobierno central pueda comprometerse firmemente a no ayudar a los gobiernos sub-centrales en circunstancias de déficit por exceso de gasto o sea capaz de distanciarse de las presiones políticas del gobierno sub-central para elevar las limitaciones de gasto, existen muy pocas probabilidades de contención de gasto por parte de los gobiernos subcentrales[11]. Consideramos que el concepto de congruencia temporal es un elemento clave en el diseño de un sistema fiscal para Escocia porque esta íntimamente relacionado con la credibilidad del sistema. Un sistema de autonomía fiscal en una Escocia, que permanezca dentro del Reino Unido, es lo más cercano, en que podemos pensar, a un compromiso creíble. La autonomía fiscal en una Escocia independiente, eliminaría por completo la posibilidad de que el ejecutivo y el parlamento escocés tuvieran que enfrentarse a las peligrosas tentaciones morales de solicitar cobertura.

Lo que puede verse comprometido al pasar a un sistema de restricciones presupuestarias más fuerte –que suponga una mayor correspondencia entre el gasto y los impuestos en Escocia– es la función aseguradora que compete al gobierno central. Las regiones que se vean afectadas por crisis económicas asimétricas pueden verse compensadas mediante transferencias del gobierno central –pero ésto probablemente será

[10] Breton citando a Watts, 1996.

[11] Con el federalismo fiscal una de las maneras de lograr congruencia temporal es incluir una cláusula de «no-cobertura» en el acuerdo financiero con Westminster. La naturaleza exacta de dicha cláusula es difícil de prever en este momento. Sin embargo, una cláusula de este tipo podría estar respaldada con legislación, que evite la cobertura en circunstancias predeterminadas y sería incluso posible responsabilizar personalmente a los miembros del ejecutivo escocés si dicha cobertura se produjese. Podría incluso ser reforzada de una forma más intensa mediante el aseguramiento de que cualquier deuda contraída por Edimburgo fuese de su responsabilidad y no de la de Westminster.

mucho mas difícil cuando exista una mayor correlación entre los gastos y los impuestos del gobierno sub-central. Tales crisis asimétricas podrían ocurrir perfectamente si Escocia fuese, digamos, demasiado dependiente de los ingresos impositivos procedentes del petróleo del Mar del Norte, que como se sabe son bastante variables en el tiempo. El elemento de compensación entre el riesgo compartido y la controversia moral resulta problemático a la hora de diseñar un sistema de federalismo fiscal[12]. Si la elección es de federalismo fiscal, una manera de resolver este asunto puede ser que el gobierno asegure a las personas físicas (por ejemplo, como con la prestación de desempleo), garantizando de ese modo beneficios a los receptores de prestaciones sociales y a los ciudadanos mayores[13]. Por supuesto, con independencia y autonomía fiscal, Escocia renunciaría a las transferencias de Westmisnter de tal manera que perdería esta estructura de aseguramiento, siendo de crucial importancia, por tanto, que se obtuviese alguna forma de facilitar esta transición con la ayuda de los ingresos del petróleo del Mar del Norte, tal vez siguiendo el ejemplo del fondo de estabilidad del petróleo noruego. Con autonomía fiscal dentro del Reino Unido, se podrían mantener algunos de los aspectos de la función aseguradora de Westminster –por ejemplo, la reducción de los pagos correspondientes a bienes o servicios públicos prestados de manera centralizada durante periodos de deterioro económico.

### *2.3. Crecimiento económico*

El argumento económico clave a favor del federalismo fiscal, que mejora la eficiencia en la utilización de los recursos («eficiencia distributiva»), debería aplicarse también en un escenario dinámico de crecimiento económico[14]. Por ejemplo, la mayor capacidad de los políticos locales para hacerse eco de las preferencias locales en cuanto a educación, innovación, inversión privada e infraestructuras podría ejercer una influencia importante sobre el crecimiento.

Un segundo argumento, que además creemos que es de una importancia considerable para Escocia, es que el actual acuerdo de descentralización con Escocia no aporta incentivos para que los políticos locales mejoren el crecimiento económico en esta región. En la actualidad, el parlamento escocés recibe una cantidad global, basada en la formula Barnett, para hacer frente a los bienes y servicios públicos y los políticos carecen de aliciente para gastar una parte importante del presupuesto en mejorar el crecimiento económico, ya que los beneficios de esa mejora económica, en términos de un aumento en los ingresos impositivos, corresponderían al Ministerio de Hacienda en Londres. El hecho de dar a los políticos escoceses un aliciente para fomentar el crecimiento económico recompensaría efectivamente a Escocia con los beneficios de dicho crecimiento, aumentando, por tanto, los incentivos para el fomento del mismo.

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[12] Ver Perrson y Tabellini (1996) y Oates (2004).
[13] Ver Perrson y Tabellini (1996).
[14] Ver Oates 1993.

Un tercer argumento, que está relacionado con el anterior, es que el federalismo fiscal puede, además de proporcionar alicientes para que los políticos locales tengan en consideración las preferencias locales, animarles a que dediquen parte de su tiempo a buscar medidas innovadoras en la producción y prestación de bienes y servicios públicos, lo cual podría redundar en sus menores costes y precios.

Un cuarto argumento, aportado por la doctrina, es que mediante la disminución de la concentración del poder político y la promoción de cierto grado de competencia fiscal, el federalismo fiscal provoca que grupos de interés ejerzan un menor control en las políticas públicas y esto produce una mejora de la democracia y (a largo plazo) crecimiento económico[15]. Dicho esto, lograr la eficiencia distributiva tiene una doble dimensión en la práctica: la dimensión de fomento, asociada con mayores potestades sobre los ingresos a la que nos referíamos antes y también la dimensión relativa a la mejora en la productividad desde la óptica del gasto. La descentralización tiene que ofrecer la oportunidad para hacer efectivo un incremento en la eficiencia de la política de gasto pero muchos piensan que no se ha aprovechado todo su potencial. Para que funcione el federalismo fiscal es necesario que exista un marco institucional apropiado, incluyendo la predisposición de los políticos locales a cumplir con las normas que establezcan fuertes restricciones presupuestarias[16]. A este respecto, un aspecto particular del panorama escocés es que existen ciertas pruebas que sugieren que Escocia está más orientada hacia la producción y que es resistente ante la competencia, en concreto en los servicios públicos, y que, por tanto, los potenciales efectos positivos de la eficiencia distributiva se ven reducidos.

Un argumento final es el que se refiere al cambio en los patrones de comportamiento ante el ahorro que se produce bajo un sistema de descentralización fiscal que, se cree, que produce un aumento del ahorro y del crecimiento económico. Por ejemplo, Brueckener (1999, 2005) ha mantenido que la descentralización fiscal, al permitir que los niveles de prestación de servicios públicos se adecuen a las diferencias en las demandas entre los consumidores jóvenes y mayores, que viven en diferentes jurisdicciones, incrementa el aliciente al ahorro. Este mayor aliciente puede, sucesivamente, originar un aumento de la inversión en recursos humanos y una consecuencia de esta mayor inversión sería la aceleración del crecimiento económico.

### *2.4. Capital Social*

Recientemente un grupo de investigadores ha argumentado que la descentralización de la política fiscal, al acercar el gobierno a la gente, puede que fortalezca el capital social. Mantenemos en esta Sección que si la financiación del gasto público en Escocia se convierte de una manera mucho más clara en responsabilidad directa de los votantes esco-

[15] Varios estudios estadísticos apoyan la idea de que el federalismo fiscal promueve el crecimiento. Entre ellos se incluyen Oates, 1985, Bahl and Linn, 1992, Thieben, 2003, y Mankiw, Romer y Weil, 1992.
[16] Ver Tanzi, 2001.

ceses, éstos pondrán más energías en controlar a sus representantes políticos. Si una mayoría del electorado no cree que sus representantes están rentabilizando los impuestos que han pagado, tiene los medios para elegir a otros representantes. La falta de conexión entre el gasto público en Escocia y la gran preocupación que suscita la rentabilidad del dinero público está debilitando al gobierno escocés. Esto se manifiesta en el temor de que cualquier reforma del sistema impositivo lo único que supondría es que el mismo tipo de políticos eleve notablemente el nivel del gasto publico escocés. Pero con una mayor autonomía tributaría en Escocia las cosas serían muy diferentes: el electorado tendría más fuerza para controlar la actuación de la gente que eligen para que les represente.

Aunque esta doctrina tiene una mayor trascendencia para los países en vías de desarrollo o en transición, merece la pena destacar sus rasgos brevemente aquí. Para citar a De Mello (2000):

> «… el capital social es un concepto multidimensional, definido en un sentido amplio como confianza, normas y cadenas que fomentan mutuamente la cooperación beneficiosa en la sociedad. Comprende virtud cívica, confianza interpersonal, cooperación social y cohesión, y compromisos asociativos entre los grupos sociales.»

Una definición un poco menos amplia define al capital social *como las normas informales que promueven la cooperación entre las personas*[17].

Knack y Keefer (1997) intentan extractar el denominador común de las diferentes definiciones de capital social:

> «Todos los conceptos de capital social tienen en común la idea de que la confianza y las normas cívicas de cooperación son esenciales para el buen funcionamiento de las sociedades y para el progreso económico de estas sociedades.»

Una serie de investigadores han asociado al capital social con el crecimiento. El crecimiento puede mejorarse en países en los que las instituciones sociales y políticas protegen los derechos sobre la propiedad y ponen trabas a actividades no productivas cuya finalidad es apropiarse de una sustancial porción del producto social (esto es lo que los economistas denominan «comportamiento que persigue obtención de renta»). Una situación como ésta da lugar a un clima pro-inversión y fomenta la actividad empresarial, estimulando, en consecuencia, el crecimiento. El capital social también puede estimular el crecimiento al reducir los costes de las transacciones vinculados a mecanismos formales, tales como los contratos legales formalistas o las normas burocráticas[18].

Aunque existen una serie de factores determinantes del capital social, desde la religión a la educación o a la polarización étnica, varios estudiosos han fundamentado

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[17] Ver Fukuyama (1999).

[18] Los siguientes autores enfatizan el vinculo entre el capital social y el crecimiento: Abramovitz, 1986, Rodrick, 1998, y Knack y Keefer, 1997.

que la estructura vertical del gobierno es un factor determinante del capital social[19]. Hay una serie de razones por las que la descentralización de la política fiscal puede mejorar al capital social[20]. En primer lugar, el argumento básico (o «distributivo») de la eficiencia económica del modelo tradicional de federalismo fiscal implicaría que las acciones del gobierno se controlan más fácilmente por la comunidad local y que esto debería contribuir a fomentar la transparencia y la responsabilidad de las acciones del sector público. Por ello, la descentralización de la política fiscal debería reforzar la percepción de los ciudadanos de que el gobierno responde a sus necesidades y preferencias de forma más rápida y más eficiente.

En segundo lugar, la descentralización de la política fiscal debería originar vínculos más intensos entre los grupos de la comunidad y entre la comunidad en general y el gobierno. En una situación en la que se ejercita la política descentralizada –bien federalista bien con autonomía– los ciudadanos locales están más predispuestos a asumir una mayor responsabilidad en el desarrollo social y económico y las discusiones entre el gobierno y las comunidades locales tenderían a ser mayores. De nuevo, es más fácil hacer cumplir las normas y los contratos en jurisdicciones más pequeñas como la descentralización escocesa parecería demostrar, aunque no esta tan claro que las normas societarias locales hagan más fácil el logro de la eficiencia distributiva que las normas del gobierno central. El refuerzo de estos lazos con toda probabilidad promoverá la cohesión social, la virtud cívica, facilitará la interacción entre las comunidades y desincentivará los intereses particulares.

En tercer lugar, los gobiernos más cercanos impulsan iniciativas de participación para toda la comunidad entre sus miembros, tales como la formación de grupos, asociaciones, y actividades socio-culturales. La cooperación cívica de esta naturaleza puede mejorar la eficiencia distributiva, si el beneficio total que se le produce a la sociedad por actuar de este modo tiene mayor peso que el coste total de las actuaciones no cooperativas. Fomentando este campo de actuación cívica disminuye lo que la sociedad tiene que pagar por aquellos ciudadanos que adoptan comportamientos poco solidarios y llevan a cabo actuaciones ilegales o ilegítimas, tales como la evasión fiscal, la deshonestidad y la corrupción.

### *2.5. Descentralización fiscal y crecimiento económico: la evidencia empírica*

Ha habido una serie de estudios sobre la relación existente entre el crecimiento y el federalismo fiscal. La mayor parte de las contribuciones iniciales a la doctrina empírica sobre el vínculo entre la descentralización fiscal y el crecimiento económico (ver,

[19] Ver La Porta, 1997 sobre la religión, Heliwell y Putman, 1999 sobre la educación, y Fox, 1996, sobre la polarización étnica.

[20] Esta argumentación procede de De Mello (2000).

entre otros, Bahl y Linn, (1992), Kim (1995), Huther y Shah (1996), Davoodi y Zou (1998), Zhang y Zou (1998), Oates (1985, 1999), ThieÂen (2003), Xie, Zou y Davoodi (1999) no son concluyentes, en la medida en que algunos encuentran esta relación como positiva mientras que otros consideran que la relación, en realidad, es negativa. Sin embargo, estos primeros estudios padecieron una serie de problemas econométricos y otros derivados de la utilización de conjuntos de datos que contenían información referente a países con características muy diferentes. Trabajos empíricos más recientes sobre dicha relación, que no presentan las deficiencias de los trabajos anteriores, (ver, entre otros, Lin y Liu (2000), Akai y Sakata (2002), Stansel (2005) y Iimi (2005)) llegan a concluir que existe una vinculación clara, y desde un punto de vista estadístico bastante relevante, de ambas variables. Por ejemplo, Stansel (2005), utiliza un nuevo conjunto de datos que comprende a 314 áreas metropolitanas de EEUU para demostrar la existencia de una relación positiva y altamente satisfactoria entre la descentralización fiscal y el crecimiento económico: una desviación al alza de un 1% en descentralización sobre la media normal produce un aumento en el crecimiento de ingresos per capita de un 2,5%.

Otra manera de abordar esta relación entre la descentralización fiscal y el crecimiento es evaluar si una menor carga impositiva y un sector público más reducido estimularía el crecimiento económico en Escocia, asunto al que se le concede una gran importancia desde una perspectiva teórica. Un trabajo publicado recientemente por Lee y Gordon (2005), utilizando datos *cross-section* correspondientes a 70 países durante el período de 1970 a 1997, sugiere que los tipos más bajos en el Impuesto sobre Sociedades contribuyen a tasas más aceleradas de crecimiento económico. En concreto, después de controlar otros factores que inducen al crecimiento, la reducción en los tipos impositivos de las empresas en un 10% puede llegar a incrementar la tasa real de crecimiento de PIB entre un 1 y un 2% al año. Lee y Gordon (2005) también hacen referencia a la, por todos conocida, ausencia de relación sistemática entre las cargas impositivas y las tasas de crecimiento económico.

Además, se pueden obtener algunas nuevas perspectivas (indirectas) sobre los efectos de la carga impositiva en el crecimiento del *ZEW IBC Taxation Index*, que determina y analiza la carga impositiva efectiva de las empresas y de la mano de obra altamente cualificada en veinte países europeos y en los Estados Unidos de América. El estudio de 2005 demuestra claramente que la competencia fiscal internacional ha reducido la carga impositiva de las empresas en los países (en relación al estudio de 2003). Los países nórdicos presentan una imposición del capital a tipos impositivos relativamente bajos, en comparación con la media europea, pero una imposición sobre el trabajo a tipos relativamente más altos. Irlanda ha adoptado una política similar pero con una carga impositiva muy inferior sobre el capital. La carga impositiva tanto del capital como del trabajo es relativamente baja en los países del este europeo. Un aspecto interesante de este estudio es que presenta las cargas impositivas sobre el capital y sobre el trabajo en cada uno de los cantones suizos, y éstas son extremadamente bajas comparadas con otros países continentales y similares a las cargas impositivas de los países de nuevo acceso a la UE.

De Mello (2000) busca analizar la relación entre federalismo fiscal y capital social. Utiliza tres indicadores del capital social: confianza en el gobierno, cooperación cívica y actividad asociativa para 29 economías de mercado[21]. Él «explica» el nivel de estos indicadores utilizando cinco medidores del grado de federalismo fiscal. Estos son: dos indicadores basados en el ingreso –impuestos del gobierno sub-central y sin autonomía fiscal–, dos indicadores basados en el gasto –el tamaño y la parte de gasto que corresponde al gobierno sub-central– y los desequilibrios verticales del comportamiento fiscal intergubernamental (que miden el desequilibrio entre los gastos del gobierno sub-central y sus propios ingresos)[22].

La relación más fuerte y más significativa es la que tiene lugar en el indicador de desequilibrios verticales que presenta la relación correcta con respecto a los diferentes indicadores de capital social[23]; los otros indicadores de descentralización fiscal resultan estadísticamente insignificantes en relación con los tres indicadores de medición del capital social[24]. Los hallazgos se toman en cuenta para fundamentar el principio de subsidiariedad de las finanzas públicas, que en la teoría tradicional del federalismo fiscal se justifica en términos de eficiencia distributiva, en virtud del cual se puede impulsar el capital social cuando las diferencias locales en necesidades y preferencias se tienen en cuenta por los que hacen las políticas[25]. Por ejemplo, la seguridad y confianza en el gobierno mejora cuando se reduce el desequilibrio vertical. Debido a que, como hemos comentado, hay un importante desequilibrio vertical en la estructura de la política fiscal del Reino Unido, éste podría ser un argumento más para reforzar la idea de federalismo fiscal en Escocia.

## 3. Restricciones presupuestarias gubernamentales

Un gobierno que tiene un presupuesto deficitario, es decir, que gasta más (G) que los ingresos tributarios (T), tiene que financiarlo de alguna manera. Por lo menos se pueden prever cuatro sistemas diferentes para Escocia.

Primero, con **autonomía fiscal en una Escocia** independiente, o autonomía fiscal total, las restricciones presupuestarias del gobierno escocés serían similares a las de cualquier otro país independiente:

[21] Los datos fueron recogidos originalmente por la *World Values Survey* (Encuesta sobre los Valores Mundiales) para el periodo de 1980-81 a 1990-91.

[22] La estimación se realiza mediante la regresión de los tres diferentes indicadores de capital social en los indicadores de descentralización y estableciendo una serie de variables de control.

[23] Está negativamente relacionado tanto con la confianza en el gobierno como con la actividad asociativa y positivamente con la cooperación cívica.

[24] Los resultados econométricos han demostrado ser sólidos ante un análisis de sensibilidad.

[25] Por supuesto que estos resultados son más orientativos que concluyentes, ya que el autor trabaja con unos conjuntos de datos limitados en términos de las dimensiones temporales y de *cross-section* de las series y también porque los indicadores de capital social son bastante básicos y no tienen en cuenta otros aspectos más amplios del capital social.

$$G - T = \Delta B + \Delta M \quad (1)$$

Donde G es el gasto del gobierno escocés y T son los impuestos recaudados en Escocia. En consecuencia, el déficit presupuestario se financia o bien emitiendo bonos o, con más frecuencia, obligaciones del Tesoro ($\Delta B$) y/o dinero de curso legal ($\Delta M$). La capacidad para emitir moneda, requiere una moneda independiente, y como comentaremos más tarde, hay buenas razones para pensar que una moneda independiente no es necesariamente una buena opción para Escocia. Escocia no es un área óptima para tener su propia moneda. Las opciones viables para una Escocia independiente serían, por tanto, o bien mantener la libra esterlina o adoptar el euro como su propia moneda. En cualquiera de los dos supuestos, la expansión monetaria ($\Delta M$), no sería posible. Además si se adoptase el euro, y presumiendo que el pacto de estabilidad presupuestaria en la UE fuese todavía de aplicación, se aplicarían limites en la cuantía de ($\Delta B$) que no podría superar en más del 3 por 100 el PIB.

En segundo lugar, las restricciones presupuestarias del gobierno escocés bajo un **sistema de autonomía fiscal dentro del Reino Unido** se reducirían a:

$$G - T = \Delta B \quad (2)$$

Es decir, el déficit presupuestario escocés se financiaría mediante la emisión de obligaciones del Tesoro escocés. Como en el supuesto de restricciones presupuestarias bajo un sistema de federalismo fiscal –ver más abajo–, ($\Delta B$) no estaría completamente en la voluntad del gobierno escocés debido a la necesidad de mantener una coherencia con la filosofía presupuestaría del Reino Unido en su conjunto. Un pacto de estabilidad limitando la cuantía de ($\Delta B$) sería necesario.

En una tercera situación, la restricción del presupuesto escocés en un **sistema de federalismo fiscal** propuesto en Hallwood y MacDonald (2004 y 2005) es la siguiente:

$$G - T = \Delta B + F - X \quad (3)$$

En la que F son las transferencias fiscales a Escocia (para las «necesidades de igualación») del presupuesto de Westminster y X representa los impuestos recaudados por Escocia y que pasan directamente a Wetsminster (si Wetminster continuase recaudando los impuestos procedentes del petróleo del Mar del Norte estos estarían incluidos en X). En este escenario de federalismo fiscal ($\Delta B$) representaría la emisión de obligaciones por la Hacienda escocesa pero, de nuevo, tendría que arreglárselas con Wetminster para lograr coherencia presupuestaria interna en el conjunto de la Unión.

En cuarto lugar, bajo el **actual sistema de fórmula Barnett** de financiación del gasto del ejecutivo:

$$G - t = \Delta b + F - X \quad (4)$$

Esta utiliza $T = t + X$. Los impuestos recaudados en Escocia, T, se dividen en los impuestos de «fuente propia» y los retenidos por el Gobierno escocés, t = fondos obtenidos bajo la «imposición *tartan*[26]» entrarían en esta categoría. X de nuevo representa los impuestos recaudados en Escocia pero que se envían directamente a Westminster. $G - t$ no es un déficit presupuestario sino la medida del desequilibrio vertical entre el gasto y los impuestos de fuente propia[27]. $\Delta b$ es endeudamiento (de emergencia) del ejecutivo escocés frente a Wetsminster (es decir, transferencias inter-departamentales del gobierno del Reino Unido, no emisión de obligaciones de la Hacienda escocesa). Merece la pena poner de manifiesto que el hecho de que si F – X es positivo, Westminster subvenciona a Escocia, y si es negativo, Escocia subvenciona a Westminster, ha sido una cuestión sometida a un intenso debate durante años.

Como hemos defendido anteriormente, las «restricciones presupuestarias Barnett» hacen muy poco por incentivar al gobierno escocés para que fomente la distribución eficiente de recursos, bien dentro del sector público escocés, o bien entre el sector público y privado, ni tampoco contribuyen a instituir una política fiscal de fomento del crecimiento, y nos gustaría profundizar en estas afirmaciones con mayor detalle. Normalmente nos referiremos a «federalismo fiscal» –las restricciones presupuestarias definidas por la fórmula (3)– defendiendo que promueve una mejor distribución de recursos y unos incentivos mayores al crecimiento económico que el sistema Barnett (4). Como las restricciones presupuestarias bajo la autonomía fiscal son, por lo menos, tan duras como en el federalismo fiscal –sin transferencias de Westminster–, creemos que las ventajas económicas del federalismo fiscal son también de aplicación a la autonomía fiscal.

## 4. Algunas cuestiones relativas a la descentralización fiscal en Escocia

En nuestro trabajo anterior sobre federalismo fiscal y las finanzas escocesas, hicimos hincapié en el principio de *cesión impositiva equilibrada*[28]. La idea es que los impuestos que se recaudan a través del sistema de cesión en un régimen de federalismo fiscal deberían ser, en la medida en que sea posible, suficientes para cubrir el gasto identificable en Escocia. Con autonomía fiscal, se presume que el gasto público y los ingresos deberían estar casi totalmente equilibrados, es decir, haciendo abstracción de cualquier desequilibrio deliberado pero temporal por razones de la gestión del ciclo

[26] Nota de la traductora: el término *tartan* hace referencia a la tela de cuadros escoceses de la que están hechas las faldas regionales escocesas, aquí los autores lo utilizan de manera figurativa para referirse a los impuestos auténticamente propios de Escocia.

[27] Incluso en el sistema actual, T permanece como los impuestos recaudados en Escocia pero queda fuera de las restricciones presupuestarias porque la inmensa mayoría de ellos pasan directamente a Westminster. Si el ejecutivo escocés activase la «imposición *tartan*» los impuestos de fuente propia, t, incrementarían en cuantía.

[28] Un impuesto asignado es aquel cuyos procedimientos se comparten entre los diferentes niveles de gobierno en base o, bien a la derivación o, bien a la igualación.

económico. Un principio básico en economía es que existe una mayor probabilidad de adoptar decisiones racionales desde un punto de vista económico –tanto en el sector público como en el privado–, cuando los que las adoptan tienen que equilibrar los beneficios que producen unas decisiones concretas de gasto con el coste de dichas decisiones. En realidad, es más probable que se adopte una decisión racional de este tipo en «el marginal» y, con el fin de dar a los políticos incentivos suficientes para que adopten las decisiones más apropiadas en el margen, propusimos anteriormente la regla de la imposición marginal. Por tanto, en un nuevo acuerdo fiscal –federalista o con autonomía–, la capacidad para incrementar el gasto correspondiente a un área concreta tendría que ser financiada o, bien mediante una reducción del gasto en otra categoría diferente o, bien mediante un aumento de los impuestos.

En el vigente sistema de subvención en bloque, hay muy poca conexión entre las decisiones de gasto adoptadas por el gobierno y el parlamento escocés y las decisiones sobre cómo y de dónde obtener los ingresos necesarios. Las presiones para incrementar el gasto del gobierno en Escocia siempre pueden ser rebatidas, culpando a Westminster y a la fórmula Barnett de reducir los fondos públicos escoceses. La manera de enfocar el gasto gubernamental en Escocia cambiaría drásticamente si el gobierno escocés tuviera que considerar en sus cálculos políticos los aspectos relacionados con los ingresos. Mantenemos que el principal problema en el Reino Unido en relación con el gasto financiado públicamente realizado por Edimburgo –regulado como está por la fórmula Barnett– es que está casi totalmente regido por el principio de equidad –o equilibrio horizontal– en detrimento de la eficiencia económica.

Establecer unas restricciones presupuestarias más estrictas que las que existen en la actualidad –y como hemos comentado serían más fuertes y probablemente más creíbles en un sistema de autonomía fiscal que en uno de federalismo fiscal–, podría tener ventajas para Escocia. Primeramente, y la más simple, sería que una mejor correlación entre la toma de decisiones por el ejecutivo y las preferencias del electorado originaría una mayor rentabilidad en la utilización de las fuentes de financiación, lo que representa una mejora estática de la eficiencia. En segundo término, Escocia no cuenta en la actualidad con fuertes incentivos para utilizar los ingresos fiscales como impulso del crecimiento económico en Escocia, porque el incremento en los ingresos impositivos derivados de un crecimiento más rápido de la base imponible impositiva sería recaudado por Westminster y no devuelto a Edimburgo, constituyendo el mejor comportamiento del crecimiento una mejora dinámica en la eficiencia. En tercer lugar, los incentivos actuales para una mayor eficiencia en el gasto público –o lo que es igual, reducir los costes y elevar la productividad de servicios públicos como sanidad y educación– son asimismo, con bastante probabilidad, deficientes[29]. Así como es verdad que, en el sistema de subvención en bloque, el ahorro de costes en un área de gasto público puede ser utili-

[29] Aunque, por supuesto, existen otras formas de mejorar la eficiencia del sector público –ver Crafts, 2004. Ver *The Economist*, 9 de abril de 2004, para una discusión sobre este asunto.

zado para realizar un mayor gasto en otra, por el momento el ahorro en los costes no se ha puesto de manifiesto en una bajada de impuestos. Existe, por supuesto, el «impuesto *tartan*»[30] que puede ser reducido para reflejar menores necesidades de gasto, pero el margen de variabilidad no es grande.

En Hallwood y MacDonald (2005) enfatizamos el hecho de que al pasar a un sistema de federalismo fiscal o de autonomía fiscal podría producirse una cierta compensación entre eficiencia y equidad. El último párrafo resume algunas maneras potenciales de mejorar la eficiencia, haciendo que los impuestos que se recauden en Escocia se queden en Escocia. Sin embargo, ¿qué pasa con la equidad en el conjunto del Reino Unido?, es decir, ¿personas en situaciones similares en el Reino Unido recibirán similares prestaciones financiadas públicamente?

Un acuerdo de autonomía fiscal, con o sin independencia, supondría alejarse del actual acuerdo de equidad implícito en el acuerdo Barnett y en los sistemas comunes de seguridad social y de pensiones en el Reino Unido, y puede que deje al margen la equidad entre Escocia y el resto del Reino Unido. Por supuesto que esta consecuencia no está totalmente clara, ya que una Escocia fiscalmente autónoma puede tener una base superior de recursos con la cual puede satisfacer objetivos de equidad más ambiciosos, mientras que al mismo tiempo mejora el objetivo de eficiencia. Sin embargo, consideramos que la ventaja potencial tanto de la autonomía fiscal como del sistema de federalismo fiscal es que incluso si las transferencias de equidad dejasen de producirse, Escocia estaría en una mejor situación económica a largo plazo. Un sistema fiscal que promueve el crecimiento económico producirá en teoría mayores ingresos tributarios –los cuales no tendrían que ser entregados a Westminster y podrían ser utilizados para soportar mayores niveles de gasto público y/o menores impuestos en Escocia a largo plazo.

La autonomía fiscal también provocaría que Escocia fuese más vulnerable a los golpes económicos adversos, porque la estabilización macroeconómica sería más difícil de lograr sin el estabilizador *automático* que suponen las transferencias netas cíclicas, en estas situaciones sensibles, procedentes de Westminster. En la actualidad, las transferencias netas aumentan cuando los ingresos de fuente escocesa se reducen como, por ejemplo, ante una reducción relativa de los impuestos sobre el petróleo en comparación con los impuestos del conjunto del Reino Unido. A fin de abordar este asunto, seríamos partidarios de que una Escocia fiscalmente autónoma estableciera un fondo de estabilización de los ingresos del petróleo siguiendo las directrices marcadas por el ejemplo noruego. Teniendo en cuenta los precios más elevados del petróleo de los últimos años, parecería que es el momento oportuno de hacerlo. Mientras que Stancke (2003) señala el satisfactorio funcionamiento del Fondo Noruego del Petróleo, se debería de hacer hincapié en que, dada la volatilidad histórica de los ingresos impositivos procedentes del petróleo, la autonomía fiscal podría resultar menos cómoda para Escocia que el actual sistema de subvención en bloque.

[30] Ver nota 25.

Incluso nuestra propuesta de cesión impositiva equilibrada bajo un sistema de federalismo fiscal tiene sus riesgos para Escocia, porque los ingresos públicos no estarían tan protegidos como están ahora con el sistema actual. Sin embargo, la variabilidad en los ingresos podría ser gestionada a través de uno de los diversos mecanismos de endeudamiento del sector público[31]. Además, el status quo también tiene riesgos ya que hace muy poco por fomentar ni la eficiencia económica estática ni la dinámica, dejando a Escocia en inferioridad de condiciones para hacerlo. Y tampoco debería

[31] Hay cuatro modelos para tratar la acumulación de deuda de un gobierno sub-central: disciplina de mercado, disciplina administrativa «colegiada», disciplina basada en las normas y objetivos de endeudamiento establecidos por los gobiernos centrales. Esta categorización está basada en Ter-Minassian y Craig, 1997. Ver también IMF (*Intenational Monetary Fund*) 2003. Ninguna de ellas es perfecta. Unos pocos países de renta elevada permiten a los gobiernos sub-centrales utilizar, en general, la disciplina de endeudamiento del mercado de capitales. Entre ellos están Canadá, Finlandia, Portugal y Suiza. Para la efectividad de la disciplina de mercado son necesarias cuatro condiciones. Los mercados no deben ser obligados a tratar a los gobiernos como deudores privilegiados, debería de existir el flujo adecuado de información a los prestamistas sobre las condiciones financieras y económicas de los gobiernos sub-centrales, no debería de existir fianza –para evitar riesgos morales– y los endeudados deberían de establecer acuerdos institucionales, que garantizasen la respuesta adecuada al deterioro en la clasificación crediticia si esto llegase a ocurrir. Dado el alto nivel de desarrollo de los mercados financieros en el Reino Unido, se podría pensar que un sistema como éste podría funcionar aquí. Pero hay riesgos: incluso en economías de mercado tan altamente avanzadas como Canadá, la disciplina de mercado no ha sido contundente ante situaciones como el rápido incremento del endeudamiento provincial y el deterioro en la clasificación crediticia de las provincias. Solamente tras un lapso de tiempo de más de una década las provincias más endeudadas han actuado con la verdadera intención de contener el crecimiento de su endeudamiento. (ver Ter-Minassian y Craig, 1997, y Krelove, Stotsky y Vehorn, 1997).

Los sistemas de disciplina basados en las normas –en los que las reglas están contenidas en leyes– son de aplicación en EEUU, España y Japón. De este modo, el endeudamiento de los gobiernos sub-centrales a ciertos niveles está limitado por la capacidad de endeudamiento estimada del gobierno sub-central o por otro tipo de indicador de solvencia. Un sistema basado en las normas también tiene las ventajas de la trasparencia y la equidad. El principal inconveniente de este sistema es que los gobiernos sub-centrales pueden tener la tentación de eludir la aplicación de las normas mediante, por ejemplo, la reclasificación del gasto corriente como gasto de capital u omitiendo parte del gasto en el balance.

En un sistema colegiado administrativo, el gobierno central y la región acuerdan cuáles consideran que son los límites de endeudamiento razonables teniendo en cuenta dimensiones tales como las necesidades previstas del gobierno sub-central, el equilibrio fiscal general o las condiciones macroeconómicas. El proceso de negociación tiene una clara dimensión política, que puede hacer primar los intereses políticos a corto plazo a costa de un endeudamiento excesivo de los gobiernos sub-centrales. En realidad, el sistema australiano de controles administrativos –mediante el que el gobierno federal y los gobiernos de los Estados acuerdan los límites de endeudamiento en el *Loan Council* (Comité de Prestamos)– ha sido complementado con esfuerzos por introducir algún tipo de disciplina de mercado (ver Craig, 1997 y Ter-Minassian y Craig, 1997).

Una cuarto sistema de gestión de la deuda es el del control directo de los gobiernos sub-centrales endeudados por parte del gobierno central. Este es el sistema en vigor en Reino Unido y en él el gobierno central aprueba anualmente los límites de endeudamiento de las autoridades locales y las restricciones pueden aplicarse a las características de los préstamos incluyendo el plazo y el tipo de préstamo (ver Potter 1997). La falta de flexibilidad puede ser una desventaja de este método de control, especialmente debido a las ventajas que puede tener el gobierno sub-central al conocer la información relativa a las necesidades locales en comparación con el gobierno central.

Escocia confiar demasiado en que Westminster vaya a aplicar siempre la fórmula Barnett, que ha resultado ser tan generosa en relación a ella.

A diferencia de la situación de autonomía fiscal que no lo requiere necesariamente, si el nuevo sistema de finanzas públicas fuese uno de federalismo fiscal, sería necesario llevar a cabo una evaluación de las necesidades con el fin de dejar claramente fijada la cuantía de cualquier tipo de subvención en bloque aportada por Westmisnter. También sería necesario el establecimiento de algún tipo de mecanismo de transición para minimizar el grado de alteración de las finanzas escocesas. Esto último sería asimismo necesario en el supuesto de autonomía fiscal.

Además, somos de la opinión de que cualquier tipo de legislación que establezca la cesión de tributos para Escocia, o, la autonomía fiscal de escasa magnitud, debería dejar un margen para futuras modificaciones del sistema fiscal escocés –muy en la línea del sistema español en el que las finanzas regionales son revisadas cada cinco años en virtud de lo que dispone la legislación. Por un lado, el federalismo fiscal se está desarrollando por todo el mundo en la actualidad y en varios países se está permitiendo su implantación. Por otro, es muy difícil hacerlo completamente bien a la primera –algo que creemos que el Acta Escocesa (1998) no logró.

En nuestra opinión, un buen sistema fiscal para Escocia sería aquel que estimulara la eficiencia en el gasto público lo que, a su vez, mejoraría la cohesión social y el crecimiento económico de Escocia y del Reino Unido en su conjunto. Creemos que las fuertes restricciones presupuestarias impuestas por la autonomía fiscal podrían conseguir esto[32].

## 5. Cuestiones sobre la zona óptima monetaria y el supuesto de autonomía fiscal

Anteriormente hemos comentado que una Escocia independiente, la que opera bajo las restricciones presupuestarias de la fórmula (1), necesitaría adoptar la decisión de si va a utilizar la emisión adicional de moneda como medio para financiar los déficits presupuestarios. Reconocimos que para tener esta potestad Escocia necesitaría tener capacidad para emitir su propia moneda y romper su rígido vínculo con la libra esterlina. En esta Sección subrayamos una serie de fundamentos en contra de que Escocia tenga su propia moneda. El estudio económico más relevante a este respecto es el de las zonas óptimas monetarias.

[32] Y como mantuvimos en Hallwood y Macdonald (2204 y 2005) el federalismo fiscal supondría un paso en la dirección correcta si se asignara una parte de ingresos tributarios concertados a Escocia (tales como impuestos sobre la renta de las personas, las empresas y el gasto), permitiera la descentralización parcial del impuesto sobre la renta de las personas y descentralizase por completo una amplia gama de impuestos tales como actos jurídicos, apuestas y juegos y los especiales sobre vehículos. Este sistema también mantendría una subvención de carácter compensatorio que tendría todo su sentido por razones de equidad, algo que sigue totalmente la práctica normalizada en el resto de la Unión Europea y en gran parte del resto del mundo.

### *5.1. La unión monetaria, la creación de mercado y el comportamiento del tipo de cambio*

Creemos que es por el propio interés de una Escocia independiente que continúe usando la libra esterlina, o, si el Reino Unido se une al euro, entonces que adopte esta unidad monetaria. Consideramos esto porque si Escocia no tuviera la misma moneda que el resto del Reino Unido, se enfrentaría a enormes tensiones en el comercio y en sus conexiones inversoras con el que sería fácilmente su mayor socio comercial –el resto del Reino Unido[33]. Un tipo de cambio flotante puede producir fuertes convulsiones macroeconómicas no bien recibidas, el comercio con el resto del Reino Unido puede caer o podría estar sometido a tensiones ante las fluctuaciones del tipo de cambio y se originarían costes como consecuencia de la reestructuración del comercio escocés fuera del Reino Unido[34].

El sentido de que dos regiones tengan una moneda común es que al reducir simultáneamente los costes de transacción, los riesgos monetarios y la opacidad de los precios relativos, se fomenta el comercio. Los estudios que analizan a los países que han abandonado una unión monetaria demuestran que la integración comercial con los miembros que permanecen en la unión cae aproximadamente a la mitad desde el nivel que tenían en la unión monetaria más o menos en el año inmediato anterior a su salida[35]. Según esto, si Escocia tuviera que dejar la unión monetaria, podría experimentar una larga y rápida caída en su comercio con su mayor socio comercial –el resto del Reino Unido[36].

Un posible escenario es que incluso fuera de la unión monetaria del Reino Unido, la intensidad del comercio escocés con la unión permanezca alta durante años, pero mientras tanto la actividad empresarial se vería atrapada entre los costosos efectos de la volatilidad del tipo de cambio sobre su comercio con el resto de los miembros que permanecen en la unión monetaria del Reino Unido, y los costes en que incurriría para encontrar nuevos socios de negocio en la UE o en cualquier otro sitio. Llegamos a la conclusión de que los costes en los que Escocia incurriría para adaptar su comercio durante un largo plazo después de abandonar la unión monetaria del Reino Unido, se alargarán en el tiempo y podrían ser inaceptablemente altos. En realidad, dado que gran parte del comercio escocés es en el sector de servicios financieros y que en este sector se comercia casi en exclusiva con el resto del Reino Unido, es altamente probable que este sector cambie rápidamente su ámbito de actuación al otro lado de la frontera para evitar los caprichos de un tipo de cam-

[33] Prueba de esto, aunque no basada directamente en datos escoceses se encuentra en MacDonald, 1999 y 2000, Buiter, 2000, Layard *et al.*, 2000, Glick y Rose, 2002, y Artis y Ehrmann, 2000.

[34] Besedes y Prusa, 2003, demuestran lo difícil que es para los países establecer nuevos socios comerciales.

[35] Ver Glick y Rose, 2002.

[36] En el último año del que existen datos, 2000, el 51.3 % de las exportaciones escocesas fueron al resto del Reino Unido, el resto fue al resto del mundo.

bio flexible que se producirían, casi inevitablemente, tras la salida de Escocia de la unión monetaria[37].

Por supuesto y como dejamos claro en nuestro trabajo anterior, la participación en la unión monetaria es un argumento más para que Edimburgo tenga la suficiente flexibilidad fiscal a la hora de hacer frente a las crisis asimétricas que se producen dentro de la unión del Reino Unido. Aunque este aspecto parece haber tenido el máximo reconocimiento en el contexto de debate sobre la incorporación del Reino Unido al euro, no se le ha dado demasiada relevancia en el debate de la descentralización fiscal en Europa.

## 6. Conclusiones

En esta ponencia hemos analizado el supuesto de la autonomía fiscal para Escocia. Autonomía fiscal, que puede ser diseñada para una Escocia dentro del Reino Unido o para una Escocia independiente, que ofrece un mecanismo de incentivación mucho más preciso y claro –tanto para el sector privado como para los representantes electos de Edimburgo– que el actual acuerdo financiero Barnett y también que otras formas menores de descentralización fiscal como el federalismo fiscal. Hemos mantenido que existe en la actualidad una base empírica convincente para fundamentar la relación entre la capacidad para modificar los impuestos sobre el trabajo y el capital y la eficiencia con la que los recursos son asignados dentro de un país o región. Los asuntos relacionados con las transferencias de equidad y la característica aseguradora del amplio sistema actual de seguridad social del Reino Unido necesitarían ser tratados en la configuración de un acuerdo de autonomía fiscal y, a este respecto, abogamos por la constitución de un fondo de estabilización del petróleo siguiendo las características de los acuerdos de Noruega. Si Escocia fuese a ser política y fiscalmente independiente de Westminster, creemos que Escocia debería mantener sus fuertes vínculos con la libra esterlina.

Nuestro análisis destaca el elemento de compensación, inherente a la autonomía fiscal, para Escocia entre el riesgo y lo que obtiene a cambio. La esencia de dicha compensación reside en la rigidez de las restricciones presupuestarias impuestas por la autonomía fiscal en comparación con el federalismo fiscal o con el sistema actual de subvención en bloque. El rendimiento potencial de la autonomía fiscal es un crecimiento económico más rápido, como resultado de un gasto público correctamente incentivado y de las decisiones en materia impositiva. De este modo, cada libra extra de gasto público se tiene que ver financiada con más impuestos (o, a corto plazo, endeudamiento público, que a largo plazo también tiene que ser pagado con impuestos

[37] Otro de aspecto interesante de la elección de Escocia del área monetaria es el hallazgo de Frankel y Rose (2000) de que los efectos beneficiosos de la unión monetaria funcionan solamente a través de la creación de empleo y no mediante influencias macroeconómicas o de las relaciones de la política monetaria con un socio comercial no inflacionista.

más altos de un tipo o de otro). El riesgo añadido procede de la pérdida de la subvención en bloque anual, en una cuantía mas o menos conocida, procedente del gobierno central. Con autonomía fiscal, la reducción de ingresos impositivos no se asegura por el gobierno central. Las transferencias netas entre Escocia y Westminster no se modifican para poner el contrapunto a la cuantía de lo que Escocia ingresa por impuestos, incrementándose en los años en que la recaudación impositiva escocesa cae. El gran interrogante económico para el público escocés es entonces: ¿Está dispuesto a aceptar el sistema de compensación riesgo-rendimiento o está más cómodo con los efectos amortiguadores del federalismo fiscal tal y como se propone en Hallwood y MacDonalds (2004 y 2005), o incluso de mayor amortiguación como los del sistema actual de subvención en bloque? Como economistas consideramos que los efectos de la autonomía fiscal en la generación de elementos incentivadores podrían ser tan grandes que los rendimientos potenciales de la autonomía fiscal podrían compensar ampliamente los riesgos potenciales y creemos que hay suficiente soporte empírico acumulado para fundamentar esta opinión.

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# Concierto Económico Vasco y Europa. Fiscalidad Regional: modelos comparados. Comunidad Autonoma del País Vasco y Comunidad Foral de Navarra

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De acuerdo con la Constitución vigente, el Estado español se organiza territorialmente en Comunidades Autónomas (entidades similares con matices a los Länder alemanes, pero diferenciados de las regiones especiales italianas o de la organización territorial francesa), las cuales gozan de las competencias que les reconoce la propia Constitución y sus Estatutos de Autonomía y aquellas otras competencias que pueden serles transferidas por parte del Estado. Lógicamente, el ejercicio de esas competencias (sanidad, educación, etc.) implica un gasto público para cuya realización han de contar con los pertinentes recursos financieros que, para las Comunidades de régimen común, enumera la propia Constitución, aunque defiriendo su concreción a una Ley Orgánica.

Siguiendo los esquemas clásicos del federalismo fiscal, encontramos que nuestro ordenamiento jurídico configura, con matices, un sistema de unión en los ingresos públicos y de separación en los gastos públicos, de forma que las Comunidades de

régimen común financian sus gastos mediante la cesión de tributos por parte del Estado (transferencias en términos económicos), el cual, sin embargo, retiene la titularidad de los mismos y las competencias legislativas sobre su regulación. O, dicho en otros términos, su autonomía política no se corresponde exactamente con su autonomía financiera, siendo superior la primera a la segunda, puesto que dependen, presupuestariamente, de las transferencias del Estado central.

Esta situación comenzó a variar en 1996 y se consolidó en 2001 cuando el Estado permitió a las Comunidades Autónomas regular, con limitaciones, determinados aspectos de los tributos cedidos (posibilidad de variar los tipos de gravamen, de establecer determinados beneficios fiscales,etc.) pero reteniendo siempre la titularidad y la competencia legislativa primaria, de forma que, con todos los matices que se quiera, el sistema de financiación de las regiones (en nuestro país Comunidades Autónomas) sigue descansando sobre las transferencias del Estado central, lo que provoca una asimetría entre el modelo político de Estado (con tendencias federales) y modelo financiero del mismo (con tendencias centralizadoras).

Los obstáculos del sistema crecen si tenemos en cuenta la dificultad de establecer parámetros eficaces para territorializar la recaudación, por un lado, y para establecer criterios justos de asignación de ingresos por otro, puesto que no todas las Comunidades tienen las mismas competencias, ni el coste de las mismas es similar en cada una de ellas. Además se hace necesario, para respetar el principio de solidaridad intrarregional establecer mecanismos de compensación financiera interterritorial –que ayude a las Comunidades con menor renta per capita igual a la media nacional, de igual manera que sucede en la Unión Europea con los fondos estructurales y otros mecanismos de equiparación del producto interior bruto y de disminución de las diferencias económicas interestatales–. Y aquí es donde han surgido y continúan asomando las discrepancias sobre si la financiación a través de las transferencias estatales ha de realizarse en función de la población, del peso del producto interior bruto de la Comunidad en el conjunto del Estado, etc., con especial énfasis en la tasa de retorno de las inversiones –algo que propugnan las Comunidades más prósperas– en detrimento de otros parámetros (déficit de infraestructuras, peso de la población, diferencial del PIB respecto de la media nacional, etc.).

Sin embargo, no todos los impuestos estatales están cedidos a las Comunidades Autónomas y, por ejemplo, el Impuesto sobre Sociedades es retenido íntegramente por el Estado por considerar que la cesión –incluso recaudatoria– afectaría a la unidad de mercado, provocando distorsiones en éste. Y problemas de otro calado se presentan a la hora de repartir la recaudación del IVA, dada la asimetría entre el objeto del impuesto –el consumo– y el hecho imponible (entregas de bienes, prestaciones de servicios, importaciones y adquisiciones intracomunitarias), problemas resueltos con fórmulas de difícil asunción bajo parámetros jurídicos e incluso económicos.

Pero junto al sistema de financiación de las Comunidades de régimen común (someramente expuesto dado el tiempo con el que contamos para nuestra intervención), nuestro ordenamiento constitucional consagra los sistemas de Concierto (para el País

Vasco) y de Convenio (para Navarra), que son, sustancialmente similares, en especial tras las reformas operadas en 2002 y en 2003, respectivamente, sistemas que debemos explicar puesto que este es el objetivo de nuestra participación en este foro.

Concierto y Convenio suponen un sistema de financiación caracterizado por la separación de ingresos y de gastos, de forma que los recursos económicos son regulados –y este punto es clave desde el enjuiciamiento del sistema bajo el Tratado de la Unión)–, gestionados y recaudados por las Diputaciones Forales (en el caso del País Vasco) y por Navarra en el caso de la Comunidad Foral. Cabe hablar, por tanto, de sistemas tributarios propios, aunque ello no signifique que no estén sujetos a limitaciones externas (normas de armonización fiscal) e internas (límites de las respectivas leyes estatales que ratifican dichos sistemas tributarios).

Básicamente hay que distinguir entre tributos concertados o convenidos y tributos no convenidos o no concertados. Los primeros pertenecen a los territorios forales mientras que los segundos pertenecen al Estado, aunque la recaudación de éste en dichos territorios es en la práctica testimonial puesto que sólo retiene la recaudación por las importaciones en el IVA y en los Impuestos Especiales (o impuestos sobre consumos específicos en la terminología europea). No obstante, el poder normativo de los territorios forales es, en muchos de los tributos convenidos o concertados, puramente formal, puesto que dichas regiones han de aplicar las mismas normas sustantivas y formales vigentes en cada momento en territorio común. Ello sucede fundamentalmente en el ámbito de la imposición indirecta (IVA, Impuestos sobre consumos específicos e Impuesto sobre Operaciones Societarias), donde además se encuentran sujetos a los límites derivados de la armonización fiscal impulsada por la Unión Europea. Junto a ello también han de aplicar las mismas normas vigentes en el resto del Estado en el caso de un impuesto directo, como es el Impuesto sobre la Renta de los No Residentes.

De tal manera que «el derecho a inventar impuestos» como dijeran Albert Hensel o Hans Nawiasky en la doctrina alemana de los años treinta del siglo pasado, es decir, la posibilidad de establecer una regulación diferenciada de la estatal se concentra en los denominados impuestos concertados de normativa autónoma, y, en concreto, el Impuesto sobre la Renta de las Personas Físicas, el Impuesto sobre Sociedades (con matices), el Impuesto sobre el Patrimonio y el Impuesto sobre Sucesiones y Donaciones. Evidentemente, en el caso de los dos primeros, los territorios forales han de respetar –pese a su libertad legislativa– los principios básicos de la Unión Europea en cuanto a libertad de establecimiento, de circulación de capitales y de trabajadores.

Hay que tener en cuenta que en la imposición directa no existe aún el concepto de armonización fiscal sino el de aproximación de legislaciones –del que ha hecho uso la Comisión Europea– y sobre todo, lo que se ha denominado la segunda armonización que es la llevada a cabo por la jurisprudencia del Tribunal de Luxemburgo, en especial en el caso del Impuesto sobre Sociedades y la ligazón entre una regulación diferenciada de la estatal y el concepto de ayuda de Estado, circunstancia que ha afectado no sólo al País Vasco y a Navarra sino a otros Estados de la Unión Europea que cuentan con te-

rritorios con regímenes fiscales diferenciados. Y ello por no mencionar la normativa española sobre el concepto de paraíso fiscal donde se incluyen territorios y/o países integrantes de la Unión Europea que resultan discriminados, lo cual quizá contravenga principios básicos del ordenamiento comunitario europeo, algo que se mantiene, por ejemplo, en el nuevo Impuesto sobre la Renta de las Personas Físicas, recientemente aprobado a través de la Ley 35/2006, de 29 de noviembre. Cabría preguntarse, desde una perspectiva comunitaria, qué ocurriría si algún Estado miembro de la Unión considerase, por ejemplo, que el País Vasco o Navarra constituyen paraísos fiscales, algo que no es sostenible a la vista del ordenamiento interno, como intentaremos demostrar.

La esencia fundamental del Concierto y del Convenio es que el producto recaudatorio de los tributos concertados o convenidos, del País Vasco y de Navarra se destina a financiar los gastos públicos asociados a las competencias asumidas, sin que puedan recurrir al Estado central en caso de insuficiencia de recursos económicos. No obstante, como el Estado central aún mantiene competencias en dichos territorios –que son exclusivas de él según la Constitución– y la recaudación obtenida en aquellos es insuficiente para su financiación, el País Vasco y Navarra realizan una aportación económica al Estado (el denominado cupo en el caso del Concierto) que supone la compensación al Estado por el coste de los servicios que sigue prestando en ambos territorios. Esta aportación económica se calcula en base a complejas fórmulas matemáticas, pero básicamente se determina en función del peso del producto interior bruto de cada territorio dentro del total nacional, siendo del 6,24% en el caso del País Vasco y del 1,60% en el caso de Navarra. De tal manera que el Estado central no es transferente de fondos públicos (como sucede en las Comunidades de régimen común), sino perceptor de una parte de la recaudación obtenida en dichos territorios forales por los tributos concertados o convenidos.

De forma muy sintética y muy elemental, esta es la esencia del régimen de Concierto Económico, al tiempo que constituye el modelo de contribución del País Vasco y de Navarra a la solidaridad interterritorial dentro del Estado español. Por tanto, no estamos ante regímenes fiscales privilegiados o que constituyan paraísos fiscales –como se ha acusado desde dentro del propio Estado español con recursos sistemáticos contra normas forales del Impuesto sobre Sociedades y que han llegado a Bruselas (Comisión Europea) y al Tribunal de Justicia de las Comunidades Europeas– sino ante regímenes diferenciados del vigente en las Comunidades Autónomas de régimen común, que gozan de respaldo constitucional y de legitimidad histórica. El régimen de Concierto es, por tanto, tan constitucional como pueda serlo el régimen del resto de las Comunidades Autónomas de régimen común.

A la vista de la reciente sentencia del Tribunal de Luxemburgo sobre el régimen de las Islas Azores, encontramos que la diferenciación en el Impuesto sobre Sociedades (centro de todas las críticas) no constituye ayuda de Estado en el sentido que esta expresión tiene en el Tratado de la Unión Europea y a la vista de la doctrina del citado órgano judicial europeo. Y ello por dos razones fundamentales: a) los territorios forales gozan de capacidad legislativa plena en este impuesto y b) el Estado central no

compensa la pérdida de recaudación que puedan experimentar los territorios forales como consecuencia del ejercicio de sus potestades legislativas. A ello hay que añadir que, salvo en casos aislados y flagrantes, el régimen diferenciado en el Impuesto sobre Sociedades no se ha realizado con el propósito probado de lograr la atracción de inversiones o de localizar empresas, puesto que, de ser cierto, ello supondría, por ejemplo, anular por constituir ayudas de Estado las normas (sobre todo en lo que se refiere a los tipos de gravamen) del Impuesto sobre Sociedades de países como Irlanda o Eslovaquia, cuyos tipos medios efectivos distan mucho de la media comunitaria. En definitiva, el problema de fondo se traslada a la Unión Europea la cual desde 1975 ha sido incapaz de establecer unas normas armonizadoras (o de aproximación de legislaciones) del Impuesto sobre Sociedades, incapacidad que se verá incrementada con la incorporación en 2007, de nuevos países –que con toda probabilidad van a utilizar sus competencias legislativas tributarias para la atracción de inversiones– y con el mantenimiento, en cuestiones de fiscalidad, de la regla de la unanimidad, que el proyecto de Constitución europea sigue manteniendo.

Además, hay que tener en cuenta, si se quiere enjuiciar de forma imparcial el Concierto y el Convenio, que una empresa no traslada su producción o su actividad a Euzkadi o a Nafarroa por motivos exclusivamente fiscales, sino que en la decisión de inversión o de traslado de la actividad económica inciden otros factores, como pueden ser las infraestructuras, la cualificación de los trabajadores, la seguridad jurídica del país destinatario de la inversión, etc.

Que Concierto y Convenio supongan normas jurídicas similares en cuanto a la regulación de las relaciones financieras con el Estado central no supone, sin embargo, la existencia de diferencias que pertenecen más al plano de organización territorial que al plano económico. En efecto, mientras que la Comunidad de Navarra es uniprovincial y las afirmaciones previas son correctas, en el caso del País Vasco el titular de las competencias tributarias no es la Comunidad Autónoma, sino los Territorios Históricos (provincias) que integran la misma. De forma que los tributos concertados se regulan por las Juntas Generales (órgano parlamentario), y se gestionan y recaudan por las Diputaciones Forales (órgano ejecutivo). De forma que la Comunidad en la que se integran –el País Vasco– carece, en puridad, de competencias sobre los tributos concertados y la peculiaridad y diferenciación respecto de Navarra consiste en que la recaudación de las Diputaciones Forales se distribuye del siguiente modo:

a) Una parte se destina a financiar las competencias propias de las mismas.
b) Otra parte se destina a transferencias al Gobierno vasco, con el cual éste financia las competencias asumidas según su Estatuto de Autonomía; sin ánimo de polemizar la financiación del Gobierno vasco derivado de las aportaciones de las Diputaciones supone entre el 85% y el 90% del total del Presupuesto del País Vasco.
c) Por último, otra parte de la recaudación se destina al pago de la aportación económica al Estado (cupo), que nominalmente paga el País Vasco, pero que económicamente es soportado por las Diputaciones Forales.

En definitiva, estamos en presencia de un sistema de confederalismo fiscal –inédito en Europa, salvo en países como Suiza– donde la capacidad recaudatoria de los cantones es superior a la del Estado en el que se integran. Hasta el punto de que ni siquiera el modelo alemán sería trasladable para explicar el sistema de financiación del País Vasco. Dado el tiempo dedicado a explicar el mecanismo de financiación de Navarra y del País Vasco, no podemos adentrarnos en explicar cuestiones latentes y conflictivas como son los coeficientes verticales y horizontales de los flujos financieros, de manera que agradezco a los asistentes su atención y lamento, como supongo habrán hecho otros ponentes, la imposibilidad de adentrarnos en cuestiones importantes pero que han quedado al margen de mi intervención.

Muchas gracias a los asistentes y sobre todo a los organizadores de este foro de debate que demuestra que, incluso en materia de fiscalidad, la Europa de las regiones se superpone a la Europa de los Estados.

Eskerrik asko.

Nafarroa, 29 de noviembre de 2006.

# Reflexiones sobre la sentencia del Tribunal de Justicia de las Comunidades Europeas de 6 de septiembre de 2006 en el asunto «Azores»

JEAN-LOUIS COLSON

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Sra. Presidente, Sras. y Sres.:

Permítanme, en primer lugar, agradecer al Comité organizador del Congreso Internacional «Concierto Económico y Europa» su iniciativa y su amable invitación a participar en dicho congreso. Es para mí un gran honor y un gran placer estar hoy en este auditorio de la Universidad de Deusto y exponer algunas reflexiones personales sobre la reciente sentencia del Tribunal de Justicia de las Comunidades Europeas en el asunto «Azores».

La sentencia del Tribunal de 6 de septiembre de 2006 en el asunto C-88/03 «República Portuguesa contra Comisión», más conocido bajo el nombre «sentencia Azores», es especialmente importante en materia de ayudas de Estado. Por primera vez, en efecto, el Tribunal (Gran Sala compuesta de once jueces) define criterios cuyo objetivo

[1] Las opiniones expresadas son personales y no las de la institución a la cual el autor pertenece.

es calificar ya sea como ayuda de Estado o como medida general ciertas medidas fiscales adoptadas por una entidad regional o local de conformidad con el derecho nacional. En este sentido, el Tribunal clarifica el concepto de selectividad (aquí regional) que es, conjuntamente con los conceptos de ventaja, recursos estatales y afectación de los intercambios comerciales entre Estados miembros, constitutivo de la noción de ayuda de Estado.

En 1999, en aplicación de las competencias que le habían sido atribuidas, la región de las Azores había reducido los tipos del impuesto sobre la renta aplicables a todos los agentes económicos. Como resultado, en la región se aplicaba un tipo impositivo más bajo que en la parte continental de Portugal.

En su decisión de 2002, la Comisión consideró esta medida como ayuda de Estado. En cuanto al criterio de selectividad, que es el único que planteaba dificultades, la Comisión expresó la opinión de que resultaba satisfecho y que la medida, por lo tanto, no era general. Esta conclusión se basaba en el hecho de que la selectividad regional procede de una comparación entre la situación de las empresas beneficiarias de la ventaja y las que no lo son dentro de un marco de referencia que sólo puede ser *nacional*. El carácter necesariamente nacional del marco de referencia procede a su vez, por una parte, de la economía del Tratado y del papel fundamental que desempeñan las autoridades centrales en dicho Tratado y, por otra parte, del efecto útil del artículo 87 que no podría aplicarse de manera distinta según el estatuto de la autoridad pública que instituye la medida cuando los efectos de la misma sobre la competencia resultan idénticos.

La sentencia, que sigue de cerca las conclusiones del Abogado General Sr. Geelhoed, es especialmente didáctica y, en algunos aspectos, muy parecida a una sentencia prejudicial. El Tribunal distingue tres situaciones «en las que puede plantearse la cuestión de la clasificación como ayuda de Estado de una medida que fije, para una zona geográfica limitada, tipos impositivos reducidos en comparación con los vigentes a nivel nacional». En la primera situación, es el gobierno central quien toma sólo la decisión y, en tal caso, está claro (tan claro que el Tribunal ni siquiera lo dice) que la medida es selectiva y por lo tanto una ayuda de Estado. En la segunda situación, todas las autoridades locales de un determinado nivel en un Estado miembro (nivel regional o nivel municipal u otro nivel) tienen atribuida la facultad de fijar libremente, dentro de los límites de sus atribuciones, un tipo impositivo para el territorio de su competencia. En tal caso, la medida tomada por cualquiera de estas autoridades locales del mismo nivel no tiene selectividad, y por lo tanto no es una ayuda de Estado, puesto que no es posible determinar un nivel impositivo normal que pueda funcionar como marco de referencia. La Comisión se había expresado en favor de la misma solución para esta segunda situación también conocida como «devolución simétrica».

En la tercera situación, que es la que se aplica a las Azores, una autoridad regional o local fija, en el ejercicio de facultades lo suficientemente autónomas con respecto al poder central, un tipo impositivo inferior al nacional, que sólo es aplicable a las empresas localizadas en el territorio de su competencia. Se trata de una situación de «devolución asimétrica» en el sentido de que la autoridad en cuestión tiene una auto-

nomía fiscal en el seno del Estado miembro al cual pertenece que las otras autoridades regionales del mismo nivel no tienen.

En tal caso, el Tribunal no descarta que el marco jurídico pertinente para apreciar la selectividad sea la zona geográfica cubierta por la autoridad regional o local si ésta, «por su estatuto o sus atribuciones, desempeña un papel fundamental en la definición del medio político y económico en el que operan las empresas localizadas en el territorio de su competencia». A continuación, el Tribunal presenta tres criterios que se tienen que cumplir para que se pueda concluir que la decisión de la autoridad se tomó en ejercicio de atribuciones suficientemente autónomas: primero, la autoridad debe contar, desde el punto de vista constitucional, con un estatuto político y administrativo distinto del Gobierno central; segundo, la decisión «debe haber sido adoptada sin que el Gobierno central haya podido intervenir directamente en su contenido»; tercero, «las consecuencias financieras de una reducción del tipo impositivo nacional aplicable a las empresas localizadas en la región no deben verse compensadas por ayudas o subvenciones procedentes de otras regiones o del Gobierno central».

En el caso de las Azores, resulta claro que el tercer criterio no se cumple puesto que las reducciones del tipo impositivo se ven compensadas por un mecanismo de financiación previsto en la misma ley y gestionado a nivel central. Por lo tanto, no se puede hablar, en estas circunstancias, de verdadera autonomía fiscal y sobre todo de autonomía financiera de la región en cuestión.

Si bien es cierto que esta sentencia sin duda aclara, como he explicado al principio de esta ponencia, el concepto de selectividad regional, cabe subrayar que también deja varias cuestiones abiertas que la Comisión y el Tribunal de Justicia tendrán que contestar en los años que vienen. Sin poder ser por definición exhaustivo, se pueden mencionar las siguientes:

Aunque el primer criterio enunciado por el Tribunal parece bastante fácil de interpretar (estatuto político y administrativo distinto del gobierno central reconocido en la constitución), el segundo, sin embargo, es ya más difícil: el Tribunal indica que la medida debe haber sido adoptada sin que el Gobierno central *haya podido* intervenir. Eso significa que no basta sólo con que el Gobierno central *no haya intervenido* en el caso concreto sino que *no haya podido hacerlo* en términos jurídicos o, en otras palabras, que no haya tenido el poder de hacerlo. Se plantea inmediatamente en tal contexto el valor que se tiene que dar a la costumbre, muy importante en derecho constitucional (mucho menos en derecho administrativo), de conformidad con la cual ciertos órganos constitucionales nunca usan de algunos de los poderes que la constitución les otorga. Del mismo modo, este criterio, que se tiene que leer conjuntamente con la frase según la cual «es necesario […] que la entidad infraestatal disponga de la competencia para adoptar […] medidas […] con independencia de cualquier consideración relativa al comportamiento del Estado central» pide que nos interroguemos sobre el valor en este contexto de las consultas obligatorias no vinculantes pero que tienen una influencia sobre la decisión de la entidad. Estos dos ejemplos demuestran la dificultad del ejercicio teniendo en cuenta la diversidad de las situaciones constitucionales.

El tercer criterio enunciado por el Tribunal es aún más difícil de interpretar: una primera interpretación dejaría pensar que para que haya selectividad sería necesario que la medida fuese compensada de manera directa y clara. Dicho de otro modo, lo único que cuenta es saber si la pérdida de recursos financieros que resulta de la reducción fiscal (y sólo ella tomada de manera aislada) da lugar a una transferencia financiera por parte del Estado central (o de otras entidades regionales). Una segunda interpretación basada sobre el hecho que el dinero es fungible y que una pérdida de recursos financieros obliga a disminuir cualquier gasto público, sería que todas las transferencias financieras en favor de la autoridad regional se tuvieran que tomar en cuenta. Para aplicar este criterio sería pues necesario calcular si existe un balance financiero en favor de la autoridad regional o, en otras palabras, una transferencia financiera neta que procede del Estado central (o de otras entidades regionales). Finalmente, una interpretación más extensiva requeriría que para calcular esta transferencia financiera neta se cuantificaran todos los servicios que el Estado central presta en (o a) la autoridad regional.

Claramente no me incumbe hoy elegir entre estas interpretaciones. Sólo puedo presentar algunos argumentos que permitan entender mejor el problema en toda su complejidad. Se puede argumentar en favor de la segunda interpretación que el impacto económico de tal medida, y por lo tanto la distorsión de competencia que crea, son iguales a las de una mera ayuda con finalidad regional y que, en consecuencia, no debería tener un tratamiento jurídico distinto en materia de competencia. Habría que subrayar, además, que sólo las regiones ricas pueden tomar las medidas en cuestión sin necesitar una compensación del Estado central: la primera interpretación tendría pues como consecuencia que las regiones más ricas de la Unión Europea escaparían parcialmente al control de ayudas de Estado, en contradicción con el principio básico de cohesión económica y social del Tratado. También las palabras utilizadas por el Tribunal («ayudas o subvenciones») sugieren que éste ha querido tomar en cuenta todas las transferencias financieras y no sólo las que corresponden a la medida en cuestión. En favor de la primera interpretación, es necesario mencionar la dificultad y la complejidad de los cálculos cuando se trata de sumar flujos financieros muy distintos, la cuestión del período de tiempo durante el cual estos cálculos tienen que realizarse, el interés de fijar un criterio que nunca se cumplirá y una metodología vacía de contenido si se hace una interpretación demasiado amplia y la necesidad para el derecho comunitario de tomar en cuenta la evolución hacia mayores niveles de autonomía que se observa en varios Estados miembros.

Dos observaciones adicionales antes de acabar. Primero, una reducción de la fiscalidad aplicable sobre un territorio no implica necesariamente una disminución de los recursos fiscales. Al contrario, puede favorecer la actividad económica y así generar recursos fiscales netos adicionales. Esta visión más dinámica no parece haber sido tomada en cuenta por el Tribunal[2] cuya visión es más estática y contable. ¿Podemos inferir de ello

[2] Sin embargo, el Tribunal no la descarta completamente (ver la palabra «puede» en el punto 75 de la sentencia).

que la verdadera interpretación de la palabra «compensación» es la de «compensación directa»? ¿Podemos considerar que cuando se aumentan los recursos fiscales, el tercer criterio no existe más?

Segundo, se podría considerar que los tres criterios definidos por el Tribunal no son criterios para aplicar la noción de región que «por su estatuto o sus atribuciones, desempeña un papel fundamental en la definición del medio político y económico en el que operan las empresas localizadas en el territorio de su competencia» sino que son adicionales a esta noción. Esta lectura resultaría del hecho de que el Tribunal habla de una decisión tomada «en estas circunstancias» (las de una región tal que definida previamente) y justo después presenta los criterios que se supone definen «lo suficientemente autónomo» de la decisión. Tal lectura, que supondría que la Comisión tendría que interpretar en derecho de la competencia una noción bastante abstracta, no se puede deducir de las conclusiones del Abogado General que precedieron la sentencia.

Espero que estas palabras hayan contribuido a aclarar una sentencia difícil. Estoy convencido, de todas formas, de que sólo la práctica, mejor que un análisis abstracto, y la jurisprudencia que seguirá permitirán entender plenamente esta sentencia. Les agradezco su atención.

# El criterio de selectividad en relación con la fiscalidad regional directa y las ayudas de Estado en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas (TJCE)

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## 1. Introducción

No es necesario recordar la importancia y la actualidad del asunto que voy a tratar en mi contribución; toca a lo más genuino de la especificidad institucional vasca, tanto de la Comunidad Autónoma del País Vasco (CAPV) como de sus Territorios Históricos (TTHH) y a lo más sensible y visible de la soberanía parlamentaria: la conexión entre la representación política y la imposición: son los representantes políticos, los junteros quienes adoptan las «leyes» que fijan los impuestos en las Juntas Generales: *no taxation without representation!*

Por extensión, el tratamiento de la fiscalidad vasca desde el derecho comunitario se haría extensivo a la problemática de la Comunidad Foral Navarra, aunque desde la perspectiva del ordenamiento jurídico interno, ésta goza de un blindaje jurídico del que carecen los TTHH cuyas Normas Forales son recurribles ante la jurisdicción contencioso-

administrativa. El blindaje navarro reside en el rango formal de ley foral de su normativa fiscal y tributaria; y desde una perspectiva política el blindaje reside en la sintonía político-partidista de las CCAA limítrofes y sobre todo del anterior Gobierno del Estado.

Paradójicamente, la fiscalidad regional directa es una cuestión que no divide especialmente a los partidos políticos o a los agentes sociales del sistema institucional vasco según las líneas divisorias clásicas (los *cleavages* político-ideológicos) de la cultura política, lo cual, por lo menos, no añade complicación adicional a la tarea. Este consenso interno se ve contrarrestado por los ataques frontales de Comunidades Autónomas limítrofes con la CAPV que no aceptan el autogobierno fiscal de los TTHH.

Debo precisar en primer lugar varios aspectos relacionados con el tema de mi ponencia sobre los que no voy a realizar consideraciones por razones de espacio y tiempo o por ser abordadas por otros ponentes: la cuestión de la participación de los territorios históricos en la UE y la potestad legislativa de los territorios históricos, el derecho comparado de la fiscalidad regional directa, las medidas comunitarias de aproximación, cooperación o incluso armonización fiscal o el derecho comunitario de las ayudas de Estado. No voy a explicar los detalles del pluralismo fiscal existente en el Estado Español ni los detalles del sistema del Concierto Económico.

Me ceñiré a una cuestión concreta, partiendo del reconocimiento de un hecho jurídico cual es la soberanía de los territorios históricos y concretamente de sus poderes legislativos o más propiamente normativos, las Juntas Generales, en materia de fiscalidad, se trata de analizar cómo el ordenamiento jurídico comunitario y particularmente la jurisprudencia del TJCE procesa este dato jurídico de la fiscalidad regional directa desde el prisma del criterio de selectividad en relación con las ayudas de Estado.

El artículo 87 CE, apartado 1, dispone:

«Salvo que el presente Tratado disponga otra cosa, serán incompatibles con el mercado común, en la medida en que afecten a los intercambios comerciales entre Estados miembros, las ayudas otorgadas por los Estados o mediante fondos estatales, bajo cualquier forma, que falseen o amenacen falsear la competencia, *favoreciendo a determinadas empresas o producciones*[1].»

El artículo 87 CE, apartado 3, prevé que pueden considerarse compatibles con el mercado común: «a) las ayudas destinadas a favorecer el desarrollo económico de regiones en las que el nivel de vida sea anormalmente bajo o en las que exista una grave situación de subempleo; […] c) las ayudas destinadas a facilitar el desarrollo de determinadas actividades o de determinadas regiones económicas, siempre que no alteren las condiciones de los intercambios en forma contraria al interés común; […]».

La doctrina del TJCE (TJ) ha integrado la noción de tales ayudas con los siguientes elementos: existencia en las medidas de que se trata de una ventaja o beneficio para empresas; atribución de tales medidas al Estado; especialidad o especificidad de las

[1] Cursiva añadida para remarcar el elemento de la selectividad.

medidas en cuanto destinadas a favorecer a determinadas empresas o producciones; y falseamiento de la competencia o repercusión en los intercambios comunitarios. El apartado 2 del artículo 87 prevé exenciones de oficio relativas a objetivos sociales o paliativos de catástrofes naturales o acontecimientos de carácter excepcional. El apartado 3 del artículo 87 prevé «excepciones eventuales». Para ello es necesario que las autoridades soliciten una decisión de la Comisión Europea de conformidad de las medidas propuestas con las previsiones del propio artículo. En virtud de la jurisprudencia constante del TJ, las facultades de los órganos jurisdiccionales nacionales, en caso de ayudas no notificadas, han de orientarse a la constatación de tal circunstancia –de que se trata efectivamente de ayudas de Estado– para en caso de respuesta afirmativa, anular las correspondientes Normas, por haber sido adoptadas sin cumplir la obligación de notificación a la Comisión Europea, no cabiendo que el Juez nacional se pronuncie sobre la compatibilidad de las medidas. Esta valoración está reservada por el Tratado a la Comisión. Pero el juez doméstico sí puede interpretar las medidas como ayudas de Estado que, en caso de no estar cubiertas por el apartado 2, hubieran debido ser notificadas.

La Comisión Europea ha analizado normas tributarias de los Territorios Históricos en varias ocasiones, llegando a declarar algunas de ellas como ayudas de Estado incompatibles con el mercado común. Por ejemplo, la exención temporal conocida como vacaciones fiscales para empresas de nueva creación en el Impuesto de Sociedades de 1993[2]; o la reducción de la base imponible para empresas de nueva creación, conocida como mini-vacaciones fiscales de 1996[3]; o el crédito fiscal del 45% del importe de las inversiones en grandes proyectos de inversión[4], o el régimen especial en el Impuesto sobre Sociedades de los centros de dirección, de coordinación y financieros[5] y la deducción por actividades de exportación en el sector siderúrgico declarada ayuda de Estado en relación con la normativa vigente en territorio de régimen común[6]. Esta lista no pretende ser exhaustiva sino indicativa.

En la sentencia de 14 de diciembre de 2006, en los asuntos acumulados C – 485/03 a C-490/03, Comisión contra España, el TJ condena al Reino de España a recuperar las ayudas concedidas por los tres TTHH y declaradas contrarias a derecho comunitario en las decisiones:

– Decisión 2002/820/CE de la Comisión, de 11 de julio de 2001, relativa al régimen de ayudas estatales ejecutado por España en favor de las empresas de Álava en forma de crédito fiscal del 45 % de las inversiones (asunto C-485/03);
– Decisión 2002/892/CE de la Comisión, de 11 de julio de 2001, relativa al régimen de ayudas estatales aplicado por España a algunas empresas de reciente creación de Álava (asunto C-488/03);

[2] Decisión 2001/86/CE, de la Comisión, de 20-12-2001, (DO L 040, de 14-02-2001, p. 11).
[3] Decisión 2002/806/CE, de la Comisión, de 11-07-02, (DO L 279 de 17-10-2002, p. 35).
[4] Decisión 2003/27/CE, de la Comisión. De 11-07-03, (DO L 17 de 22-01-03, p. 1).
[5] Decisión 2003/81/CE, de la Comisión, de 22-08-03, (DO L 31 de 06-02-03, p. 26).
[6] Decisión CECA de 31-10-2001 (DO L 60 de 01-03-01, p. 57).

– Decisión 2003/27/CE de la Comisión, de 11 de julio de 2001, relativa al régimen de ayudas estatales ejecutado por España en favor de las empresas de Vizcaya en forma de crédito fiscal del 45 % de las inversiones (asunto C-487/03);
– Decisión 2002/806/CE de la Comisión, de 11 de julio de 2001, relativa al régimen de ayudas estatales aplicado por España en favor de algunas empresas de reciente creación en Vizcaya (asunto C-490/03);
– Decisión 2002/894/CE de la Comisión, de 11 de julio de 2001, relativa al régimen de ayudas estatales ejecutado por España en favor de las empresas de Guipúzcoa en forma de crédito fiscal del 45 % de las inversiones (asunto C-486/03), y
– Decisión 2002/540/CE de la Comisión, de 11 de julio de 2001, relativa al régimen de ayudas estatales aplicado por España a algunas empresas de reciente creación en Guipúzcoa (asunto C-489/03).

En esta contribución examinaré detenidamente el asunto concreto en el que el máximo órgano judicial comunitario, el Tribunal de Justicia de las Comunidades Europeas ha tenido ocasión de analizar este dato, pero no llegó a hacerlo y la última sentencia relevante sobre la cuestión, de 6 de septiembre de 2006, dictada en el asunto C-88/03, Portugal contra Comisión, conocido como el asunto de las Azores sin detenerme en los detalles. Presentaré los Asuntos acumulados C-400/97, C-401/97 y C-402/97, Administración del Estado contra Juntas Generales de Guipúzcoa y otros y analizaré las Conclusiones del Abogado General en dicho asunto, único documento disponible pero que de ninguna forma vincula al Tribunal de Justicia ni prejuzga la línea que pueda adoptar eventualmente ante un asunto similar, como viene confirmado por la sentencia Azores.

Como última fase del desarrollo, analizaré la sentencia del Tribunal Supremo español de 9 de diciembre de 2004 en la que se pronuncia sobre cuestiones que fueron objeto de consulta prejudicial al Tribunal de Justicia pero sobre las que no existió pronunciamiento pretorial.

Para terminar procederé a extraer ciertas conclusiones de carácter teórico sobre la soberanía fiscal de los territorios históricos ante la UE, incidiendo en las cuestiones siguientes: la teoría del acto claro; la autonomía institucional de los Estados miembros, el concepto de ayuda pública en derecho comunitario y la política comunitaria de ayudas, la armonización fiscal en derecho comunitario.

## 2. Los asuntos acumulados C-400/97, C-401/97 y C-402/97, Administración del Estado contra Juntas Generales de Guipúzcoa y otros

### *2.1. Descripción de la problemática y cuestión prejudicial*

Las tres Juntas Generales de las Diputaciones Forales de Guipúzcoa, de Álava y de Vizcaya adoptaron las Normas Forales n. 11/93, de 26 de junio, 18/93, de 5 de julio y 5/93, de 24 de junio, respectivamente, relativas a medidas fiscales urgentes de

apoyo a la inversión e impulso de la actividad económica (las llamaremos las Normas Forales impugnadas).

Dichas Normas Forales establecían, para el período comprendido entre su entrada en vigor y el 31 de diciembre de 1994, **una serie de beneficios fiscales** en materia de Impuesto de Sociedades y de Impuesto sobre la Renta de las Personas Físicas. Las medidas adoptadas conferían a las empresas y a las personas físicas sujetas al régimen fiscal de los Territorios Vascos algunas ventajas. Por lo que se refiere a las personas jurídicas, se trataba más concretamente de exenciones, reducciones o deducciones de los impuestos por creación de nuevas empresas, realización de inversiones en activos fijos materiales, inversiones en investigación y desarrollo, inversiones para el fomento de las exportaciones, amortización de activos nuevos, capitalización de pequeñas empresas, y contratación y formación de personal. Los mismos beneficios fiscales eran de aplicación a los sujetos pasivos del Impuesto sobre la Renta de las Personas Físicas que ejercieran actividades empresariales o profesionales y determinasen su rendimiento neto en régimen de estimación directa.

Por lo que se refiere al **ámbito de aplicación personal** de los referidos beneficios fiscales, éste venía determinado a la luz de tres parámetros «en cascada». Las Normas de referencia se aplicaban, en primer lugar, a los sujetos pasivos que tributasen exclusivamente a la Diputación Foral autora de las Normas; en segundo lugar, a los sujetos pasivos que, tributando conjuntamente a la Diputación Foral autora de la Norma y a cualquier otra Diputación Foral, tuvieran su domicilio fiscal en el Territorio Histórico de la Diputación Foral que promulgó la Norma o, teniéndolo en Territorio común, realizasen en el territorio de la Diputación Foral autora de la Norma la proporción mayor del volumen de sus operaciones; por último, a los sujetos pasivos que, tributando conjuntamente a la Diputación Foral autora de la Norma y a la Administración del Estado, o a la Diputación Foral autora de la Norma, a cualquier otra Diputación Foral y a la Administración del Estado, tuviesen su domicilio fiscal en el Territorio Histórico de la Diputación Foral autora de la Norma y el volumen de sus operaciones realizado en el País Vasco en el ejercicio anterior fuese superior al 25 % del volumen total de sus operaciones. En cuanto al Impuesto sobre la Renta de las Personas Físicas, los beneficios fiscales previstos en las Normas Forales eran de aplicación a los sujetos pasivos que tuvieran su residencia habitual en los territorios de las Diputaciones Forales de Guipúzcoa, de Álava y de Vizcaya.

Resulta necesario señalar que la Comisión, mediante **Decisión 93/337/CEE de 10 de mayo de 1993**[7], dirigida al Reino de España, se había pronunciado sobre otras Normas Forales, las 28/1988 (DFA), 8/1988 (DFB) y 6/1988 (DFG) que incluían beneficios fiscales de contenido idéntico a las recogidas en las Normas Forales impugnadas. La Comisión consideró que las ayudas fiscales a la inversión, eran, en lo que respecta a las medidas relativas al Impuesto de Sociedades y al Impuesto sobre la Renta de las Personas Físicas, incompatibles con el mercado común de conformidad

[7] Decisión de la Comisión de 10 de mayo de 1993, relativa a un sistema de ayudas fiscales a la inversión en el País Vasco (DO L 134, p. 25).

con el apartado 1 del artículo 92 del Tratado CE (artículo 87 CE), habida cuenta de que se concedieron en forma contraria al artículo 52 del Tratado CE (artículo 43 CE). La Comisión solicitaba a España que modificase el sistema fiscal con el fin de eliminar las distorsiones a más tardar el 31 de diciembre de 1993. La referida Decisión no fue objeto de impugnación, ni por parte del destinatario conforme al apartado 1 del artículo 173 del Tratado CE (artículo 230 CE), ni por parte de las autoridades vascas que habían aprobado las Normas Forales con arreglo al apartado 4 del mismo artículo. En cumplimiento de la Decisión, el Reino de España introdujo la Disposición Adicional Octava titulada «Concesión de incentivos fiscales y subvenciones a los residentes en el resto de la Unión Europea que no lo sean en territorio español», en la Ley 42/1994, de 30 de diciembre[8]. Se modificaba el régimen precedente, estableciendo que las sociedades tendrán derecho al reembolso por la Administración Tributaria del Estado de las cantidades que hubieran pagado efectivamente en exceso con respecto al supuesto de haberse podido acoger a la legislación propia de dichas Comunidades Autónomas o Territorios Históricos[9]. Como consecuencia de la adopción de la referida Disposición, la Comisión estimó, en escrito de 3 de febrero de 1995 enviado a la Representación Permanente de España ante la Unión Europea, *que el régimen fiscal vasco ya no entrañaba discriminación alguna* en el sentido del artículo 43 del Tratado CE[10].

Las Normas Forales que nos ocupan fueron impugnadas por la Administración del Estado (Abogacía del Estado) en junio y en octubre de 1994 ante el TSJPV. Entre los **motivos de impugnación**, la demandante indicaba la infracción de los artículos 43 y 87 del Tratado CE dado que tales Normas Forales excluían de los beneficios fiscales establecidos a los ciudadanos y a las sociedades de otros Estados miembros que, si bien ejercían una actividad económica en el territorio vasco, no eran al mismo tiempo residentes en territorio español.

Mediante tres autos de fecha 30 de julio de 1997, de idéntico contenido, el Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso-Administrativo) planteó al Tribunal de Justicia una **cuestión prejudicial** del siguiente tenor:

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[8] Boletín Oficial del Estado de 31 de diciembre de 1994.

[9] La sentencia de 13 de octubre de 1998, en un recurso directo interpuesto también por la Abogacía del Estado contra la Norma Foral 14/1987 de las Juntas Generales de Guipúzcoa, proclamó que el régimen fiscal del País Vasco es diferente al del resto del Estado, al igual que ocurre con otras Comunidades Autónomas, tales como Canarias y Navarra, y que en el caso del País Vasco y Navarra, tales peculiaridades tienen reflejo en el sistema de conciertos o convenios. Sin perjuicio de lo cual estimó que se habían producido en dicha Norma violaciones del principio de legalidad que afectaban a los impuestos sobre Transmisiones Patrimoniales, Sociedades, Renta de las Personas Físicas, Actividades Comerciales e Industriales, Contribución Territorial Urbana y restantes tributos de las Corporaciones Locales, que además hubieran supuesto una infracción del art. 52 del Tratado Constitutivo de la Unión Europea, de no haber mediado una obligación de reembolso por el Estado a las empresas que se establecieran en otros Estados de la Unión Europea para compensar las diferencias existentes entre el importe pagado en aplicación del sistema fiscal del territorio común y el importe derivado de la aplicación de los regímenes fiscales existentes en los territorios forales vascos.

[10] La STC 96/2002, de 25 de abril de 2002, al resolver el recurso de inconstitucionalidad 1135/95, terminaría por declarar la inconstitucionalidad de la Disposición Adicional 8.ª de la Ley 42/1994.

«Si el artículo 52 del TCE (actual 43 CE) debe ser interpretado en el sentido de que se opone al mismo y, en su caso, al artículo 92.1 de dicho Tratado (actual 87,1 CE), una reglamentación afectante a un Territorio perteneciente a una Comunidad Autónoma de un Estado miembro, relativa a medidas fiscales urgentes de apoyo a la inversión e impulso de la actividad económica, a las que pueden acogerse los sujetos pasivos que tributen exclusivamente a la Hacienda Foral de dicho Territorio o tengan su domicilio fiscal o realicen en él la proporción mayor del volumen de sus operaciones o tengan su domicilio fiscal en tal Territorio y el volumen de sus operaciones realizado en la Comunidad Autónoma en el ejercicio anterior sea superior al 25 % del total volumen de sus operaciones, y no incluye entre los beneficiarios de dichas medidas a las demás personas físicas y jurídicas residentes en el propio Estado o en otro Estado miembro de la Comunidad Europea.»

El órgano jurisdiccional nacional precisa en el auto de remisión que la aplicación de la normativa citada tenía como consecuencia que los sujetos pasivos que tuvieran la condición de no residentes en el territorio español quedaban sometidos al ordenamiento tributario del Estado y, por tanto, excluidos de la hipotética obtención de los beneficios fiscales que se contienen en las Normas Forales impugnadas.

Las JJGG y el Gobierno Vasco, partes demandadas y coadyuvantes en el procedimiento principal, presentaron una **excepción de inadmisibilidad** ante el Tribunal de Justicia considerando que las remisiones prejudiciales no eran estrictamente necesarias para la solución de los litigios planteados al TSJPV y no aportaban elementos precisos de hecho y de Derecho sobre los procedimientos principales. Mediante la adopción de la Disposición Adicional Octava de la Ley 42/1994, habían sido ya superados los posibles efectos contrarios al Derecho comunitario de las Normas Forales impugnadas ya que dicha Disposición era aplicable con efectos *ex tunc* a cualquier posible desventaja que pueda derivarse de la aplicación del régimen fiscal de los Territorios Históricos vascos. Además, la Comisión, había ya reconocido que la aprobación de la referida Disposición hizo desaparecer cualquier tipo de duda en relación con la compatibilidad con el Derecho comunitario de las disposiciones fiscales del País Vasco. Insistían además en el hecho de que todas las partes en los tres procedimientos principales pusieron claramente de manifiesto ante el TSJPV que no consideraban necesario un pronunciamiento sobre la validez de las Normas Forales impugnadas, ya que cualquier incompatibilidad con el artículo 43 había quedado solventada con la aprobación de la citada Disposición Adicional.

### *2.2. Las Conclusiones del Abogado General*

Sobre la **excepción,** con muy buen criterio el AG recuerda la jurisprudencia existente en el sentido de que la decisión de remisión prejudicial adoptada por el órgano jurisdiccional que conoce del asunto principal únicamente puede ser cuestionada por el Tribunal de Justicia cuando esté claro que la interpretación o la apreciación de la validez de una norma comunitaria no tengan relación alguna con la efectividad o con

el objeto del asunto. El AG recuerda en este sentido que las partes no están en modo alguno de acuerdo sobre la solución que ha de darse a la cuestión prejudicial y, en consecuencia, a la controversia *de qua*, no resulta artificial en el sentido de la jurisprudencia Foglia v. Novello. A ello se añade, según el AG, que de las observaciones presentadas por las partes en sus escritos y en la vista no resulta del todo claro ni el ámbito de aplicación temporal de la disposición aprobada por España a efectos de eliminar la supuesta incompatibilidad de la legislación local con las disposiciones del Tratado, ni la eficacia de dicha disposición para poner realmente término a las disparidades de trato supuestamente provocadas por la propia legislación.

Pero a estas consideraciones que muy probablemente hubiera podido hacer suyas el propio TJCE, el AG añade otra mucho más polémica que va a marcar definitivamente el devenir del litigio hasta la propia sentencia del TS de diciembre de 2004: Por lo que respecta al supuesto carácter incompleto de las tres remisiones prejudiciales, que no aclaran con la precisión necesaria que **en las diversas zonas del territorio español coexisten diversos sistemas fiscales**, sino que hacen pensar en la existencia de un único sistema general con excepciones para determinadas zonas, al AG le parece suficiente señalar que la presencia de diversos sistemas fiscales plantea, realmente, un problema de fondo, que se tratará cuando corresponda, y que no es otro que el de la valoración de las medidas de que se trata a la luz de las normas comunitarias sobre ayudas de Estado, no ya a la luz del artículo 43 CE.

Lo que realizó el AG con esta afirmación tan general fue desplazar la controversia tal y como fue planteada por el órgano remitente, es decir referida a las Normas Forales impugnadas, hacia la compatibilidad de todo el sistema fiscal con los artículos 43 y 87 CE. Precisamente el AG se termina posicionando a favor de la interpretación que las partes demandadas en el asunto principal pretendían evitar pero que podría estar sugerido por el propio tenor de las cuestiones prejudiciales y que podría tener cierta ascendencia en la judicatura española, es decir que existiría un único sistema general con excepciones, «privilegios» o «fueros» para determinadas zonas. No queda claro de la lectura de las Conclusiones si esta cuestión es puramente interna y por lo tanto de obligado respeto institucional comunitario o si es también una cuestión comunitaria por su impacto en aspectos como las ayudas de Estado.

### *2.3. Sobre el fondo del asunto*

El Abogado General comienza con una descripción del régimen previsto en el Concierto que atribuye a las autoridades de los Territorios Históricos Vascos competencia para regular dentro de su territorio *el régimen tributario*, salvo los tributos que se integran en la renta de aduanas, los que se recaudan a través de monopolios fiscales y la imposición sobre alcoholes, cuya regulación es competencia exclusiva del Estado.

El Concierto Económico establece, (artículo 6 de la Ley n. 12/1981, modificada por la Ley n. 27/1990) que las personas físicas y jurídicas no residentes en el Estado

español están sujetas a la legislación fiscal del Estado y quedan excluidas, por tanto, de las ventajas previstas por la legislación fiscal del País Vasco. Según la **Disposición Adicional Octava** de la Ley 42/1994, las sociedades que operan en el Territorio Vasco, sin que puedan acogerse a las desgravaciones fiscales en él concedidas, tienen derecho al reembolso por la Administración Tributaria del Estado de las cantidades que hubieran pagado efectivamente en exceso con respecto al supuesto de haberse podido acoger a la legislación propia de los Territorios Históricos. El AG precisa, disintiendo de la posición de la Comisión, que esta Disposición Adicional no eliminó la disparidad de trato. Su razonamiento es que en el balance de una empresa, existe una considerable diferencia entre exenciones previas, como las concedidas por las disposiciones forales, y reembolso posterior, reconocido por la Disposición Adicional. El mecanismo del *solve et repete* no eliminaría la discriminación ya que las empresas de otros Estados miembros deberían dedicar tiempo y personal para seguir los trámites burocráticos necesarios para obtener el reembolso, con los consiguientes costes adicionales para la empresa. Este análisis lo realiza el AG de forma superficial sin considerar el gasto burocrático en tiempo y personal que puede suponer para las empresas «residentes» en los TTHH o para las empresas «residentes en otros Estados miembros» el justificar que cumplen las condiciones exigidas por las Normas Forales relativas a la facturación sobre el total de operaciones, y comparar seguidamente dicho gasto y esfuerzo con el que pudiera representar la *repetitio ex post*.

El AG continúa con un breve pero correcto repaso de la jurisprudencia comunitaria relativa a la **libertad de establecimiento** (artículo 43 y ss CE). Dentro del ámbito de aplicación de los artículos 43 y 48 del Tratado CE, el domicilio de las sociedades sirve para determinar, a semejanza de la nacionalidad de las personas físicas, su sujeción al ordenamiento jurídico de un Estado. La libertad de establecimiento permite a los nacionales de un Estado miembro el acceso a las actividades no asalariadas y su ejercicio en las mismas condiciones que las fijadas por la legislación del Estado miembro de establecimiento para sus propios nacionales y comprende, conforme al artículo 58 del Tratado (artículo 48 CE), para las sociedades constituidas de conformidad con la legislación de un Estado miembro y cuya sede social, administración central o centro de actividad principal se encuentre dentro de la Comunidad, el derecho a ejercer su actividad en el Estado miembro de que se trate por medio de una sucursal o agencia[11]. De la sentencia Comisión/Francia[12], se extrae que «admitir que el Estado miembro donde se encuentra el establecimiento puede aplicar libremente un trato diferente, por la única razón de que el domicilio de una sociedad se halle en otro Estado miembro, privaría […] de su contenido a esta disposición». Si bien es cierto que, a falta de medidas de armonización, la fiscalidad directa es competencia de los Estados miembros, estos últimos deben ejercerla respetando el Derecho comunitario. Está comprendido, pues, dentro del ámbito de aplicación del artículo 43 del Tratado CE un

[11] Sentencia del Tribunal de Justicia de 12 de abril de 1994, Halliburton (C-1/93, Rec. p. I-1137), apartado 14.

[12] Sentencia de 28 de enero de 1986 (270/83, Rec. p. 273), apartado 18.

trato fiscal discriminatorio que obstaculice o limite el ejercicio del derecho de establecimiento[13].

Respecto de la posibles restricciones a la libertad de establecimiento, el artículo 46 del Tratado CE deja bien claro que sólo en supuestos taxativos y excepcionales –orden público, seguridad y salud públicas– puede estar justificada la existencia de legislaciones nacionales discriminatorias pero que consideraciones de mero carácter económico, como la pérdida de ingresos fiscales o la lucha contra el fraude fiscal, no pueden justificar la existencia de restricciones[14]. Una de las vías de justificación que en su momento contempló el TJCE (asunto *Bachmann*[15]) es la necesidad de mantener la **coherencia del régimen** fiscal o tributario en el sentido de un vínculo directo entre tributación y deducción o una relación de compensación entre las cantidades recaudadas por el Estado como consecuencia de la tributación y las devueltas a los contribuyentes en forma de deducción siempre dentro del mismo sistema tributario[16]. Las partes demandadas y coadyuvantes en el asunto principal argumentaron que los criterios de sujeción son reflejo del reparto interno de competencias entre las autoridades tributarias del País Vasco y las del Estado y la coherencia se situaría entonces en el equilibrio entre los distintos sistemas tributarios existentes en el Estado español. El TJCE ha establecido tantas condiciones a la aplicación de la jurisprudencia *Bachmann* en sentencias como *Svensson, Asscher y Futura Participations*[17],o *Bosal Holding*[18] que puede afirmarse que se trata de una jurisprudencia extravagante. La sentencia de 13-12-2005, en el asunto C-446/03 Marks & Spencer ha dado la ocasión al Tribunal de precisar más la excepción al declarar que los artículos 43 CE y 48 CE no se oponen a la normativa de un Estado miembro que excluye con carácter general la posibilidad de que una sociedad matriz residente deduzca de su beneficio imponible las pérdidas sufridas en otro Estado miembro por una filial establecida en el territorio de éste, cuando prevé tal posibilidad en el caso de pérdidas sufridas por las filiales residentes,

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[13] Sentencias de 4 de octubre de 1991, Comisión/Reino Unido (C-246/89, Rec. p. I-4585); de 14 de febrero de 1995, Schumacker (C-279/93, Rec. p. I-225); de 27 de junio de 1996, Asscher (C-107/94, Rec. p. I-3089); de 15 de mayo de 1997, Futura Participations SA (C-250/95, Rec. p. I-2471), y de 16 de julio de 1998, ICI (C-264/96, Rec. p. I-4695).

[14] Sentencia de 13 de julio de 1993, Commerzbank (C-330/91, Rec. p. I-4017).

[15] Sentencia de 28 de enero de 1992 (C-204/90, Rec. p. I-249), apartado 28.

[16] Véase J Bengoetxea, «Los principios de coherencia y autonomía fiscal» en «*Derecho Comunitario. Análisis jurisprudencial*», pags. 197-216, editado por el Consejo General del Poder Judicial y el Gobierno Vasco, Vitoria-Gasteiz, 1997.

[17] Mencionadas en las notas anteriores. En el asunto *Bachmann*, la pérdida de ingresos fiscales debida a la deducción de las primas de seguro de vida resultaba compensada por el impuesto aplicado sobre las pensiones, rendimientos y capitales adeudados por los aseguradores. En el caso *Svensson*, el Tribunal de Justicia precisó además que no basta con la existencia de dicho vínculo, sino que debe tratarse de un vínculo directo entre las dos operaciones. En aquel caso, relativo a un régimen de ayuda a la vivienda en forma de bonificación de intereses sobre préstamos contraídos con entidades de crédito establecidas en el territorio nacional, el Tribunal de Justicia señaló (apartado 18 de la citada sentencia) que «no existe, en el presente caso, ningún vínculo directo entre, por un lado, la concesión de la bonificación de interés a los prestatarios y, por otro, su financiación a través del impuesto que grava los beneficios de las entidades financieras».

[18] C-168/01, sentencia de 18-09-2003.

pero sí se opone si la filial no residente ha agotado las posibilidades de que se tengan en cuenta las pérdidas sufridas en su Estado de residencia.

El AG considera que la normativa del País Vasco subordina la concesión de beneficios fiscales al requisito de la residencia, del domicilio fiscal o de la realización de una parte importante del volumen total de las operaciones en territorio vasco. Una sociedad de otro Estado miembro que desease abrir una sucursal, una agencia o un establecimiento en el País Vasco, manteniendo su actividad propia (y, por consiguiente, su domicilio fiscal) en el país de origen, no podría beneficiarse de dichas ayudas. Pero esta afirmación no la matiza con el efecto de la Disposición Adicional mencionada. El AG proponía responder a la primera pregunta en el sentido de que el artículo 43 del Tratado CE se opone a una normativa relativa a medidas urgentes de apoyo a la inversión a las que pueden acogerse los sujetos pasivos que tributen exclusivamente a la Hacienda Foral de los Territorios Históricos Vascos o tengan su domicilio fiscal o realicen en él la mayor parte de su volumen de operaciones, o tengan su domicilio fiscal en tal Territorio y su volumen de operaciones realizado en la Comunidad Autónoma en el ejercicio anterior sea superior al 25 % de su volumen total de operaciones, y que no incluye entre los beneficiarios de dichas medidas a las demás personas físicas o jurídicas residentes en otro Estado miembro de la Comunidad Europea.

La segunda parte de la cuestión prejudicial se refiere a la posible compatibilidad de las medidas de apoyo a la inversión adoptadas por las autoridades vascas con las **disposiciones del Tratado sobre ayudas de Estado** (artículos 87 y siguientes del Tratado CE). El AG Saggio concluirá que se trata de ayudas de Estado no justificadas. El mismo precisa que en la medida en que se traten de ayudas de Estado no notificadas, los órganos jurisdiccionales internos pueden anularlas directamente[19]. Esta hipótesis no se discute en profundidad en el asunto y tampoco se detiene a analizar que las medidas habían sido objeto de análisis por parte de la Comisión bajo el tamiz del artículo 43 CE y que por tanto pudieran considerarse como ya conocidas por la Comisión, lo cual le hubiera conducido seguramente a analizar si las autoridades que adoptaron dichas disposiciones hubieran podido alegar una protección de expectativas legítimas al no haber la Comisión planteado el debate en términos de control de las ayudas de Estado. Pero ésta es otra problemática distinta. Tampoco analiza el AG si precisamente la obligación de notificación afecta a un tipo de medidas fiscales cuya calificación de ayudas de Estado hubiera resultado novedosa y poco evidente.

Para analizar si las medidas contenidas en las Normas Forales están comprendidas dentro del concepto de ayuda recogido en el apartado 1 del artículo 87, el AG centra

[19] La sentencia de 11 de julio de 1996, *SFEI* (C-39/94, Rec. p. I-3547), apartado 39, en la que el Tribunal de Justicia precisó que «la intervención de los órganos jurisdiccionales nacionales […] se debe al efecto directo reconocido a la prohibición de ejecución de los proyectos de ayuda establecida por la última frase del apartado 3 del artículo 93». El Tribunal de Justicia añadió, en consecuencia, que «el carácter inmediatamente aplicable de la prohibición de ejecución prevista en este artículo alcanza a toda ayuda que haya sido ejecutada sin haber sido notificada».

el análisis en **tres elementos**: la imputabilidad de las medidas de que se trata al Estado español; la existencia de una ventaja o beneficio perceptibles por las empresas, obtenidos a resultas de una intervención pública; la especificidad de las medidas estatales, por cuanto van destinadas a favorecer a algunas empresas o producciones. El AG pasa a analizar los tres elementos, pero confundiéndolos en ocasiones. Lo esencial en este asunto reside en la especificidad o selectividad.

### *2.4. La existencia de una ventaja o beneficio*

Considera que no puede ponerse en duda que las medidas adoptadas por las Juntas Forales en virtud de las competencias conferidas por la Ley n. 12/1981, de 13 de mayo, por la que se aprueba el Concierto Económico, constituyen una ayuda concedida en forma de beneficios fiscales y son imputables al Estado. Se apoya para ello el AG en una reiterada jurisprudencia del Tribunal de Justicia según la cual el concepto de ayuda comprende «no sólo las prestaciones positivas, como las propias subvenciones, sino también las intervenciones que, bajo formas diversas, alivian las cargas que normalmente recaen sobre el presupuesto de una empresa y que, por ello, sin ser subvenciones en el sentido estricto del término, son de la misma naturaleza y tienen efectos idénticos»[20].

Es interesante traer a colación el precedente concreto que cita el AG, la sentencia Banco Exterior, donde se especificaba que «una medida mediante la cual las autoridades públicas conceden a determinadas empresas una exención tributaria que, aunque no implique una transferencia de fondos estatales, coloque a los beneficiarios en una situación financiera más favorable que a los restantes contribuyentes, constituye una ayuda de Estado en el sentido del apartado 1 del artículo 92 del Tratado»[21]. De esta afirmación deduce que las Normas Forales impugnadas constituyen una ayuda, por cuanto tienen como resultado aliviar la carga fiscal soportada por las empresas comprendidas dentro del ámbito de aplicación subjetivo de las propias Normas.

Realiza para ello un salto en el razonamiento: nadie cuestiona que las ayudas de Estado puedan adoptar la forma de exenciones tributarias pero lo que debe probarse es que estas exenciones colocan a los beneficiarios en una situación financiera más favorable que a *los restantes contribuyentes*. Pero **¿cómo se determina quiénes son los restantes contribuyentes?** Si las exenciones se conceden a todas las empresas sometidas a un mismo régimen tributario que cumplan determinadas condiciones, resultará necesario demostrar que la exención concedida a una empresa la coloca en

[20] Sentencia de 23 de febrero de 1961, Steenkolenmijnen/Alta Autoridad (30/59, Rec. p. 3); y como más recientes, las sentencias de 15 de marzo de 1994, Banco Exterior (C-387/92, Rec. p. I-877), y de 1 de diciembre de 1998, Ecotrade (C-200/97, aún no publicada en la Recopilación).

[21] Sentencia antes citada, apartado 14, y sentencia de 19 de mayo de 1999, República Italiana/Comisión (C-6/97, aún no publicada en la Recopilación), apartado 16.

una situación más favorable desde el momento en que su competidora puede acceder a la misma exención. Sobre esta cuestión incidirá al tratar el tercer elemento.

### *2.5. Imputabilidad al Estado*

Al analizar la imputabilidad al Estado de las medidas impugnadas el AG resulta aún más superficial pues le basta con referirse a la sentencia República Federal de Alemania/Comisión[22] donde se consideró imputable a la RFA un sistema de ayudas establecido por el Land de Renania del Norte-Westfalia en el ámbito de un programa de mejora de la estructura económica regional, a favor de empresas establecidas en algunas zonas de su territorio. «La normativa regional se había adoptado con arreglo a una Ley marco federal. Al examinar la legalidad de la Decisión de la Comisión que consideraba que el programa de ayudas regionales era incompatible con el mercado común, el Tribunal de Justicia señaló que «el hecho de que este programa de ayudas haya sido adoptado por un Estado federado o por una colectividad territorial y no por el poder federal o central no impide la aplicación del apartado 1 del artículo 92 del Tratado, si se cumplen los requisitos de este artículo. En efecto, dicha disposición, al mencionar las ayudas concedidas por los Estados mediante fondos estatales bajo cualquier forma, se refiere a todas las ayudas financiadas por medio de recursos públicos. De ello se deduce que las ayudas concedidas por las entidades regionales y locales de los Estados miembros, cualesquiera que sean su estatuto y denominación, deben también ser examinadas, en el sentido del artículo 92 del Tratado». De ayudas concedidas por entidades territoriales se trataba también en el asunto *Exécutif régional wallon* y *SA Glaverbel/* Comisión, resuelto por el Tribunal de Justicia mediante sentencia de 8 de marzo de 1988[23]. En aquel caso, el Tribunal de Justicia examinó, previo recurso presentado por el [gobierno valón], la legalidad de la Decisión, dirigida al Estado belga, mediante la cual se declaraba incompatible con el mercado común un proyecto de ayudas a la producción que deberían haber sido concedidas por las autoridades regionales citadas[24]. En definitiva, la circunstancia de que las medidas concretas de ayuda sean adoptadas o concedidas por entidades territoriales no excluye la imputabilidad al Estado de las mismas a efectos de la aplicación de las normas comunitarias sobre ayudas de Estado. Por con-

[22] Sentencia de 14 de octubre de 1987 (248/84, Rec. p. 4014).

[23] Asuntos acumulados 62/87 y 72/87, Rec. p. 1573.

[24] La imputación a los Estados de las medidas de ayuda adoptadas por entidades territoriales resulta del sistema general previsto por el Tratado, para el cual el único interlocutor de la Comisión en el procedimiento de evaluación de las ayudas, así como en cada una de las fases sucesivas del sistema centralizado de evaluación contemplado en el artículo 88, es exclusivamente el Estado. En este mismo contexto, véase la sentencia de 11 de julio de 1984, Comisión/Italia (130/83, Rec. p. 2849). En aquella ocasión, al condenar a Italia por no haberse atenido a una Decisión de la Comisión por la que se declaraba la incompatibilidad de algunas ayudas y asignaciones concedidas por la Región de Sicilia con arreglo a una Ley regional, el Tribunal de Justicia no acogió la excepción formulada por el Gobierno italiano, que manifestaba que había intervenido en varias ocasiones ante la Región de Sicilia para inducirla a que derogase las normas a que se refiere la Decisión de la Comisión (apartado 3 de la sentencia).

siguiente, las Normas objeto de controversia en el presente asunto están comprendidas dentro del ámbito de aplicación del artículo 87 del Tratado CE».

Se ha mantenido la cita in extenso para percibir mejor la falacia en la que incurre, similar a la anterior. Del mismo modo, nadie cuestiona que la ayuda **concedida por una autoridad regional** pueda considerarse una ayuda pública; eso no es lo que se cuestiona en las Normas Forales impugnadas. Es obvio, también en derecho comunitario, que al tratarse de recursos públicos nos colocamos en la dimensión estatal. De ahí a decidir que por el hecho de ser concedidas por autoridades regionales deban convertirse automáticamente en específicas hay un *non sequitur* abismal. Precisamente si las ayudas de un *Land* se apoyan en el desarrollo de una *ley marco* federal, será porque forman parte del mismo sistema tributario. El caso de los TTHH presenta una especificidad que parece habérsele escapado al AG y es que no cabría ninguna analogía con una ley marco estatal y un desarrollo (subordinado a dicha ley marco) por parte de un TH; esto es inconcebible en el sistema del Convenio o del Concierto, donde nos encontramos en presencia de sistemas tributarios distintos y separados pero esta cuestión nuevamente nos lleva a la especificidad.

### *2.6. La especificidad o selectividad*

Hemos llegado al núcleo de la problemática que nos ocupa. La especificad o selectividad consiste en que la ayuda favorezca, en términos de competencia «a algunas empresas o producciones» en un universo de comparación más amplio donde otras empresas o producciones resultan comparativamente desfavorecidas. Los criterios jurisprudenciales para detectar la especificidad los recuerda acertadamente el AG. Se trata de ayudas destinadas a sectores específicos[25], a una empresa determinada[26], a empresas establecidas en una región determinada[27]. El Abogado General Sr. Darmon en sus conclusiones sobre el asunto Sloman Neptun[28], incide en el carácter excepcional de la medida respecto a la estructura del sistema general al que se atiene pero el Tribunal de Justicia no adoptó este criterio. El AG plantea el análisis en la comparación entre el sistema foral y el sistema común español sin reparar en un dato crucial, el sistema *común* español no es aplicable a los territorios históricos. El AG comete el mismo error que imputa a las partes demandadas en el asunto principal al examinar el principio de la coherencia ya que no alcanza a entender que la especificidad debe examinarse dentro del mismo sistema tributario y no entre sistemas tributarios independientes por mucho que se encuentren en el mismo Estado miembro.

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[25] Sentencia de 2 de julio de 1974, Gobierno de la República Italiana/Comisión) (173/73, Rec. p. 709), apartados 27 y 28.

[26] Sentencias Gobierno de la República Italiana/Comisión, antes citada, y de 2 de febrero de 1988, Van der Kooy (asuntos acumulados 67/85, 68/85 y 70/85, Rec. p. 219).

[27] Sentencia República Federal de Alemania/Comisión, antes citada.

[28] Sentencia de 17 de marzo de 1993 (asuntos acumulados C-72/91 y C-73/91, Rec. p. I-887).

Para el AG «se trata, en realidad, de dilucidar si dichas medidas constituyen, en efecto, una «ayuda de Estado», que atribuye una ventaja en términos de competencia respecto a otras empresas sujetas al sistema común, o bien una medida de carácter general que forma parte, en cuanto tal, de las decisiones político-económicas del Estado, incontrolables a nivel comunitario con arreglo a las normas recogidas en los artículos 87 y siguientes del Tratado CE y sujetas, en su caso, a otras disposiciones del Tratado menos rigurosas. A tal efecto, en una primera aproximación, pueden considerarse «medidas generales» las disposiciones de carácter legal y reglamentario que sean de aplicación general dentro de un determinado Estado miembro, mientras que las medidas, imputables al Estado, que favorezcan a algunos sectores económicos o a determinados operadores con respecto a otros deberán considerarse «ayudas» en el sentido del artículo 87». Independientemente de lo absolutamente reduccionista e incorrecto de esta última afirmación, que él mismo se ve obligado a matizar en el apartado siguiente, nos encontramos ante un planteamiento estatalista jacobino –uniformizador y centralizador– que niega que dentro del mismo Estado pueda producirse una fragmentación de sistemas tributarios o incluso una distribución federal ya que parece apuntar a que las medidas adoptadas por una entidad federal, por un fragmento territorial del Estado por definición no podrán ser de carácter legal y reglamentario ni de aplicación general dentro de un determinado Estado miembro.

El AG detecta pues una especificidad o selectividad en el hecho de que se trata de beneficios fiscales concedidos exclusivamente a las empresas que responden a los requisitos indicados en las Normas Forales: básicamente, las empresas que tienen su domicilio fiscal en el País Vasco. Detecta igualmente selectividad en el hecho de que se trata de una medida normativa «excepcional» respecto del «sistema general». Para nada analiza los puntos de conexión, tan importantes en el sistema tributario del Concierto. Se ve claramente el error de concepto o de categoría al considerar que el sistema tributario aplicable en el Estado español en el territorio que no comprende a los territorios históricos es el sistema general; cuando en realidad no es más que el sistema aplicable en la mayor parte del territorio español y a la mayor parte de los contribuyentes en España.

Dice literalmente en el apartado 35: «Aquéllas van destinadas exclusivamente a empresas establecidas en una determinada región del Estado miembro de que se trate y constituyen para las mismas una ventaja de la que no pueden disfrutar empresas que lleven a cabo operaciones económicas análogas en otras zonas del mismo Estado.»

Al argumento presentado conjuntamente por las partes demandadas en el asunto principal y la abogacía del Estado, como interviniente en el asunto prejudicial (¡pero parte demandante en el asunto principal!) en el sentido de que las normas de atribución de competencias en materia fiscal a las autoridades de los Territorios Históricos no son distintas de las normas que regulan el reparto de competencias entre autoridades fiscales soberanas de dos Estados miembros de la Unión Europea y que las divergencias entre sistemas tributarios no pueden constituir una ayuda de Estado en el sentido del artículo 87, mientras que el único remedio a las distorsiones causadas al mercado es

la adopción de medidas de armonización de las legislaciones nacionales, el AG replica que la supuesta soberanía fiscal es «una circunstancia meramente formal que no es suficiente para justificar el trato preferencial dado a las empresas comprendidas dentro del ámbito de aplicación de las Normas Forales. De no ser así, el Estado podría fácilmente evitar la aplicación, en parte de su propio territorio, de las disposiciones comunitarias en materia de ayudas de Estado simplemente introduciendo modificaciones al reparto interno de competencias en determinadas materias, para poder invocar el carácter «general», para ese determinado territorio, de las medidas de referencia».

Parece irrisorio concebir que un Estado miembro vaya a fragmentar su sistema tributario único para pasar a una diversidad de sistemas tributarios sólo para poder invocar el carácter general de las medidas. Parece además absurdo que pueda además hacerlo «fácilmente» como sugiere el AG. Incluso si tratase *sólo* de un rediseño del reparto competencial interno en determinadas materias, lo que no le colocaría en la situación en que se encuentra el Estado español en materia tributaria. Todo constitucionalista sabe que los rediseños constitucionales no se realizan a capricho ni con liviandad.

Añade además el AG que dicha argumentación tendría difícil justificación a la luz de la jurisprudencia del Tribunal de Justicia[29] y especialmente de la sentencia Comisión/Italia, (Región de Sicilia)[30], de la cual se desprende que todas las medidas que implican una ventaja en términos de competencia, limitada a las empresas que invierten en una determinada zona del Estado miembro, son imputables al Estado de que se trate y, en consecuencia, por definición, no pueden considerarse, dentro del sistema del régimen tributario del Estado, medidas de carácter general». Vuelve a mezclar los criterios: no se trata tanto de un reparto competencial dentro de un mismo sistema tributario sino de sistemas distintos.

Pero lo peor está por venir, en el apartado 38 afirma el AG que «La autonomía fiscal de los Territorios Vascos no refleja… ninguna especificidad del territorio de que se trata –por lo que se refiere a condiciones económicas como el nivel de empleo, los costes de producción, las infraestructuras, el coste de la mano de obra– que exija, de rebote, un trato fiscal diferente con respecto al vigente en el resto del territorio español. El régimen resultante de las Normas de que se trata no responde a otra lógica que no sea la de favorecer las inversiones en los Territorios Históricos. Los motivos aducidos por las autoridades vascas para la adopción de las medidas demuestran, en efecto, que se trata de normas coyunturales destinadas a mejorar la competitividad de las empresas a las que se aplican para hacer frente a los retos del mercado. Ello pone de relieve claramente, una vez más, el carácter excepcional y singular de las medidas respecto a la lógica general de la normativa tributaria». En

[29] Las sentencias citadas anteriormente y la sentencia de 14 de noviembre de 1984, Intermills (323/82, Rec. p. 3809).

[30] Sentencias Gobierno de la República Italiana/Comisión, citada en la nota 31 supra, y de 9 de diciembre de 1997, Tierce Ladbroke (C-353/95 P, Rec. p. I-7007).

este apartado se percibe con claridad el planteamiento del AG: es imposible que un sistema territorial sea general, a lo sumo estaría justificado por una especificidad regional como excepción al sistema general.

Pero todo el edificio está montando sobre un error: no existe ningún sistema general en España. Es curioso además que un antiguo presidente del Tribunal de Primera Instancia se sorprenda de que la lógica a la que responden las medidas fiscales no sea otra que la de favorecer las inversiones. ¿Alguien conoce un sistema fiscal que no responda a esta lógica?

Como veremos, la sentencia Azores deja claro que estas disquisiciones del AG Saggio eran totalmente extravagantes.

### *2.7. Retirada del Asunto*

Mediante auto de 16 de febrero de 2000, el Presidente del Tribunal de Justicia decidió retirar los asuntos acumulados C-400/97, C-401/97 y C-402/97 del registro del Tribunal. Mediante escritos de 8 de febrero de 2000 el Tribunal Superior de Justicia del País Vasco había comunicado al Tribunal de Justicia que retiraba la cuestión prejudicial planteada mediante auto de remisión de 30 de julio de 1997. Las costas correspondientes a las partes principales en el asunto principal se dilucidan en el asunto principal por el órgano jurisdiccional remitente.

Esta es la única realidad jurídica verificable. Según la Sentencia del TS de 9 de diciembre de 2004, las prejudiciales se retiraron «como consecuencia de los acuerdos logrados con la Administración Central». Tras ella se desenvuelve una compleja trama de negociaciones jurídicas y sobre todo políticas que llevaron a la retirada de la cuestión prejudicial. Puede suponerse que para todas las partes resultaba arriesgada y desconcertante la cuestión prejudicial. Para las partes demandadas en los asuntos principales, las Juntas Generales y las Diputaciones Forales y para el Gobierno Vasco como coadyuvante en la causa, las Conclusiones del Abogado General Saggio presentaban una amenaza seria no ya de anular las Normas Forales sino, a minore ad maius, el propio sistema del Concierto sobre el que se asienta la soberanía fiscal de los Territorios Históricos, detentada por las Juntas Generales y sobre el que se asienta la peculiar estructura federal de la Comunidad Autónoma de Euskadi. Esta amenaza planeaba también sobre el sistema del Convenio Navarro, que sin embargo, seguramente por motivos políticos, parecía salir ileso de los ataques de Comunidades Autónomas limítrofes y de la propia Abogacía del Estado.

Pero la propia Abogacía del Estado y el Reino de España como Estado Miembro tenían serios motivos para la retirada. Desde un punto de vista de justicia procesal se encontraba en una esquizofrénica situación de demandante y demandado, algo insólito en derecho comunitario y totalmente contrario a los requisitos de un proceso justo y del principio de igualdad de armas y del contradictorio (artículo 24 de la CE y artículo 6 del Convenio Europeo de Derechos Humanos), por no hablar de su indecencia

moral y política. Fue la autora de la impugnación ante el TSJPV pero al mismo tiempo el Reino de España, a través de la Abogacía del Estado, presentaba sus observaciones ante el Tribunal de Justicia en defensa de las Normas Forales que atacaba en el asunto principal.

Por su parte la Comisión se situaba en una postura curiosa ya que había aprobado el sistema de las Normas Forales desde la perspectiva del derecho de establecimiento gracias a la Disposición Adicional Octava de la Ley nº 42/94 y el AG ahora concluía en el sentido de la incompatibilidad de las medidas impugnadas con la libertad de establecimiento por el trato discriminatorio. Respecto del carácter de ayudas, la Comisión parecía posicionarse en lineamientos similares a los del AG pero se encontraba en la compleja situación de no haber actuado desde la DG de la Competencia al tener conocimiento del régimen.

El propio Tribunal de Justicia debió experimentar un cierto alivio al ver retirada la prejudicial ya que su sistema jurídico y procesal permitía y sigue permitiendo una situación en la que las regiones sólo tienen una consideración procesal como la de un particular y se llegaba a una situación en que un demandante en los asuntos principales se posicionaba con los propios demandados en Luxemburgo con lo que se burla uno de los elementos esenciales del litigio y la propia razón de ser del sistema prejudicial.

Es muy posible que todas las partes implicadas en el asunto se sintiesen aliviadas por la retirada del asunto a quo. Sólo el TSJPV se encontraría perplejo ante la situación; había sido este órgano el que había planteado por iniciativa propia una cuestión prejudicial que ninguna parte había considerado necesaria a la luz precisamente del escrito de la Comisión considerando el sistema compatible con la libertad de establecimiento. Ahora retiraba el asunto quizá con más dudas que antes. Estamos ante un fracaso del sistema de cooperación judicial previsto por el Tratado, una quiebra a la que contribuye indudablemente el Abogado General.

Cabe especular sobre lo que hubiera ocurrido ante el Tribunal de Justicia. Está fuera de toda duda que las Conclusiones de un Abogado General no vinculan al Tribunal de Justicia y tampoco lo condicionan de ningún modo. Incluso si el Tribunal de Justicia se hubiera pronunciado sobre la compatibilidad de las Normas Forales con el derecho comunitario en sentido negativo, es perfectamente posible que no hubiera seguido las conclusiones de Saggio respecto de la especificidad o selectividad mostrando mayor sensibilidad constitucional hacia la autonomía institucional de los Estados miembros. La retirada de la prejudicial ha tenido la consecuencia de dejar en manos del Tribunal Supremo la calificación interna propia al sistema jurídico español o la calificación comunitaria del régimen tributario de los TTHH.

Con retrospectiva, y a la luz de la sentencia Azores, cabe quizá considerar que lo más adecuado hubiera sido no retirar el asunto principal y mantener la prejudicial. En su momento así se lo hice saber al Gobierno Vasco. Lógicamente mi criterio, formulado desde mi condición de ex-letrado del TJCE, no fue tenido en cuenta.

## 3. La sentencia del Tribunal Supremo de 9 de diciembre de 2004 en el asunto

Las Normas Forales que son objeto del presente recurso 24/1996, de Álava, 3/1996, de Vizcaya y 7/1996, de Guipúzcoa, conceden ayudas fiscales consistentes en la reducción de la base imponible para algunas empresas de reciente creación, así como ayudas en forma de crédito fiscal. Algunas de sus disposiciones han sido objeto de varias Decisiones de la Comisión de 11 de julio de 2001 y de Sentencias del Tribunal de Primera Instancia de la Comunidad Europea, de 6 de marzo de 2002, y del TJCE.

La Federación de empresarios de La Rioja interpuso recurso contencioso administrativo contra las Normas Forales de las JJGG de Guipúzcoa 7/1996, de Bizkaia 3/1996 y de Alava, 24/1996 y subsidiariamente contra una serie de artículos de estas Normas Forales, ante el Tribunal Superior de Justicia del País Vasco. El TSJPV estimó parcialmente el recurso, rechazando el motivo de inadmisibilidad de falta de legitimación –por falta de interés o por el carácter meramente hipotético del supuesto efecto deslocalizador– opuesto por las demandadas[31] y anuló el artículo 26 de las Normas Forales sin hacer imposición en costas. Demandadas y demandantes interpusieron sendos recursos ante el Tribunal Supremo.

Respecto al motivo de inadmisibilidad, el TS concluye que no puede negarse a la Federación de Empresarios de La Rioja una legitimación suficiente para el ejercicio de la acción frente a las Normas Forales de que se trata en la medida en que éstas puedan ser discriminatorias o su aplicación redundar en perjuicio de los intereses empresariales cuya defensa tiene asumida como fin específico.

Pasando al meollo del asunto, es decir, «la naturaleza de las Normas Forales», veamos la argumentación del TS, que este órgano presenta como consecuencia de una línea jurisprudencial. El Supremo realiza una argumentación en dos planos, uno general con dos pasos, el análisis de la naturaleza del régimen tributario de los TTHH dentro del sistema de fuentes considerando que las NNFF no tienen rango de ley, y el segundo sobre las Normas Forales atacadas. En el plano concreto procede a analizar la sentencia recurrida y la cuestión de compatibilidad de las NNFF con el derecho comunitario y con el derecho interno. Son estos últimos los aspectos que analizo en esta sede.

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[31] Excepción previamente rechazada en sentencias anteriores como las de 3 de noviembre de 2004 (rec. cas. 8648/2004), de 26 de julio de 2003 (rec. cas. 10581/1998) y 11 de febrero de 2004 (rec. cas. 10590/98) que reconocen legitimación a la Cámara Oficial de Comercio e Industria de La Rioja, a la Comunidad Autónoma de La Rioja y a la Comunidad Autónoma de Cantabria para impugnar Normas Forales reguladoras del Impuesto de Sociedades: el interés legítimo no sólo es superador y más amplio que el interés directo sino que es, por sí, autosuficiente, en cuanto presupone que la resolución administrativa o la disposición general impugnada ha repercutido o puede repercutir, directa o indirectamente, pero de un modo efectivo y acreditado, es decir, no meramente hipotético, potencial y futuro, en la correspondiente esfera jurídica de quien formula la demanda.

A) **Plano General** sobre el sistema tributario de los TTHH (fundamento quinto). En primer lugar el TS niega el carácter (formal) de ley a las NNFF, a pesar de su potestad normativa «sui generis», reservando la potestad legislativa al Estado (Const E: art. 62.2) y a la Comunidad Autónoma [art. 152.1 y 153.a]). «Las propias Normas Forales reconocen la subordinación a la Ley del Concierto que define los principios a los que ha de sujetarse el ejercicio de la potestad tributaria de los Territorios Históricos… La capacidad normativa de dichos Territorios se ejerce en el marco de la Constitución y de la Ley, aunque los límites definidos por ésta sean, en ocasiones, extraordinariamente amplios e implique, de hecho, una deslegalización [sic!] en materia tributaria que ha resultado posible por la citada Disposición Adicional Primera de la Norma Fundamental… Y, en todo caso, en tanto no se produzca una reforma de la Ley Orgánica del Tribunal Constitucional que permita residenciar ante este Tribunal la impugnación de las Normas Forales, el producto normativo de las Juntas Generales, de carácter reglamentario, ha de estar sometido a los controles de constitucionalidad y de legalidad de la Jurisdicción Contencioso-Administrativa, haciendo efectivas las exigencias de tutela judicial (art. 24.1 CE) y de sometimiento a Derecho de los poderes públicos».

Pasando, en segundo lugar, al examen del artículo 26 de las Normas Forales, el TS afirma su contradicción con el artículo 4 de la Ley del Concierto Económico, que establece la prohibición de menoscabar la competencia empresarial o distorsionar la asignación de recursos y el libre movimiento de capitales y mano de obra, así como la necesidad de una presión fiscal efectiva global que no sea inferior a la del territorio común. Exigencias que constituyen límites a la autonomía tributaria del País Vasco. Sobre estas cuestiones se expresa con mayor detenimiento en los fundamentos séptimo y octavo donde extrae varios principios de sus sentencias sobre el régimen tributario de los TTHH. No podemos entrar en estas cuestiones, pero lo que nos interesa en el fundamento quinto es que añade una afirmación que parece fuera de lugar,

> «Las más altas instancias comunitarias europeas han considerado discriminatorias las normas en cuestión (art. 26 de las Normas Forales), debiendo afirmarse que el ordenamiento comunitario rechaza la creación de incentivos que fomenten, en perjuicio de otras, la implantación de empresas en un territorio determinado dentro de la Unión Europea, alterando el juego de la libre competencia entre ellas.
>
> La prueba más evidente de las distorsiones mencionadas se da, precisamente, en el ámbito del Derecho Comunitario Europeo, como es sabido, de aplicación directa y preferente al Ordenamiento interno, y que los Jueces nacionales, como Jueces Comunitarios de Derecho Común, están obligados a salvaguardar y proteger».

Un análisis de estos dos párrafos nos muestra que son imprecisos, cuando no tergiversados. No informan realmente de nada: ni quienes son «las más altas instancias europeas», ni cuál es la norma del «ordenamiento comunitario» que rechaza la creación de tales incentivos ni cuál es el territorio del que se está hablando. Habla de una prueba evidente de distorsiones en el ámbito del Derecho comunitario europeo pero en

ningún momento se explica de qué está tratando ni se menciona el concepto de ayudas o de libertad de establecimiento o de armonización fiscal, etc. En resumidas cuentas, la pobre argumentación del TS se fundamenta en un único argumento para apoyar la incompatibilidad, el argumento de autoridad siguiente:

> «Y, en definitiva, esta Sala ha confirmado ya la procedencia de la anulación del artículo 26 de cada una de las normas forales impugnadas de Álava, Guipúzcoa y Vizcaya (24/1996, de 5 de julio, 7/1996, de 4 de julio, y 3/1996, de 26 de junio, reguladoras del Impuesto de Sociedades); por cierto posteriormente derogados (Normas Forales 7/2000, de 29 de marzo, 3/2000, de 13 de marzo y 7/2000, de 19 de julio).»

B) En el Plano **concreto de la argumentación** (fundamento sexto) el Supremo analiza la sentencia del TSJPV sometida a control de casación distinguiendo dos partes.

> Una de ellas, en la que, con carácter general, se señala que la demanda planteaba «*una cuestión de Derecho Comunitario Europeo*» de la que se hacen derivar consecuencias de Derecho interno, consistente en la declaración de nulidad de pleno derecho de las Normas Forales combatidas al amparo del artículo 62.1.*e*) de la LRJ y PAC por haberse prescindido total y absolutamente del procedimiento establecido ya que se habían aprobado omitiendo el trámite previsto en el artículo 93.3 del Tratado CEE, de comunicación previa a la Comisión ya que reconocían beneficios fiscales para las empresas susceptibles de ser calificadas «ayudas de Estado».
>
> *Y, otra parte, en la que la sentencia efectúa determinadas consideraciones particulares*. El artículo 26 de las Normas Forales es entendido como una norma que establece una acusada exoneración de gravamen que afecta al deber básico de contribuir (art. 31 CE) y que es medida desproporcionada e inidónea para obtener los fines legítimos de promoción económica, por ser susceptible de afectar indirectamente a la libre circulación de personas y bienes originando unas condiciones de ventajas inasumibles, con quiebra del principio de generalidad que no puede ser aplicado a fines que no sean especialmente cualificados constitucionalmente (sic). Por el contrario, la medida prevista en el artículo 45 de las Normas Forales, consistente en deducciones por creación de empleo (600.000 pesetas en la cuota por cada persona/año de incremento de promedio de la plantilla con contrato laboral de carácter indefinido, siempre que se mantuviera durante los dos años siguientes) es considerada proporcional por la carga que para el pasivo de la sociedad comporta la contratación indefinida, no pudiéndose afirmar que por la obtención de la deducción la empresa mejorase la posición competitiva. Y, en fin, el Tribunal «a quo» no estudia el resto de las medidas de las Normas Forales impugnadas porque todas las cuestiones se exponen de modo globalizado y ha de tenerse en cuenta lo razonado de modo general sobre la mera diferencia entre los sistemas y subsistemas [tributarios] en un mismo espacio unitario, «sin perjuicio de que en otro recurso que se resuelve simultáneamente frente a las mismas disposiciones forales, se dé respuesta desestimatoria a muchos de los preceptos que se combaten».

Nuestro análisis se centrará en la cuestión de derecho comunitario europeo y la supuesta nulidad por falta de comunicación de las medidas. Respecto de esta cuestión, el TSJPV, después de hacer referencia a la doctrina establecida al efecto

por el Tribunal de Justicia, afirma que «hasta la fecha» no constaba que el referido tema hubiera sido objeto de decisión prejudicial, y que se estaba en presencia de un conflicto de Derecho netamente interno y resoluble por el juego de los principios y normas constitucionales y de legalidad ordinaria «excediendo de los intereses legitimantes y de las facultades concretas de dicha asociación [Federación de empresarios de la Rioja] suscitar una cuestión como la de la definición de las ayudas de Estado, que lo que pone en conflicto hipotético es a la normativa tributaria vasca con la igualdad de trato, la libre competencia y el derecho al libre establecimiento por parte de empresas comunitarias, y no con los principios y derechos fundamentales que los ciudadanos españoles pueden oponer al contenido de tales regulaciones fiscales…». Esta es la parte que el TS va a casar fundamentandose en su peculiar entendimiento de la doctrina del efecto directo del derecho comunitario. He aquí su razonar:

> Ahora bien, la tesis general expuesta de la que parte la sentencia y en la que también insisten algunas de las representaciones procesales de las partes recurridas, representa una concepción del Derecho comunitario europeo que no puede ser compartida, en cuanto supone que los ciudadanos españoles no pueden alegar como fundamento de su pretensión las normas y principios del acervo europeo frente a normativas tributarias que puedan vulnerar exigencias derivadas de tal Derecho. O, dicho en otros términos, la regulación europea de las «ayudas de Estado» puede hacerse valer ante los Tribunales nacionales por cualquier ciudadano europeo, sin que resulte justificada una exclusión discriminatoria de los españoles que, según el criterio que resulta de la sentencia que se revisa, habrían de limitar la fundamentación de su pretensión a los postulados del Derecho interno. La eficacia directa y primacía del Derecho Europeo, en el ámbito del ejercicio de las competencias atribuidas a las instituciones europeas y con respeto a la identidad de los Estados integrados y a sus estructuras constitucionales básicas, ha sido proclamada reiteradamente por la doctrina del Tribunal de Justicia de las Comunidades Europeas y del Tribunal de Primera Instancia, así como por la doctrina del Tribunal Constitucional y la jurisprudencia de este Alto Tribunal y dicha eficacia del Derecho Comunitario Europeo se produce en las relaciones verticales (poderes públicos/particulares) y en las relaciones horizontales (entre particulares). Esta plenitud de eficacia de la normativa europea aparece reconocida en el artículo 250 del Tratado consolidado (anterior art. 189), de manera que resulta directamente aplicable y produce efectos inmediatos en cuanto confiere a los particulares de cualquiera de los Estados derechos e intereses que las jurisdicciones nacionales deben proteger y a este efecto se opone la aplicación de cualquier medida legislativa incompatible con las disposiciones del Derecho Europeo. Incluso, aunque la inaplicación de la norma nacional incompatible permita la aplicación preferente de la norma comunitaria, un Estado miembro que mantenga en vigor una norma nacional contraria incumple la obligación de adoptar las medidas necesarias para asegurar el cumplimiento del Tratado y de los actos de las Instituciones (art. 10 del Tratado consolidado, antiguo art. 5). O, dicho en otros términos, la primacía y el efecto directo de las disposiciones comunitarias no dispensan a los Estados miembros de la obligación de eliminar de su orden jurídico interno aquellas disposiciones que resulten incompatibles. Se trata, así, de evitar situaciones de incertidumbre en cuanto a la posibilidad de que cualquier ciudadano comunitario (sin exclusión de los propios nacionales) se acoja a la normativa europea. Y, de manera más concreta, la discriminación o

la existencia de elementos de «ayuda de Estado», de existir en las Normas Forales impugnadas, alcanzaría tanto a los residentes en otros Estados miembros como a los residentes en el territorio común español.

En consecuencia, no puede negarse interés ni, consecuentemente, legitimación a la Federación recurrente para alegar la normativa europea que también ampara a los empresarios a que representa.

El TS acoge, en su fundamento sexto, el primero de los motivos de casación formulado por la representación de la Federación de Empresarios de La Rioja, y, de conformidad con lo establecido en el artículo 95.1.d) LJCA, procede a analizar si las Normas Forales resultan contrarias al Derecho europeo, a las normas constitucionales (arts. 2, 14, 31, 138, 139, 149 y 158), estatutaria (art. 41) o del Concierto económico (arts. 11, 12 y 13) que la parte recurrente cita, y a la jurisprudencia a la que ésta también se refiere.

Hasta aquí, el TS realiza una correcta descripción del sentido del efecto o la eficacia directa del derecho comunitario y su invocabilidad por los particulares. Pero ello no era ni cuestionado ni negado por el TSJPV y aquí reside el error del Supremo. Lo que el TSJPV está diciendo es que no constaba el carácter de ayuda de Estado de las Normas Forales, por lo que difícilmente se va a poder concluir que se produce una vulneración de la obligación de comunicación de las mismas. Textualmente afirma: «hasta la fecha» no constaba que el referido tema hubiera sido objeto de decisión prejudicial. Ello es cierto. Por ello procede el TSJPV a analizar la problemática desde un prisma distinto al comunitario sobre las ayudas de Estado.

Desde el derecho comunitario puede resultar objetable e incluso censurable esta estrategia judicial consistente en afirmar que hasta la fecha no consta que las Normas Forales constituyan ayudas y que *por ello* no se analiza el tema desde el prisma comunitario. El que no exista decisión prejudicial al respecto no significa que no se trate de una *quaestio iuris* comunitaria, aspecto que requeriría una remisión prejudicial o al menos una dilucidación comunitaria previa por parte del TSJPV antes de aplicar la teoría del acto claro y resolver la duda por su cuenta. Eso es en realidad lo que va a hacer el Supremo pero de una forma, en mi opinión, contraria a derecho comunitario. Procede a otorgar la calificación de ayudas de Estado a una serie de medidas sobre las cuales podía planear la duda razonable de su naturaleza como ayudas. A partir de esa apriorística calificación anula formalmente las medidas en cuestión por no haber sido notificadas a la Comisión.

### *3.1. El análisis de los preceptos de las NNFF y su compatibilidad con el derecho comunitario*

La siguiente referencia, indirecta, al derecho comunitario se realiza al final del fundamento jurídico décimo, dejando presagiar un análisis circular de la problemática:

> El análisis particularizado que se hará de los preceptos de las NN.FF. pondrá de relieve que en algunos, los que coinciden con el concepto de «Ayudas de Estado», puede apreciarse un tratamiento favorable para determinadas sociedades en función de su punto de conexión territorial, y en este sentido resultan contrarios al postulado constitucional de [igualdad]. Pero no ocurre así en relación con aquellos otros en los que la diferencia de tratamiento puede encontrar su justificación en un fundamento o elemento de distinción jurídicamente relevante como es el propio reconocimiento constitucional y estatutario de los sistemas forales tributarios.

En el fundamento undécimo, la confusión se acrecienta ya que el TS mezcla la presión fiscal equivalente –requisito esencial de la no discriminación– con la capacidad de contribución financiera de las haciendas vascas al Estado:

> Precisamente el parámetro europeo que se utilizará para apreciar la nulidad de determinados preceptos de las NN.FF. que se enjuician sirve también de mecanismo válido para la verificación de la presión integral. O, dicho en otros términos, la contradicción con el Derecho Europeo, a través del régimen de las «Ayudas de Estado», es también indicio suficiente para apreciar una falta de «equivalencia financiera» globalmente consideradas entre los sistemas financieros.

El derecho comunitario para nada se cuestiona la equivalencia financiera de las haciendas, sino el tratamiento otorgado a las empresas. La cuestión recaudatoria de la presión fiscal no tiene interés comunitario, salvo que sea para estudiar los criterios de convergencia de la UEM; el interés proviene únicamente del posible trato discriminatorio que supone que, en ausencia de medidas de armonización de la fiscalidad directa, dentro de un mismo territorio unas empresas sean favorecidas y otras sean comparativamente desfavorecidas mediante todo tipo de medidas públicas, entre ellas, las fiscales.

Sin embargo, al analizar la cuestión de la solidaridad, el Supremo realiza una afirmación curiosa que, aunque constituya un *obiter*, puede desdecir gran parte del trasfondo de la argumentación según la cual la selectividad de las ayudas proviene de su carácter regional:

> Resulta posible una cierta competitividad fiscal entre Comunidades Autónomas, con diferentes ofertas de incentivos, siempre que, por su importancia, no deban calificarse de auténticas «Ayudas de Estado», sometidas a un régimen especial por el Derecho Europeo.

El análisis de las ayudas de Estado lo realiza el TS en los fundamentos decimocuarto y decimoquinto. Sigue para ello el esquema del AG en las conclusiones comentadas, por lo que no repetiremos la crítica. En el apartado referido a la selectividad sí que interesa comentar el añadido del TS:

> El hecho de que las empresas beneficiarias no sean empresas concretas identificadas de antemano, no excluye al sistema del ámbito de aplicación del artículo 92 del Tratado

[actual art. 87], en la medida en que sean identificables por reunir determinados requisitos, como es el establecimiento o desarrollo de la actividad en un ámbito territorial concreto.

El Tribunal de instancia contempla la incidencia que en el análisis de la cuestión puede tener la existencia de «sistema y subsistemas [tributarios] en un mismo espacio unitario» a la que alude la sentencia impugnada y las partes recurridas. Esto es, la existencia de medidas fiscales cuyo ámbito de aplicación está limitado a una zona determinada del territorio del Estado junto al régimen general aplicable al resto del territorio (territorio común), como consecuencia de las normas de atribución de competencias en materia fiscal.

Estos son los únicos puntos en que el Supremo se acerca a explicar la supuesta selectividad de las medidas. Una vez más comprobamos los riesgos a los que conduce la caracterización del régimen aplicable en el territorio común como régimen *general* respecto del cual el régimen aplicable en los territorios históricos pasaría a ser *especial*. En realidad, para los efectos fiscales se trata de regímenes distintos aunque coordinados. Desde la perspectiva del derecho comunitario podría incluso hablarse de regímenes distintos cual si se tratase de Estados miembros distintos. Pero sobre este aspecto, el Supremo adopta una concepción muy distinta, y muy imprecisa:

Los Estados miembros pueden legislar, de acuerdo con su ordenamiento jurídico y forma de distribución territorial del poder político, sobre los tributos [directos], pero al hacerlo han de respetar las disposiciones del derecho comunitario; en particular, en lo que ahora interesa, las que consagran la libertad de circulación de capitales claramente contrarias a medidas fiscales discriminatorias. Así las instituciones comunitarias resultan legitimadas para emprender una acción armonizadora en aquellos aspectos de la imposición cuya divergencia provoque distorsiones a las condiciones de libre concurrencia u obstaculicen el ejercicio de libertades fundamentales. Y es indudable que los impuestos directos operan sobre los costes de producción pudiendo crear ventajas y desventajas artificiales, especialmente por su reflejo en los costes de capital, en las operaciones de reestructuración y concentración empresarial, incidiendo sobre la libre competencia y la libre circulación de capital y sobre la libertad de establecimiento.

Los incentivos fiscales son posibles para potenciar determinadas regiones o actividades económicas, pero, desde la perspectiva de la instrumentalidad que presenta la materia fiscal, resulta evidente la necesidad de que resulten compatibles con el Derecho Comunitario. De manera que medidas tales como las amortizaciones aceleradas o ventajas fiscales, en general, no resulten sospechosas de constituir «Ayudas de Estado», no permitidas por el artículo 92 [actual artículo 87], o sujetas a determinadas exigencias de comunicación a la Comisión derivadas del artículo 93 [actual artículo 88] del Tratado.

Las afirmaciones vertidas en estos párrafos son muchas y muy confusas, aunque presentadas como una teoría general sobre la fiscalidad directa. Acto seguido criticaré las afirmaciones más sorprendentes. En primer lugar postula de forma general que las disposiciones del Tratado sobre libre circulación de capitales son contrarias a medidas fiscales discriminatorias. Esto no es correcto en sentido estricto: las medidas fiscales discriminatorias pueden estar prohibidas por la libertad de establecimiento o por la libre prestación de servicios o por la libre circulación de trabajadores. La libre circulación de

capitales se asegura de que no se produzcan restricciones o limitaciones al movimiento de capitales entre Estados miembros, cuestión que no afecta de forma directa a los impuestos sobre sociedades. Por otra parte, la afirmación sobre potestad armonizadora de las instituciones comunitarias para evitar distorsiones, con ser cierta, es muy limitada. Mucho más relevante es la obligación de los Estados miembros de no discriminar mediante trato fiscal distinto a los sujetos pasivos establecidos en otros Estados miembros como consecuencia de la necesidad de respetar el derecho comunitario al ejercer la competencia exclusiva en fiscalidad directa. La afirmación sobre la necesaria incompatibilidad de los incentivos fiscales con el derecho comunitario es errónea: siempre que no discriminen los Estados miembros pueden conceder incentivos y ventajas fiscales ilimitadas; al no haber armonización de esta materia, los Estados miembros conservan su competencia prácticamente intacta; la única condición es la no discriminación. La última conclusión extraída por el Supremo resulta aún más chocante: no se entiende por qué iban a resultar libres de sospecha las ventajas fiscales o las amortizaciones aceleradas.

En el fundamento decimosexto, el TS procede a un **examen pormenorizado** de cada una de las disposiciones de las Normas Forales impugnadas desde la perspectiva del derecho comunitario sobre las ayudas de Estado, pero entendido de la forma que lo hace el TS, es decir, como «desviación favorable», «beneficio fiscal específico» o «exclusión significativa» o «singularmente beneficioso» para las sociedades sujetas a la *normativa especial* (la foral!) con respecto al *régimen general* (el común!). Llega a conclusiones ridículas cuando afirma que la deducción por actividades de exportación (art. 43) no constituye ayuda por ser similar a la existente en territorio de régimen común. ¡Una medida como ésta ha sido precisamente confirmada como ayuda de Estado en el marco de la CECA por la sentencia de 15-07-2004, cinco meses antes de la sentencia del Supremo! Esta forma de plantear la problemática se contradice con la propia presentación del régimen tributario de los TTHH que el propio Supremo ha realizado partiendo de la Constitución, el Estatuto de Autonomía y el Concierto Económico, atendiendo a la globalidad del sistema tributario.

En ningún momento se aportan argumentos de peso para demostrar el carácter selectivo de las NNFF. Para la Sala del Supremo por el mero hecho de ser territoriales y por el mero hecho de ser distintas de las aplicables en el régimen común se suponen selectivas. El Tribunal Supremo realiza un análisis erróneo del régimen tributario de los TTHH al considerar que éste sólo se aplica a las empresas establecidas en una determinada región mientras que el sistema general es el vigente en el territorio de régimen común, ignorando que los puntos de conexión entre los cinco regímenes tributarios *generales* existentes en el Estado español no tienen una base territorial estricta sino una de domicilio fiscal y volumen de operaciones. Tampoco la normativa de la Administración del Estado se aplica con carácter general en todo el Estado sino en relación con los contribuyentes a quienes se aplica su normativa[32].

[32] Véase el comentario de esta sentencia por I. Alonso Arce, «Una Sentencia inorportuna y desafortunada», *Actualidad Aranzadi*, Junio 2005.

El TS ha optado por ignorar un dato esencial, a saber, que no existe una normativa general tributaria que se aplique, por ser general, a todos los contribuyentes aunque sea a nivel de principio.

En el fundamento decimoséptimo el TS procede a examinar si las disposiciones de las NNFF consideradas como ayuda de Estado pueden subsumirse en las **excepciones previstas en los apartados 2 y 3** del anterior artículo 92 del Tratado (actual art. 87). El apartado 2 prevé exenciones de oficio relativas a objetivos sociales o paliativos de catástrofes naturales o acontecimientos de carácter excepcional. No se da el caso. El apartado 3 prevé «excepciones eventuales». Para ello es necesario que las autoridades soliciten una decisión de la Comisión Europea de conformidad de las medidas propuestas con las previsiones del propio artículo. Recuerda el TS la constante doctrina del TJCE en virtud de la cual las facultades de los órganos jurisdiccionales nacionales, en caso de ayudas no notificadas, han de orientarse a la constatación de tal circunstancia –de que se trata efectivamente de ayudas de Estado– para en caso de respuesta afirmativa, anular las correspondientes Normas, por haber sido adoptadas sin cumplir la obligación de notificación a la Comisión Europea, no cabiendo que el Juez nacional se pronuncie sobre la compatibilidad de las medidas. Esta valoración está reservada por el Tratado a la Comisión. Pero el juez doméstico sí puede interpretar las medidas como ayudas de Estado que, en caso de no estar cubiertas por el apartado 2, hubieran debido ser notificadas.

El TS desestima el recurso de casación interpuesto por los TTHH y confirma la nulidad del artículo 26 de las NN.FF. Acoge además el primer motivo aducido por la Federación de Empresarios de La Rioja, sin necesidad de examinar los restantes motivos de casación. Casa y anula la sentencia de instancia **declarando la nulidad**, además del artículo 26 de las NN.FF, de los artículos 11, apartado 2.a); 14 en cuanto se refiere a «sociedades de promoción de empresas»; 15, apartado 11; 29, apartado 1.a); 37; 39; 40; 45, apartado 2.1.º; 49; 53; 54 y 60, al **haberse omitido la necesaria notificación** a la Comisión Europea establecida en el artículo 93 (actual artículo 88) del Tratado para medidas que indiciariamente pueden constituir «Ayudas de Estado». Sin que, de conformidad con lo establecido en el artículo 73 LJCA, la anulación de los referidos preceptos afecte a la eficacia de las sentencias o de los actos firmes que los hayan aplicado antes de que su anulación alcance efectos generales. Impone en las costas causadas en los recursos de casación interpuestos por las representaciones procesales de la Diputación Foral de Gipúzkoa y de las Juntas Generales de Gipúzkoa, de la Diputación Foral de Bizkaia y de las Juntas Generales del Territorio Histórico de Bizkaia a tales Administraciones.

En definitiva, el fallo declara ilegales elementos que se aplicaban hasta ahora a todo tipo de empresas, independientemente de su tamaño, y pone en cuestión incluso el 'corazón' del propio impuesto, como es el tipo de gravamen, la desgravación del 10% en la inversión en activos nuevos, la deducción por creación de puestos de trabajo o las tablas para el cálculo de las amortizaciones. También anula medidas que afectan especialmente a las pequeñas y medianas empresas, como es el caso de la libertad de amor-

tización de los activos. Algunas de las cuestiones ilegalizadas por el Supremo ya habían sido modificadas desde 1996, anuladas en algunos casos y 'armonizadas' con el Estado en otros. Buena parte de estas ventajas fiscales fueron anuladas tras un pacto alcanzado por las haciendas central y vasca a principios de 2000, en el proceso que se calificó como «la paz fiscal». Otras que ahora anula el Supremo, sin embargo, ni siquiera habían sido cuestionadas por el Ejecutivo central. Las únicas vías de defensa serían plantear un incidente de nulidad de actuaciones conforme al artículo 241 de la LOPJ ante el propio TS o un recurso de amparo por indefensión y violación del artículo 24 de la Constitución Española. Se debería entonces solicitar la remisión de una cuestión prejudicial en un doble sentido; sobre la materia y sobre el acto claro y la posible infracción al artículo 234 a la luz de la jurisprudencia *Köbler*[33] y ahora de la sentencia de 13 junio 2006, en el asunto C-173/03, *Traghetti del Mediterraneo*[34].

## 4. La sentencia Azores

El órgano legislativo de la Región de las Azores aprobó en 1999 las modalidades de adaptación del sistema fiscal portugués a las particularidades regionales, en aplicación de sus competencias. Esta normativa redujo los tipos de los impuestos sobre la renta automáticamente para todos los operadores económicos con el objetivo, en particular, de permitir a las empresas instaladas en la región de las Azores superar las desventajas estructurales intrínsecas a su situación en una región insular y ultraperiférica.

El mencionado régimen fiscal se comunicó tardíamente a la Comisión y entró en vigor sin autorización. Tras examinar las medidas, la Comisión llegó a la concusión de que constituían ayudas de funcionamiento que sólo podrían ser autorizadas si, respetando las condiciones establecidas en las Directrices relativas a las ayudas estatales de finalidad regional, estuvieran justificadas por su contribución al desarrollo regional y fueran proporcionales a los costes adicionales que tenían por objeto compensar. Por lo tanto, no podían concederse a favor de empresas que ejerciesen actividades financieras o del tipo «servicios intragrupo» (actividades cuyo fundamento económico es prestar servicios a las empresas pertenecientes a un mismo grupo), puesto que tales actividades no participan lo suficiente en el desarrollo regional.

Portugal ha impugnado esta Decisión ante el Tribunal de Justicia de las Comunidades Europeas, especialmente en la medida en que califica de ayudas de Estado las medidas controvertidas. El Tribunal de Justicia recuerda, en primer lugar, que el Tratado CE prohíbe las ayudas de Estado selectivas, es decir, aquellas que favorezcan a determinadas empresas o producciones. Sin embargo, estas medidas no constituyen ayudas de Estado incompatibles con el mercado común si están justificadas por la

[33] C-224/01, de 30 de setiembre de 2003.
[34] C-173/03, de 13 de junio de 2006.

naturaleza o la estructura del sistema fiscal. El Tribunal de Justicia destaca que, para apreciar si es selectiva una medida por la que una entidad infraestatal fija para una parte del territorio de un Estado miembro un tipo impositivo reducido, ha de examinarse si la medida ha sido adoptada por dicha entidad en el ejercicio de facultades lo suficientemente autónomas del poder central. Debe también comprobarse si se aplica efectivamente a todas las empresas establecidas o todas las producciones efectuadas en el territorio sobre el que dicha entidad tenga competencia.

Por lo tanto, el marco de referencia para apreciar la selectividad de una medida fiscal puede limitarse a la zona geográfica de que se trate en el caso de que la entidad infraestatal desempeñe un papel fundamental en la definición del medio político y económico en el que operan las empresas localizadas en el territorio de su competencia.

En este contexto, para que pueda considerarse que una decisión se ha adoptado en ejercicio de atribuciones lo suficientemente autónomas es necesario que sea obra de una autoridad territorial que, desde el punto de vista constitucional, cuente con un estatuto político y administrativo distinto del Gobierno central. Además, debe haber sido adoptada sin que el Gobierno central haya podido intervenir directamente en su contenido.

Por último, las consecuencias financieras de la aplicación de un tipo impositivo reducido a las empresas localizadas en la región no deben verse compensadas por ayudas o subvenciones procedentes de otras regiones o del Gobierno central. Es necesario que la entidad infraestatal asuma las consecuencias políticas y financieras de tal medida. Los dos aspectos de la política fiscal del Gobierno regional de las Azores –por una parte, la decisión de aligerar la presión fiscal regional ejerciendo la facultad de reducir los tipos del impuesto sobre la renta y, por otra, el cumplimiento de su misión de corrección de las desigualdades derivadas de la insularidad– son indisociables y dependen, desde el punto de vista financiero, de las transferencias financieras gestionadas por el Gobierno central. Por tal motivo, el Tribunal de Justicia ha declarado que estas medidas deben apreciarse en relación con la totalidad del territorio portugués, marco en el que no se presentan como medidas generales, sino selectivas.

A la luz de estos criterios, parece razonable concluir que el TS debería revisar su doctrina sobre la selectividad inherente de la fiscalidad vasca. El análisis debería ser mucho más sofisticado y entrar a analizar el sistema del Concierto en su globalidad, así como el sistema de cupo.

## 5. Conclusión

### *5.1. La teoría del acto claro*

Una de las censuras que realiza el Supremo a la sentencia del TSJPV es la de haber decidido el asunto descartando el motivo de impugnación basado en la regulación europea de las «ayudas de Estado». Para el Supremo dicho motivo puede hacerse valer

ante los Tribunales nacionales por cualquier ciudadano europeo, sin que resulte justificada una exclusión discriminatoria de los españoles que, según el criterio que resulta de la sentencia que se revisa, habrían de limitar la fundamentación de su pretensión a los postulados del Derecho interno. Pero el Supremo está llevando la discusión a derroteros distintos de los seguidos por el TSJPV. Para este órgano, no constaba el carácter de ayuda de Estado de las Normas Forales cuestionadas y por ello, descartaba la pretensión de la nulidad por obligada notificación. Para el Tribunal Supremo, es evidente el carácter de ayuda de Estado y por lo tanto era obligatoria la notificación.

Sin embargo, ningún Estado miembro tiene la obligación de notificar a la Comisión su normativa relativa a la imposición directa. Lo que si notificará son las medidas específicas de apoyo a ciertas empresas o a ciertos sectores, pues son éstas las que ocupan el ámbito sobre el que se dirige el núcleo de la definición comunitaria de ayuda.

El Tribunal Supremo parece haber procedido a aplicar la teoría del acto claro. Es el único órgano que ha tenido claro el carácter de ayuda; el resto de los órganos y sobre todo, el TSJPV no parecen haberlo tenido tan claro. Mucho menos pudiera decirse que se tratase de un acto aclarado, lo que sí hubiera eximido al Supremo de la obligación de examinar si pudiera tratarse de un acto claro. Las condiciones que impone el derecho comunitario para operar según los parámetros de la teoría del acto claro fueron formulados en Cilfit[35] por primera vez y confirmados en Lyckeskog[36]. El Tribunal Supremo no parece haber tomado nota de tales precedentes y en realidad ha operado algunos de los criterios de la jurisprudencia comunitaria relativa a las ayudas de Estado de una forma casi mecánica, pero obviando las dificultades. Ello es particularmente patente en el caso del criterio de la selectividad donde las razones aportadas por este órgano son parcas y poco poderosas: existe selectividad porque se produce una diferencia respecto del régimen del territorio común. El Tribunal Supremo hubiera debido formular una prejudicial. El artículo 234 del Tratado CE (y el Reglamento 659/1999, del Consejo (DOCE L 083) le obligaba a hacerlo salvo que demostrase que la situación era acto claro. A partir de aquí podríamos incluso especular sobre la eventual responsabilidad judicial por incumplimiento de derecho comunitario la cual ha provocado indefensión, aunque la ausencia de particulares personalmente afectados puede complicar la cuestión.

El propio TSJPV ha optado por evitar la teoría del acto claro. Si no le constaba que el derecho comunitario hubiera catalogado las normas forales de ayuda de Estado, podía haber sentido la curiosidad jurídica sobre la cuestión y formular remisión prejudicial a Luxemburgo sobre la materia y ello, aunque las partes se posicionasen en contra de dicha eventualidad. Pero el TSJPV prefirió dejar de lado la cuestión europea y decidir sobre la base del derecho interno. Su experiencia pasada en materia de cuestiones prejudiciales posiblemente le dejaría un regusto desagradable. En todo caso, al

[35] Sentencia de 6 de octubre de 1982, Cilfit y otros (283/81, Rec. p. 3415).
[36] C-99/00, de 4 de junio de 2002.

no ser última instancia no pesaba sobre el TSJPV obligación alguna de remitir, sino sólo potestad. La obligación recaía sobre el Supremo.

Ante los pleitos relacionados con la fiscalidad directa de los TTHH planteados en la actualidad y a la luz de la Sentencia Azores, con valor de precedente para nuestro caso, tanto el TSJPV como el TS deberían, en mi opinión, optar por una de las dos estrategias siguientes:

– considerar que se trata de un caso aclarado por el TJCE al afirmar claramente (apartados 57 y 60 de la sentencia Azores) que no cabe deducir que una medida sea selectiva por el único hecho de ser aplicada solamente en una zona geográficamente limitada del Estado-miembro y aplicar al caso concreto el criterio relativo a las transferencias presupuestarias gestionadas por el gobierno central,
– si alguna duda le pudiera quedar al analizar este criterio, debería plantear la prejudicial.

### *5.2. Autonomía Institucional*

La Constitución «ampara y respeta los derechos históricos de los territorios forales», añadiendo que «la actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y los Estatutos de Autonomía» (Disposición Adicional Primera). El Estatuto de Autonomía del País Vasco se refiere a los Territorios Históricos como titulares del derecho a formar parte de la Comunidad Autónoma del País Vasco, definiéndose el territorio de ésta por la integración de aquéllos. Sus órganos forales se rigen por el régimen jurídico privativo de cada uno de ellos (art. 37.1), no viéndose modificada la naturaleza de dicho régimen foral específico o las competencias de los regímenes privativos de cada Territorio Histórico por lo dispuesto en el Estatuto (art. 37.2). El propio Estatuto recoge diversas competencias propias de los Territorios Históricos y menciona en el artículo 37.3 unas que, en todo caso, les corresponden con carácter de exclusividad. El artículo 41, que señala que las relaciones de orden tributario entre el Estado y el País Vasco serán reguladas mediante el sistema foral tradicional de Concierto Económico o Convenios, dispone que «las Instituciones competentes de los Territorios Históricos podrán mantener, establecer y regular, dentro de su territorio, el régimen tributario, atendiendo a la estructura general impositiva del Estado, a las normas que para la coordinación, armonización fiscal y colaboración con el Estado se contengan en el propio Concierto y a las que dicte el Parlamento Vasco para idéntica finalidad».

La Comisión, en sus distintas decisiones sobre las medidas tributarias de los TTHH, y el Tribunal de Justicia, en las sentencias de 11-11-2004 en los asuntos acumulados C-186/02P y C-188/02P (Ramondín) y en los asuntos acumulados C-183/02P y C-187/02P (Demesa), habían precisado que sus pronunciamientos no ponían en cuestión el régimen de Concierto Económico y las competencias reconocidas a los TTHH en materia de imposición directa. En ningún momento aplicaron un criterio de selectividad

regional automático sino que analizaron las medidas concretas y encontraron en ellas la selectividad.

El argumento presentado por las JJGG (y el Estado español en la causa prejudicial) se fundaba en parte sobre un importante principio de derecho constitucional comunitario, el respeto a la autonomía institucional de los Estados miembros; en nuestro caso uno de los rasgos principales del sistema institucional interno es la soberanía fiscal o tributaria de las JJGG. Parece claro que el AG Saggio rebasó los límites de dicho principio al pasar a interpretar los distintos sistemas tributarios del Estado español de un modo contrario al evocado por los propios representantes de dicho Estado. El planteamiento del AG es que resulta imposible que un sistema territorial sea *general;* a lo sumo estaría justificado por una especificidad regional –nivel de empleo bajo, crisis industrial grave– como excepción al sistema general de conformidad con las apartados 2 y 3 del artículo 87. Pero todo el edificio está montando sobre un error: el AG habla de sistema *específico* –el de los TTHH– y de sistema *general* pero en realidad no existe ningún sistema general en España. Así lo expresó el propio Gobierno Español pero el AG tildó este argumento constitucional de «mera formalidad».

Mucho más grave es que sea el propio Tribunal Supremo quien incurra en dicho error, no sólo cuando niega el carácter de legislativo a las JJGG[37], aspecto que podría quedar en una «mera formalidad» sin interés para el derecho comunitario sobre el rango de las distintas fuentes en derecho español aunque ello suponga materialmente ignorar el carácter de auténtico sistema federal de la CAPV[38], sino sobre todo cuando considera que los regímenes fiscales forales son *especiales y específicos* respecto del régimen *común, general* y que por lo tanto resultan automáticamente selectivos. Esta calificación sólo la podría ahora corregir el Tribunal Constitucional (o el Supremo en Sentencia posterior). Si le llegase una remisión prejudicial al Tribunal de Justicia cuestionando dicha calificación, éste órgano debería abstenerse de calificar el sistema interno español, aunque lo que sí podría hacer es aclarar el concepto de selectividad en relación con la territorialidad y con la fragmentación de un sistema tributario en un

[37] Afirma explícitamente «… es evidente que el Estatuto de Autonomía del País Vasco no configura las Juntas Generales como cámaras legislativas y es, igualmente, claro que no pueden dictar normas con valor de ley».

[38] A mi entender, el sistema o bloque de constitucionalidad formado por la Disposición Adicional de la Constitución española, el Estatuto de Autonomía de Gernika, el Concierto Económico y la LTH otorgan un marcado carácter federal a la CAPV; la soberanía fiscal originaria reside en las Juntas Generales, representantes y detentadoras del principio político-constitucional *no taxation without representation*. Los TTHH, a su vez, siguiendo un modelo de federalismo ascendente o centralizante crean la CAPV. Nada similar ocurre en el resto del Estado español. En el concreto tema del régimen tributario, no existe parangón en toda la UE y el principio de la autonomía institucional de los Estados miembros consagrado en el artículo 5 del TCE lleva al respeto a dicho sistema cuya defensa debe interesar a todos los órganos del Estado miembro en cuestión. Piénsese en los regímenes especiales en el archipiélago Äland o en Escocia. Sobre este particular véase S. Weatherill and U. Bernitz (eds), *The Role of Regions and sub-national Actors in Europe*, Hart, Oxford 2005.

Estado. Para ello le serían de gran utilidad los ejemplos similares o parangonables que puedan aportarse de otros Estados miembros. En realidad se trata de ejemplos que dejan patente un pluralismo jurídico del que el sistema comunitario toma nota. La situación del derecho penal en el Reino Unido o incluso en Finlandia con el archipiélago Äland podrían aportar lecciones interesantes. Es por ello que la sentencia Azores cobra especial relevancia pues, de la mano de los argumentos desarrollados por los agentes de los gobiernos español y británico, marca los confines dentro de los cuales resulta compatible con el criterio de selectividad un régimen regional de fiscalidad directa. Una ventaja reconocida solamente en una parte del territorio nacional no puede considerarse, por ese único hecho, selectiva: «para que pueda considerarse que existe la suficiente autonomía política y fiscal en relación con el Gobierno central en lo que atañe a la aplicación de las normas comunitarias sobre ayudas de Estado, es necesario no sólo que la entidad infraestatal disponga de la competencia para adoptar, para el territorio de su competencia, medidas de reducción del tipo impositivo con independencia de cualquier consideración relativa al comportamiento del Estado central, sino también que asuma las consecuencias políticas y financieras de tal medida» (apartado 68 de la sentencia Azores).

### *5.3. Ayudas Públicas y política comunitaria de ayudas*

Incluso si el Tribunal Supremo estuviera en lo cierto, incluso si hubiera formulado una cuestión prejudicial al TJ y éste hubiera concluido sobre la calificación de las medidas impugnadas y casadas como ayuda de Estado en derecho comunitario, queda una cuestión. ¿Cabe anular de plano las medidas por defecto de notificación? ¿No cabría argumentar que en una situación donde los sistemas tributarios de imposición directa son competencia exclusiva de los Estados miembros, donde no existen medidas armonizadoras y donde en principio los regímenes generales de imposición, las posibles ventajas fiscales son concedidas a todas las empresas que cumplen las condiciones exigidas por la norma, existiría una presunción de validez del sistema precisamente porque no existen empresas desfavorecidas? Las ventajas se reconocen a todas las empresas sometidas a dicho régimen fiscal, es decir a todos los sujetos pasivos, a todos los contribuyentes. A la luz de dicha presunción de validez, las autoridades competentes podrían argumentar que no era ni mucho menos evidente la obligación de notificar; obligación que sólo habría aparecido con claridad tras una sentencia interpretativa del Tribunal de Justicia[39]. En tales circunstancias, anular las medidas por la falta de notificación de algo que a primera vista no tendría porqué

[39] El propio Tribunal de Justicia reconoce, en el marco del Tratado CECA que el carácter de ayudas de las medidas de carácter fiscal no es evidente: «Es también legítimo que la Comisión, al tratarse de medidas de carácter fiscal cuya calificación como «ayudas» a efectos del artículo 4 CA, letra c), no es evidente, haya considerado útil abrir una investigación en todos los Estados miembros, con el fin de verificar si la legislación de éstos contenía el mismo tipo de medidas que las adoptadas en España», (C-501/00, España/Comisión, sentencia del TJCE de 15-07-04, apartado 55).

notificarse parece sobrepasar los límites del principio de proporcionalidad y violar el principio de las expectativas legítimas[40].

El Tribunal Supremo ha actuado en materia de Ayudas Públicas conforme a una política de centralización que las Comunidades Europeas han lanzado en materia de derecho de la competencia. Su proceder pone en evidencia los riesgos inherentes al sistema y las innumerables ocasiones en las que se producen dudas genuinas sobre la aplicación del derecho comunitario que, sin embargo, pasan a ser decididas directamente por las jurisdicciones domésticas con fundamento en una incorrecta aplicación de la teoría del acto claro.

La propia política de ayudas de la Comisión está siendo revisada en la actualidad en un Plan de Acción que está en fase de consulta. La Comisión se propone utilizar las normas sobre ayudas de Estado del Tratado CE para incitar a los Estados miembros a que contribuyan a la estrategia de Lisboa orientando la ayuda a mejorar la competitividad de la industria de la UE y a crear empleo sostenible (más ayuda para I+D, innovación y capital riesgo para pequeñas empresas), a garantizar la cohesión social y regional y a mejorar los servicios públicos. La Comisión también pretende racionalizar y simplificar los procedimientos, con objeto de que las normas sean más claras y haya que notificar menos ayudas, y agilizar la toma de decisiones. El Plan de acción pretende que las ayudas produzcan menos falseamientos de la competencia y estén mejor orientadas de tal modo que el dinero público se emplee con eficacia con objeto de mejorar la eficiencia económica, generar más crecimiento y más empleos sostenibles, incrementar la cohesión social y regional, mejorar los servicios de interés económico general y fomentar el desarrollo sostenible y la diversidad cultural. El nuevo sistema debe permitir autorizar con mayor facilidad y rapidez las ayudas que produzcan menos falseamientos, especialmente cuando es más difícil conseguir dinero en los mercados financieros, para que la Comisión pueda concentrar sus recursos en los casos que pueden crear falseamientos de la competencia y del comercio más graves. Para ello buscará implantar unos procedimientos más ágiles y eficientes, una aplicación más correcta, una mayor predictibilidad y un incremento de la transparencia. Por ejemplo, actualmente los Estados miembros tienen que notificar a la Comisión la mayoría de las subvenciones estatales que quieren conceder. La Comisión propone que un mayor número de medidas de ayuda queden exentas de esta obligación de notificación y simplificar los procedimientos.

[40] Un argumento semejante fue esbozado por el TH de Araba en el asunto Ramondín (C-186/02 P y 188/02 P sentencia de 11-11-04, apartado 56): antes de examinar su calificación de ayudas de Estado, se debió considerar que las medidas fiscales adoptadas antes de las conclusiones del Consejo Ecofin de 1 de diciembre de 1997 sobre política fiscal (DO 1998, C 2, p. 1) y de la Comunicación de 10 de diciembre de 1998 relativa a la aplicación de las normas sobre ayudas estatales a las medidas relacionadas con la fiscalidad directa de las empresas (DO C 384, p. 3) estaban excluidas del control de las ayudas de Estado. Así, dado que dichas medidas se encuadraban en la política industrial aplicada por el Estado miembro de que se trata, estaban excluidas *ab initio* del ámbito de aplicación del artículo 92 del Tratado.

Lo que sí tiene en común con la nueva política de descentralización de la competencia es la afirmación de una responsabilidad compartida entre la Comisión y los Estados miembros: la Comisión no puede mejorar las normas y la práctica en materia de ayudas estatales sin el apoyo efectivo de los Estados miembros y sin su pleno compromiso a cumplir con sus obligaciones de notificar cualquier ayuda prevista y de hacer cumplir las normas correctamente.

### *5.4. El criterio de la selectividad*

Hemos visto como este es punto neurálgico de la consideración de una medida fiscal como ayuda de Estado; el hecho de que favorece a una o varias empresas desfavoreciendo a otras. Los criterios aportados por el AG y por el propio TS para concluir sobre la especificidad de las medidas contenidas en las Normas Forales prácticamente se apoyan en el carácter territorial de las mismas o en un supuesto carácter específico respecto del régimen erróneamente tildado de general y aplicable en el territorio común. Sin embargo, de la jurisprudencia del TJCE no cabe extraer este tipo de consecuencias. El status quaestionis lo presenta de la siguiente manera el TJCE (sentencia España/Comisión, antes citada, apartados 120 a 125):

> La deducción fiscal establecida por la Ley 43/1995 solamente puede beneficiar a una categoría de empresas, a saber, aquellas que realizan actividades de exportación y efectúan determinadas inversiones contempladas en las medidas controvertidas. Pues bien, tal consideración basta para demostrar que dicha deducción fiscal cumple el requisito de especificidad que constituye una de las características del concepto de ayuda de Estado, a saber, el carácter selectivo de la ventaja de que se trata (véase, en relación con un tipo de redescuento preferencial para la exportación concedido por un Estado únicamente para los productos nacionales exportados, la sentencia Comisión/Francia, antes citada, apartados 20 y 21; en relación con el reembolso de intereses sobre créditos a la exportación, la sentencia de 7 de junio de 1988, Grecia/Comisión, 57/86, Rec. p. 2855, apartado 8; y en relación con un régimen excepcional en materia de quiebra a favor de grandes empresas en crisis que se encuentren en una situación de endeudamiento particularmente elevado respecto a determinadas categorías de acreedores, en su mayoría de carácter público, la sentencia Ecotrade, antes citada, apartado 38).
>
> No es necesario, para acreditar el carácter selectivo de las medidas controvertidas, que las autoridades nacionales competentes dispongan de una facultad discrecional en la aplicación de la deducción fiscal controvertida (véase la sentencia de 17 de junio de 1999, Bélgica/Comisión, antes citada, apartado 27), aun cuando la existencia de tal facultad pueda permitir a los poderes públicos favorecer a determinadas empresas o producciones en detrimento de otras y, en consecuencia, demostrar la existencia de una ayuda a efectos de los artículos 4 CA, letra c), u 87 CE.
>
> En cambio, la naturaleza y la estructura del sistema fiscal del Estado miembro de que se trate, en el que se inscriben determinadas medidas nacionales, en principio podrían justificar válidamente su carácter excepcional con respecto a las normas generalmente

aplicables. En este caso, dichas medidas, en cuanto que responden a la lógica del sistema fiscal considerado, no cumplirían el requisito de especificidad.

Es preciso recordar a este respecto que, en el estado actual del Derecho comunitario, la fiscalidad directa es competencia de los Estados miembros, si bien es jurisprudencia reiterada que estos últimos deben ejercer ésta respetando el referido Derecho (véase, en particular, la sentencia de 14 de septiembre de 1999, Gschwind, C_391/97, Rec. p. I_5451, apartado 20) y abstenerse, por tanto, de adoptar en este contexto cualquier medida que pueda constituir una ayuda de Estado incompatible con el mercado común.

Sin embargo, en el caso de autos, para justificar las medidas controvertidas basándose en la naturaleza o en la estructura del sistema fiscal en el que se inscriben, no basta con afirmar que tienen por objeto favorecer los intercambios internacionales. Tal finalidad constituye, efectivamente, un objetivo económico, pero no se ha demostrado que se corresponda con una lógica global del sistema fiscal vigente en España, tal como se aplica a todas las empresas.

Además, es jurisprudencia reiterada que las ayudas de Estado no se caracterizan por sus causas o sus objetivos, sino que se definen en función de sus efectos (véase, en particular, la sentencia de 12 de diciembre de 2002, Bélgica/Comisión, antes citada, apartado 45). Asimismo, la circunstancia de que las medidas controvertidas persigan un objetivo de política comercial o industrial, como el fomento de los intercambios internacionales mediante el apoyo a las inversiones en el extranjero, no es suficiente para que puedan eludir de entrada la calificación de «ayudas» a efectos del artículo 4 CA, letra c).

Debe examinarse la lógica global del sistema fiscal, su naturaleza y estructura. Estos pueden justificar válidamente su naturaleza excepcional y en tal caso, las medidas no podrían considerarse específicas. Aunque el TJCE sigue utilizando un lenguaje apoyado en el carácter general y excepcional, no lo relaciona necesariamente con el territorio. La sentencia Azores lo ha dejado muy claro.

### *5.5. Armonización Fiscal en derecho comunitario*

Recientemente Laszlo Kovacs, comisario europeo de fiscalidad, ha anunciado que la Comisión se ha fijado a sí misma un plazo de dos años para avanzar en un asunto clave como es la definición de una base imponible común para el cálculo del impuesto sobre sociedades. Hablar de la armonización de tipos sería soñar, ya resulta bastante difícil armonizar la base imponible, es decir qué se somete a imposición. La estrategia del comisario es lanzar una cooperación reforzada en este ámbito. Incluso los Estados miembros con regímenes fiscales más favorables a las empresas (vacaciones, tipos bajos, bonificaciones y exenciones a empresas de nueva creación) como son Irlanda, Reino Unido, Eslovaquia se han apuntado al grupo de trabajo. Francia y Alemania denuncian la práctica de un cierto dumping fiscal o competencia desleal por la aplicación de tipos bastantes más bajos en algunos Estados miembros como Irlanda (12,5%) Polonia o Eslovaquia (19%) que los practicados por éstos dos Estados (33% en Francia y hasta 38%! en Alemania).

Los avances en materia de armonización de la fiscalidad directa son realmente tímidos. La Comisión ha conseguido escasos progresos y frecuentemente ha optado por atacar regímenes particulares[41]. Recientemente ha entrado en vigor una directiva sobre la fiscalidad del ahorro (de los intereses generados por el ahorro) que prevé el intercambio de informaciones sobre los ingresos generados por el ahorro percibidos por una persona que tenga ciudadanía de la Unión en un Estado miembro donde no tenga su residencia, con el objetivo de someterlos al impuesto en su Estado de origen. Los Estados miembros esperan así poder enfrentarse al fraude fiscal, obligando a los bancos a colaborar con las Administraciones fiscales. Si el puro intercambio de informaciones se considera un éxito, ello indica que nos encontramos lejísimos de la armonización de las cuestiones concretas de la fiscalidad directa, uno de los famosos redlines o vetos que el gobierno del Reino Unido impuso a sus negociadores del Tratado Constitucional.

En estas circunstancias parece muy poco probable en la actualidad que en un Estado miembro, por ejemplo Irlanda, su máximo órgano judicial declare la nulidad de las medidas del impuesto de sociedades por no haber sido notificadas a la Comisión.

### *5.6. Conclusión*

Si esto resulta absurdo, debemos preguntarnos porqué le ha parecido normal al Tribunal Supremo. Por plantearlo más crudamente: ¿se atrevería el Supremo a declarar la nulidad de las normas del Impuesto de Sociedades aplicable en el territorio común, suponiendo que contenga, como seguramente contiene, alguna medida más favorable para las empresas que tributan de acuerdo a dicho régimen, por no haber sido notificadas a la Comisión siendo claro su carácter de ayuda al ser aplicables sólo en una parte del Estado español?

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[41] Así, en el asunto Ramondín (C-186/02 P y 188/02 P sentencia de 11-11-04, apartados 34 y 35), el Territorio Histórico de Álava se pregunta cuáles fueron las razones que llevaron a la Comisión a incoar tantos procedimientos contra las Normas Forales del País Vasco y por qué motivo se eliminaron una serie de medidas fiscales de la lista elaborada por el grupo «Primarolo», formado en el seno del Consejo para detectar posibles medidas fiscales cuya eliminación era necesaria en aras de la armonización fiscal, para perseguirlas posteriormente por la vía del procedimiento en materia de ayudas de Estado. A su juicio, la reticencia de varios Estados miembros hace que no sea posible lograr el necesario acuerdo en el seno del Consejo por lo que respecta a una armonización fiscal. Por ello, prosigue, la Comisión ha elegido la vía más rápida y sencilla del procedimiento de ayudas de Estado.
Del mismo modo, en el asunto sobre la siderurgia (C-501/00, España/Comisión, sentencia del TJCE de 15-07-04), explica el TJCE que la Comisión (de 31 de octubre de 2000, relativa a las leyes españolas sobre el impuesto de sociedades, DO 2001, L 60, p. 57, punto 28) no ordenó el reembolso de las ayudas declaradas incompatibles por parte de las empresas siderúrgicas beneficiarias debido, en particular, a la diferente posición que había adoptado en el pasado en relación con medidas nacionales análogas y a la duración del procedimiento de examen, no imputable al Reino de España, de suerte que «incluso las empresas siderúrgicas más prudentes e informadas podían no haber previsto la calificación de las disposiciones fiscales en cuestión como ayudas estatales contrarias al artículo 4 del Tratado CECA y que podrían justificadamente alegar expectativas legítimas».

Si la respuesta es negativa deberíamos preguntarnos porqué no ha sentido ningún reparo en hacerlo con los regímenes forales.

Igualmente podemos plantearnos sobre la adecuada composición de dicho Tribunal cuando procede a dilucidar cuestiones que afectan a regímenes como los forales, muestra del pluralismo jurídico público y privado existente en el Estado Español. Si existe un verdadero pluralismo jurídico, ¿porqué no recibe luego una proyección jurisdiccional en los máximos órganos jurisdiccionales? ¿Se estará imponiendo una unidad jurisdiccional sobre una realidad sustantiva diversa y plural? Cuando la House of Lords decide cuestiones que afectan al derecho civil escocés o Scots Civil Law, su composición (Scottish Law Lords) es lógicamente distinta a cuando decide cuestiones de derecho inglés.

En realidad si la UE busca inspiración en algún modelo del derecho comparado para ir alcanzando la armonización, el modelo más interesante y eficaz sería precisamente el español, con la armonización de sus cinco sistemas tributarios más la situación específica de Ceuta, Melilla y el Archipiélago Canario.

# Concierto Económico y ayudas de Estado

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*Abogado del Iltre. Colegio de Abogados del Señorío de Bizkaia*

En primer lugar, quisiera agradecer a los organizadores, a la Asociación Ad Concordiam y al Instituto de Estudios Vascos de la Universidad de Deusto, la invitación a estas jornadas, a esta Conferencia Internacional.

Mi intervención intentará, de alguna manera, ayudar a comprender por qué la sentencia del Tribunal Supremo de 9 de diciembre de 2004[1] que «aplicaría» Derecho

[1] Sentencia de la Sala de lo Contencioso-Administrativo, sección Segunda, recurso Casación núm. 7893/1999 que casa, parcialmente, la sentencia de la Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia del País Vasco de 30 de septiembre de 1999 en el Recurso núm. 3753/96. Resolución del Tribunal Supremo que, además de confirmar la nulidad del artículo 26 de las Normas Forales de las Juntas Generales de Gipúzkoa, núm. 7/1996, de 4 de julio, de Bizkaia, núm. 3/1996, de 26 de junio, y Álava núm. 24/1996, de 5 de julio, reguladoras del Impuesto de Sociedades, anula los siguientes preceptos de las citadas Normas Forales: artículo 11 (corrección de valor: amortización); apartado 2.a) del artículo 14 en cuanto se refiere a «sociedades de promoción de empresas»; apartado 11 del artículo 16 (regla de valoración); apartado 1.a) del artículo 29 (tipo de gravamen del 32,5%); artículo 37 (deducciones por inversiones en activos fijos materiales nuevos); artículos 39 y 40 (reserva para inversiones productivas y adquisición de renta variable); apartado 2.1º del artículo 45 (libertad de amortización para el inmoviliza-

comunitario, en concreto en materia de ayudas de Estado, se ha denominado «atentado» al Concierto Económico[2].

Comenzaré por referirme, en primer lugar, al concepto de «ayuda de Estado», en el sentido del artículo 87 del Tratado CE, que –como se ha señalado por ponentes que me han precedido en el uso de la palabra– es un concepto comunitario. Y uno de los elementos que lo componen es el de la *selectividad* –el cual es, como se verá, ciertamente controvertido, máxime a la luz de lo señalado por el Tribunal Supremo–.

A propósito de las ayudas de Estado, como Vds. bien sabrán, la Comisión Europea es la única Institución competente para determinar si éstas son o no compatibles con el mercado común (claro está, bajo la supervisión de los tribunales comunitarios). Ahora bien, he de subrayar que esta atribución exclusiva es bien distinta de la competencia para determinar si una medida pública constituye una ayuda de Estado en el sentido del artículo 87 Tratado CE. Cuestión ésta que es necesariamente previa al examen de la compatibilidad de una medida pública (ayuda) con el mercado común. Competencia de análisis sobre el concepto de ayuda de Estado que corresponde, además de a la Comisión, también a los órganos jurisdiccionales internos de los Estados miembros[3].

Pues bien, por lo que se refiere a medidas fiscales vascas, nos encontramos con que la Comisión Europea ha adoptado varias decisiones precisamente en el ámbito de la ayuda de Estado. Me centraré en las adoptadas en tres fechas concretas y, cómo no, intentaré exponer, lo más claramente posible, el argumento relativo al requisito de selectividad de la noción de ayuda de Estado que fue empleado por la Comisión en cada una de ellas.

La Comisión se pronunció por primera vez en el año 1993[4]. Permítanme aquí un breve paréntesis para exponer lo que considero ha sido, en numerosas ocasiones, una

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do material existente y el de nueva adquisición); artículo 49 (pequeñas empresas, concepto y amortización); artículos 53 y 54 (centros de dirección, de coordinación y financieros), y artículo 60 (sociedades de promoción de empresas).

[2] Recojo la expresión «atentado» de los medios, los cuales se hicieron eco de las manifestaciones de altos responsables políticos de los Territorios Históricos del País Vasco tras conocer el contenido de la citada sentencia del Tribunal Supremo de 9.12.2004 («Es un *atentado* contra el Concierto»). Vid., *ad exemplum*, el diario El Correo Español de 28.1.2005, p. 38.

[3] Sentencia del Tribunal de Justicia de las Comunidades Europeas (en adelante, «TJCE»), de 22 de marzo de 1977, Steinlike und Weinlig/Alemania, 78/76, Rec. 1977, p. 595, apartado 14: «… un órgano jurisdiccional nacional puede tener motivos para interpretar y aplicar el concepto de ayuda recogido en el artículo 92 [actual artículo 87] al objeto de determinar si una ayuda de Estado introducida incumpliendo el procedimiento de examen preliminar establecido en el apartado 3 de artículo 93 [actual artículo 88] tendría que haber estado sujeta a este procedimiento». Véase, también, la Comunicación 95/C 312/07 de la Comisión sobre la cooperación entre los órganos jurisdiccionales nacionales y la Comisión en materia de ayudas de Estado (Diario Oficial de las Comunidades Europeas –en adelante, DOCE– C 312 de 23.11.1995, p. 8).

[4] Decisión 93/337/CEE de la Comisión de 10 de mayo de 1993 relativa a un sistema de ayudas fiscales a la inversión en el País Vasco (DOCE L 134 de 3.6.1993, p. 25). Se refiere, en concreto, a las Normas Forales de las Juntas Generales núm. 28/1988 de Álava, 8/1998 de Bizkaia y 6/1988 de Gipuzkoa, que

interpretación tendenciosa de esta decisión. En esta decisión del año 1993, la Comisión consideró las medidas fiscales analizadas incompatibles con el mercado común «*habida cuenta de que se conceden de forma contraria al artículo 52*[5] *del Tratado*». De este modo, como además la propia Comisión reconoció, de eliminarse las distorsiones con respecto al citado artículo 52, las medidas fiscales eran calificadas de ayudas compatibles. Tal es el tenor literal de la parte dispositiva de la citada decisión[6]. Cierro paréntesis.

Posteriormente, el 11 de julio de 2001, la Comisión adopta un conjunto de decisiones (seis) relativas, por una parte (tres) a un crédito fiscal del 45 por ciento para inversiones de importe superior a 2.500 millones de las antiguas pesetas[7] y, por otra (tres), a las denominadas minivacaciones fiscales del año 1996 (del año 1994 en Álava) para empresas de nueva creación[8]. La Comisión califica las medidas fiscales como ayudas incompatibles con el mercado común. Nada podemos decir al respecto. Se trata de ayudas de Estado[9].

Por lo demás, la sentencia de mañana[10], directamente relacionada con las citadas decisiones de la Comisión, puede que declare que hay un incumplimiento en la ejecución de la orden de recuperación de las decisiones de la Comisión.

Y llegados a este punto, reflexiono: ¿constituyeron estas decisiones un «atentado» al Concierto Económico? No. ¿La sentencia de mañana del Tribunal de Justicia va a constituir un «atentado» al Concierto? Tampoco. Me explicaré.

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establecían, por lo que se refiere al Impuesto de Sociedades, un crédito fiscal del 20% (con posibles incrementos porcentuales) de las inversiones.

[5] Actual artículo 43 (libertad de establecimiento).

[6] Artículo 4.1: «En un plazo de dos meses a partir de la notificación de la presente Decisión, las autoridades españolas velarán por que *se concedan* dentro de las zonas y límites máximos de las ayudas regionales nacionales o de las condiciones previstas en las directrices comunitarias sobre ayudas a las PYME dentro del respeto de las disposiciones comunitarias sobre acumulación de ayudas con finalidades diferentes, así como de los límites establecidos en determinados sectores de actividad de la industria, la agricultura y la pesca». Permítase pues llamar la atención sobre la expresión «*se concedan*» sólo y exclusivamente comprensible desde una perspectiva de compatibilidad del régimen analizado (una vez solventada, como así fue, la infracción de la libertad de establecimiento denunciada).

[7] DOCE L núms. 296 de 30.10.2002, p. 1 (sobre la Norma Foral 22/1994 de Álava); 314 de 18.11.2002, p. 26 (sobre la Norma Foral 7/1997 de Gipuzkoa), y 17 de 22.1.2003, p 1 (sobre la Norma Foral 7/1996 de Bizkaia).

[8] DOCE L núms. 174 de 4.7.2002, p. 31 (sobre el artículo 26 de la Norma Foral 7/1997, de Gipuzkoa); 279 de 17.10.2002 (sobre el artículo 26 de la Norma Foral 3/1996, de Bizkaia) y 314 de 18.11.2002, p. 1 (sobre el artículo 26 de la Norma Foral 24/1996 de Álava). Se trata de unas medidas fiscales que a empresas de nueva creación exoneran parcialmente del pago del Impuesto de Sociedades, en su caso, correspondiente durante un período de tiempo (4 años).

[9] Véanse las sentencias del Tribunal de Primera Instancia de 6 de marzo de 2002, as. ac. T-127/99, T-129 y 148/99 (asunto Demesa), Rec. p. II-1275, y as. ac. T-92/00 y T-103/00 (asunto Ramondín), Rec. p. II-1385; y las sentencia de casación del TJCE de 11 de noviembre de 2004, as. ac. C-183/02 P y C-187/02 P (asunto Demesa) Rec. p. I-10609, y as. ac.. C-186/02 y C-188/02 (asunto Ramondín), Rec. p. I-10653.

[10] Me estoy refiriendo al asunto Comisión/España, as. ac. C-485/03 a C-490/03 sobre un posible incumplimiento de ejecución de las decisiones de la Comisión de 11 de julio de 2001 (vid, notas 8 y 9 *supra*), en que el Tribunal de Justicia ha anunciado la sentencia para el 14.12.2006.

Pero antes de ello, falta por referirme a una tercera fecha: diciembre de 2001. La Comisión adoptó tres decisiones relativas a las denominadas vacaciones fiscales de 1993[11]. El hecho de declarar tales medidas fiscales ayudas de Estado, vuelvo con la reflexión, ¿supone un «atentado» al Concierto? Tampoco.

¿Dónde está entonces el «conflicto» (entre el Concierto Económico y las ayudas de Estado)?

Pues nos tenemos que referir a la citada sentencia del Tribunal Supremo de 9 de diciembre de 2004.

Veamos: toda medida que se califique como ayuda de Estado, en principio, tiene que ser autorizada por la Comisión (esto es, para declararla compatible). Para poder ser autorizada, obviamente, necesita ser conocida por la Comisión. A este respecto, existe una obligación por parte de los Estados miembros de notificar a la Comisión las *nuevas* ayudas de Estado o sus modificaciones, por así establecerlo el artículo 88.3 TCE y reiterada jurisprudencia del Tribunal de Justicia al respecto. Una vez que se notifica una medida, la Comisión se pronuncia: compatible o incompatible.

Pero no se pase por alto que cabe, ciertamente, incluso la posibilidad de que la Comisión se pronuncie en el sentido de que la medida pública analizada no constituye una ayuda de Estado en el sentido del artículo 87.1 del Tratado[12], o que constituye una ayuda de Estado *existente*[13].

Y al hilo de esta última hipótesis planteo el siguiente interrogante: ¿existe, en el caso de una medida pública que no constituye una ayuda de Estado, o constituye una ayuda de Estado *existente*, una obligación de notificación a la Comisión Europea con arreglo al Derecho comunitario?

El artículo 88.3 del Tratado establece que los Estados miembros tienen la obligación de notificar los proyectos de ayudas de Estado (*nuevas* ayudas) o las modificaciones de ayudas (ya *existentes*) en el sentido del artículo 87.1 TCE.

Luego, en presencia de una medida o intervención pública que, por ejemplo, no constituye una ayuda de Estado, en el sentido del artículo 87.1 TCE, no existirá obligación de notificar a la Comisión por parte de los Estado miembros.

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[11] Decisiones de 20 de diciembre de 2001: DOCE L núms. 17 de 22.1.2003, p. 20 (sobre el artículo 14 de la Norma Foral 18/1993 de Álava); 40 de 14.2.2003, p. 11 (sobre el artículo 14 de la Norma Foral 5/1993 de Bizkaia); 77 de 24.3.2003, p. 1 (sobre el artículo 14 de la Norma Foral 11/1993 de Gipuzkoa). Se trata de unas medidas fiscales que a empresas de nueva creación exoneran completamente del pago del Impuesto de Sociedades, en su caso, correspondiente durante un período de tiempo (10 años).

[12] Artículo 7.2 del Reglamento (CE) nº 659/1999 del Consejo, de 22 de marzo, por el que se establecen disposiciones de aplicación del artículo 93 [actual artículo 88] del Tratado CE (DOCE L núm. 83, de 27.3.1999, p. 1).

[13] Sobre el concepto de ayuda existente, me remito al contenido del artículo 1, letra b), del Reglamento (CE) nº 659/1999 del Consejo, de 22 de marzo, citado en la nota anterior.

Pensemos, por ejemplo, en una ampliación de capital en una empresa pública que actúa en un sector en plena concurrencia. Cuando tal ampliación responde al principio del inversor privado en una economía de mercado no existe ayuda de Estado, en el sentido del artículo 87.1 TCE. De este modo, tal ampliación de capital público no deberá someterse a la aprobación de la Comisión. Tampoco será el caso cuando se esté en presencia de ayudas *existentes*.

Por tanto, el hecho de que un Estado miembro, llegado el caso, notificara a la Comisión medidas públicas que no constituyen ayudas de Estado en el sentido del artículo 87 del Tratado, simplemente lo que significa es que ese Estado ha buscado una mayor seguridad jurídica. Nada más.

Llega, pues, el momento de analizar uno de los «elementos», a mi juicio, conflictivos de la citada sentencia del Tribunal Supremo de diciembre de 2004. ¿Dónde lo encontramos?

Conviene recordar que es la primera vez que el Alto Tribunal declara que una medida fiscal foral vasca, *de carácter general*, esto es aplicable a todas las empresas de un régimen fiscal, debía haber sido objeto de notificación a la Comisión en virtud del artículo 87 TCE.

Con anterioridad, nunca antes un órgano jurisdiccional había llegado a tal conclusión. Tampoco la Comisión. En efecto, si analizamos la decisión del año 1993, a la que antes me he referido[14], la Comisión consideró que existían ayudas de Estado porque, en el examen del requisito de selectividad, constató que determinados sectores (producciones) estaban excluídos de beneficiarse de las medidas fiscales forales[15]. No se trataba, por tanto, de medidas de carácter general en el marco jurídico pertinente de análisis.

Siguiendo con la misma lógica jurídica sobre el análisis de la selectividad (material) de las medidas objeto de las decisiones comunitarias adoptadas en el año 2001, antes citadas, cabe constatar cómo la Comisión concluye que determinadas medidas fiscales vascas eran ayudas porque se trataba de un crédito fiscal del 45% del que sólo podrían beneficiarse empresas que invirtieran más de 2.500 millones de pesetas. Es decir, la Comisión pudo reflexionar en el siguiente sentido: ¿una empresa sujeta al mismo ámbito de aplicación de las normas forales que invierte 2.000 millones de pesetas no tiene derecho al crédito fiscal 45%? Como la respuesta es negativa, la Comisión concluye en la existencia de discriminación; luego, la medida beneficia a «determinadas empresas» en el sentido del artículo 87.1 TCE. Por lo tanto, constituye una ayuda de Estado. Análisis, a mi juicio, correcto.

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[14] Vid. nota 4, *supra*.

[15] Vid. apartado III de la Decisión 93/337/CEE: «Estas ayudas se aplican únicamente a determinadas empresas, quedando excluídas de ellas las siguientes actividades: las de los intermediarios de comercio, los servicios de alimentación, el arrendamiento de maquinaria, aparatos de medida y elementos de transportes, los servicios personales y los servicios recreativos y culturales.»

En la misma línea encontramos las decisiones de la Comisión del año 2001 sobre las vacaciones y las minivacaciones fiscales antes referidas. Recordemos que se trataba de unos regímenes fiscales en beneficio de empresas de nueva creación (y, en concreto, que crearan diez puestos de trabajo…). Reflexión: y una empresa que se ha creado el día anterior a la entrada en vigor del citado régimen fiscal y crea diez puestos de trabajo, ¿no tendría derecho a la exención fiscal? Respuesta: pues no, no tendría derecho. Conclusión de la Comisión: se está discriminando; la medida es selectiva en el sentido del artículo 87.1 TCE puesto que es en beneficio de «determinadas empresas». Por lo tanto, constituye una ayuda de Estado (luego debía haberse notificado). Correcto.

Ahora bien, el Tribunal Supremo en su sentencia de 9 de diciembre de 2004 no sigue la misma línea de análisis de la selectividad realizado hasta la fecha.

Veamos: tomemos como ejemplo el tipo general de gravamen del 32,5% del Impuesto de Sociedades establecido por las Normas Forales de 1996.

De entrada, debo recordar que el Tribunal Supremo, como se desprende de la lectura de los Fundamentos de Derecho 17 y 18 de la sentencia[16], consideró que tal medida *puede* constituir una ayuda de Estado; no consideró que se tratara de una ayuda. Nos encontramos, por tanto, en presencia de un análisis provisional.

En mi opinión, es un análisis, de entrada, manifiestamente incorrecto por lo ya señalado en el sentido de que hubiera debido determinarse, con total certeza si se estaba en presencia o no de ayudas de Estado en el sentido del artículo 87.1 TCE (lo que implica *necesariamente* una correcta interpretación del requisito de selectividad), y no de si *pueden ser susceptibles de constituir* ayudas de Estado. Y si existen dudas respecto del concepto de ayuda de Estado ahí está el mecanismo de cooperación judicial con el Tribunal de Justicia al que se refiere el artículo 234 TCE. Debo insistir en que, en mi opinión, constituyen una aberración jurídica los citados fundamentos diecisiete y dieciocho de la misma, los cuales –no se olvide– son el único razonamiento para la declaración de nulidad respecto de determinadas medidas fiscales de carácter general al apreciarse, única y exclusivamente, una infracción de procedimiento en su adopción por las Juntas Generales de los Territorios Históricos del País Vasco.

En efecto, se señala literalmente por el Tribunal Supremo que el tipo general de gravamen se anula (como el resto de disposiciones fiscales finalmente anuladas) porque, siempre según el Tribunal Supremo, resultaría del Tratado, de su artículo 93 (actual artículo 88 TCE), que se presentaba necesaria, y se había omitido, la comunicación a la Comisión de medidas que indiciariamente pueden constituir ayudas de Estado[17].

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[16] Fundamento Jurídico Decimoséptimo: «De las anteriores consideraciones resulta que cabe considerar, *inicialmente*, incluibles en el concepto de ayudas de Estado (…)». Fundamento Jurídico Décimo Octavo: «b). (…) declarando la nulidad (…), al haberse omitido la necesaria notificación a la Comisión Europea establecida en el artículo 93 (actual artículo 88) del Tratado para medidas que *indiciariamente pueden* constituir ayudas de Estado.» La cursiva es añadida.

[17] Este razonamiento cabe encontrarlo con mayor claridad si cabe, sobre todo por su reiteración, en el auto del Tribunal Supremo de 4.4.2005 resolutorio (con desestimación) del incidente de nulidad planteado

Como ya he expuesto, la simple lectura del Tratado (artículos 87 y 88) no permite concluir la existencia de una obligación de los Estados miembros de notificar medidas *presuntamente*, o *susceptibles de constituir,* ayudas de Estado. Insisto, las medidas que no constituyen ayudas de Estado en el sentido del artículo 87.1 TCE no tienen por qué notificarse a la Comisión[18]. Por lo tanto, el razonamiento anulatorio del Tribunal no se extrae del Tratado.

Y aquí es precisamente donde la sentencia, dada la exigencia de notificación a la Comisión Europea que impone –a la luz de la interpretación particular que realiza del Derecho comunitario–, puede interpretarse ciertamente que vacía de contenido el Concierto Económico.

En efecto, si resulta que, de entrada, hay que notificar a la Comisión las presuntas ayudas –que son todas las medidas (tipo impositivo) adoptadas por las Juntas Generales aplicables a todas las empresas de su ámbito de aplicación a la luz de la particular interpretación que del requisito de «selectividad geográfica» realiza el Tribunal Supremo en su sentencia–, el «atentado» al Concierto vendría de la (novedosa) imposición a las instituciones forales de tener que contar con la previa autorización de la Comisión para poder adoptar y ejecutar todas sus medidas tributarias. Esto resulta «impensable» dado que «atenta» contra la propia «soberanía» de las Instituciones forales vascas, al menos tal y como ésta se venía entendiendo hasta la fecha[19].

¿Y qué ocurre si no se dispone de la autorización de la Comisión? Que no se puede ejecutar las medidas tributarias, en su caso, adoptadas, so pena de incurrir en ilegalidad. Además, siguiendo este razonamiento del Tribunal Supremo, nos podríamos encontrar con un problema añadido. Si quien notifica a la Comisión Europea es el Estado (Representación Permanente del Reino de España en Bruselas), ¿qué ocurre si se solicita al Estado que notifique una medida adoptada por las Juntas o las Diputaciones y el Estado no lo hace? Y esta hipótesis, en cierta medida, ya se ha producido, por ejemplo, con un incentivo fiscal de Bizkaia. Se trataba de unos incentivos fiscales al sector del transporte marítimo. Reconociendo que se trataba de una ayuda de Estado, en el sentido del artículo 87.1 TCE (dado su carácter selectivo pues únicamente beneficiaría a empresas de un concreto sector), se pretendía obtener de la Comisión su

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contra la sentencia de 9.12.2004 [Razonamiento Jurídico Sexto: «(…) la Sala ha entendido que determinadas Normas Forales *podían* constituir «ayudas de Estado», según la jurisprudencia del TJCE, y por aplicación de lo establecido en el artículo 93 (actual 87 –*sic*–) del Tratado era preciso para su aprobación la notificación a la Comisión Europea (…)». La necesidad de notificación o informar a la Comisión de los proyectos dirigidos a conceder o modificar *posibles* ayudas es una consecuencia directa del régimen establecido en los artículos 87 y 88 TCE (…)]. La cursiva es añadida.

[18] Véase las conclusiones del Abogado General Leger en el asunto Traghetti del Mediterraneo, as. C-173/03 presentadas el 11.10.2005, apartados 87 a 89. La exposición del Abogado General es asumida plenamente por el TJCE en su sentencia de 13.6.2006, en el citado asunto, apartado 41.

[19] Con fundamento en la Disposición Adicional Primera de la Constitución Española de 1978 y en el artículo 41.2 del Estatuto de Autonomía del País Vasco (Ley Orgánica de las Cortes Generales Españolas 3/1979, de 18 de diciembre). Sobre la posibilidad de existir diversidad de tipo de gravamen del Impuesto de Sociedades dentro del Estado, vid. sentencia del Tribunal Constitucional 19/1987, de 17 de febrero, FJ 4.

declaración de compatibilidad con el mercado común. Se solicitó por parte de las autoridades forales la notificación a «Bruselas» vía Madrid –porque, insisto, «Bruselas» no reconoce (no acepta) notificaciones de entes infraestatales de los Estados miembros–. Pues bien, esa notificación estuvo parada en Madrid durante meses por razones que me son desconocidas. Ahora bien, piensen Uds. que esa parada pueda durar uno, dos, tres años, y mientras ¿qué …?

Si, como propone el Tribunal Supremo, se considera que todas las medidas adoptadas por un ente infraestatal, por el hecho de que no se aplican a todo el conjunto del Estado, constituyen ayudas de Estado en el sentido del artículo 87.1 TCE, [argumento de selectividad empleado por el Tribunal Supremo en su sentencia de 9 de diciembre de 2004, ya que se «beneficiarían determinadas empresas» (aquellas empresas sometidas a normativa tributaria distinta de la del Estado), apoyándose en una jurisprudencia comunitaria, por lo demás, inexistente, como se ha puesto de manifiesto el 20 de octubre de 2005 por un Abogado General[20]], se está introduciendo, o imponiendo, la autorización de la Comisión como requisito de procedimiento para que se puedan ejecutar legalmente las medidas tributarias de los entes infraestatales.

Y es aquí donde radica el verdadero problema. Incluso, si hubiera un mecanismo directo de notificación a la Comisión por parte de los entes infraestatales de los Estados miembros tampoco se solucionaría el problema, porque siempre la Comisión tendría la potestad de decidir que no se apliquen esas medidas generales aplicables a todos los contribuyentes de esa entidad infraestatal en el supuesto de que, tras calificarlas de ayudas de Estado, declarara su incompatibilidad con el mercado común.

Por ello, resulta esencial para los entes infraestatales de los Estados miembros que las medidas generales que adopten en su ámbito de competencia puedan calificarse como medidas generales (en el ámbito comunitario), y no como ayudas de Estado.

La sentencia del Tribunal Supremo lo que aplica es un criterio de selectividad geográfica que ya fue expuesto por el Abogado General Saggio[21]. Me congratulo ciertamente de haber escuchado al representante de la Comisión afirmar que la opinión del Abogado General ha sido superada. Es verdad. Ha sido ignorada por la sentencia «Azores»[22].

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[20] En el asunto C-88/03, Portugal/Comisión, puntos 42 y 43 de sus conclusiones, en particular sobre el criterio de selectividad:

> «42. (…) ¿Qué principios han de aplicarse para determinar si las modificaciones en los tipos impositivos nacionales adoptados únicamente para una determinada región geográfica de un Estado miembro se hallan comprendidas dentro del ámbito de aplicación de las normas comunitarias sobre las ayudas de Estado?
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> 43. Hasta la fecha, el Tribunal de Justicia nunca ha respondido a esta cuestión en su jurisprudencia. (…)»

[21] En sus conclusiones presentadas el 1 de julio de 1999 en los asuntos acumulados C-400/97 a C-402/97 (Juntas Generales de Gupuzkoa y otros).

[22] Sentencia del TJCE de 6 de septiembre de 2006, Portugal/Comisión, as. C-88/03. Vid. igualmente, Decisión 2003/442/CE de la Comisión, de 11 de diciembre de 2002, relativa a la parte del régimen que

La sentencia Azores no supone –en mi opinión, contrariamente a lo que alguno ha pretendido ver– ninguna variación en la jurisprudencia del Tribunal de Justicia. Ya lo indica el propio Tribunal de Justicia –me remito al punto 59 de la sentencia– cuando expresamente señala que el argumento que la Comisión está utilizando sobre el criterio de la selectividad en su decisión del año 2002 en el asunto Azores –y que sigue, en concreto, la tesis citada del Abogado General Saggio– es erróneo a la luz del Tratado y la jurisprudencia comunitaria.

Cabe, por tanto, afirmar que la interpretación del Derecho comunitario que realiza el Tribunal Supremo en su sentencia de 9 de diciembre de 2004, y, en particular, del criterio de selectividad –apelando además a una «jurisprudencia reiterada del Tribunal de Justicia» inexistente– resulta, cuando menos, errónea. En efecto, no ha habido ninguna modificación; la sentencia Azores no aporta ningún giro jurisprudencial. Es conocido que cuando el Tribunal de Justicia ha dado un giro en su jurisprudencia, así además lo ha reconocido expresamente. Por ejemplo, la sentencia famosa de «Los Verdes» cuando, finalmente, reconoce la legitimación pasiva al Parlamento Europeo[23]. O cuando tras primar la libre circulación de mercancías sobre los derechos exclusivos de propiedad industrial (sentencia Hag I[24]), el Tribunal de Justicia varía su jurisprudencia primando éstos últimos sobre aquélla (sentencia Hag II[25]). En la sentencia Azores no encontraremos ningún *giro* jurisprudencial.

Por los argumentos expuestos, cuando el Tribunal Supremo señaló que las medidas controvertidas eran posibles ayudas lo hizo de forma absolutamente equivocada.

Incluso aunque hubiera declarado que se trataba de ayudas de Estado, tal declaración no se sustenta en ninguna doctrina jurisprudencial del Tribunal de Justicia, a fecha 2004, sobre el criterio de selectividad, por mucho que así lo pretenda hacer creer (en particular, en su auto de 4 de abril de 2005 justificando el porqué no ha lugar a revocar la sentencia a través del incidente de nulidad).

Lo que es, a mi modo de ver, una errónea sentencia, lamentablemente no se queda ahí. ¿Por qué? Porque, por una parte, el beneficiario de esa sentencia pretende ejecutarla, y, por otra, ciertas Administraciones autonómicas limítrofes pretenden servirse de ella para impedir la entrada en vigor de cualquier disposición tributaria foral de contenido distinto a las existentes en el régimen común. Y es entonces cuando entra en escena el Tribunal Superior de Justicia del País Vasco.

En principio, no sería éste el foro para entrar a analizar en profundidad si, en el trámite de ejecución de la sentencia del Tribunal Supremo, las disposiciones forales

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adapta el sistema nacional a las particularidades de la Región Autónoma de las Azores en lo relativo a las reducciones de los tipos de impuesto sobre la renta (DO L 150, 18.6.2003 p. 52).

[23] Sentencia del TJCE de 23 de abril de 1986, Parti écologiste «Les Verts»/Parlamento Europeo, asunto 294/83.

[24] Sentencia del TJCE de 3 de julio de 1974, Van Zuylen as. 192/7.

[25] Sentencia del TJCE de 17 de octubre de 1990, Hag, as. C-10/89.

que se adoptaron en el año 2005 –como establecían el mismo tipo impositivo del Impuesto de Sociedades (el 32,5%) que el anulado por el Tribunal Supremo–, el Tribunal Superior necesariamente las tenía que anular.

Ahora bien, sí me parece oportuno exponer una reflexión sobre la argumentación del Tribunal Superior de Justicia para llegar a una declaración de nulidad del tipo de gravamen (o, en otros procedimientos abiertos, a la suspensión cautelar del mismo): presupone (por ejemplo, en el auto de 14 de noviembre de 2005[26]), una infracción de procedimiento en el proceso de adopción de la disposición fiscal foral.

Y me pregunto: si una medida no constituye una ayuda de Estado, en el sentido del artículo 87.1 TCE, ¿cómo es posible que se haya infringido un procedimiento previsto sólo para las nuevas ayudas de Estado? En un trámite en el que no existe verdadera y completa contradicción entre las partes, cuál es un trámite de ejecución de sentencia, ¿se podía entender la existencia de una infracción del procedimiento, la del artículo 88 TCE, apartado 3? Porque, atención, la sentencia Azores lo que viene a mostrar claramente es que el criterio de selectividad empleado por la sentencia del Tribunal Supremo no es (nunca lo ha sido) válido. Luego, entonces ¿qué criterio se está utilizando?

Cuando se adopta en el año 2005 una norma tributaria, si hay un procedimiento en el año 2005, éste se tiene que respetar; pero si tal procedimiento legalmente no resulta aplicable, es obvio que no se tiene que respetar: simplemente es inaplicable.

Y lo que se está argumentando actualmente por parte de las entidades forales al adoptar los tipos de gravamen del Impuesto de Sociedades, y otro tipo de disposiciones fiscales, es que, al tratarse de medidas generales por ser el marco pertinente de referencia su ámbito de aplicación, no es necesaria su notificación a la Comisión.

El Tribunal Superior de Justicia del País Vasco, por otra parte, ha suspendido cautelarmente estos tipos de gravamen (el 32,5%). En mi opinión, al entender que debe primar la doctrina del Tribunal Supremo que en la sentencia de 9 de diciembre de 2004 expresa, el Tribunal Superior de Justicia ha considerado realmente que existe una infracción de procedimiento (la apreciada por el Tribunal Supremo). Y, en mi modesta opinión, tal razonamiento estaría prejuzgando el fondo del asunto (que solicita la nulidad de las disposiciones impugnadas por infracción del procedimiento previsto en el articulo 88.3 TCE) en la medida en que solamente podrían infringir un procedimiento comunitario las medidas que constituyen ayudas de Estado en el sentido del artículo 87.1 TCE (y no siempre), y nunca las medidas generales.

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[26] Vid. nota 1 *supra*. Procedimiento de Ejecución 3753/96 sobre, entre otras disposiciones, la Norma Foral de Bizkaia 7/2005, el Decreto Foral de Gipuzkoa 32/2005 y el Decreto Normativo de Urgencia Fiscal de Álava 2/2004. FJ 4: «(…) el único modo coherente de trasladar ese esquema decisorio al presente incidente es subsumir estrictamente en el discurso ya dado por la sentencia el contenido de cada norma de sustitución llamada a realizar el relleno del vacío producido, *y esto, presupuesta la falta de notificación que afecta igualmente a las nuevas disposiciones*…». La cursiva es añadida.

Cuando en diciembre del año 2005, se adopta el tipo impositivo del Impuesto de Sociedades en el 32,6% en el marco de un procedimiento (interno) concreto, y se analiza si ha habido una infracción de procedimiento, se tiene que analizar si ha habido una infracción en el año 2005.

Pues bien, ¿cuál sería la infracción si las medidas adoptadas no constituyen ayudas de Estado? Y siguiendo un poco más, si en el año 2007 se adoptara un nuevo tipo impositivo, el 28%, el 34% –estando el del Estado en el 35%–, el 23%, ¿qué infracción de procedimiento existiría si no constituyen ayudas de Estado? ¿Por qué se califican de ayudas? ¿Y quién ha dicho que son ayudas?

Quizás ahora, tras la sentencia Azores que deja en evidencia la sentencia del Tribunal Supremo, de leerse correctamente los artículos 87 y 88 TCE en el sentido de que solamente se refieren a ayudas, ¿qué argumento, en su caso, invocarán los nuevos recurrentes? ¿Qué argumento se podrá acoger por los tribunales?

No se puede prejuzgar en el sentido de que ha habido una infracción de procedimiento. Para constatar (que no presuponer) tal infracción hay que entrar en el fondo. Y para entrar en el fondo resulta que, después de más de un año de conflictos judiciales, el propio Tribunal Superior de Justicia entiende que las cosas no están claras sobre el concepto de ayuda de Estado, y en concreto sobre el requisito de selectividad que lo integra, y que, por tanto, procede plantear una cuestión prejudicial al Tribunal de Justicia[27].

¿Y qué ha cambiado? La sentencia Azores nada. El Tratado es el mismo desde el año 1957. No ha cambiado absolutamente nada (en esta materia). No ha habido giro jurisprudencial porque la lectura de la sentencia evidentemente no permite extraer esa conclusión. Simplemente la sentencia Azores lo que viene a decir, a matizar, es que donde antes las entidades infraestatales y los Estados miembros podían pensar que cuando las medidas fiscales se aplicaban a todos los contribuyentes dentro de una región de un Estado nunca constituían ayudas (por eso no se adoptaban decisiones por parte de la Comisión hasta el año 2002 existiendo regímenes fiscales de entidades infraestatales mucho antes), puede que, en determinados casos, constituyan ayudas de Estado. ¿Cuándo? Cuando la entidad infraestatal autora de las medidas fiscales no tenga suficiente autonomía política y financiera. ¿Estamos nosotros en este supuesto de falta de autonomía? Entiendo que no.

Es la Comisión quien tiene que reinterpretar todo su planteamiento, porque es a ella a quien se ha corregido en la sentencia Azores; es ella la que ha seguido un criterio de selectividad geográfico, puro y duro, sin analizar absolutamente nada más. Tomando como marco de referencia el territorio del Estado en su conjunto, consideró (como el Tribunal Supremo) que una medida fiscal de no aplicarse en todo ese territorio constituye una medida selectiva, en el sentido del artículo 87.1 TCE. Pues bien, el Tribunal de Justicia le ha dicho que ese argumento es equivocado.

[27] Asuntos acumulados C-428/06 a C-434/06.

No es de descartar que la Comisión pretenda, mediante ingeniería jurídica, reinterpretar la doctrina Azores. En principio, ya no va a poder desarrollar plenamente sus argumentos en el asunto Gibraltar, salvo en la vista oral, de producirse[28]. El asunto Gibraltar es un asunto que, en este momento, está pendiente ante el Tribunal de Primera Instancia. Asunto éste, por cierto, conocido perfectamente por el Tribunal de Luxemburgo cuando dicta la sentencia en el asunto Azores (en el que, recuérdese además, el Reino de España, al igual que el Reino Unido, discutió la validez del criterio de selectividad empleado por la Comisión).

Suscribo las palabras del Sr. Colson[29] de que la sentencia de Azores va más allá de lo que es una sentencia de nulidad: se trata de una sentencia de naturaleza más bien prejudicial.

A mi juicio el Tribunal de Justicia, con su sentencia en el asunto Azores, ha pretendido esencialmente dejar bien claro cómo tiene que interpretar la Comisión las normas de ayudas de Estado, no los Estados[30]. Es la Comisión la que tiene que cambiar el criterio de selectividad geográfico empleado en los asuntos Azores y Gibraltar.

Dicho lo cual, ¿dónde entonces la Comisión puede intentar demostrar que sus argumentos sobre la selectividad geográfica –si entiende que tiene que seguir manteniéndolos– deben imponerse? Pues es claro que en la cuestión prejudicial que ha planteado el Tribunal Superior de Justicia del País Vasco[31]. Ahí tiene la oportunidad de explicarse sobre cómo interpreta toda la cuestión de la selectividad expuesta en la sentencia Azores (en particular, mediante una interpretación de los criterios de autonomía, con especial mención al de la autonomía económica).

Ignoro si la Comisión va a incoar un procedimiento en aras a adoptar el día de mañana una decisión formal respecto de unas medidas forales de naturaleza tributaria (de ámbito general para nosotros) porque considerara que son selectivas al ser adoptadas por un ente infraestatal que carece de autonomía suficiente.

Por último, lamento que la cuestión prejudicial no se hubiera planteado por el Tribunal Supremo; tenía los mismos argumentos que el Tribunal Superior de Justicia del País Vasco para hacerlo. Creo sinceramente que el Tribunal Superior de Justicia está realizando un esfuerzo ímprobo por deshacer el entuerto.

Lo que ocurre es que quizá le hubiéramos pedido algo más: que no hubiera decretado la suspensión de disposiciones forales y luego plantee la cuestión prejudicial, y no al revés, porque, de alguna manera –es mi opinión–, habría prejuzgado al presu-

[28] Asuntos acumulados en el Tribunal de Primera Instancia T-211/04 y T-215/04.

[29] Miembro de la Comisión que había intervenido anteriormente en la Jornada.

[30] Me estoy refiriendo al poder político, por cuanto, como ya he señalado, la interpretación del Derecho comunitario, y en particular, del concepto de ayuda es competencia de los órganos jurisdiccionales internos de los Estados miembros.

[31] Ver nota 27, *supra*.

poner la existencia de una infracción de procedimiento (que fue el argumento de nulidad empleado por el Tribunal Supremo) donde no existe.

Espero que respecto a medidas fiscales forales sucesivas que pudieran ser impugnadas (evidentemente por quien considera que puede tener derecho [para tal impugnación]), el Tribunal Superior de Justicia del País Vasco tome en consideración los últimos acontecimientos, e incluso las variaciones que han sufrido los recurrentes en sus planteamientos en los últimos escritos (ahora se afirma que la sentencia del Tribunal Supremo es «provisional» porque el propio Tribunal reconoce que le puede enmendar la plana la Comisión). Y todo ello sirva, al menos, para que no se les reconozca una apariencia de buen derecho, y, de este modo, cuando soliciten, en su caso, la adopción de una medida cautelar de suspensión, se les desestime. Y a partir de ahí, si se quiere plantear una cuestión prejudicial que se plantee, pero que los contribuyentes puedan estar tranquilos en el sentido de que la seguridad jurídica por las apariencias de buen derecho, en todo caso, están de la parte de las Instituciones forales vascas y no de la del recurrente. Muchas gracias.

# Ayudas de Estado y proceso Contencioso-Administrativo interno

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## Introducción

Para amoldarme a la brevedad del tiempo de intervención, y para evitar posibles coincidencias temáticas con otros intervinientes de esta misma jornada, me voy a limitar a exponer una síntesis de las actuaciones y criterios que la Sala de lo Contencioso-Administrativo del Tribunal Superior de Justicia del País Vasco a la que pertenezco ha mantenido en esta materia, caracterizando las sucesivas etapas y, en lo posible, la suerte final de cada una de ellas. Está también muy presente en mi ánimo que no es la limitada jurisdicción administrativa interna el lugar principal desde el que intentar adoctrinar sobre una institución como la de las ayudas de Estado, que cuenta con prestigiosos especialistas en este Congreso que celebramos en la Universidad de Deusto.

Me voy a introducir en este tema con una reflexión, muy personal, sobre el marco jurisdiccional en que el continuado conflicto, –pues de él ha de hablarse–, se ha venido residenciando. Estamos hablando de un Tribunal integrado en la organización judicial del Estado autonómico, y concebido, por tanto, por los artículos 152 CE y

34 EAPV como culminante de esa organización en el ámbito territorial del País Vasco. A la vez, hasta la fecha, sus sentencias han sido posible objeto de Recurso de Casación ordinaria ante el Tribunal Supremo, con lo cual, –y pronto lo examinaremos en relación con las diversas fases de conflicto continuado sobre ayudas de Estado a lo largo de los últimos años–, ha funcionado como un mero órgano judicial de primera instancia.

Ahora bien, tengo la experiencia de que, por la naturaleza de los litigantes, –poderes territoriales o institucionales, estatales o autonómicos, dotados de una gran carga política de base electoral o, «de facto»–, el Tribunal se ve sometido a una gran tensión deslegitimante cuando afronta conflictos entre Administraciones e instituciones que son unas de ellas internas y otras externas a su ámbito. Se originan discursos paralelos confrontados de raíz política y económica, (y no exentos de buenas dosis de propagandismo), que menoscaban realmente la validez de la respuesta jurisdiccional y empujan a todo el sistema de relaciones en torno al Concierto Económico hacia una perspectiva de ruptura. Las partes internas consideran las resoluciones adversas como derivadas de la falta de conocimiento y de sensibilidad del Tribunal ante la normativa aplicable, mientras que las externas las achacan a la asfixiante presión ambiental que el Tribunal sufre. Con toda humildad tengo que anotar que, en ocasiones y a lo largo de los años, han sido esas mismas partes las que en contextos más desfavorables han tratado de hacer valer la autoridad de los Tribunales que antes menoscabaron, y que no pocos estudios y hasta reformas sobre la materia por ellas propiciados van a estar frecuentemente inspirados en las aportaciones judiciales realizadas a la interpretación del Concierto Económico.

Esa situación supone, como no decirlo, una exigencia extrema de neutralidad política e imparcialidad para quien juzga, –artículos 117.1 y 127 de la Constitución–, pero invita también a superar la situación de peculiar marginalidad del órgano judicial territorial. No obstante, y de no interponerse otras fórmulas, eso es lo que ocurrirá seguramente con la próxima reforma de la Ley Orgánica del Poder Judicial y Ley Reguladora de la Jurisdicción Contencioso-Administrativa, si es que suprime la Casación ordinaria para estos casos y, con ello, la actuación del Tribunal Supremo en esa peculiar segunda instancia.

A mi entender, y en vez de convertir al Tribunal del País Vasco en la primera y, –quién sabe–, hasta en la única estructura de solución de conflictos, sería más oportuno llenar de todo su contenido posible a las propias instituciones de creación de consenso previstas en el Concierto Económico, –Comisión de Coordinación y Evaluación Normativa y Junta Arbitral–, para situar en el terreno de la negociación y luego en instancias suprautonómicas, la solución voluntaria o judicial de las controversias sobre normativa tributaria del País Vasco, bien se haga sobre la base de reorientar indirectamente los mecanismos actualmente dados de solución de conflictos, bien sobre la base de rediseñar los mismos para el caso concreto. En este punto me voy a limitar a apostar por el resultado de plena constitucionalidad del que finalmente se establezca.

## I

Dicho esto, y centrándome ya en las aproximaciones jurisdiccionales a la contemplación a lo largo de estos años de algunas disposiciones fiscales del País Vasco como ayudas de Estado, podrían hacerse varias categorizaciones, una de las cuales está en función del sujeto promotor de la declaración.

Cabe de este modo, y partiendo del restablecimiento del régimen de Concierto Económico en 1981, hablar de una primera fase en que es la propia organización central del Estado la que, por decirlo así, aspira a autoimpugnar la normativa interna foral ante las instituciones europeas. Más tarde el sujeto activo serán las Comunidades Autónomas limítrofes y determinados agentes económicos y sociales enclavados en las mismas. Esta segunda fase coincide progresivamente con una clara mitigación de la actuación procesal de la Administración del Estado, que se difumina a partir del año 2000.

Hito inicial del primer grupo son los procesos surgidos en torno a las Normas Forales de incentivos a la inversión de 1988. La Administración del Estado ya suscitó entonces novedosamente que las deducciones previstas por las Normas Forales 14/1987, 8/1988, y 28/1988 de Gipuzkoa, Bizkaia, y Alava, respectivamente, aquejaban la omisión del requisito formal de ser comunicadas a la Comisión Europea.

La Sala de lo Contencioso-Administrativo del País Vasco hizo entonces un primer examen intensivo de esta cuestión, (pueden verse los Fundamentos quinto a séptimo de nuestra sentencia 17 de mayo de 1991 en R.C.A 1.595/88), y resolvió negativamente la pretensión anulatoria del Estado desde una perspectiva de mínimos, esencialmente procedimental, y en función de no considerar atribuible, en concreto, la falta de comunicación a las instituciones forales normadoras, en relación con la existencia de previas actuaciones de solicitud de información al Estado por parte de la Comisión.

Posteriormente tres sentencias dictadas por el Tribunal Supremo en fechas de 7 de Febrero, 13 y 22 de Octubre de 1998, vinieron a revocar las de la Sala territorial y a anular las referidas Normas Forales, adoptando un enfoque diferente, que partía de que, en el curso de ese procedimiento, las citadas Normas Forales habían sido objeto de la Decisión 93/337/CEE, de 10 mayo, que estableció que afectaban al artículo 52 del Tratado Constitutivo de la Comunidad Económica Europea.

Dijo entonces el Tribunal Supremo, que: «(…) ha quedado probada la existencia de una auténtica discriminación y un menoscabo de los principios de libertad de competencia, que ha sido remediado en cuanto a los empresarios residentes en la Unión Europea que no lo sean en España y que, por estar sometidos a la legislación común española, no puedan acogerse a la de la Comunidad Autónoma, pero no en cuanto a los empresarios del restante espacio interior del sistema fiscal español, de suerte que las empresas españolas que operen en el País Vasco, pero establecidas fuera de él, aunque sean también residentes en la Unión Europea, no tendrán reembolso alguno

de la reconocida diferencia en los tributos que abonen y quedarán en desventaja competitiva no sólo respecto de las empresas sometidas al régimen foral, sino también de las de los demás Estados Miembros de dicha Unión Europea que ejerzan actividades en el País Vasco.

No cabe, pues, prueba más palpable de que las Normas Forales conteniendo los incentivos fiscales que se han citado, y, del mismo modo, la número 28/1988 de Alava impugnada en el presente recurso, discriminan abiertamente las actividades de los empresarios radicados en el territorio de que se trata con relación a los del resto de los Estados Miembros de la Unión Europea y, por tanto, a los del resto de España.

Se ha puesto, en consecuencia, de manifiesto la vulneración por la Norma Foral 28/1988 de Alava de las reglas once (menoscabo de la libre competencia empresarial) y doce (presión fiscal efectiva global inferior a la que exista en territorio común) del artículo 4 de la Ley del Concierto Económico de 1981, que conlleva, forzosamente, la nulidad de la Norma impugnada, en su totalidad.

Son, por tanto, las más altas instancias comunitarias europeas las que han declarado discriminatorias las Normas en cuestión, debiendo afirmarse que el ordenamiento comunitario rechaza la creación de incentivos que fomenten, en perjuicio de otras, la implantación de empresas en un territorio determinado dentro de la Unión Europea, alterando el juego de la libre competencia entre ellas».

La base de la anulación de las normas forales por parte del Tribunal Supremo no fue, por tanto, su consideración explícita como ayudas de Estado, sino una reflexión jurisprudencial que parecía entroncar más claramente con un desideratum, como es la uniformización de la imposición directa en la Unión Europea hasta hoy inalcanzada y sometida a la vía lenta del articulo 94 del Tratado, presidida por la directriz de que cualquier trato fiscal aisladamente favorable debe de ser aplicable a todos los operadores de los Estados miembros, extranjeros y españoles, independientemente de su ámbito subjetivo de aplicación. La eventual afectación a una de las libertades del tratado, –la de establecimiento del entonces articulo 52, (hoy 43)–, se transformaría así en mecanismo de unificación de legislaciones, de forma que medidas fiscales obstaculizadoras del establecimiento impondrían la unificación de legislaciones sobre impuestos directos. De otra parte, late en dicha sentencia la consideración, también presente en la Decisión 337/93, de que se está ante Ayudas de Estado, como revela el último inciso transcrito, pero en este caso el Tribunal Supremo incorporaba al enjuiciamiento interno una calificación autónoma que la Comisión, –conocidas y examinadas las medidas incentivadoras de 1988–, no había llegado a adoptar, al menos de forma completa ni consecuente, con lo que el Tribunal interno prescindía de las facultades subordinadas y de apoyo que el articulo 93.3 del Tratado le otorga al Juez nacional. (Es sabido que las medidas adoptadas por la Ley 42/1994 habían sido asumidas por la citada Comisión en 1995 como superadoras del obstáculo a la libertad de establecimiento en que principalmente la Decisión descansaba).

Cabe concluir, por ello que, si bien el Tribunal Supremo recondujo nominalmente la infracción al articulo 4º del Concierto Económico entonces vigente, la caracterización como ayuda de Estado incompatible con el mercado común de medidas de incentivo fiscal derivadas del Concierto, tomaba ya carta de naturaleza por mor de esa decisión de la jurisprudencia interna, –ajena en ese momento a la disciplina de los artículos 87 y 88 del Tratado–, mediante la idea, poco argumentada en tales sentencias, de que las libertades establecidas por el Tratado de la Unión requerían forzosamente la uniformidad de la legislación fiscal directa española para evitar discriminaciones o privilegios de unos españoles sobre otros.

El núcleo de esa idea, perfeccionado en lo formal y argumental, –e intermediado por la tesis de la mayoría del Tribunal Constitucional en la STC 96/2002–, es lo que, a mi juicio, iba a dar origen a la Sentencia de 9 de Diciembre de 2004.

## II

Siguiendo con nuestro particular viaje a través del tiempo, el siguiente hecho procesal destacable fueron los recursos contra las normativas forales de impulso a la actividad económica de 1993 y 1995. En esta fase temporal convergen por primera vez las impugnaciones del Estado, (que iban a dar origen a las cuestiones prejudiciales C-400-401 y 402 de 1997 ante el Tribunal de Justicia de las Comunidades Europeas), con las de alguna Comunidad Autónoma, y tanto en unos como en otros procesos se planteaba abiertamente la necesidad de comunicación a la institución europea de las medidas fiscales adoptadas (créditos fiscales, libertad de amortización etc…). Prescindiendo de otros avatares, –como fue el debate sobre la legitimación de las citadas CC.AA, que llegó a postergar en el tiempo la decisión de algunos recursos–, la propia Sala se mostró inicialmente reacia a reconocer su papel en esta cuestión de las ayudas de Estado, de lo que da testimonio, por ejemplo, la Sentencia de 5 de Diciembre de 1997 en R.C.A 1.802/95, sobre normas de apoyo a la reactivación económica de 1995.

En ella se decía que; «esta misma Sala ha tenido ocasión anterior de plasmar el criterio de que, «en general gozan de efecto directo las normas «self executing» o perfectas, y quedan fuera de ese alcance las disposiciones de los Tratados que establecen obligaciones de puro trámite y se refieren a las relaciones entre los Estados y la Comunidad, como señala respecto del articulo 93 la sentencia «Costa-ENEL», salvedad hecha de «la ultima frase del apartado 3», a que ahora nos referiremos. Quedan también fuera de dicha eficacia las normas que establecen «amplios poderes de apreciación para la Comunidad», teniendo aquí entrada los artículos 92 y 93 en su conjunto y generalidad.-Sentencia de 13 de Julio de 1989, en asunto 380/87».

Sobre la base de lo que antecede la conclusión es que los órganos jurisdiccionales de un Estado miembro no pueden sustituir a la Comisión y no pueden, –no podemos, por tanto–, decidir si las ayudas fiscales que la Norma Foral contiene tienen encaje o no en los supuestos excepcionales del articulo 92.3.

Sin embargo, tiene también toda la apariencia dicho problema de referirse a una cuestión puramente procedimental o de relaciones entre Estados y Comisión a que antes nos referíamos, y es preciso examinar cuáles son las facultades de los Tribunales internos al respecto, así como cuál puede ser la influencia de la omisión de comunicación sobre la validez de la Norma Foral, que es la materia sobre la que este proceso versa en exclusiva.

Sobre estos temas también se ha manifestado con anterioridad esta Sala y Sección, –así en pieza separada de suspensión de autos 2.684/93, con resolución de 18 de Noviembre de 1993, (confirmada por STS de 4 de Mayo de 1995, (Ar. 3.821)–, diciendo que: «…tanto la indicada sentencia «Costa-ENEL», como más tarde la de 11 de Diciembre de 1.973 en asunto 120/73, o sentencia «Lorenz», o la más reciente que se cita de 21 de Noviembre de 1991, han establecido y perfilado el efecto directo atribuible a la ultima frase o inciso del apartado 3 del articulo 93 del Tratado constitutivo, en el sentido de que el carácter inmediatamente aplicable de la prohibición de llevar a la practica o ejecutar la ayuda, (que es lo que refiere dicho ultimo inciso o frase), se extiende al conjunto del periodo al que la prohibición se aplica, por lo que, de esta forma, el efecto directo de la prohibición se extiende a toda ayuda llevada a cabo sin ser notificada, y en caso de notificación, dicho efecto se mantiene durante la fase preliminar, y si la Comisión inicia el procedimiento contradictorio, hasta la decisión final. Significa todo ello que no solo están prohibidas las ayudas aún no declaradas compatibles por la Comisión, sino también aquellas respecto de las cuales el procedimiento preventivo o contradictorio esté en curso, o ni siquiera se haya iniciado por falta de notificación del proyecto a dicho órgano comunitario, pero, muy al contrario de lo que sostiene la parte recurrente en estos autos, no significa en modo alguno que la obligación del Estado miembro de informar sobre el proyecto de ayudas, que es una obligación de trámite contenida en otro lugar del articulo 93.3, goce de «efecto directo» alguno, y pueda ser invocada ante los Tribunales nacionales y hecha efectiva por estos mediante las sanciones de invalidez pertinentes.»

No obstante lo anterior, los procesos relativos a la normativa de 1993 llegaron por el cauce de la cuestión interpretativa del articulo 234 TCEE a suscitar, al menos de soslayo, el tema de las ayudas de Estado, y el Abogado General Saggio formuló sus bien conocidos planteamientos conducentes a dicha consideración, sobreseyéndose no obstante el asunto por desistimiento de la Abogacía del Estado en los procesos internos. Es significativo que la representación procesal de España ante el TJCEE, pese a ser la Administración del Estado quien promovía el recurso, se opuso a dichas tesis. De los puntos de vista adoptados en esas conclusiones quiero destacar ahora, por su posible repercusión sobre el debate de estos días de finales de 2006, que dicho Abogado General consideraba parcial la autonomía fiscal de las provincias vascas y no determinante para las empresas de un contexto económico diferente del de las empresas que operan en el resto del territorio español.

A partir de esos acontecimientos nos adentraremos enseguida en la fase más reciente del conflicto jurisdiccional sobre ayudas de Estado derivadas de la aplicación del

Concierto Económico con la práctica desaparición del Estado como agente procesal a partir de los acuerdos de «paz fiscal» del año 2000, lo que supuso la eliminación de los procesos en que se encontraba implicado en ambas instancias, incluídos lo interpuestos contra las Normas Forales del Impuesto de Sociedades promulgadas en 1996 que, por primera vez, definían un tipo impositivo general inferior al de la Ley común, ya para entonces, Ley 43/1995.

Mientras tanto, no se había agotado la litigiosidad en torno a las aludidas Normas Forales del Impuesto de Sociedades promulgadas en 1996, pues a los del Estado les siguieron los recursos formulados por agentes económicos o institucionales diversos del ámbito de las Comunidades autónomas, de los que llegó a conocerse en el R.C.A 3753/1996, dando lugar a nuestra sentencia de 30 de Septiembre de 1999.

## III

Pero antes todavía de repasar esa actuación, queda por reseñar otra importante faceta resolutoria de esta Sala, que tomando como referencia ahora la Sentencia de 29 de Enero de 1999, como significativa de una serie de ellas, anulaba por razones de derecho constitucional interno determinadas medidas fiscales (especificamente un crédito fiscal a la inversión del 45 por 100). El interés que veo en mencionar tal serie de resoluciones es que venían a coincidir, desde el paradigma del derecho interno, con las dos claves que las instituciones comunitarias apreciaban para calificar como ayuda de Estado concretas aplicaciones de tales disposiciones. (Su carácter selectivo por reservarse las Haciendas Forales plena discrecionalidad en el otorgamiento y por los elevadísimos límites cuantitativos mínimos de la inversión). El reflejo, por tanto, de dichos criterios se produce en sentencia del Tribunal de Primera Instancia de 23 de Octubre de 2002 en asuntos acumulados T-269, T-271 y T-272. El criterio del Tribunal interno fue esencialmente material y ajeno a la apreciación de toda especificidad o carácter selectivo derivado del marco autonómico o regional del que la medida emanaba, y, en apariencia, el del TPICE también.

Se decía en nuestra sentencia que, «examinado el contenido de la disposición impugnada es de ver que los incentivos que en ella se contienen quedan limitados a inversiones en activos fijos nuevos que excedan de dos mil quinientos millones de pesetas, incorporando, así, un elemento restrictivo de acceso al beneficio fiscal, cuya razón de ser no se justifica, de otro lado, en la propia disposición, comportando un factor de discriminación, no ya sólo para aquellas entidades que operen o realicen sus inversiones en activos fijos fuera del Territorio Foral, sino, incluso, para las que operando o invirtiendo en Guipúzcoa no alcancen, sin embargo, dicha cantidad, con infracción del principio de igualdad que proscribe la letra c) del artículo 4 de la Ley del Concierto Económico.

Desde otra perspectiva, la citada disposición adicional décima, objeto de impugnación, prevé un crédito fiscal del 45 por 100 del importe de la inversión que determine la

Diputación Foral, singularizando el beneficio no sólo en su cuantía sino, además, en los hipotéticos destinatarios a discreción de la propia Administración Tributaria, en contradicción con la prescripción que se contiene en el artículo 7 de la Ley General Tributaria según la cual el ejercicio de la potestad reglamentaria y los actos de gestión en materia tributaria constituyen actividad reglada, así como con afección del principio de seguridad jurídica que proclama el artículo 9 de la Constitución Española».

Con este ejemplo he querido patentizar que los principios y límites que rigen la capacidad normativa atribuida por el Concierto Económico pueden llevar, –y con toda seguridad llevarán–, a descalificar una disposición o un acto de aplicación normativo cuando constituya una ayuda o ventaja que menoscabe las posibilidades de competencia empresarial, en coincidencia con su calificación como ayuda de Estado en el plano del derecho comunitario. Sin embargo, el fundamento es distinto en cada caso y creo que no pueden amalgamarse ambos cánones de evaluación de validez hasta deducir proposiciones del tipo de, «si existe una inicial diferencia de tributación para los extranjeros que son comunitarios, también existirá para los comunitarios españoles, luego la norma es discriminatoria». Buena prueba de ello es que el articulo 21 del Concierto Económico de 2002 ha permitido superar el primer problema aplicando la normativa foral a los comunitarios no residentes, (como lo hacía ya con todos los españoles residentes en territorio foral), y ello no impone por sí mismo que la condición de validez de una disposición foral sea su aplicabilidad universal a quienes, españoles o extranjeros, quedan fuera de su ámbito subjetivo de aplicación definido por los pertinentes puntos de conexión.

Cuestión distinta es que sea muy opinable, hasta la fecha, que medidas de reducción de la carga impositiva de base regional que procedan de un Estado miembro de la Unión puedan considerarse distorsionadoras de la competencia por provenir del mismo ámbito macroeconómico que las medidas generales de dicho Estado, aunque cada miembro goce todavía de plena libertad regulatoria en imposición directa. El rechazo en tal sentido se sitúa en los orígenes del Mercado Común y se trata de comprobar si la evolución de los últimos catorce años lo ha mutado. ¿Supone realmente la STJCEE en el Asunto 88/03 el punto de inflexión, o está exigiendo una autonomía tan plena e irreal a las regiones europeas que sus criterios legitimadores van a resultar ilusorios?

## IV

Retomando el hilo de lo que supuso la Sentencia de 30 de setiembre de 1999, en torno al problema de la apreciación de las ayudas de Estado, lo primero a destacar es que la Sala replanteaba ya allí sus anteriores puntos de vista en torno a la apreciabilidad por el Juez interno de los presupuestos de la Ayuda de Estado:

«Respecto de la primera faceta –extensión del «efecto directo» del artículo 93.3, al supuesto aquí enjuiciado–, la parte recurrente da por sentado que las disposiciones

generales en que se establecen beneficios de carácter tributario se ven afectadas en su validez misma en la medida en que no hayan sido notificadas a la Comisión, y en fundamento de ello extracta parte de la Sentencia Lorenz de 11 de diciembre de 1973, o las conclusiones del Abogado General Jacobs para la Sentencia de 21 de noviembre de 1991, relativas al efecto directo del último inciso de tal apartado 3, o también las conclusiones del asunto C-142-87, Sentencia de 21 de marzo de 1990 donde podría tener más acomodo la tesis de que incluso las normas generales mismas, y no sólo las medidas concretas de reconocimiento o concesión formal de una ayuda –que es a lo que avoca una interpretación literal del precepto–, pueden ser tenidas como actos sometidos a notificación bajo consecuencias directamente aplicables por los Tribunales nacionales.

Tal parece ser la línea doctrinal imperante en las instituciones comunitarias, y en la práctica se debe asumir el criterio de la parte recurrente en función de los propios precedentes de esta Sala que, previa audiencia concedida a las partes y al Ministerio Fiscal, tiene planteadas y pendientes de decisión tres «cuestiones prejudiciales» mediante Autos de 30 de julio de 1997, en proceso ordinario 2679/1993 y otros, promovidos por la Administración del Estado frente a Normas Forales de los tres Territorios Históricos dictadas en 1993, sobre medidas urgentes de apoyo a inversión e impulso a la actividad económica (TJCE, C-400-97, C-401-97 y C-402-97), y en las que, siquiera secundariamente, se somete al Tribunal comunitario, junto con otro aspecto principal, la posible oposición de aquéllas al artículo 92.1 del Tratado Constitutivo de la CEE».

No obstante, al llegar a plantearse la posibilidad de una nueva remisión prejudicial, se rechazaba por el argumento de que: «hay que atenerse a otro de los principios o postulados fundamentales que, por el contrario, desvirtúa la promoción de tales decisiones prejudiciales en función de su falta de utilidad cierta, pues como pone de relieve la doctrina, el objeto por antonomasia del ordenamiento comunitario es el flujo transfronterizo de personas, mercancías, servicios y capitales, y el mantenimiento de una situación de libre competencia que no altere el comercio entre Estados miembros, que imponen, en palabras de algún autor, la concurrencia de «un elemento de extranjería comunitaria», cuya falta comportará un indicio de que lo discutido en el proceso es una cuestión interna a resolver mediante el canon del derecho nacional».

Como resumen de todo lo anterior, la actitud a lo largo de esos años de la Sala del País Vasco en relación con la conceptuación de determinados incentivos como ayudas de Estado se sintetiza en los siguientes puntos;

– Dudas sobre el efecto directo de determinados aspectos de la normativa del articulo 93 TCEE.
– Propensión a suponer que son las medidas concretas fiscales aplicadas, y no la normativa abstracta y general contenida en las disposiciones forales, las que pueden ser objeto de revisión desde el prisma de requisitos materiales y procedimentales de los artículos 87 y 88 del Tratado.

– Cuando se superan esas limitaciones, no se asume la interpretación del Tratado como clara y exenta de duda, sino que se trata de acceder a la subsunción en el concepto de Ayuda de Estado por medio de la Cuestión Prejudicial, que es lo que ocurre en 1997 y tiene su secuencia actual con las remisiones prejudiciales de 2006.

Precisamente, tendencia muy diferente es la que, con revocación de dicha sentencia de 30 de Setiembre de 1999, representaría la Sentencia del Tribunal Supremo de 9 de Diciembre de 2004, sobre la que apenas me voy a extender.

Destaco simplemente lo que su Fundamento Jurídico 17 concluye, al decir que; «De las anteriores consideraciones resulta que cabe considerar, inicialmente, incluibles en el concepto de «Ayudas de Estado» las medidas fiscales contenidas en los siguientes preceptos de las NN.FF… Queda, sin embargo, por examinar si pueden considerarse incluibles en las excepciones previstas en los apartados 2 y 3 del anterior artículo 92 del Tratado (actual art. 87).

El referido apartado 2 recoge una serie de supuestos que por razones de especial solidaridad, determinadas ayudas orientadas a concretas finalidades, son compatibles con el régimen del Derecho europeo. Se trata de las consideradas «exenciones de oficio» en las que la Comisión no tiene capacidad de apreciación ya que la compatibilidad resulta *ope legis* pero que, desde luego, no resultan aplicables a las reseñadas previsiones de las NN.FF. que no contemplan los objetivos sociales ni los mecanismos paliativos de desastres naturales o de acontecimientos de carácter excepcional a que se refiere el precepto europeo.

El apartado 3 señala las que pueden entenderse como «excepciones eventuales» que exigen una decisión de la Comisión Europea de conformidad con las previsiones del propio artículo. Pero, en cualquier caso, ha de tenerse en cuenta que, a la luz de la constante doctrina del TJCE, las facultades de los órganos jurisdiccionales nacionales, en caso de ayudas no notificadas, han de orientarse a la constatación de tal circunstancia, para en caso de respuesta afirmativa, anular las correspondientes Normas, por haber sido adoptadas sin cumplir la obligación de notificación a la Comisión Europea establecida en el artículo 93 (actual artículo 88). O, dicho en otros términos, no cabe que el Juez nacional se pronuncie sobre la compatibilidad de las medidas de ayuda con el Derecho europeo, en los casos en que esta valoración está reservada por el Tratado a la Comisión, y sólo puede decidir, a efectos de aplicar el apartado 3 del artículo 93 (actual art. 87) si las medidas adoptadas son susceptibles de ser comprendidas dentro del concepto «Ayudas de Estado».

(…) declarando la nulidad, además del artículo 26 de las NN.FF. ya apreciada, de los siguientes preceptos de las mismas Normas… al haberse omitido la necesaria notificación a la Comisión Europea establecida en el artículo 93 (actual artículo 88) del Tratado para medidas que indiciariamente pueden constituir «Ayudas de Estado».

Aunque puedo suponer que se hará comentario más detenido de esta Sentencia por otros participantes en esta mesa, y dada la controversia procesal que ha desenca-

denado, sí quiero hacer una mínima observación sobre el sentido que a ese juicio indiciario al que alude el Tribunal Supremo cabe dar, pues no creo que sea el sentido de un juicio meramente indirecto, presuntivo, o en base a apreciaciones incompletas, sino el de un juicio completo, pero dotado de provisionalidad e instrumentalidad en orden al cumplimiento del requisito de la comunicación, que no perjudica una decisión posterior de la Comisión como órgano que monopoliza las decisiones sobre la materia. El Tribunal interno no califica definitivamente las medidas, sino que las prejuzga a unos limitados efectos procedimentales –necesidad o no de comunicación previa–. La cuestión de si ese juicio está bien fundamentado o no lo está en la STS de 9 de Diciembre de 2004 no puede entremezclarse con lo anterior, como tampoco cabría descalificar el método por el hecho de que se discrepase de la razón de fondo que al T.S. inspira.

## V

La última fase a mencionar aquí es la que abarca el dictado, a partir de 2005, de nuevas disposiciones forales referidas al Impuesto de Sociedades que han mantenido tipos impositivos idénticos o muy similares al anulado en dicha Sentencia y que han dado lugar a nuevas impugnaciones de varias Comunidades Autónomas, sin que tales procesos, fuertemente condicionados en su planteamiento y eventual decisión por la anterior anulación de las Normas Forales de 1996, y cuyo desarrollo ha venido acompañado de una intensa reacción pública en el País Vasco, hayan sido hasta la fecha sentenciados, estando pendientes varios de ellos en la actualidad de nuevas Cuestiones Prejudiciales ante el TJCE, y cuestiones interpretativas éstas, si no determinadas en su totalidad, si, al menos, propiciadas por el dictado de la Sentencia de 6 de Setiembre de este mismo año de 2006. Puede suponerse que, de entrar a examinar el TJCEE la cuestión que en dichos procesos se eleva a su consideración interpretativa, la incidencia del derecho comunitario europeo sobre las peculiaridades tributarias del Concierto Económico con el País Vasco puede quedar definitivamente esclarecida, sin perjuicio de que, cualquiera que sea su posicionamiento, subsistirán muy importantes divergencias en clave puramente interna sobre la existencia y aplicación del Concierto Económico.

Me queda la pequeña frustración de que el debate que siguió a la Mesa Redonda del 13 de Diciembre de 2006, con presencia en el Auditorio de Deusto de grandísimos estudiosos de este tema, de nuestro país y de otros de la CEE, no llegase a centrar su atención en las perspectivas de este tema prejudicial ante el TJCEE, (ya se había hecho en alguna medida tras la brillante intervención esa misma tarde de Mr. Colson con motivo de la Sentencia de 6-09-06), y esto era algo que a mi, personalmente, por la responsabilidad que asumo en su planteamiento, me hubiese estimulado especialmente.

# Concierto Económico y ayudas de Estado: las ayudas fiscales en la Jurisprudencia del Tribunal Supremo

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Con carácter previo al examen de las ayudas de Estado en la Jurisprudencia del Tribunal Supremo y especialmente en relación con la autonomía financiera del País Vasco, conviene hacer algunas observaciones acerca de ésta y su marco constitucional, siguiendo al respecto la doctrina contenida en las SSTS de 9 de diciembre de 2004 y 7 de febrero de 2006.

## 1. La autonomía financiera en los Territorios Históricos

### *a) Régimen normativo*

Los derechos históricos y su actualización son reconocidos en la **Disposición Adicional Primera de la Norma Fundamental** (la STC 76/1988, de 26 de abril, que al pronunciarse sobre la Ley de Territorios Históricos, acogió la tesis de la foralidad como institución garantizada por la Norma Fundamental).

El marco normativo básico del sistema tributario del País Vasco derivado de la norma constitucional está constituido, en primer lugar, por el **Estatuto de Autonomía del País Vasco** (EAPV), aprobado por LO 3/1979, de 18 de diciembre, que tras enunciar un principio general –la reafirmación del sistema foral tradicional–, define el contenido del Concierto y precisa sus condicionamientos y límites, tendentes a lograr que no obstante la autonomía tributaria del País Vasco su sistema impositivo se acomode a los principios generales establecidos en la legislación estatal y la legislación vasca.

En segundo término, ha de tenerse en cuenta el **Concierto Económico**, aprobado inicialmente por la Ley 12/1981, de 13 de mayo, que después fue sustituido por el Concierto aprobado por Ley 12/2002, de 23 de mayo, que reconoce a los Territorios Históricos la facultad de establecer su propio régimen tributario, atribuyéndoles capacidad normativa para regular buena parte de los impuestos directos –Impuesto sobre la Renta de las Personas Físicas, Impuesto sobre Sociedades, Impuesto sobre el Patrimonio e Impuesto sobre Sucesiones y Donaciones–, quedando excluido el Impuesto Sobre la Renta de los no residentes –aunque en este caso se aplicará la normativa foral a los contribuyentes que operen mediante establecimiento permanente–, correspondiéndoles la exacción, gestión, liquidación, inspección, revisión y recaudación de tales tributos. No obstante se reconoce la competencia exclusiva del Estado para la regulación, gestión, inspección, revisión y recaudación de los derechos de importación y de los gravámenes de importación en los Impuestos Especiales y en el Impuesto sobre el Valor Añadido, así como la alta inspección en la aplicación del Concierto Económico. A ello debe añadirse que las normas vigentes en el territorio de régimen común, tienen el carácter de Derecho supletorio (Disposición Adicional Primera de la Ley del Concierto).

Como decíamos, la autonomía financiera reconocida a los Territorios no es incondicionada ni carece de límites. Por el contrario, tales condicionamientos están también fijados en la misma Ley del Concierto, de naturaleza paccionada, en la que se fijan las bases para el ejercicio de las potestades tributarias autonómicas vascas y sus límites.

Sustancialmente se reconoce al País Vasco el derecho a la recaudación tributaria nacida en su propio territorio (en consonancia con el art. 156.2 CE), sin perjuicio de su obligación de contribuir a las cargas generales del Estado, mediante un «cupo», en virtud del principio de solidaridad interterritorial que consagra nuestra Constitución (vid. art. 158). Y se reconocen asimismo facultades normativas propias, conforme hemos visto.

Por lo demás, los artículos 3 y 4 de la Ley del Concierto desarrollan las previsiones para lograr una efectiva armonización fiscal entre los tributos que se recaudan en el País Vasco y en el territorio común del Estado. Dicha armonización está reconocida unánimemente como una de las finalidades esenciales de la citada Ley.

A este respecto, la Jurisprudencia ha reiterado la consideración de que la Ley del Concierto es un núcleo intangible, por prescripción estatutaria, del contenido del ré-

gimen foral, razón por la cual a lo dispuesto en ella debe sujetarse en todo caso la normativa tributaria de las instituciones forales de los Territorios Históricos.

### *b) Consecuencias de su relación con la CE y los principios tributarios que establece*

El reconocimiento constitucional de las singularidades tributarias de los Territorios Históricos supone una serie de consecuencias que han de ser tenidas en cuenta al enjuiciar las Normas Forales.

1. En primer lugar, **la modulación del principio de reserva de Ley**. La capacidad de autonormación que el reconocimiento constitucional de los derechos históricos comporta no supone que los entes forales sean titulares de potestad legislativa, pues ésta se haya reservada por el propio texto constitucional al Estado (art. 62.2) y a la Comunidad Autónoma [art. 152.1 y 153.a].

Por ello el principio de reserva de ley y de legalidad en materia tributaria, de por sí con alcance relativo, tiene una relatividad más específica y acusada con respecto a los Territorios Históricos. Esto es, la exigencia de subordinación y de complementariedad del Reglamento con respecto a la Ley, no se exige en relación con las normas reglamentarias que dictan las Juntas Generales en los mismos términos que se establecen con carácter general para dicha clase de normas en el ámbito tributario. En definitiva, el principio de reserva de Ley establecido el artículo 31.3 CE resulta matizado para los Territorios Forales a los que el artículo 8.1 LTH reconoce, en las materias que son de su competencia exclusiva una potestad normativa sui generis ejercida mediante las Normas Forales de que se trata.

Ahora bien, aunque se reconoce potestad normativa en materia tributaria a las instituciones forales de los Territorios Históricos, es evidente que el Estatuto de Autonomía del País Vasco no configura las Juntas Generales como cámaras legislativas y es, igualmente, claro que no pueden dictar normas con valor de ley. Las Normas Forales tienen por tanto naturaleza reglamentaria o si se quiere híbrida por constituir formalmente reglamentos y materialmente normas legales.

No obstante, la capacidad normativa de dichos Territorios se ejerce en el marco de la Constitución, del Estatuto de Autonomía del País Vasco y de la Ley del Concierto Económico, aunque los límites definidos por ésta sean, en ocasiones, extraordinariamente amplios e implique, de hecho, una deslegalización en materia tributaria que ha resultado posible por la citada Disposición Adicional Primera de la Norma Fundamental.

Y, en todo caso, en tanto no se produzca una reforma de la Ley Orgánica del Tribunal Constitucional que permita residenciar ante este Tribunal la impugnación de las Normas Forales, el producto normativo de las Juntas Generales, de carácter reglamentario, ha de estar sometido a los controles de constitucionalidad y de legalidad de

la Jurisdicción Contencioso-Administrativa, haciendo efectivas las exigencias de tutela judicial (art. 24.1 CE) y de sometimiento a Derecho de los poderes públicos. Si tal reforma se produjera, aunque se reservara al Tribunal Constitucional la declaración de inconstitucionalidad de las Normas Forales, ello no impediría que los Tribunales ordinarios pudieran examinar su constitucionalidad o su conformidad con el Derecho Comunitario en lo que atañe al cumplimiento del procedimiento relativo a las ayudas de Estado a través de los recursos contencioso-administrativos dirigidos contra actos de aplicación de aquellas, con el consiguiente planteamiento de la cuestión de inconstitucionalidad para el primer supuesto, o la inaplicación de tales Normas Forales en el segundo supuesto, en su caso.

Dicha capacidad normativa foral encuentra otro límite en el Derecho Comunitario Europeo que, como es sabido, es de aplicación directa y preferente al Ordenamiento interno, y que los Jueces nacionales, como Jueces Comunitarios de Derecho Común, están obligados a salvaguardar y proteger.

En cualquier caso, el carácter paccionado del Concierto, acentuado en el vigente de 23 de mayo de 2002, al que se da un carácter indefinido con objeto de su inserción en un marco estable que garantice su continuidad al amparo de la Constitución y el Estatuto de Autonomía, no impide que las Normas Forales deban ser examinadas desde la perspectiva del Derecho europeo.

2. En segundo lugar, **los principios constitucionales de autonomía, igualdad, unidad y solidaridad** han de ser entendidos desde las exigencias que impone la propia pervivencia de los sistemas forales reconocida por la propia Norma Fundamental y que obliga, desde luego, a establecer un cuidadoso equilibrio entre dichos principios y el ejercicio de las competencias tributarias de los territorios forales partiendo de la doctrina del Tribunal Constitucional, que se rompe cuando de Ayudas de Estado en el ámbito foral se trata.

2.1. La compatibilidad entre la igualdad y la autonomía financiera (art. 156 CE), conduce a que la jurisprudencia constitucional haya entendido que **la igualdad de los ciudadanos españoles** no significa que sea imprescindible una total uniformidad fiscal en todo el territorio nacional, lo que sería incompatible con la autonomía financiera –recuérdese que la autonomía no es sino la capacidad de cada nacionalidad o región para decidir cuándo y cómo ejercer sus propias competencias en el marco de la Constitución y del Estatuto–, y aún más con el específico sistema foral. Lo que impone el principio de igualdad es que se asegure la igualdad de posiciones jurídicas fundamentales de los ciudadanos en relación con los deberes tributarios, que evite ciertamente la configuración de sistemas tributarios verdaderamente privilegiados en el territorio nacional.

Por consiguiente, el deber básico de contribuir a los gastos públicos establecido en el artículo 31.1 CE puede tener un tratamiento diferenciado en los Territorios Históricos, siempre que quede a salvo la igualdad básica de todos los españoles y ello no suponga un trato fiscal realmente privilegiado.

2.2. **La unidad del sistema tributario** tiene un carácter instrumental respecto del principio de igualdad de los españoles, y según la doctrina del Tribunal Constitucional, tampoco es incompatible con las competencias tributarias de las Comunidades Autónomas y con la autonomía presupuestaria y financiera de las mismas (STC 19/1987). Y es precisamente la desigualdad tributaria derivada de los distintos sistemas en su conjunto –y no de un impuesto concreto– lo que las Leyes de Concierto y Convenio Económico tratan de controlar, previendo normas de armonización, entre las que destaca la exigencia de una presión fiscal efectiva global equivalente a la existente en el resto del Estado.

2.3. **La solidaridad**, rectamente entendida, no es exigencia de uniformidad ni tampoco proscribe toda diferencia. Es precisamente la constancia de notables desigualdades de unas partes del territorio con respecto a otras las que entran en contradicción con dicho principio (STC 64/1990, de 5 de abril).

3. **La libre competencia y la libertad de establecimiento** son exigencias que aparecen tanto en el Derecho europeo como en el ordenamiento interno (arts. 139.2 y 38 CE). El Tribunal Constitucional ha señalado que la unidad de mercado descansa sobre dos principios: la libre circulación de bienes y personas por todo el territorio español, que ninguna autoridad podrá obstaculizar directa o indirectamente y la igualdad de las condiciones básicas de ejercicio de la actividad económica, sin los cuales no es posible alcanzar en el mercado nacional el grado de integración que su carácter unitario impone (SSTC 96/1984, 88/1986 y 64/1990).

Esos mismos principios de libre competencia y libertad de establecimiento que resultan centrales en la Unión Europea, son los que servirán, de acuerdo con la doctrina del Tribunal de Justicia de la Comunidad Europea y el criterio de las propias instituciones europeas, para diferenciar de modo individualizado los preceptos de las NN.FF que, al ser encuadrables en el concepto de «Ayudas de Estado», son susceptibles de incidir en las libertades de competencia y establecimiento.

Esta última consideración nos conduce al examen de las llamadas ayudas de Estado desde el punto de vista del Derecho Comunitario.

## 2. Ayudas de Estado

Las ayudas de Estado a ciertas empresas o actividades económicas constituyen una manifestación del intervencionismo estatal en la economía, cuya subsistencia resulta difícil de conciliar con las exigencias de una economía libre de mercado e, incluso, con el principio de igualdad.

Tales ayudas son el fruto, generalmente, del desarrollo de políticas proteccionistas por parte de los Estados, siendo su defecto más relevante en lo que aquí nos interesa el favorecer a unas empresas en detrimento de otras, dificultando la competitividad de estas últimas. Por ello, interesa de manera especial a la Unión Europea la concesión

de estas ayudas y su supervisión por la Comisión Europea, limitando así la autonomía de las políticas económicas de los Estados miembros.

El establecimiento de un régimen que garantice que la competencia no sea falseada, como uno de los principios sobre los que se apoya la construcción europea, supone que el Derecho comunitario de la competencia se preocupe tanto de los comportamientos anticompetitivos procedentes de las empresas como de los propios Estados miembros. De ahí la necesidad de someter a control las ayudas concedidas por aquellos, en la medida en que su concesión pueda falsear la competencia y afectar al comercio intracomunitario y con ello, al interés común perseguido por la propia Unión Europea en su conjunto, es decir, en la medida en que sean incompatibles con el mercado común.

El régimen de las «ayudas de Estado» y de su supervisión por la Comisión Europea constituye, por tanto, una cuestión de suma trascendencia para el Derecho europeo, necesario para la consecución de los propios objetivos del Tratado, y representa una importante limitación para la autonomía de las políticas económicas de los Estados miembros, pues aquellas se caracterizan por el uso de fondos públicos a favor de determinadas empresas o producciones, de modo que se ocasione una distorsión en la competencia intracomunitaria.

### *2.1. Concepto de ayudas de Estado*

El artículo 87 del Tratado (antiguo art. 92) dispone que *«salvo que el presente Tratado disponga otra cosa, serán incompatibles con el Mercado común, en la medida que afecten a los intercambios comerciales entre Estados miembros, las ayudas otorgadas por los Estados o mediante fondos estatales, bajo cualquier forma, que falseen o amenacen falsear la competencia, favoreciendo a determinadas empresas o producciones».*

Corresponde a la Comisión examinar si las ayudas de Estado previstas por los Estados miembros merecen tal calificación a los efectos del precepto citado, y para ello estos deberán comunicar a aquella los proyectos dirigidos a conceder o modificar tales ayudas (articulo 88.3 TCE).

La doctrina del TJCE ha integrado la noción de tales ayudas por los siguientes elementos: a) existencia en las medidas de que se trata de una ventaja o beneficio para empresas; b) atribución de tales medidas al Estado, es decir concedida por el Estado y mediante fondos estatales; c) especialidad o especificidad de las medidas en cuanto destinadas a favorecer a determinadas empresas o producciones; y d) falseamiento de la competencia o repercusión en los intercambios comunitarios –afectación de la competencia o los intercambios de los Estados miembros–. Más adelante examinaremos tales requisitos.

Además, las empresas que se consideren perjudicadas por las ayudas pueden dirigir su queja a la Comisión y acudir a los Tribunales nacionales y comunitarios (arti-

culo 230 TUE). Al respecto el TJCE ha considerado que las empresas competidoras de las beneficiarias de una ayuda aprobada por la Comisión tienen legitimación activa para cuestionar la validez de la decisión positiva adoptada por ésta, y pueden, incluso, plantear recursos de responsabilidad extracontractual contra la Comisión y excepcionalmente contra el Consejo, en base a lo dispuesto en el artículo 288 TUE, a fin de obtener la reparación de los daños sufridos como consecuencia de la declaración de compatibilidad de una ayuda con el mercado adoptada equivocadamente.

Asimismo, cuando el Estado o cualquier autoridad pública a que se refiere el artículo 87 otorga una ayuda de Estado ignorando la obligación de notificación prevista en el articulo 88 TUE, cualquier competidor puede recurrir a los Tribunales nacionales para denunciar esta infracción. En este sentido el TJCE ha precisado que se trata de una norma con efecto directo, de modo que los órganos jurisdiccionales nacionales tienen que salvaguardar el derecho de los justiciables frente a un eventual desconocimiento de la referida norma por las autoridades nacionales, extrayendo todas las consecuencias pertinentes en el Derecho interno, tanto en lo referente a la validez de los actos que ejecutan las medidas de ayuda, como a la recuperación de las ayudas concedidas con infracción de la citada norma o respecto de eventuales medidas provisionales, e, incluso, el otorgamiento de indemnizaciones por responsabilidad patrimonial del Estado.

Tal y como se establece en el articulo 88 TUE y el Reglamento 659/1999 del Consejo, cuando un Estado incumple sus obligaciones procedimentales, bien por haber ignorado la obligación de notificación a la Comisión de la ayuda prevista, bien porque la ayuda ha sido puesta en práctica antes de que la Comisión adopte una decisión final sobre su compatibilidad con el Mercado Común, o bien porque se ha otorgado una ayuda contrariamente a lo dispuesto en la decisión de la Comisión, el derecho de ésta a decidir la supresión de la ayuda conlleva la facultad de exigir el reembolso de las ayudas ilegalmente otorgadas. Cuando la Comisión así lo dispone, la empresa o empresas beneficiarias deben devolver lo recibido, junto con sus intereses a la autoridad otorgante. En este particular se ha sostenido por el TJCE que a los empresarios beneficiados les es exigible un estándar de diligencia que les lleve a comprobar que el procedimiento de supervisión de las ayudas de Estado establecido en el articulo 88 citado ha sido cumplido regularmente por el Estado.

Por otro lado, si existiera decisión de la Comisión declarando la incompatibilidad de una ayuda, ésta podrá ser invocada ante los Tribunales nacionales y acordarse por estos la restitución de las ayudas ilegalmente percibidas, pues las disposiciones del articulo 87 TUE están destinadas a surtir efecto en el ordenamiento jurídico de los Estados miembros.

Examinemos a continuación los requisitos que configuran las llamadas ayudas de Estado, siguiendo la doctrina del TJCE.

a) **Constituyen ventajas o beneficios para empresas o producciones.** El Tratado UE considera incompatibles y, por lo tanto, en principio prohibidas, las medidas

de origen estatal que, financiadas directa o indirectamente con recursos públicos, favorezcan –confieran una ventaja– a determinadas empresas o producciones, cuando se acredite que afecten o puedan afectar a la competencia y a los intercambios intracomunitarios, siendo para ello irrelevante cuál sea su forma –subvenciones, beneficios fiscales, cobertura de pérdidas de explotación, garantías de préstamos, cesión de inmuebles, exoneración de cargas sociales, etc.– o la actividad económica afectada.

De esta manera, la ventaja puede traducirse en un beneficio fiscal y puede decirse que una Norma que tenga como resultado la disminución de la carga fiscal soportada por las empresas comprendidas dentro de su ámbito de aplicación subjetivo constituye una «ayuda» en el sentido del artículo 87 del Tratado.

Las ayudas fiscales, en sus distintas modalidades, suponen en definitiva un trato de favor a una posición proteccionista, de ahí su carácter restrictivo y el control comunitario que sobre ellas se ejerce, desde la perspectiva del Derecho de la Competencia.

b) **La medida ha de ser atribuible al Estado,** es decir, financiada por medio de recursos públicos y, por tanto, su calificación como ayuda de Estado alcanza a los supuestos en que el reconocimiento de la ventaja se produce por entidades territoriales –regionales o locales– e, incluso, por instituciones u organismos públicos competentes para ejercitar funciones típicas de Estado o que actúen bajo el control de éste.

Por consiguiente, la circunstancia de que las medidas concretas de ayuda sean adoptadas o concedidas por entidades territoriales o autoridades infraestatales no excluye la atribución al Estado de las mismas a los efectos de la aplicación de las normas comunitarias sobre «ayudas de Estado» si cumple los requisitos establecidos en el articulo 87 TCE, pudiendo por ello constituir beneficios selectivos. Pero el hecho de que una medida se aplique en una zona geográfica limitada no basta para ser considerada selectiva sin más (SSTS de 9 de diciembre de 2004, rec. 7893/1999, y de 7 de febrero de 2006, rec. 2250/1997).

c) **La especialidad o especificidad de las medidas en tanto que se dirigen a favorecer a determinadas empresas o producciones.** El criterio de la especificidad resulta, a veces, difícil de precisar. Permite distinguir las medidas generales, es decir, las que afectan a toda la economía en su conjunto, que pertenecen al ámbito de la armonización fiscal, de las medidas especiales que pueden entrar en el ámbito de los artículos 87 a 89 TUE.

Desde luego, han de tratarse de medidas de carácter selectivo que sean concedidas como tratamiento singular respecto a una norma general, incluyendo según la doctrina del TJCE no sólo las ayudas a empresa determinada o sectores de producción específicos sino también las destinadas a empresas establecidas en una región determinada. En definitiva, la apreciación del criterio de la selectividad requiere que se examine si en el marco de un régimen jurídico concreto una medida nacional puede favorecer a determinadas empresas o producciones en relación con otras que se encuentren en una relación fáctica o jurídica comparable.

Esta cuestión resulta especialmente compleja cuando se trata de ayudas fiscales, siendo preciso dilucidar cuándo una medida fiscal es selectiva y por lo tanto, de concurrir los demás elementos del apartado primero de art. 87 UE, constituye una ayuda estatal o cuando, por carecer de dicho carácter, puede ser calificada de medida de carácter general, por ser una medida de origen estatal que favorece a una pluralidad indeterminada de beneficiarios, adoptada dentro del margen de apreciación reservado a los Estados miembros en el marco de su política económica, industrial o del mercado de trabajo. De hecho, aunque una medida se formulara como general, por dirigirse a una realidad indeterminada de destinatarios, será considerada ayuda de Estado cuando se estime que en realidad afecta a un sector concreto de la economía.

De lo expuesto se deduce con claridad que para que una medida fiscal constituya una ayuda de Estado es esencial que establezca una excepción a la aplicación del sistema fiscal a favor de determinadas empresas del Estado miembro.

El hecho de que las empresas beneficiarias no sean empresas concretas identificadas de antemano, no excluye la aplicación del artículo 87 del Tratado, en la medida en que sean identificables por reunir determinados requisitos, como es el establecimiento o desarrollo de la actividad en un ámbito territorial concreto.

Este carácter selectivo de las medidas cuestionadas, que objetivamente favorecen a las empresas que pueden acogerse al mismo, cuyos costes se ven reducidos, es lo que determina que pueda verse falseada la competencia y afectados los intercambios entre Estados miembros en la medida en que las empresas beneficiadas exportan una parte de su producción a los demás Estados miembros; de igual manera, cuando estas empresas no exportan, la producción nacional se ve favorecida en la medida en que disminuyen las posibilidades de las empresas establecidas en otros Estados miembros de exportar sus productos al mercado donde se aplique tal medida.

En principio, como primera aproximación al problema, podría decirse que las medidas cuyo alcance se extiende a todo el conjunto del territorio del Estado son las únicas que, en principio, no deben ser calificadas de específicas, mientras que, por el contrario, las de alcance territorial regional o local, las destinadas específicamente determinados sectores o empresas o las que favorezcan exclusivamente los productos exportados sí resultarían a priori sometidas al art. 87 TUE.

No obstante, debe contemplarse la incidencia que en el análisis de la cuestión puede tener la existencia de «sistema y subsistemas [tributarios] en un mismo espacio unitario». Esto es, la existencia de medidas fiscales cuyo ámbito de aplicación está limitado a una zona determinada del territorio del Estado junto al régimen general aplicable al resto del territorio (territorio común), como consecuencia de las normas de atribución de competencias en materia fiscal.

Aunque esta cuestión tan solo se plantea pero no se resuelve en la STS de 9 de diciembre de 2004 citada, sí es abordada en la STJCE de 6 de septiembre de 2006 (Republica portuguesa/Comisión).

d) **Por último, se requiere falseamiento de la competencia o repercusión en los intercambios comunitarios.** La identificación entre la existencia de una ventaja sectorial y el criterio de la distorsión de la competencia o la afectación del comercio intracomunitario no es total, o, dicho en otros términos, la existencia de una ventaja no da lugar siempre a una distorsión de la competencia o del flujo comercial entre Estados miembros, y, cuando esto no se produce, no estamos ante «ayuda de Estado» a los efectos del artículo 87 del Tratado.

La relevancia comunitaria europea de dichas ayudas viene determinada por la incidencia efectiva o la susceptibilidad de incidencia en los intercambios comerciales o en la circulación y establecimiento de personas y capitales. O, dicho en otros términos, que la ayuda sea suficiente o apropiada para causar el efecto que la norma trata de evitar.

La Comisión ha sostenido una interpretación amplia de la expresión «distorsión de la competencia», prevista en el artículo 87 TUE, llegando a estimar que las ayudas estatales distorsionan la competencia casi «per se». Sin embargo el TJCE ha exigido a la Comisión que examine cuáles son los efectos probables en la competencia y exprese en sus decisiones el resultado de dicho examen junto con los motivos que han permitido llegar a dicha conclusión. Ahora bien, la aplicación del régimen de ayudas de Estado resulta posible atendiendo a un falseamiento de la competencia efectivo o potencial, aunque, como decíamos, deba concurrir esa relación de causalidad entre la ayuda y la amenaza o realidad del falseamiento. Por tanto, no se exige una afectación efectiva, ni tampoco un concreto grado de afectación para la aplicación del régimen de ayudas de Estado.

Por otro lado, el falseamiento es apreciable tanto si se produce o puede producirse entre empresas de un mismo país o en el marco de las relaciones entre empresas nacionales y competidoras de otros Estados miembros.

No cabe considerar que una ventaja distorsione la competencia cuando sea de aplicación la llamada «regla de mínimos», es decir aquella que establece el límite por debajo del cual las «ayudas de Estado» no están sometidas al régimen de los actuales artículos 87 y 88 del Tratado.

Consecuentemente con lo expuesto, apreciada la concurrencia de los requisitos establecidos por el articulo 87 TCE, la medida cuestionada debe ser calificada provisionalmente como ayuda de Estado. Ahora bien, los apartados 2 y 3 del articulo 87 del Tratado establecen excepciones a la incompatibilidad entre las ayudas de estado y el Derecho Comunitario. Concretamente el apartado 2 recoge una serie de supuestos que por razones de especial solidaridad, determinadas ayudas orientadas a concretas finalidades, son compatibles con el régimen del Derecho europeo. Se trata de las consideradas «exenciones de oficio» en las que la Comisión no tiene capacidad de apreciación ya que la compatibilidad resulta «ope legis» pero que, desde luego, no resultan aplicables a las ayudas que no contemplan los objetivos sociales ni los mecanismos paliativos de desastres naturales o de acontecimientos de carácter excepcional a que se refiere el precepto europeo.

El apartado 3 señala las que pueden entenderse como «excepciones eventuales» que exigen una decisión de la Comisión Europea de conformidad con las previsiones del propio artículo, facultándose a ésta para considerar compatibles aquellas ayudas de Estado en función de diversos criterios relativos a la finalidad perseguida –desarrollo económico de regiones deprimidas, realización de un importante proyecto europeo, etc–, confiriéndose un amplio margen de discrecionalidad a la misma en última instancia para por mayoría cualificada autorizar ayudas de Estado que se estimen compatibles con los principios del Mercado Común.

### 3. Procedimiento

Corresponde a la Comisión la facultad de determinar la compatibilidad de todas las ayudas con los principios del Mercado Común. Esta potestad se ejerce a través de un sistema de investigación y control de las ayudas otorgadas o previstas por los Estados miembros en los términos establecidos en el artículo 88 TUE.

- Procedimiento tipo ante la Comisión: tras el examen por la Comisión de las ayudas existentes en los Estados, en caso de dudas sobre la compatibilidad comunitaria de la ayuda pública, aquélla emplaza a los interesados para que presenten sus observaciones. Si la Comisión comprueba que en los términos establecidos en el articulo 87 TUE la ayuda pública no es compatible con el Mercado Común o que dicha ayuda se aplica de manera abusiva, ordenará que el Estado la suprima o modifique en el plazo determinado por aquella. A continuación, si el Estado interesado no cumple con esa decisión en el plazo fijado, la Comisión o cualquier Estado interesado podrá recurrir directamente ante el TJCE.
- Procedimiento excepcional ante el Consejo: a petición de un Estado miembro, el Consejo podrá decidir, por unanimidad y no obstante lo dispuesto del articulo 87 TUE, que la ayuda que ha concedido o tiene previsto conceder dicho Estado sea considerada compatible con el Mercado Común cuando circunstancias excepcionales justifiquen esa decisión. Si la Comisión hubiere iniciado ya el procedimiento ordinario, la petición del Estado interesado dirigida al Consejo causa la suspensión de dicho procedimiento hasta que se pronuncie éste sobre la cuestión, con la salvedad de que el Consejo no adoptare pronunciamiento alguno dentro del plazo de tres meses siguientes a la petición, en cuyo caso la Comisión decidirá al respecto.

En cualquier caso, ha de tenerse en cuenta que, a la luz de la constante doctrina del TJCE, las facultades de los órganos jurisdiccionales nacionales, en caso de ayudas no notificadas, han de orientarse a la constatación de tal circunstancia, para en caso de respuesta afirmativa, anular las correspondientes normas o actos, por haber sido adoptadas sin cumplir la obligación de notificación a la Comisión Europea establecida en el artículo 93 (actual artículo 88). O, dicho en otros términos, no cabe que el Juez nacional se pronuncie sobre la compatibilidad de las medidas de ayuda con el Derecho europeo, en los casos en que esta valoración está reservada por el Tratado a la Comi-

sión, y sólo puede decidir, a efectos de aplicar el apartado 3 del artículo 88 TUE si las medidas adoptadas son susceptibles de ser comprendidas dentro del concepto «Ayudas de Estado». Es decir, a diferencia de lo que ocurre con el cumplimiento del procedimiento del articulo 88 TUE, el articulo 87 TUE carece de efecto directo esgrimible ante los Tribunales nacionales.

Los órganos jurisdiccionales nacionales son competentes, por tanto, para interpretar y aplicar el concepto de ayuda de Estado, solo a los efectos de determinar si una medida estatal adoptada sin observar el procedimiento de control previsto por el artículo 87 citado debe o no debe someterse a dicho procedimiento (STJCE de 21 de noviembre de 1991, 1991/330).

Desde esta perspectiva comunitaria, el hecho de que algunos aspectos del régimen fiscal que establecen las Normas Forales puedan plantear dudas de compatibilidad con el Derecho europeo, no supone cuestionar las competencias normativas que ostentan las entidades representativas de los Territorios Históricos, sino que la esencia del problema es determinar si el ejercicio de dichas competencias ha podido producir un resultado discriminatorio que sea relevante desde la perspectiva del Derecho comunitario europeo. Y es que el ejercicio de la capacidad normativa de los entes territoriales de los Estados, cualquiera que sea la forma de distribución territorial del poder político (unitario, autonómico o complejo, incluidos los Estados federales), no puede sustraerse, como consecuencia del principio de eficacia directa y de primacía del Derecho europeo, al régimen comunitario europeo de las «Ayudas de Estado».

Por tanto, desde la perspectiva del Tribunal Supremo si un precepto de una Norma Foral incorpora una «Ayuda de Estado» se exige, al menos, el trámite de comunicación a la Comisión Europea según disponía el artículo 93 del Tratado (actual art. 88.3).

En atención a tal consideración se dictó la STS de 9 de diciembre de 2004, por la cual se ha procedido a dilucidar si las medidas de carácter fiscal concernidas resultaban o no subsumibles en el concepto de ayuda de Estado. Ciertamente, el órgano jurisdiccional pudo solicitar aclaraciones a la Comisión para superar sus dudas, en su caso, acerca de la calificación de aquellas medidas fiscales como tales ayudas, y pudo plantear cuestión prejudicial ante el Tribunal de Justicia en relación con la naturaleza de alguna de tales medidas en particular –establecimiento de un tipo de gravamen en territorio foral inferior al previsto en el territorio común para el Impuesto de Sociedades–, pero lo cierto es que no se hallaba obligado a ello y decidió no hacerlo –amen de no solicitarlo ninguna de las partes en el proceso con anterioridad a la sentencia–, concluyendo que se encontraba en determinados supuestos ante ayudas de Estado, a consecuencia de lo cual las declaró nulas de pleno derecho por no haberse cumplido el trámite de notificación a la Comisión a los efectos antes de expresados –ex artículo 62.1 e) LRJPAC en relación con los artículos 87 y 88 TUE–.

El Tribunal Supremo en la referida sentencia de 9 de diciembre de 2004 no se pronunció sobre si las medidas fiscales forales examinadas, calificadas provisionalmente como ayudas de Estado, podían o no resultar compatibles con el derecho comuni-

tario, pues tal decisión sólo puede ser adoptada por la Comisión, sino que, ante la convicción de que aquellas medidas eran susceptibles de ser consideradas como ayudas de Estado y comprobado que se había incumplido el deber de notificación a la Comisión, se limitó a declarar las mismas nulas por razones meramente procedimentales.

## 4. Un supuesto particular: las ayudas regionales de carácter general

El Tribunal de Justicia se ha pronunciado en diversas ocasiones sobre la incompatibilidad con el Derecho Comunitario de las ayudas de carácter sectorial, considerando las ayudas de Estado prohibidas por los artículos 87 a 89 TUE. Sin embargo, surge la duda acerca de si tal prohibición alcanza o no a las ayudas regionales de carácter general.

Aunque desde algunos sectores de la doctrina se haya afirmado que responde afirmativamente a esta cuestión el Tribunal Supremo en su sentencia de 9 de diciembre de 2004, refiriéndose al establecimiento de un tipo de gravamen y diversos incentivos fiscales del Impuesto sobre Sociedades en los territorios vascos, que anula por considerarlos no notificados a la Comisión, lo cierto es que en dicha sentencia el Tribunal Supremo no se pronuncia de forma expresa, como no podía ser de otra manera, acerca de la compatibilidad con el derecho comunitario de las medidas fiscales controvertidas, limitándose a calificarlas provisionalmente como ayudas de Estado a los efectos del articulo 92 TCE (en la actualidad artículo 87 TUE), anulándolas por razones procedimentales, como ya dijimos.

Hasta la sentencia de 6 de septiembre de 2006 (Republica de Portugal/Comisión) el Tribunal de Justicia nunca se había pronunciado acerca de los supuestos en los que medidas de carácter general que contemplan modificaciones tributarias, tales como la reducción de tipos impositivos nacionales limitada a un ámbito geográfico, constituyen ayudas de Estado comprendidas en el artículo 87 TCE.

Obviamente, el carácter selectivo de la medida será, en principio, lo determinante para considerar que el establecimiento de un tipo impositivo diferente –inferior– aplicable en una zona geográfica concreta está comprendido en el mencionado precepto, pues tales medidas sólo beneficiarían a aquellas empresas que operasen en esa concreta región o territorio del Estado.

Tal y como expresa la referida sentencia del Tribunal de Justicia para apreciar si es selectiva una medida adoptada por una entidad infraestatal que fije sólo para una parte del territorio de un Estado miembro un tipo impositivo reducido en comparación con el vigente en el resto del Estado, ha de examinarse si la medida ha sido adoptada por dicha entidad en el ejercicio de facultades lo suficientemente autónomas del poder central y, en su caso, si se aplica efectivamente a todas las empresas establecidas o todas las producciones efectuadas en el territorio sobre el que aquélla tenga competencia.

En tres situaciones puede plantearse la cuestión de la clasificación como ayuda de Estado de una medida que fije, para una zona geográfica limitada, tipos impositivos reducidos en comparación con los vigentes a nivel nacional:

– En la primera situación, donde el Gobierno central decide unilateralmente aplicar en una determinada zona geográfica un tipo impositivo inferior al aplicable a nivel nacional, la medida será selectiva.
– En la segunda situación, que corresponde a un modelo de reparto de las competencias fiscales conforme al cual todas las autoridades locales de un determinado nivel (regiones, municipios u otros) tienen atribuida la facultad de fijar libremente, dentro de los límites de sus atribuciones, un tipo impositivo para el territorio de su competencia, la medida no sería selectiva, ya que no es posible determinar un nivel impositivo normal, que pueda funcionar como parámetro de referencia.
– En la tercera situación, donde una autoridad regional o local fija, en el ejercicio de facultades lo suficientemente autónomas del poder central, un tipo impositivo inferior al nacional, que sólo es aplicable a las empresas localizadas en el territorio de su competencia, la medida no será selectiva si se aprecia que fue adoptada con verdadera autonomía institucional, procedimental y económica, en los términos que después examinaremos.

Es decir, en esta última situación, el marco jurídico pertinente para apreciar la selectividad de una medida fiscal podría limitarse a la zona geográfica de que se trate en el caso de que la entidad infraestatal, por su estatuto o sus atribuciones, desempeñe un papel fundamental en la definición del medio político y económico en el que operan las empresas localizadas en el territorio de su competencia.

Para que pueda considerarse que una decisión que se haya adoptado en estas circunstancias lo ha sido en ejercicio de atribuciones lo suficientemente autónomas es necesario, en primer lugar, que sea obra de una autoridad regional o local que, desde el punto de vista constitucional, cuente con un estatuto político y administrativo distinto del Gobierno central –autonomía institucional–. Además, debe haber sido adoptada sin que el Gobierno central haya podido intervenir directamente en su contenido –autonomía procedimental–. Por último, las consecuencias financieras de una reducción del tipo impositivo nacional aplicable a las empresas localizadas en la región no deben verse compensadas por ayudas o subvenciones procedentes de otras regiones o del Gobierno central –autonomía económica–.

De lo anterior resulta, tal y como concluye dicha sentencia de 6 de septiembre de 2006, que para que pueda considerarse que existe la suficiente autonomía política y fiscal en relación con el Gobierno central en lo que atañe a la aplicación de las normas comunitarias sobre ayudas de Estado, es necesario no sólo que la entidad infraestatal disponga de la competencia para adoptar, para el territorio de su competencia, medidas de reducción del tipo impositivo con independencia de cualquier consideración relativa al comportamiento del Estado central, sino también que asuma las consecuencias políticas y financieras de tal medida.

Por todo ello –y esto es ya una mera observación personal–, admitiendo que los Territorios Históricos cuentan en relación con el Estado español con la autonomía institucional y procedimental antes expresada en relación con la adopción de medidas fiscales de carácter general aplicables en esos territorios, lo relevante será determinar si se cumple con la exigencia de autonomía económica respecto de la medida fiscal de que se trate, o lo que eso mismo, que la reducción de los ingresos que la aplicación de la medida lleva aparejada no incide negativamente en modo alguno en el «cupo» que prevé la Ley del Concierto entre el Estado y el País Vasco.

Y ello es así porque la exigencia de autonomía económica supone que la menor carga impositiva aplicable en una región determinada no deba ser financiada con una transferencia de fondos desde el Gobierno central.

Pues bien, dado que los presupuestos de las instituciones del País Vasco –Comunidad Autónoma y Territorios Históricos– se nutren de la recaudación tributaria de las Haciendas Forales –no del Estado– y que por contra las instituciones del País Vasco deben efectuar una aportación al Estado conocida como «cupo», en compensación por los gastos soportados por el Estado en relación con las competencias no asumidas por la Comunidad Autónoma del País Vasco –calculado mediante un índice de imputación que responde a tal concepto sobre el que operan ciertas correcciones técnicas que dan lugar al cupo líquido–, regulada en la Ley del Concierto Económico, lo relevante a los efectos de la autonomía económica será determinar si en la cuantificación del cupo incidiría una hipotética reducción del nivel recaudatorio de las Haciendas Forales, mermándolo –salvo que dicha autonomía fuere valorada sobre la base de todas las transferencias y flujos económicos existentes entre la Comunidad Vasca y el Estado, lo que dificultaría notablemente el análisis de la cuestión que nos ocupa–.

De no producirse tal incidencia habríamos de convenir que la medida fiscal regional –foral– de carácter general en cuestión resultaría compatible con el Derecho comunitario. Si bien ello no excluiría per se su hipotética incompatibilidad con los principios constitucionales que limitan la autonomía financiera del País Vasco –unidad, igualdad, solidaridad, libre competencia y libertad de establecimiento–, que dependerá en buena medida del alcance y relevancia económica de la medida fiscal de que se trate, pues para evitar tal incompatibilidad habría de contar con fundamento justificado y racional y responder a situaciones que puedan legítimamente considerarse diversas, conforme a la doctrina constitucional antes expuesta.

# El Concierto Económico y su compatibilidad con el Derecho Comunitario desde una valoración académica

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Buenas tardes:

Deseo en primer lugar agradecer al Instituto de Estudios Vascos y, en particular, a su Director, el profesor y compañero en la Facultad de Derecho, Santiago Larrazábal, por invitarme a participar en este Congreso. No es simple cortesía lo que expreso, sino sincero agradecimiento por estar aquí participando, en principio, como oyente de tantos expertos en la materia que se debate y entre los que no me incluyo. Por ello, considero una distinción la posibilidad de intervenir, además, como ponente en esta mesa.

Por mi parte y como profesora de Derecho Comunitario, voy a intentar aportar una lectura académica sobre la compatibilidad del Concierto Económico Vasco con el Derecho Comunitario. Lo voy a hacer basándome en el estudio y en la observación de la evolución de este tema, tan cercano a nosotros, así como en mi experiencia en las aulas que comparto, en especial, con los alumnos de 5º de Derecho en la asignatura de Practicum, en la que abordamos el análisis y la valoración de algunas de las

Decisiones de la Comisión Europea, así como de las sentencias del Tribunal de Justicia de las Comunidades Europeas (TJCE), contra las normas fiscales forales.

Voy a iniciar el análisis hablando del Concierto, seleccionando aquellos rasgos esenciales que permiten a continuación valorar mejor su confrontación con la normativa comunitaria.

## 1. Sobre el Concierto Económico Vasco

El sistema de Concierto Económico es la continuación de una tradición histórica que cuenta con más de 800 años y según la cual los territorios que componen actualmente la CAPV constituyen unidades económicas singulares con respecto al resto de España, al disfrutar, en particular, de una notable autonomía fiscal. En la actualidad la autonomía tributaria es plena prácticamente en todos los impuestos directos, como el Impuesto de Sociedades y el Impuesto sobre la Renta de las Personas Físicas (IRPF). Por el contrario, no existe capacidad normativa en los impuestos indirectos más significativos, IVA e impuestos especiales.

En realidad, hasta 1876 el grado de autonomía de los territorios vascos iba más allá de los aspectos puramente fiscales y, de hecho, se erigían en unidades económicas separadas del resto de España. Al abolirse en 1876 los Fueros de Álava, Vizcaya y Guipúzcoa el único elemento del sistema anterior que persistió fue la autonomía fiscal que se materializó en forma de Conciertos Económicos[1].

Estas peculiaridades fiscales representan el aspecto más diferenciador con respecto al resto de Comunidades Autónomas (CCAA), las cuales se someten al regimen común, a excepción de Navarra, que, al igual que la CAPV, tiene un sistema foral de fiscalidad directa. Por lo tanto, la autonomía tributaria de la CAPV no es el resultado de un acuerdo político coyuntural con objeto de conseguir un tratamiento fiscal diferenciado. Tampoco es la insularidad o la lejanía del territorio nacional lo que justifica esta peculiaridad. Es simplemente la Historia, la continuación de un esquema particular de relaciones fiscales entre los Territorios Vascos y el Estado que se remonta a los siglos XII y XIII.

Este sistema de relaciones fiscales y financieras está reconocido y protegido por la Disposición Adicional Primera de la Constitución española, que reconoce «los derechos históricos» de los territorios forales de País Vasco y Navarra, y ha sido actualizado por lo dispuesto en el art. 41 del Estatuto de Autonomía del País Vasco (Ley Orgánica 3/1979 de 18 de diciembre).

El Concierto Económico Vasco es, por tanto, en estos momentos el instrumento jurídico mediante el cual los Territorios Históricos regulan, recaudan y gestionan los

[1] Para un análisis detenido sobre el Concierto Económico y su evolución, léase I. ZUBIRI, *El sistema de Concierto Económico en el contexto de la Unión Europea*, Círculo de Empresarios Vascos, Bilbao, 2000, pp. 19-66.

tributos que integran sus sistemas fiscales, en particular, el Impuesto de Sociedades y el IRPF. Las características del sistema foral actual se desprenden del Concierto Económico Vasco aprobado por Ley 12/2002 de 23 de mayo, que sustituyó al Concierto anterior de 1997[2].

El sistema de Concierto Económico de la CAPV, junto con el del Convenio Económico de la Comunidad Foral de Navarra, es singular en el Estado español y es peculiar también en la Unión Europea (UE).

## 2. Su confrontación con el Derecho Comunitario: una relación compleja

¿En qué aspectos y por qué se produce la confrontación entre el Concierto Económico y el Derecho Comunitario?

Curiosamente, el Concierto Económico en general y la capacidad normativa que los Territorios Históricos ejercen en materia de fiscalidad directa en particular, no colisionan materialmente con las normas comunitarias de armonización de la fiscalidad directa.

En este sentido, hay que recordar que el Tratado de la Comunidad Europea (TCE) impone la unanimidad para la adopción de normas de armonización fiscal, ya sea de fiscalidad indirecta, como directa (arts. 94 y 95, 2º del TCE). Este blindaje jurídico político demuestra la enorme sensibilidad que suscita la armonización fiscal en Europa. En la práctica, la exigencia de la unanimidad y la dificultad de conseguirla ha supuesto que la competencia comunitaria armonizadora apenas se haya ejercido y que, en relación al Impuesto de Sociedades, casi se reduce a la aprobación de 3 Directivas: la que regula el régimen común de fusiones y escisiones, la que pretende la eliminación de la doble imposición en el pago de dividendos entre matrices y filiales de diferentes Estados miembros, ambas de 1990, y la que afecta al pago de intereses y cánones, de 2003. A ellas se añade también un convenio internacional entre los diferentes Estados miembros para evitar los problemas de doble imposición derivados de los ajustes en materia de precios de transferencia: la denominada Convención de Arbitraje de 1990[3].

Ahora bien, esta parcela de competencia estatal, como cualquier otra, encuentra sus límites en la efectividad interna del Derecho Comunitario que regula otros ámbitos cercanos, en los que la competencia jurídica comunitaria sí se ha ejercido ampliamente, a saber, la regulación de las libertades económicas fundamentales y la prohibición de las ayudas públicas contrarias a la libre competencia.

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[2] BOE de 24 de mayo de 2002.

[3] Respectivamente, Directivas 90/434/CEE y 90/435/CEE del Consejo de 23 de julio de 1990 (DO L 225 de 20 de agosto de 1990), Directiva 2003/49/CE del Consejo de 3 de junio de 2003 (DO L157 de 26 de junio de 2003), Convenio de 23 de julio de 1990 (90/436/CEE), DO L 225 de 20 de agosto de 1990.

### *2.1. Los primeros problemas: la confrontación con la normativa comunitaria sobre libertad de establecimiento y libre circulación de personas*

Este primer tipo de conflicto con el Derecho Comunitario se suscitó en 1988, cuando las Diputaciones Forales y las Juntas Generales comenzaron a ejercer su autonomía en materia de Impuesto de Sociedades, estableciendo una serie de incentivos fiscales a las empresas con el objeto de dar un impulso a la economía vasca que atravesaba un proceso de reconversión industrial. En concreto, estas primeras normas concedían ventajas fiscales a aquellas empresas que realizasen en la CAPV inversiones superiores a 8 millones de pesetas en activos fijos materiales nuevos, con una amortización de 5 años, una financiación propia del 30% y que supusiera al menos el 25 % del activo fijo de la empresa[4].

En aquel momento, el Concierto Económico en vigor, aprobado por Ley 12/1981 de 13 de mayo, establecía unos puntos de conexión para determinar qué contribuyentes del Impuesto de Sociedades podían acogerse a la normativa foral del citado Impuesto, pero el propio Concierto reservaba a la competencia exclusiva del Estado la tributación de los no residentes. Por tanto, los incentivos fiscales no resultaban aplicables a los contribuyentes no residentes en los Territorios Históricos que operasen mediante un establecimiento permanente (una sucursal); esto es, hubieran tenido que constituir filiales para gozar del régimen tributario dispensado a las entidades residentes.

La Comisión Europea dirigió una Decisión al Reino de España por la que consideraba contraria al actual art. 43 del TCE, relativo a la libertad de establecimiento, la regulación de los Territorios Históricos en materia del Impuesto de Sociedades en el apartado de los incentivos fiscales a la inversión, al excluir a los establecimientos permanentes de entidades no residentes, pero residentes en otros Estados miembros[5].

Hay que destacar que la Comisión, aun pronunciándose sobre un régimen de ayudas, no ponía en entredicho la regulación concreta que los Territorios Históricos empezaban a elaborar, ni tampoco procedía a una comparación con la normativa vigente en el territorio común o en cualquiera de otros Estados miembros. Su imputación residía en la exclusión de la aplicación de esa regulación fiscal a los establecimientos permanentes de entidades residentes en otros Estados. Consecuentemente, la Decisión de la Comisión exigía al Estado español, como responsable internacional ante la UE, la modificación de las normas fiscales vascas.

Hubo una primera solución, que aceptó la Comisión, y que consistió en reconocer el derecho de los residentes en el resto de los Estados miembros, que no lo

[4] Para más detalles sobre las medidas fiscales de 1988, léase J. L. CRUCELEGUI, «Repercusiones del control de las ayudas públicas en el País Vasco», *Ekonomiaz* nº 61, 2006, pp. 232-253.

[5] Decisión 93/337/CEE de la Comisión de 10 de mayo de 1993, DO L 134 de 3 de junio de 1993.

sean en territorio español, al reembolso por la Administración del Estado de las cantidades pagadas en exceso con respecto al supuesto de haberse podido acoger a la legislación propia de los Territorios Históricos Vascos. Ahora bien, la solución definitiva vino con la renovación del Concierto Económico de 2002, texto actualmente vigente[6]. En este marco se reconoce la aplicación de la normativa foral de impuestos directos a los no residentes, que operen mediante un establecimiento permanente en los Territorios Históricos, en las mismas condiciones que se aplica a los residentes.

En cualquier caso, el respeto de la normativa comunitaria relativa al Mercado Interior y, en particular, a las libertades económicas fundamentales, constituye el primer parámetro de validez a la hora de ejercer las competencias fiscales por parte de las Haciendas forales vascas. De hecho, con posterioridad, ha habido otras medidas fiscales que han debido modificarse para ser conciliables con las libertades fundamentales (normas sobre subcapitalización o sobre transparencia fiscal internacional)[7].

Ahora bien, el ámbito del Derecho Comunitario con el que más ha colisionado la capacidad normativa de los Territorios Históricos en materia de imposición directa ha sido el referido a la defensa de la libre competencia en el apartado de las ayudas públicas.

### *2.2. La incompatibilidad con la normativa comunitaria relativa a ayudas estatales*

El primer choque importante con el Derecho Comunitario en esta vertiente tuvo lugar con respecto a las normas forales de impulso a la actividad económica y de incentivos fiscales a la inversión de 1993[8]. Estas disposiciones fiscales fueron recurridas por la Abogacía del Estado ante el Tribunal Superior de Justicia del País Vasco que, a su vez, planteó una consulta de interpretación al TJCE sobre la compatibilidad de las normas forales con los arts. 43 y 87 del TCE[9].

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[6] A este respecto hay que recordar que al mismo tiempo que la Administración del Estado proponía a la Comisión una solución para superar la discriminación por razón de la residencia de las normas fiscales vascas, interponía un recurso contra las mismas ante el Tribunal Superior de Justicia del País Vasco. Esta instancia judicial desestimó el recurso contencioso-administrativo, pero la sentencia fue recurrida ante el Tribunal Supremo que anuló finalmente las disposiciones forales por considerarlas discriminatorias para las empresas españolas con respecto a las sometidas al régimen tributario foral.

[7] Léase al respecto el análisis de I. ALONSO, «Las normas fiscales vascas y el Derecho europeo de la Competencia», *Ekonomiaz* nº 61, 2006, pp. 256-259.

[8] Estas previsiones establecían una serie de beneficios fiscales entre los que destacaban, como más relevantes, la exención del Impuesto de Sociedades durante 10 años y el crédito fiscal del 25% en activos fijos, 30% en I+D, 25% inversiones en el extranjero, 50% reserva para inversiones, 15% creación de empleo, 10% formación profesional y 25% ampliaciones de capital de pymes.

[9] Asuntos C-400/97, C-401/97 y C-402/97, Rec. 1997, p. I-1073.

La cuestión prejudicial suscitada por el Tribunal Superior de Justicia del País Vasco no fue finalmente resuelta por el TJCE, ya que la Administración del Estado desistió del recurso, dando lugar al archivo del caso[10]. Sin embargo, sí dio tiempo al Abogado General del procedimiento, el Sr. Saggio, a publicar sus conclusiones el 1 de julio de 1999. Esencialmente, extraía que las normas fiscales forales eran susceptibles de ser consideradas ayudas públicas de carácter selectivo al aplicarse solamente en una parte del Estado español, en el País Vasco, y, por tanto, cumplir el requisito de selectividad regional, e incluir disposiciones más beneficiosas que el régimen general aplicable en España.

Es evidente que el Abogado General elaboró sus conclusiones desde Luxemburgo, sin tener en cuenta, o no comprender bien, el origen, la evolución histórica y la razón de ser del Concierto Económico: como hemos afirmado al inicio, no se trata de un acuerdo para eludir la aplicación de las normas comunitarias de libre competencia, o para atraer inversiones, sino de un reparto de competencias entre diferentes Administraciones fiscales. De hecho, en materia del Impuesto de Sociedades, existen cinco regímenes tributarios diferentes: los tres de los Territorios Históricos, el de la Comunidad Foral de Navarra y el del Estado, aplicable en territorio de régimen común. En consecuencia, no hay normativa general en España del Impuesto de Sociedades aplicable a todos los contribuyentes del Estado.

En cualquier caso, este litigio evidencia que el elemento clave a la hora de valorar la conformidad de las normas fiscales vascas con el Derecho Comunitario en materia del Impuesto de Sociedades reside en la apreciación del requisito de la selectividad.

En su Comunicado de 1998 sobre la aplicación de las normas sobre ayudas estatales a la fiscalidad directa de las empresas[11], la Comisión establecía que tendrían la consideración de medidas generales aquellas que afectasen a todos los contribuyentes de un determinado Estado, abstracción hecha de la descentralización política existente en algunos Estados miembros.

Si nos atenemos al sentido literal de la Comunicación, toda medida aplicable en un ámbito geográfico inferior al del Estado debe considerarse como selectiva en el sentido del art. 87 del TCE y, en consecuencia, sometida a las obligaciones de notificación y de autorización previa establecidas. Si fuera así, rara sería la norma fiscal de los Territorios Históricos que escapara a la noción de ayuda de Estado. Aceptar esto último supondría una revisión constitucional implícita[12], ya que la propia Constitución

[10] Auto del TJCE de 16 de febrero de 2000, Rec. 2000, p. I-1091. Poco después, en julio de 2000, la Administración del Estado y la CAPV llegaron a unos acuerdos, en el marco de la Comisión Mixta del Cupo, por los que, entre otros aspectos, el Estado renunciaba a los recursos interpuestos contra las normas fiscales vascas adoptadas antes del 31 de enero de 2000 y la CAPV, por su parte, desistía de los recursos de casación ante el Tribunal Supremo.

[11] DO C 384 de 10 de diciembre de 1998.

[12] Se trataría de una modificación tácitamente aceptada vía art. 93 de la Constitución española, en virtud del cual el Estado, mediante Ley Orgánica, fue autorizado a adherirse a los Tratados de las Comunidades

del Estado español consiente la coexistencia de 5 regímenes fiscales diferentes dentro del territorio nacional. Consecuentemente, la interpretación del carácter selectivo de una medida es un aspecto de gran trascendencia ya que, más allá de la incompatibilidad material de las normas fiscales, está en juego la autonomía política y jurídica de los Territorios Históricos.

Si las conclusiones del Abogado General, el Sr. Saggio, hubiesen sido acogidas por el TJCE, los Territorios Históricos hubieran perdido toda capacidad de legislar en materia de Sociedades. Sin embargo, como hemos comentado, la Sentencia no llegó a adoptarse por lo que el problema, al menos coyunturalmente, quedó resuelto.

Con posterioridad, la Comisión Europea, en sus sucesivas reacciones contra medidas fiscales de los Territorios Históricos, especialmente intensas a partir de 2000, no hizo mención, en sus juicios de valor, a las conclusiones del Abogado General, ni interpretó el elemento de la selectividad desde un punto de vista regional, tal como podía desprenderse del tenor literal de su Comunicación de 1998. Por el contrario, a la hora de motivar y deducir la incompatibilidad de las medidas fiscales forales se basó en un criterio de selectividad material, esto es, la que genera una diferenciación objetiva entre beneficiarios de unas ayudas y otras entidades que no pueden optar a las mismas, o aquella derivada de una apreciación discrecional por parte de la Administración tributaria a la hora de valorar el cumplimiento de los requisitos, así como la intensidad de su concesión. Un ejemplo sería el crédito fiscal del 45% de las inversiones, cuando se exige una cuantía invertida superior a 16 millones de euros: es evidente que, con esta condición, se está restringiendo su ámbito de aplicación objetivo, ya que solamente puede favorecer a las grandes empresas capaces de desarrollar este tipo de inversión[13].

Es más, las sentencias, tanto del Tribunal de Primera Instancia (TPI), como del TJCE, confirmando las Decisiones de la Comisión a propósito de este tipo de medidas fiscales, no cuestionaban en absoluto la posibilidad de dictar disposiciones generales aplicables en un ámbito geográfico inferior al territorio del Estado correspondiente[14]. Por tanto, puede afirmarse que la justicia comunitaria, aun constatando la incompatibilidad de las normas forales, ha dejado a salvo la autonomía política y jurídica de los Territorios Históricos.

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Europeas, transfiriendo a estas últimas, en los ámbitos cubiertos por los textos constitutivos, competencias derivadas de la Constitución (legislativas, ejecutivas y judiciales). Al hacer esta transferencia, se aceptaron también, implícitamente, las consecuencias del ejercicio de esas competencias.

[13] I. ALONSO, op.cit., nota 7, pp. 264-265.

[14] Véanse en este sentido las sentencias pronunciadas el 6 de marzo de 2002, por el TPI, y el 11 de noviembre de 2004, por el TJCE, con respecto a la aplicación de las mini-vacaciones y del crédito fiscal del 45% de las inversiones a la empresa Ramondín, contra la que la Comisión reaccionó en 1997 cuestionando estos incentivos y que dio lugar a su Decisión 2000/795/CE declarando tales incentivos ayudas estatales incompatibles con la normativa y la política comunitarias de libre competencia. Respectivamente, Asuntos acumulados 92/00 y 103/00, Ramondín y Territorio Histórico de Alava-Diputación Foral de Alava contra Comisión de las Comunidades Europeas, Rec. 2002, p. II-01385 y Asuntos acumulados C-186/02 y 188/02, Ramondín y Territorio Histórico de Alava-Diputación Foral de Alava contra Comisión de las Comunidades Europeas, Rec. 2004, p. I-10653.

El espaldarazo decisivo al autogobierno fiscal de los Territorios Históricos, así como de otras regiones europeas con competencias similares, se ha producido, aún indirectamente, con el pronunciamiento de la Sentencia en el caso de la Región Autónoma las Islas Azores[15]. Reunido en Gran Sala, lo que no es frecuente y otorga una mayor trascendencia a su decisión, el TJCE ha dejado establecidas las condiciones de la compatibilidad de las normas fiscales emanadas de entidades subestatales con las disposiciones comunitarias sobre ayudas públicas.

La cuestión clave que se planteaba en este caso, y que era de especial interés para la CAPV y Navarra, era la delimitación del ámbito geográfico, esto es, la región o todo el territorio nacional, a la hora de apreciar el carácter general o selectivo, de las disposiciones fiscales.

El TJCE optó por la primera opción, rechazando así la postura de la Comisión Europea, que en este asunto mantenía la tesis de la selectividad regional. Según la instancia judicial, los entes subestatales pueden tener regímenes tributarios propios si, en primer lugar, tienen un estatuto de autogobierno político reconocido constitucionalmente (autonomía institucional). En segundo lugar, las disposiciones fiscales de ámbito regional se adoptan sin intervención del Gobierno del Estado (autonomía procedimental). En tercer lugar, la disminución de los ingresos públicos, derivada de las medidas fiscales adoptadas, no es compensada mediante subvenciones o transferencias cruzadas por el Estado (autonomía económica).

Estos tres principios o condiciones se observan en el caso de la CAPV y de Navarra, no así en la Región de las Islas Azores, donde no existe la autonomía en términos económicos, tal como estimó finalmente el TJCE.

Independientemente del desenlace judicial y de las consecuencias que esta decisión pueda acarrear, lo verdaderamente relevante es el equilibrio que el TJCE encuentra entre las disposiciones del Derecho Comunitario y el principio de autonomía institucional de los Estados miembros y el respeto de sus estructuras constitucionales, aceptando así la existencia en algunos Estados de una «descentralización asimétrica», es decir, que algunas entidades subestatales tengan descentralizada la competencia tributaria y no todas las demás[16].

Ahora bien, desde el punto de vista de la valoración jurídica, el pronunciamiento del TJCE no salva el problema de la posible incompatibilidad material de las normas fiscales vascas. Existen ya numerosas Decisones de la Comisión y Sentencias de las instancias de Luxemburgo para saber en qué aspectos las ventajas fiscales derivadas del Concierto chocan con las normas comunitarias. Por ello, pienso que, cara a evitar tanto expediente institucional y tanto procedimiento judicial, las Diputaciones deberían notificar sus proyectos de normas tributarias, si conllevan alguna

[15] Asunto C-88/03, Portugal contra Comisión, Sentencia de 6 de septiembre de 2000. Puede leerse el texto de este pronunciamiento en http://www.curia.europa.eu/es/content/juris/index.htm

[16] Léase, entre otros, el comentario de esta Sentencia en I. ALONSO, op.cit., nota 7, pp. 268-271.

distinción en su aplicación o dejan margen de apreciación en su concesión. Además, pende todavía sobre ellas la obligación de recuperar las ayudas concedidas entre 1993 y 2000[17].

Llegados a este punto, nos preguntamos: ¿dónde radica la causa principal de la inseguridad jurídica actual y de la precaria situación en la que se encuentra la tributación empresarial en los Territorios Históricos? Está claro que no procede de Bruselas ni de Luxemburgo, porque no es tanto un problema de confrontación con la normativa comunitaria, esto último puede solventarse, del mismo modo que se ha hecho en otros Estados miembros objeto de imputación por la Comisión. El principal problema lo tenemos dentro: es la litigiosidad constante promovida, en un primer momento, desde la Administración del Estado y, últimamente, por máximos representantes políticos de CCAA limítrofes, hasta organizaciones de empresarios de estas CCAA.

## 3. Los recursos en el ámbito interno: el cuestionamiento de la capacidad normativa fiscal de los Territorios Históricos y la inseguridad jurídica generada

En julio de 1999, cuando el Sr. Saggio hizo públicas sus conclusiones en el procedimiento prejudicial iniciado por el Tribunal Superior de Justicia del País Vasco, había en tramitación varios recursos contra la normativa foral del Impuesto sobre Sociedades de 1996, pendientes de resolución judicial. En uno de ellos, interpuesto por la Federación de Empresarios de la Rioja, se invocaba el Derecho Comunitario como uno de los motivos centrales de la impugnación. En septiembre de 1999 el Tribunal Superior de Justicia del País Vasco desestimó estas alegaciones, no apreciando incompatibilidad con la normativa comunitaria de ayudas públicas.

La Federación de Empresarios de la Rioja interpuso un recurso de casación contra esta Sentencia, que fue resuelto por el Tribunal Supremo el 9 de diciembre de 2004, acogiendo la tesis de la Federación riojana de Empresarios. Aparte de considerar las normas forales como ayudas estatales por su carácter selectivo regional, en tanto en cuanto incorporaban una ventaja con relación a la normativa estatal, procedió a anularlas al considerarlas contrarias al art. 88,1º TCE, por no haber sido notificadas previamente a la Comisión.

No es la primera vez que el Tribunal Superior de Justicia del País Vasco y el Tribunal Supremo llegan, sobre el mismo asunto, a juicios totalmente dispares. Sin embargo, independientemente de la valoración conceptual y jurídica que sus pronuncia-

[17] En Sentencia de 14 de diciembre de 2006, el TJCE confirmó la infracción del Estado español por no haber recuperado estas ayudas declaradas por la Comisión contrarias al art. 87,1º TCE (Asuntos acumulados C-485/03 a C-490/03, Comisión contra España). Puede leerse la Sentencia en http://www.curia.europa.eu/es/content/juris/index.htm

mientos puedan merecer, ambas instancias cumplieron con su papel de juez comunitario, conforme a la jurisprudencia del propio TJCE, por lo que, en cualquier caso, debe respetarse su independencia y su labor, nada fácil en estos casos. En estos momentos se está a la espera de la sentencia de amparo que dictará próximamente el Tribunal Constitucional.

Con todo, es previsible que la puesta en cuestión permanente de las normas fiscales forales, especialmente virulenta en los dos últimos años, y la inseguridad jurídica que acarrea no acaben ahí, incluso con una Sentencia favorable del Tribunal Constitucional. Pienso, por ello, que deben abrirse otros caminos, aparte del judicial.

## 4. Alternativas para una mayor estabilidad y futuro pacífico

### *4.1. La cooperación y confianza mutua*

En este panorama de constante crispación, parece obvia la necesidad del entendimiento político y de la cooperación. En el ámbito del TCE el principio de cooperación de los Estados miembros está escrito en su art. 10[18]. En la Constitución española no está previsto expresamente, aunque sí definido por la jurisprudencia constitucional, como principio encargado de garantizar el ejercicio leal de las competencias entre el Estado y las CCAA, así como entre las CCAA entre sí, de modo que todos los componentes del Estado tengan en cuenta los intereses del resto en el momento de ejercer las respectivas competencias[19].

### *4.2. Una mayor protección judicial de las normas forales*

En la actualidad las normas forales de las Juntas Generales son enjuiciables ante la jurisdicción ordinaria, lo que constituye una anomalía jurídica y procesal con respecto a las demás disposiciones de idéntico contenido emanadas de las Cortes Generales, de la Comunidad Foral de Navarra o de otras CCAA, siendo todas ellas competencia del Tribunal Constitucional.

A finales de noviembre de 2006, se alcanzó un acuerdo entre representantes del Gobierno Vasco y de la Administración del Estado para dotar de mayor protección

[18] Dice el art.10 TCE: «Los Estados miembros adoptarán todas las medidas generales o particulares apropiadas para asegurar el cumplimiento de las obligaciones derivadas del presente Tratado o resultantes de los actos de las instituciones de la Comunidad. Facilitarán a ésta el cumplimiento de su misión. Los Estados se abstendrán de todas aquellas medidas que puedan poner en peligro la realización de los fines del presente Tratado».

[19] Para un estudio del principio de cooperación y la jurisprudencia del Tribunal Constitucional, léase J. LASO PEREZ, *La cooperación leal en el ordenamiento comunitario*, Ed. Colex, Madrid, 2000, pp. 117-144.

jurídica a las normas forales. Según el consenso alcanzado, que conllevará una reforma de la Ley Orgánica del Tribunal Constitucional, las disposiciones tributarias de las Haciendas Forales solo podrán ser recurridas ante el Tribunal Constitucional, cerrándose la vía de la Justicia ordinaria, lo cual reduce la capacidad procesal de los sujetos que pueden actuar de demandante, entre ellos, el Gobierno Central y los autonómicos que se vean directamente afectados.

Por el momento, esta mayor resistencia procesal no ha sentado muy bien en la Rioja, desde donde se han alzado voces en contra anunciando un posible recurso ante el Constitucional.

### *4.3. Participación de la CAPV y de Navarra en la formación del Consejo sobre Asuntos Económicos y Financieros (Ecofin)*

Ahora que se ha abierto, desde hace poco más de un año, la posibilidad de participar en cuatro formaciones del Consejo de la UE[20], sería interesante negociar con el Estado la participación de un Consejero de la CAPV o de Navarra en el Consejo Ecofin, cuando vayan a discutirse propuestas de nuevas normas de armonización de fiscalidad directa. Ello incluiría la participación del personal técnico correspondiente en los grupos de trabajo de esta formación, así como en el COREPER.

Esta sería una vía para preservar en el futuro las parcelas de autonomía fiscal o, cuando menos, para expresar y defender directamente los intereses propios en este ámbito.

### *4.4. Diálogo y contacto permanente con la Comisión*

Tanto a nivel técnico, como a nivel político, sería aconsejable un contacto permanente con los responsables de la Dirección General de la Política de la Competencia. Esta vía de diálogo podría canalizarse a través de la mediación de la Delegación de Euskadi, o por medio de la Consejería de Asuntos Autonómicos de la Representación Permanente, cuyos miembros son, desde 2005, funcionarios designados de forma rotatoria por las CCAA[21].

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[20] Acuerdo de 9 de diciembre de 2004, de la Conferencia para Asuntos Relacionados con las Comunidades Europeas sobre la participación de las Comunidades Autónomas en los grupos de trabajo del Consejo de la Unión Europea y sobre el sistema de representación autonómica en las formaciones del Consejo de la Unión Europea (véase la Resolución de 28 de febrero de 2005 de la Secretaría de Estado de Cooperación Territorial, publicada en el BOE nº 64 de 16 de marzo de 2005).

[21] Al respecto de esta nueva composición, véase el Acuerdo de 9 de diciembre de 2004 de la Conferencia para Asuntos Relacionados con las Comunidades Europeas, sobre la Consejería para Asuntos Autonómicos en la Representación Permanente de España ante la UE, publicado también en el BOE nº 64 de 16 de marzo de 2005.

Se trataría de transmitir la singularidad fiscal de la CAPV, su encaje político e histórico, sus sensibilidades e intereses para que, de algún modo la Comisión comprenda esta realidad peculiar, que comparten algunas otras regiones de los Estados miembros, y la incluya en las nuevas tendencias de la política de libre competencia[22].

Muchas gracias por su atención.

[22] En 2005, la Comisión publicó el Plan de Acción de Ayudas Estatales (2005-2009), documento de base en que establece la necesidad de proceder a una reforma exhaustiva de la política de ayudas, con objeto de acomodarla a los desafíos trazados en la Cumbre de Lisboa y a la nueva situación generada por las últimas ampliaciones. Este Plan y las medidas que se van a desprender van a condicionar el alcance y contenido de las políticas de apoyo a las empresas por los Estados miembros.

# La participación de las instituciones regionales en los órganos de la Unión Europea en relación con la fiscalidad[1]

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## Órganos europeos que tienen relación con la normativa fiscal

En 2004, el Tribunal de Justicia de las Comunidades Europeas sostuvo que el termino Estado Miembro, a los efectos de las disposiciones institucionales del Tratado, *«se refiere exclusivamente a las autoridades gubernamentales de los Estados Miembros de las Comunidades Europeas y no puede comprender los gobiernos de las regiones o de las comunidades autónomas con independencia de las potestades que estas tengan»*[2]. La razón es, según el Tribunal, que mantener algo diferente supondría desequilibrar el balance institucional de la Comunidad. Esta afirmación del Tribunal refleja los problemas a los que se enfrentan los gobiernos regionales, incluso aquellos dotados de capacidades legislativas y administrativas, para conseguir tener acceso a

[1] Versión original de la ponencia en inglés.

[2] Caso C-87/02 Comisión versus Italia (2004) Rec. I-5975.

los órganos decisorios de la Unión Europea. Las disposiciones institucionales de la Unión Europea simplemente no habilitan la posibilidad de una implicación regional amplia en las decisiones clave, incluso cuando la estructura constitucional nacional respeta una división interna de competencias entre las entidades nacionales e infraestatales.

A los efectos de la normativa fiscal, los órganos clave de la Unión Europea que se ven afectados son el Consejo (en concreto el ECOFIN), junto con una gran variedad de grupos de trabajo, la Comisión y el Tribunal de Justicia de las Comunidades Europeas. El tipo de medidas que se pueden adoptar van desde medidas del mayor rango legal, típicamente en forma de directivas basadas en la unanimidad, hasta disposiciones del menor rango en forma de directrices o comunicaciones (denominadas colectivamente comunicaciones a los efectos de esta exposición). El artículo 93 del Tratado establece que pueden adoptarse *«disposiciones para la armonización de la legislación que afecta a los impuestos sobre el consumo, los impuestos especiales y otras formas de imposición indirecta»*. El artículo 94 establece que las directivas pueden ser adoptadas en asuntos de fiscalidad directa cuando se requieran medidas para proteger el establecimiento o funcionamiento del mercado interno. Las directivas son medidas del máximo rango adoptadas siguiendo el método de la Comunidad, tal y como dispone el Tratado, que implica la preparación de un borrador por la Comisión y la adopción del texto final bien por el Consejo o por el Consejo junto con el Parlamento. Tanto en el caso del artículo 93 como en el del 94, se sigue el procedimiento de consulta, que exige que tanto el Parlamento como el Comité Económico y Social sean consultados, una vez realizadas las propuestas por la Comisión, y que el Consejo adopte la decisión final en relación al texto. Las directivas requieren que los Estados Miembros las implementen, siguiendo el método y la forma elegidos por cada Estado a la luz de su ordenamiento jurídico interno. Cuando sea necesario, se puede requerir al TJCE para interpretar el contenido de las diferentes directivas y puede también que tenga que tomar parte en los procedimientos de infracción, si un Estado Miembro incumple a la hora de trasponer lo dispuesto por una directiva a su propio ordenamiento jurídico interno, bien por no hacerlo respetando las disposiciones de la Directiva o, bien por no hacerlo dentro del plazo establecido.

Gran parte de la actividad de la UE en el área de la normativa fiscal, sin embargo, no toma la forma de disposiciones legales del mayor rango. Por ejemplo, las Directrices de la Comisión sobre ayudas nacionales de ámbito regional[3], o el Comunicado de la Comisión sobre ayudas de Estado en el ámbito de la fiscalidad directa, son medidas de rango reglamentario inferior diseñadas más bien para coordinar que para armonizar las disposiciones fiscales nacionales o para influenciar en las políticas fiscales de los Estados Miembros. En asuntos que son políticamente sensibles, existe una preferencia por utilizar este tipo de disposiciones, a veces como preludio de medidas legislativas de mayor rango y otras veces como una alternativa a estas últimas.

[3] DO 1998, C 74/9 modificado por DO 2000 C 258/5.

## Descentralización fiscal en la UE

La regulación de la fiscalidad dentro de los Estados Miembros es normalmente función de los gobiernos centrales. Esto se debe en algunas ocasiones a razones históricas pero también a la necesidad de una política fiscal uniforme dentro de un Estado cuyo gobierno central actúa para redistribuir los recursos, asegurando un cierto grado de igualdad dentro del Estado. Asimismo, existe la opinión de que una unidad fiscal de mayor tamaño tiene mayor capacidad para resistir las crisis económicas y por lo tanto supone una mejor protección para los ciudadanos del Estado. Aunque hay ejemplos de descentralización fiscal en la UE, el modelo más común no es el de descentralización fiscal. A pesar de ello, ejemplos de descentralización fiscal se encuentran en la UE en España y en cierta medida en Portugal, Finlandia y en Reino Unido. En el caso del País Vasco y Navarra, por razones históricas, se garantiza autonomía fiscal total en los términos de lo dispuesto en el Concierto Económico. La autonomía fiscal se define como una situación en la que la autoridad regional es responsable de generar los impuestos que después gasta y en la que no hay transferencias de carácter fiscal del gobierno central al gobierno regional. Casi en el otro extremo del espectro de descentralización fiscal está el caso de Escocia, en el que se prevé una capacidad limitada para modificar exclusivamente la tributación de las personas físicas, en relación a la cual el Parlamento Escocés tiene capacidad para incrementar o reducir el ingreso tributario en tres peniques por libra[4]. Este es un modelo de una descentralización fiscal extremadamente limitada (y de hecho esta capacidad legislativa tributaria no ha sido utilizada nunca). Bajo este sistema de descentralización, no hay una conexión directa entre los ciudadanos escoceses y los departamentos de gasto del Gobierno escocés. Al Gobierno escocés se le otorga una subvención en bloque calculada conforme a la fórmula Barnnet. «*La fórmula es una manera de compartir costes (no el nivel) correspondientes a los planes públicos de gasto entre los países que participan en la Unión. A Escocia se le asigna una parte, calculada conforme a su población, del total de los costes de los planes de gasto en programas análogos en Inglaterra o en Inglaterra y Gales. Como la formula esta basada en la participación en base a la población, no refleja necesariamente las necesidades de gasto*»[5]. Los archipiélagos de Azores y Madeira en Portugal disfrutan de autonomía regional. Sin embargo, las finanzas de las regiones autónomas se coordinan con las finanzas del Estado bajo el principio nacional de solidaridad. El sistema que rige en Azores y Madeira puede ser definido de manera útil como una forma de federalismo fiscal, ya que una proporción considerable de los ingresos se obtiene y gasta dentro de la región aunque haya transferencias presupuestarias del gobierno central para asegurar la solidaridad nacional.

Ante esta variedad de modelos o de potestades fiscales regionales, tal vez no sea sorprendente que aquellas regiones (relativamente pocas) que tienen potestades amplias

[4] Acta Escocesa de 1998. Sección 73.

[5] R.MacDonald and P.Hallwood 'The Economic Case for Fiscal Federalism in Scotland' (Glasgow, Fraser of Allander Series) p. 50.

hayan experimentado dificultades en acceder a la UE y tener influencia en las políticas relativas a la normativa fiscal.

## El Consejo

La institución clave en la UE en lo que a esta materia se refiere es el Consejo de Ministros, particularmente en su composición ECOFIN, cuando los ministros nacionales de finanzas (en el Reino Unido el *Chancellor of the Exchequer*) se reúnen no solo como foro de creación de políticas sino también como asamblea legislativa. Originariamente, el Consejo de Ministros estaba compuesto por un miembro de cada gobierno de los Estados Miembros[6]. Esta formulación excluye de la representación del Estado Miembro a cualquiera que no sea miembro de los gobiernos nacionales. Esto fue modificado por el Tratado de Maastrich por la presión, en concreto, de los *Länders* alemanes. La pertenencia al Consejo está abierta ahora a la representación de cada Estado Miembro *«de nivel ministerial autorizada para comprometer al gobierno de dicho Estado Miembro»*. Es por lo tanto posible para un ministro de un gobierno regional asistir y votar en el Consejo de Ministros. Sin embargo, el ministro regional debe representar a la totalidad del Estado y no puede representar exclusivamente los intereses regionales. El o ella tiene que tener las facultades suficientes para comprometer al Estado Miembro con la adopción de una serie de medidas o con la asunción de una cláusula concreta en el ámbito de la legislación comunitaria.

Es la regulación constitucional nacional más que la legislación comunitaria la que determina la elección de la representación ministerial en el Consejo de Ministros. En el Reino Unido, es siempre el ministro que encabeza el gobierno el que decide la composición del equipo ministerial que asistirá a las reuniones del Consejo. Los ministros escoceses han asistido a las reuniones del Consejo en una serie de ocasiones en las que se estaban tratando materias descentralizadas, por ejemplo, al Consejo de Pesca o al Consejo de Justicia y Política Interior, como reconocimiento de la importancia que estas formaciones del Consejo tiene para los intereses escoceses. Ningún Ministro escocés ha asistido jamás o ha sido requerido para asistir al ECOFIN ya que, con la excepción de la competencia normativa de modificación mencionada anteriormente, las políticas fiscal, económica y monetaria están específicamente reservadas al gobierno del Reino Unido[7] en virtud del acuerdo de descentralización de ese país[8].

Las leyes nacionales deben también determinar cómo un concreto Estado Miembro establece la postura que va a adoptar en relación a cualquier aspecto concreto de la política de la UE. La solidaridad nacional dentro del Consejo debe ser respetada, ya que el Consejo no tiene entre sus funciones la representación de los intereses territo-

[6] Artículo 146 del Tratado de Roma.
[7] Acta escocesa de 1998. Inventario 5. Sección A1.
[8] Acta escocesa de 1998. Inventario 5. Sección A1.

riales internos. En el Reino Unido ha habido sugerencias para que los votos que se le asignan en el Consejo puedan distribuirse de manera proporcional a los gobiernos descentralizados pero han sido desechadas por ser poco realistas desde un punto de vista político y, sin el acuerdo del resto de los Estados Miembros, imposibles de llevar a cabo en la práctica. Dentro del marco de la UE, por tanto, la función de un Ministro regional en el Consejo es representar la postura acordada por el Reino Unido incluso si el o ella considera que la posición defendida por el Reino Unido va en detrimento de los intereses de la región en cuestión. Corresponde a las regiones persuadir y negociar con otras regiones y con el gobierno central una postura nacional adecuada con anterioridad a las reuniones del Consejo. Dentro de cada Estado Miembro, existen una gran variedad de foros en los que tales negociaciones se pueden llevar a cabo. En el Reino Unido, estas negociaciones se suelen efectuar entre los niveles funcionariales altos más que entre los niveles ministeriales aunque el Comité Conjunto Ministerial (Europa) se reúne regularmente para discutir asuntos europeos de interés común[9].

El Consejo de Ministros descansa su trabajo en el COREPER, Comité de Representantes Permanentes y en una multitud de Grupos de Trabajo y de Comités. Aunque algunos grupos de trabajo puede que estén formados por representantes políticos, como el que fue convocado por Dawn Primarolo para supervisar el funcionamiento del Código de Conducta en relación a la imposición de las empresas e informar directamente al Consejo, la mayoría de los comités de apoyo, incluyendo el COREPER, están formados por altos funcionarios de la Administración Pública de los Estados Miembros. De nuevo, los mecanismos que están en vigor en cada Estado Miembro determinarán en qué medida los funcionarios que trabajan en las regiones descentralizadas podrán participar en estos grupos de trabajo. En el Reino Unido, los funcionarios que presentan sus servicios en el Gobierno escocés pertenecen a un cuerpo funcionarial unificado. Los funcionarios del Gobierno escocés pueden por tanto ser convocados para participar en los grupos de trabajo del Consejo como parte de la representación del Reino Unido. Ellos recibirán también (o deberían recibir) la información sobre los asuntos europeos de manera rutinaria cuando un asunto europeo afecta a una competencia descentralizada. La *«UKRep»*, la representación diplomática de Reino Unido, trabaja con la Oficina UE del Gobierno escocés en Bruselas, y ambas forman parte de la representación diplomática del Reino Unido ante la UE. En principio, este hecho da acceso a Escocia a las instituciones de la UE aunque la Oficina UE del Gobierno escocés debe trabajar apoyando la labor de la *«UKRep»* más que obstaculizándola. En otros Estados Miembros, en los que no existe este concepto de cuerpo funcionarial unificado, es mucho mas difícil para una región obtener el acceso a los grupos de trabajo del Consejo. El intercambio de información rutinaria tiene menos probabilidades de producirse, la recepción de los documentos y de la correspondencia es menos probable que ocurra y los funcionarios pueden tener la tentación de no hacer partícipes a sus colegas regionales de la información que puede ayudarles a entender y poder influenciar en las actuaciones de ámbito comunitario que les afecten.

[9] A Trench, 'Devolution: the withering away of the Joint Ministerial Committee' [2004] *Public Law* 513.

Dentro del Reino Unido, dado que la política fiscal es competencia exclusiva, los funcionarios del Gobierno escocés carecen de posibilidades de verse convocados a los grupos de trabajo relacionados con la normativa tributaria o con cualquier otro aspecto de la política fiscal, económica o monetaria.

## La Comisión

Mientras que la función del Consejo consiste en proporcionar un foro a los Estados Miembros en el se representen sus intereses, la Comisión es la institución que tiene como tarea representar los propios intereses de la UE. Los Comisarios son en principio elegidos en base a su independencia y su lealtad se la deben al Colegio de Comisarios. Son colectivamente responsables ante el Parlamento Europeo. Ni los intereses nacionales ni los intereses regionales deberían de prevalecer dentro de la Comisión. La Comisión tiene la competencia de impulsar las actuaciones legislativas, en la mayor parte de las ocasiones en forma de borradores de directivas, en materia fiscal. Como guardián del Tratado, la Comisión es también responsable de asegurar el cumplimiento de la legislación comunitaria. En este aspecto, su función es tanto educativa como de ejecución.

El método comunitario de legislar exige que la Comisión inicie los procedimientos legislativos. La Comisión publica informes blancos y verdes con anterioridad a hacer público un borrador de directiva y se embarca en la labor de realizar consultas de amplio espectro. Hasta ahora no ha habido ningún intento sistematizado de consultar específicamente con los gobiernos de los niveles regionales, aunque como parte de la Regulación para una Mejor Estrategia de la Comisión se ha intentado establecer un compromiso de dialogo sistemático con las regiones. Es demasiado pronto para evaluar si el dialogo sistemático puede constituir un mecanismo auténtico para la consulta y la participación de los gobiernos regionales en la primera etapa del proceso legislativo comunitario. Las Regiones pueden también buscar el compromiso de dialogo con la Comisión vía el Comité de las Regiones, otra de las innovaciones de Maastrich. Sin embargo, el Comité de las Regiones, como tal, no tiene el derecho de ser consultado en asuntos relativos a la legislación fiscal y su contribución al proceso comunitario está ampliamente considerada como pobre. Dicho esto, si las propias regiones persiguen establecer un dialogo con la Comisión sobre asuntos que afectan a sus intereses, la Comisión esta dispuesta a tales conversaciones. Sin embargo, la voz de mayor peso es inevitablemente la del Estado Miembro y la Comisión tiene muy pocas probabilidades de proponer medias que resulten inaceptables por los Estados Miembros en el Consejo. Además, en cuestiones de legislación fiscal, la Comisión ha defendido hasta ahora una mayor centralización de la legislación fiscal en Europa y ha encontrado la resistencia de algunos Estados Miembros, incluido España y, tal vez más rotundamente, el Reino Unido. No hay prueba hasta hoy de que la Comisión favorezca la descentralización y regiones tales como el País Vasco y Azores han encontrado en la Comisión una actitud poco receptiva en relación al concepto de regímenes fiscales diferenciados dentro de un mismo Estado Miembro.

La función pedagógica de la Comisión es crucial en áreas en las que el Derecho Comunitario es complejo o en un periodo de transición y desarrollo acelerados. Mediante la utilización de las Comunicaciones en sus formas más diversas, la Comisión establece su interpretación del Derecho Comunitario para servir de guía a los gobiernos y tribunales de los Estados Miembros así como a los operadores económicos. Estas comunicaciones pueden adoptar la forma de Opiniones, Comunicados, Comunicaciones o Directrices y forman parte de una gran cantidad de instrumentos normativos de rango menor desarrollados en el ambito de la Unión Europea. Estas Comunicaciones vienen en muchos casos a dar respuesta a la necesidad de aclarar la jurisprudencia del Tribunal de Justicia en los casos en los que al Tribunal se le ha solicitado que interprete aspectos de la legislación comunitaria a la luz de especificas circunstancias de hecho. A menudo la jurisprudencia puede mostrase confusa o contradictoria o en ocasiones puede ir incluso mas allá del propio entendimiento que tanto los Estados Miembros como la Comisión hacen de la legislación. En estas circunstancias es a menudo útil para la Comisión intentar codificar los principios e interpretaciones desarrolladas por el tribunal en un documento más accesible. Dada la naturaleza de esta tarea, ni los gobiernos regionales ni los nacionales pueden influir en la Comisión al desarrollar estos instrumentos.

Sin embargo, la interpretación de la Comisión de la jurisprudencia del Tribunal puede ser defectuosa en sí misma y su interpretación puede ser contradicha en los posteriores asuntos que se vean ante el Tribunal de Justicia Europeo. Un buen ejemplo de esto se encuentra en el asunto interpuesto por Portugal contra la Comisión en relación a las medidas fiscales adoptadas por Azores[10]. El artículo 17 de la Comunicación de la Comisión sobre ayudas de Estado en el ámbito de la fiscalidad directa estaba en cuestión en este asunto. El articulo 17 establece que «sólo las medidas cuyo ámbito de aplicación se extienda a la totalidad del territorio de un Estado escapan del criterio de especificidad establecido en el artículo 87.1 del Tratado». El marco de referencia en el que debe juzgarse si algunos operadores podrían beneficiarse de un esquema de tributación frente a otros que no pudieran, según la Comisión, solamente podría establecerse en relación a los tipos impositivos «normales» y los tipos impositivos normales son aquellos que se aplican por el Gobierno central de un Estado Miembro. Esta interpretación fue puesta en tela de juicio por Portugal y por el Reino Unido que intervino en este asunto. Fueron los argumentos del Reino Unido los que salieron adelante en el juicio y merece la pena repetirlos en su totalidad:

> «Donde, como en este caso, el parlamento de una región autónoma establece tipos impositivos que se aplican uniformemente en toda la región en cuestión pero que son inferiores que los que se aplican en otras partes del Estado Miembro por decisión del parlamento nacional, la selectividad de la medida no puede derivar simplemente del hecho de que las otras regiones están sometidas a un nivel diferente de tributación. Dependiendo de las circunstancias, puede que sea apropiado determinar dicha selectividad en el contexto de la propia región y no en el contexto del Estado miembro en su conjunto. Tal será el caso si

[10] Asunto C-88/03 Portugal vs. Comisión. Sentencia de 6 de septiembre de 2006.

existe un sistema constitucional que reconozca autonomía fiscal suficiente de tal manera que pueda considerarse que la reducción fiscal otorgada por la autoridad local lo ha sido en virtud de la decisión de una región autónoma o descentralizada que no sólo tiene el poder de adoptar dicha decisión sino que debe también soportar las consecuencias fiscales y políticas de ella…

Por lo tanto… antes de catalogar a los tipos tributarios regionales que son inferiores a los tipos tributarios nacionales de ayudas de Estado, la Comisión debería haber tenido en consideración el grado de autonomía de la autoridad local o regional que estableció los tipos reducidos teniendo en cuenta una serie de factores, tales como el hecho de que la competencia en asuntos fiscales sea parte de un sistema constitucional que otorga un nivel significativo de autonomía política a la región, el hecho de que la decisión de reducir el tipo impositivo se adopte por una entidad que sea elegida por la población de la región o responsable ante la misma y el hecho de que las consecuencias financieras de tal decisión sean soportadas por la región y no compensadas mediante subvenciones o contribuciones de otras regiones o del Gobierno central».

El Reino Unido defendía que su sistema de descentralización, en relación a Escocia y a Irlanda del Norte, sería cuestionado si el Tribunal no respetaba estos principios. La Comisión presentó argumentos frente al Reino Unido, rechazando cualquier argumento para sustentar que las reducciones impositivas pueden ser justificadas por diferentes circunstancias. Esto, según la Comisión, se opondría a la jurisprudencia del Tribunal de Justicia porque el Tribunal ya ha determinado que la ayuda se define en relación a sus efectos sobre las empresas y no a los objetivos pretendidos por la medida en cuestión.

El Tribunal sostuvo que el examen que había que aplicar a cada medida era si el esquema de ayuda era de tal naturaleza que favorecía a ciertas empresas o a las producciones de ciertos bienes, independientemente de que la medida fuese adoptada por el Estado Miembro o por un gobierno regional. Tales medidas son selectivas. Sin embargo, el Tribunal aceptó las observaciones presentadas por el Reino Unido de que el marco de referencia podía no ser siempre el territorio completo del Estado Miembro. El hecho de que sean aplicables diferentes tipos impositivos no implica necesariamente que la media es selectiva sólo por esa razón. El Tribunal ha establecido los parámetros (las diferentes circunstancias rechazadas por la Comisión) para examinar la legalidad de las variaciones impositivas de carácter regional. El Tribunal sostuvo:

«No puede excluirse que una entidad infraestatal cuente con un estatuto jurídico y fáctico que la haga lo suficientemente autónoma del Gobierno central de un Estado miembro como para que sea ella misma, y no el Gobierno central, quien, mediante las medidas que adopte, desempeñe un papel fundamental en la definición del medio político y económico en el que operan las empresas. En tal caso, es el territorio en el que la entidad infraestatal que ha adoptado la medida ejerce su competencia, y no el territorio nacional en su conjunto, el que debe considerarse pertinente para determinar si una medida adoptada por dicha entidad favorece a ciertas empresas, en comparación con otras que se encuentren en una situación fáctica y jurídica comparable, habida cuenta del objetivo perseguido por la medida o el régimen jurídico de que se trate».

Esta frase demuestra una genuina y tal vez inusual deferencia del Tribunal a las tradiciones e instituciones constitucionales de los Estados Miembros. También reconoce que la política fiscal de una región puede tener un papel importante en el logro de los objetivos de un gobierno regional, en oposición a uno central. El Tribunal estableció cuatro pruebas a aplicar:

– Si las medidas son adoptadas por el gobierno regional en el ejercicio de unas competencias lo suficientemente autónomas frente al poder central: típicamente el gobierno regional juega «un papel fundamental en la definición del medio político y económico en el que las empresas en el territorio de su competencia operan». Tendrá un status político y administrativo separado.
– Si la medida se aplica a todas las empresas dentro de la región.
– La medida debe haber sido adoptada sin que el Gobierno central haya podido intervenir directamente en la determinación del contenido de la medida.
– Las consecuencias financieras de la medida deben ser soportadas por el gobierno regional y no compensadas por ayudas o subvenciones de otras regiones o del Gobierno central.

Este asunto demuestra que la interpretación de la Comisión de la jurisprudencia del Tribunal puede que no siempre constituya una comprensión precisa de la misma y que el Tribunal está preparado para actualizar su propia jurisprudencia la luz de los nuevos argumentos. También es una muestra de la ausencia de una voz regional ante el Tribunal. Los protagonistas del caso fueron los Estados Miembros, Portugal como parte y Reino Unido como interesado interviniente y la Comisión Europea. Fueron los Estados Miembros los requeridos para defender los intereses regionales y no las propias regiones.

La Comisión asegura que el Derecho comunitario se cumple mediante la utilización de los procedimientos de infracción contra los Estados Miembros por el incumplimiento del Derecho comunitario según lo dispuesto en el artículo 226 del Tratado de la UE. Esto ocurre no solamente en cuestiones relacionadas con regulaciones fiscales sino en general. En tales procedimientos de infracción un Estado Miembro no puede depender de la incapacidad de un gobierno regional para defender su propio incumplimiento en asegurarse de que las directivas se implementan completamente en el tiempo debido[11]. La responsabilidad del Estado Miembro frente a la Comunidad existe incluso en el caso de que los órganos del Gobierno central, según la propia ley constitucional del Estado, no tengan capacidad para obligar a las regiones a que adopten legislación comunitaria «*o para ponerse en su lugar y directamente trasponer las directivas en el supuesto de un retraso persistente por su parte*»[12]. Este enfoque refleja la «*idea de que el concepto comunitario de Estado es legalmente indivisible, como en Derecho internacional, un enfoque que el Tribunal*

[11] Caso C-33/90 Comisión vs. Italia (1991) REC-I-5245 y también, en este sentido, la Orden del Tribunal en el asunto C-180/97 Región de Toscana vs. Comisión Rec. I-524 (1997).
[12] Asuntos acumulados 227, 228 y 229/85 Comisión vs. Bélgica (1998).

*ha mantenido consistentemente tanto en relación con los procedimientos de infracción como en casos de responsabilidad del Estado*[13]». Queda a la voluntad de cada Estado Miembro implicar a los gobiernos regionales en los casos significativos ante el Tribunal de Justicia cómo y cuándo sea requerido por las leyes nacionales constitucionales. En el Reino Unido donde los asuntos pueden implicar un incumplimiento del Derecho comunitario por parte de un gobierno regional y se abren los procedimientos de infracción contra el Reino Unido, se ha acordado que los gobiernos regionales deben implicarse en la preparación de las alegaciones e incurrirán en responsabilidad financiera cuando el incumplimiento del Derecho comunitario les sea imputado[14]. Si se abriera un procedimiento de infracción frente al Reino Unido, debido al ejercicio de las diferentes potestades tributarias por parte del Parlamento escocés, serían de aplicación estas reglas.

La Comisión ejerce su propia potestad de decisión en relación con la aplicación de las reglas de ayudas de Estado. El artículo 88.2 del TUE dispone que es labor de la Comisión la supervisión de la aplicación de las reglas de ayudas de Estado. Cuando la Comisión determina que una medida es incompatible con el mercado común, puede que, habiendo notificado al Estado Miembro afectado, decida que el Estado debe suprimir o modificar la medida. Si el Estado no cumple con la decisión de la Comisión, la Comisión puede llevar al Estado Miembro ante el Tribunal Europeo de Justicia. Si el asunto se refiere a una infracción cometida por el Gobierno regional, es al propio Estado y no al Gobierno regional al que la Comisión debe llevar ante el Tribunal para hacer que cumpla su decisión[15].

## El Tribunal Europeo de Justicia y el Tribunal de Primera Instancia

Durante los últimos veinte años más o menos, los gobiernos regionales han solicitado el establecimiento de un derecho, independiente del Estado Miembro, para enjuiciar los actos legislativos comunitarios ante el Tribunal Europeo de Justicia. El Tribunal de Justicia ha rechazado repetidamente las peticiones de los gobiernos regionales, solicitando la equiparación con el Estado miembro a los efectos de ejercitar el recurso de anulación del artículo 230 TUE: la razón fundamental del Tribunal es que *«no es posible que las Comunidades europeas comprendan un mayor número de Estados miembros que el número de Estados entre los que ellas se establecieron»*[16].

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[13] R.W. Davis «Liability in damages for a breach of Community law» (2006) 31 *European Law review* 69.

[14] Concordato sobre Coordinación de los asuntos de la Unión Europea, B3.22-25: en http://www.scotland.gov.uk/library2/memorandum/mous-06.htm

[15] Por ejemplo ver los casos acumulados C-485/03 a C-490/03. Comisión vs. España, sentencia del tribunal de 14 de Diciembre de 2006.

[16] Asuntos acumulados 227, 228 y 229/85 Comisión vs. Belgica (1998) Rec.1: ver tambien N. Burrows «Nemo me impune lacessit: The Scottish right of access to the European Courts» (2002) 6 *European Public Law* 45.

El Tribunal también mantiene que los recursos de anulación reflejan los procedimientos de infracción en los que el Estado Miembro se presenta como responsable por el defecto de los gobiernos regionales en el cumplimiento de la legislación comunitaria. Así, incluso cuando un acto legislativo comunitario afecte a las prerrogativas establecidas por el Derecho nacional constitucional de un gobierno regional, el gobierno regional no tiene el derecho de poner en tela de juicio la validez del acto comunitario tal y como lo tiene el Estado Miembro.

Sin embargo, cuando el Derecho nacional constitucional reconoce que un gobierno regional tiene capacidad o personalidad jurídica puede interponer el recurso de anulación contra las decisiones de las que sea destinatario «*y contra las decisiones que, aunque revistan la forma de un reglamento o de una decisión dirigida a otra persona, le afecten directa e individualmente*» en virtud de lo dispuesto en el artículo 230 TUE. Tales recursos se interponen ante el Tribunal de Primera Instancia. Los términos del artículo 230 excluyen cualquier recurso de anulación frente a una directiva y la mayor parte de los actos legislativos comunitarios en el ámbito de la tributación son en forma de directivas. El Tribunal de Primera Instancia también ha mantenido que un gobierno regional no puede recurrir la validez de un reglamento salvo que pueda probar un interés directo e individual en relación al reglamento en cuestión. Un reglamento que habilitaba a la Comisión para adoptar decisiones dirigidas a los gobiernos de España, Alemania y Grecia autorizando el pago de una ayuda a los astilleros no pudo ser recurrido por la Comunidad autónoma de Cantabria, incluso aunque la decisión producía un impacto negativo en dicha Comunidad. El Tribunal sostuvo:

> La confianza de una autoridad regional de un Estado Miembro en el hecho de que la puesta en marcha o la aplicación de una medida comunitaria es capaz, en general, de afectar las condiciones socio-económicas dentro de su jurisdicción territorial no es suficiente para considerar el recurso interpuesto por la autoridad admisible[17].

El Tribunal de Primera Instancia aplica el examen del interés individual y directo de manera estricta en los casos en que un gobierno regional persigue poner en cuestión la validez de una medida de aplicación general. El gobierno de Azores trató de cuestionar la validez de un reglamento que tenía por efecto privarle de la competencia para legislar en asuntos de pesca los cuales, desde el punto de vista de la Constitución portuguesa, eran de competencia del gobierno regional. El Tribunal de Primera Instancia mantuvo que el hecho de tener la responsabilidad en materia de pesca no originaba un interés individual a los efectos del artículo 230 TUE[18].

En su función de asegurar la correcta aplicación de la reglas de ayudas de Estado, la Comisión dirigirá una decisión a un Estado Miembro incluso cuando la violación alegada de la regulación de las ayudas de Estado se cometa por un gobierno regional.

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[17] Asunto T-238/97 Comunidad autónoma de Cantabria vs. Council (1998) Rec. II-227.

[18] El asunto se discute ampliamente en J. Wakefield, «The plight of the regions in a multi-layered Europe» (2005) 30 *European Law Review* 406.

En estos casos, el Tribunal de Primera Instancia ha reconocido que un gobierno regional puede que tenga un interés que proteger que sea diferente del interés del Gobierno central. El Tribunal ha reconocido que cuando la decisión de la Comisión produce efectos sobre la manera en la que las regiones pueden ejercitar sus poderes autónomos, el gobierno regional afectado tiene derecho a interponer un recurso de anulación contra la decisión rebatida. Las decisiones de la Comisión relativas a los sistemas de reducciones impositivas adoptados por Álava, Bizkaia y Gipuzkoa han sido recurridas por los gobiernos regionales ante el Tribunal de Primera Instancia[19]. Así, el gobierno regional puede cuestionar la validez de la decisión ante el Juzgado de Primera Instancia pero el incumplimiento de la decisión de la Comisión puede llevar a un procedimiento de infracción contra el Estado Miembro ante el Tribunal de Justicia.

## Conclusiones finales

No ha resultado fácil para los gobiernos regionales hacer valer su posición dentro de la UE. Las estructuras institucionales existentes están diseñadas para dar cabida a los Estados que son las partes contratantes en los Tratados. Incluso las regiones muy poderosas dotadas de amplios poderes legislativos y administrativos, incluidos los poderes tributarios, no tienen el mismo peso que los Estados Miembros, algunos de los cuales ni en población ni en fuerza económica alcanzan ni con mucho el tamaño y la fuerza de algunos movimientos regionales. En algunos de los Estados Miembros este hecho ha llevado a solicitar independencia. En Escocia, por ejemplo, el Partido Nacional Escocés, el partido independentista, tiene como slogan «Escocia en Europa» a fin de que Escocia pueda tener su propia voz independiente dentro de la Unión Europea. Estos argumentos parecen de mucho mayor peso en el contexto de una Unión Europea en la que varios de los Estados Miembros son mucho más pequeños que Escocia en términos de población, en términos de comportamiento económico y en términos de un gobierno y unas instituciones estables y efectivas en la sociedad civil. La independencia en Europa permitiría a Escocia tener completa autonomía fiscal (dentro de los parámetros europeos admisibles). Es inevitable que tales demandas crezcan a futuro si la Unión Europea no puede encontrar los modos de dar cabida a las diferentes estructuras constitucionales actualmente en vigor en los Estados Miembros.

Marzo 2007.

[19] Asuntos T-227/01, T-230/01, T-228/01, T-231/01, T-229/01, T-232/01 asuntos pendientes.

# El futuro de la autonomía fiscal de las regiones en la Unión Europea. La participación de las instituciones vascas en los órganos de la Unión Europea en relación con la fiscalidad. Una visión desde Euskadi

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## Introducción

El hecho de que la Asociación para la promoción y difusión del Concierto Económico, AD CONCORDIAM y el Instituto de Estudios Vascos de la Universidad de Deusto hayan decidido organizar estas jornadas bajo el título de *Concierto Económico Vasco y Europa* es indicativo de la preocupación, tanto académica como política, existente en la sociedad vasca en relación con este asunto. Me atrevería, incluso, a destacar que este tipo de foros no eran, en general, ni imaginables hace veinte años, cuando entramos a formar parte de la Unión Europea (1986), ni siquiera hace algunos

[1] Las opiniones del autor han sido expresadas a título particular, por lo que no coinciden necesariamente con la posición oficial de la institución a la que representa ni comprometen a ésta.

menos, cuando aún no se habían suscitado los expedientes sobre ayudas de Estado y fiscalidad ante la Comisión Europea, ni los subsiguientes recursos ante el Tribunal de Justicia, ni el recurso prejudicial planteado por el TSJPV en el caso de las Normas Forales de 1993 y la opinión del Abogado General Saggio en el caso.

Por razones obvias, el tema de la participación de las instituciones regionales en los órganos de la Unión Europea no se plantea desde la esfera central de los Estados miembros; es decir, o se trata en el derecho comparado de una competencia no descentralizada, y por lo tanto de competencia central, también en los Estados compuestos, o como en el caso del Estado español sencillamente no existe interés en tratar esta cuestión, como veremos a lo largo de esta exposición.

Es precisamente la singularidad de la figura del Concierto Económico, institución basada en el pacto y la actualización, lo que ha servido como excusa (y lo sigue haciendo), para evitar interesadamente su análisis y consiguiente articulación en el procedimiento de decisión comunitario europeo, en especial si tenemos en cuenta la dificultad de encontrar paralelismos en Derecho comparado. Efectivamente, la ausencia de analogías en el Derecho interno de otros Estados miembros de la Unión Europea en cuanto al diseño constitucional de la competencia en materia de fiscalidad (a día de hoy no tenemos constancia de la participación de ninguna región en una sesión del Consejo de Economía y Finanzas, comúnmente conocido como ECOFIN) ha constituido una razón de peso para los diferentes gobiernos, de distinto signo, que se han sucedido en el Estado español desde la fecha del ingreso en la Comunidad Económica Europea (CEE), posteriormente Unión Europea (UE), para evitar tratar de la cuestión.

Las reticencias a la participación vasca en el Consejo ECOFIN no son de extrañar si tenemos en cuenta las dificultades con las que ha ido avanzando el sistema general de participación de las Comunidades autónomas en otras formaciones del Consejo en materias políticamente menos sensibles. Pero a una cultura centralista a la hora de concebir el Estado, al menos en los asuntos europeos (conflicto positivo de competencia suscitado ante la apertura de una delegación en Bruselas en 1988, nula participación autonómica directa hasta 2005, etc.) en clara contradicción con el espíritu descentralizador de la Constitución de 1978, se añade un insuficiente conocimiento (cuando no desconocimiento), tanto de la figura del Concierto Económico (Convenio Económico en Navarra), como del contenido de la Disposición Adicional 1ª de la Constitución, no sólo en la opinión pública en general, sino también entre políticos y funcionarios, e, incluso, muchos expertos de Hacienda Pública, de dentro y de fuera del Estado.

Esta práctica ha conducido, además, a una situación perversa en el escenario comunitario, pues no sólo se ha hurtado directamente a las instituciones vascas el derecho a intervenir en el ámbito comunitario, en clara contradicción o, al menos, de forma incoherente con la configuración competencial diseñada por la Constitución, sino que, a menudo, las reticencias internas a la hora de interpretar el Concierto/Convenio se han trasladado a Bruselas, careciendo muchas veces las autoridades comunitarias (bien en la Comisión, bien en el Consejo) de interlocultores que defendieran

adecuadamente la figura del Concierto y, consecuentemente, de una idea de lo que el Concierto Económico es y el ordenamiento constitucional español contempla.

Aunque no corresponde a esta intervención realizar un análisis de la figura del Concierto Económico, sí será necesario, al menos, dar unos rasgos descriptivos sobre su encuadramiento jurídico en la Constitución española y en el Estatuto de Autonomía del País Vasco. Igualmente, se hará un sucinto análisis de la naturaleza de la competencia en materia de fiscalidad en el ámbito comunitario y las posibilidades reguladoras por parte de la Unión.

Conviene subrayar que la mayor parte de las cuestiones que en esta aportación se dirán con respecto a las instituciones de los Territorios Históricos del País Vasco en relación con el Concierto Económico son de aplicación a las de la Comunidad Foral Navarra, ya que el Convenio Económico navarro y el Concierto son fruto de la común pertenencia de Euskadi y Navarra al concepto de Euskalherria. *A la fecha, la diferencia formal y sustancial más reseñable, y quizá única, entre Convenio y Concierto es la que se deriva del tripartito poder tributario subyacente en éste, que descansa en las Diputaciones Forales, frente al único del Convenio coincidente con la CFN (Comunidad Foral Navarra)*[2]. Tal y como destaca Fernando de La Hucha en el prólogo a «Provincias exentas. Convenio-Concierto: Identidad colectiva en la Vasconia peninsular (1969-2005) de Mikel Aranburu Urtasun, *la cada vez mayor proximidad jurídica entre ambos textos obedece a dos hechos paradójicos: la lejanía en el plano político, entre los postulados de Euskadi y Navarra y la absoluta incomunicación entre ambas normas… Moleste o no, Navarra ha ido a rebufo de las modificaciones del Concierto, hasta el punto de que ahora el Convenio se parece a aquél y no a la inversa. Pero, junto a ello, Concierto y Convenio se integran en el ordenamiento estatal a través de leyes ordinarias, cuyo mayor defecto es que implican una incomunicación absoluta entre los cuatro territorios forales (o de uno respecto de los tres restantes).*

Quisiera hacer notar que, a lo largo de esta exposición, se utilizará el término región, que es el que normalmente se utiliza en el ámbito comunitario, para designar a todas aquellas entidades comprendidas en el interior de cada Estado miembro, sean éstas naciones sin Estado, regiones, länder, Comunidades autónomas o meras divisiones administrativas sin capacidad legislativa strictu sensu.

## El Concierto Económico: consideraciones generales

No trataré del origen del Concierto Económico ni incidiré en los aspectos relativos a su naturaleza jurídica, por considerar que habrán sido suficientemente analizados a

[2] ARANBURU URTASUN, Mikel. *Provincias exentas, Convenio-Concierto:Identidad colectiva en la Vasconia peninsular (1969-2005).* Pág. 69. Fundación para el Estudio del Derecho Histórico y Autonómico de Vasconia.

lo largo de estas tres jornadas y, además, por personas con mayor conocimiento que el mío sobre la cuestión. Pero sí quisiera subrayar que disponer de una idea, al menos general, sobre el tema resulta fundamental para una adecuada comprensión de la institución y de su eventual articulación en otros ordenamientos jurídicos, sea éste el estatal (Constitución española) o el comunitario (TCE).

El marco jurídico en el que se desarrolla y actualiza el Concierto Económico está presidido por dos disposiciones, a saber la Disposición Adicional 1ª de la Constitución española de 1978 (en adelante CE) y el artículo 41 del Estatuto de Autonomía del País Vasco o Estatuto de Gernika (en adelante EAPV). Por otra parte, la ley 12/2002, de 23 de mayo, por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco, y que sustituye a la anterior Ley 12/1981, confiere vigencia indefinida que no 'inalterable' al mismo, constituyendo el elemento jurídico-formal mediante el cual se aprueba el Concierto Económico.

La Disposición Adicional 1ª de la CE establece que *La Constitución ampara y respeta los derechos históricos de los territorios forales. La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía.*

El artículo 41.1 del EAPV señala que *Las relaciones de orden tributario entre el Estado y el País Vasco vendrán reguladas mediante el sistema foral tradicional de Concierto Económico.*

El Concierto Económico no es el único derecho histórico en vigor, pero sí puede decirse que es el más visible, importante o paradigmático; y su dimensión constitucional va más allá del mero contenido tributario y financiero, constituyendo, junto con el Estatuto de Autonomía, el principal instrumento de integración de Euskadi con el Estado. Además, el punto de la Disposición Adicional 1ª relativo a la actualización del régimen foral cobra todo su significado ante la última Ley de Concierto Económico o las adaptaciones que han sido necesarias, especialmente tras la entrada del Reino de España en las Comunidades Europeas o en razón de los avances tecnológicos o los cambios derivados de la globalización.

El Artículo 41 del EAPV establece la base sobre la que se va a desarrollar esta institución, al reservar a las Instituciones de los Territorios Históricos las potestades tributarias normativas y ejecutivas inherentes a la autonomía tributaria y al garantizar la armonía e integración de dicha autonomía con respecto al sistema tributario estatal. Igualmente, al regularse las relaciones de orden tributario entre el Estado y el País Vasco, se prevé la intervención de las instituciones autonómicas en la definición de su contenido.

## El marco competencial en el derecho comunitario

El sistema de reparto competencial de la Unión Europea se basa en el sistema de atribución expresa de competencias. De esta manera, las competencias no atri-

buidas expresamente a la Unión siguen estando en manos de los Estados miembros. En cualquier caso, una vez determinada la titularidad de la competencia en una determinada materia cabe distinguir, por su naturaleza, entre competencias exclusivas[3] y compartidas[4] (cabiendo, incluso, una tercera categoría de competencias complementarias).

Conviene, en cualquier caso, señalar que las competencias expresamente atribuidas a la Comunidad Europea pueden ser específicas, cuando se derivan de un fundamento jurídico de acción concreto y expresamente previsto en el Tratado para una materia concreta, o generales, en relación a las previstas en los artículos 94 y 95, en virtud de los cuales el Consejo podrá adoptar, por unanimidad o por mayoría cualificada, respectivamente, las medidas armonizadoras que tengan por objeto el establecimiento y funcionamiento del mercado interior. Sin embargo, en aras a una mayor flexibilidad, desde el origen del TCE, se recoge una cláusula de imprevisión en el artículo 308 TCE[5]. Además existen otras disposiciones que podríamos considerar como reservas competenciales. Por ejemplo, las contenidas en los protocolos anexos a los Tratados.

La fiscalidad propiamente dicha está regulada en el Tratado CE en los artículos 90 a 93, y se limita a establecer determinadas estipulaciones para los Estados miembros tendentes a garantizar el correcto funcionamiento del mercado común.

Más específicamente, el artículo 93 TCE dice que *El Consejo, por unanimidad, a propuesta de la Comisión y previa consulta al Parlamento Europeo y al Comité Económico y Social, adoptará disposiciones referentes a la armonización de las legislaciones relativas a los impuestos sobre el volumen de negocios, los impues-*

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[3] En el caso de las competencias exclusivas de la Unión los Estados pierden inmediata e irreversiblemente toda posibilidad de intervención en el ámbito competencial de que se trate. La atribución resulta, así, total, definitiva y absoluta, incluso en caso de inactividad comunitaria. A esta categoría de competencias, forzosamente escasa, pertenecen hasta ahora la política monetaria…, así como la política comercial común (limitada de momento a las mercancías…), la conservación de los recursos marinos, determinados aspectos del derecho institucional y algunos elementos de la política de competencia [MARTÍN Y PÉREZ DE NANCLARES, J.: «El nuevo sistema de competencias en el Proyecto de Constitución Europea». *Cuadernos Europeos de Deusto*. Núm. 30/2004. pág. 84].

[4] Las competencias compartidas hacen referencia a los casos en que, tanto los Estados miembros, como la Unión son competentes para actuar. Por el principio federal nortamericano de la preemption, los Estados están habilitados para ejercer las competencias mientras la Unión no las ejerza y, a sensu contrario, en el momento en que la Comunidad intervenga en el ejercicio de la competencia el Estado queda desplazado. La mayoría de las competencias comunitarias pertenecen a esta categoría, y una competencia originariamente compartida puede devenir, con el tiempo, en competencia exclusiva o casi exclusiva por una intervención exhaustiva de la Comunidad, así, por ejemplo, la supresión de obstáculos a la libre circulación, la política agraria común, las políticas sobre competencia o la política común de transportes [Ver, MARTÍN PÉREZ DE NANCLARES, J.].

[5] Art. 308 TCE: *Cuando una acción de la Comunidad resulte necesaria para lograr, en el funcionamiento del mercado común, uno de los objetivos de la Comunidad, sin que el presente Tratado haya previsto poderes de acción necesarios al respecto, el Consejo, por unanimidad, a propuesta de la Comisión y previa consulta al Parlamento Europeo, adoptará las disposiciones pertinentes.*

*tos sobre consumos específicos y otros impuestos indirectos, en la medida que dicha armonización sea necesaria para garantizar el establecimiento y el funcionamiento del mercado interior.* Sobre la base de este artículo, la Comisión ha dictado Reglamentos y Directivas en relación al IVA y a los impuestos ambientales y energéticos.

Asimismo, sobre la base del artículo 94 TCE (bajo la rúbrica del Capítulo 3, *Aproximación de las legislaciones)*, que permite al Consejo, también por unanimidad, dictar *directivas para la aproximación de las disposiciones legales, reglamentarias y administrativas de los Estados miembros que incidan directamente en el establecimiento o funcionamiento del mercado común,* se han adoptado recomendaciones y otro tipo de normas en las áreas de imposición sobre las personas físicas, sobre sociedades, sobre capitales y sobre vehículos.

En base a todo lo dicho debemos concluir que el ámbito de la fiscalidad es una materia que queda dentro de la competencia exclusiva de los Estados miembros, de manera que para llevar a cabo una política comunitaria en la materia se necesitaría el acuerdo por unanimidad de los Estados miembros. Excepcionalmente, podría hacerse uso de la cláusula de imprevisión del artículo 308 TCE, que contempla implícitamente la posibilidad de utilización del derecho de veto por parte de un Estado miembro, al exigir la unanimidad.

## La participación de las regiones en el proceso de decisión comunitario

### *Regulación de la participación regional en los Tratados*

La Comunidad Europea se funda en 1957 sobre la base del Tratado de Roma y constituye la puesta en común de diferentes ámbitos de soberanía por parte de seis Estados miembros. Hoy, casi 50 años después, está integrada por 25 Estados miembros (27 a partir del 1 de enero de 2007). La Comunidad Europea, hoy Unión Europea, se constituyó como un club donde sólo los Estados miembros tenían cabida, es decir, no cabía hablar de una Europa de los pueblos ni de las regiones. Hoy la UE sigue manteniendo la misma naturaleza, pero las regiones han ido obteniendo un cierto reconocimiento que, entre otras cosas, permite que éstas participen en determinadas instituciones y órganos comunitarios. El propio Libro Blanco de la Gobernanza, publicado por la Comisión Europea en 2001, es consciente de la sima existente entre los ciudadanos y sus políticos y de la falta de identificación hacia el proyecto europeo; en este sentido, creemos que una mayor participación regional en las decisiones comunitarias contribuye a lograr una mayor transparencia y eficacia, y, a medio plazo, a acercar el proyecto político a la ciudadanía.

La gran reforma de los Tratados realizada en Maastricht (1992) supuso el reconocimiento de la existencia de los entes infraestatales, en definitiva, de los länder, regiones, comunidades autónomas o Estados federados, según los casos. Esta tímida,

aunque positiva, irrupción del hecho regional[6] coincidió en el tiempo con el nuevo orden político europeo (y mundial) que emergió tras la guerra fría.

El artículo 146 del Tratado de Maastricht (hoy artículo 203 TCE, tras la reforma de Amsterdam) admitía la posibilidad de la presencia de representantes de las regiones en su seno al indicar que *El Consejo estará compuesto por un representante de cada Estado miembro de rango ministerial, facultado para comprometer al gobierno de dicho Estado miembro.* Este mismo Tratado contempla, por primera vez, el principio de subsidiariedad en la escena europea.

El Tratado de Ámsterdam (1997) poco pudo aportar de nuevo a la participación de las regiones en la Unión. Sin embargo, tres de los Estados de la Unión de estructura compleja más importantes, Bélgica, Austria y Alemania, suscribieron una declaración (la número 3), relativa a la subsidiariedad, por la que señalaban que este principio afectaba, además de a los Estados miembros, a sus entidades no centrales[7]. España se mantuvo al margen de la declaración, lo que da una idea de la falta de sensibilidad del gobierno central de entonces hacia las Comunidades Autónomas.

El objetivo más importante del Tratado de Niza (2001) fue configurar un nuevo reparto del poder de decisión entre los Estados miembros que permitiera afrontar en buenas condiciones el proceso de ampliación al Este de la Unión Europea. No logró su objetivo, y fue inmediatamente contestado tras su ratificación por los Estados miembros. Así lo demuestra la declaración 23, que, a pesar de la aparente satisfacción de los Estados miembros, remite a una nueva Conferencia donde volvería a plantearse el asunto del equilibrio de poder, a la vez que una profunda revisión de los Tratados, incluido el asunto del reparto competencial entre la Unión y los Estados miembros[8]. El tratamiento de la cuestión regional fue, en el mejor de los casos, testimonial.

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[6] También se debe al Tratado de Maastricht la creación del Comité de las Regiones, órgano consultivo de composición heterogénea que agrupa a regiones, con y sin competencias legislativas, e incluso a algunas entidades locales.

[7] **Declaración** (nº 3) **de Alemania, Austria y Bélgica sobre la subsidiariedad.** *Para los Gobiernos alemán, austriaco y belga, es evidente que la acción de la Comunidad Europea, de conformidad con el principio de subsidiariedad, no sólo afecta a los Estados miembros sino también a sus entidades, en la medida en que éstas disponen de un poder legislativo propio que les confiere el Derecho constitucional nacional.*

[8] Declaración (nº 23) relativa al futuro de la Unión:

*… Una vez abierto el camino a la ampliación, la Conferencia apela a un debate más amplio y profundo sobre el futuro de la Unión Europea. En 2001, las Presidencias sueca y belga, en colaboración con la Comisión y con la participación del Parlamento Europeo, favorecerán un amplio debate con todas las partes interesadas: los representantes de los Parlamentos nacionales y del conjunto de la opinión pública, tales como los círculos políticos, económicos y universitarios, los representantes de la sociedad civil, etc. Se asociará a este proceso a los Estados candidatos según modalidades por definir.*

*… El Consejo Europeo aprobará, en su reunión de Laeken/Bruselas en diciembre de 2001, una declaración que incluya iniciativas adecuadas para la continuación de este proceso.*

*Este proceso deberá abordar, en particular, las siguientes cuestiones:*

– *La forma de establecer y supervisar una delimitación más precisa de las competencias entre la Unión Europea y los Estados miembros, que respete el principio de subsidiariedad;*

Ni siquiera el nuevo Tratado por el que se establece una Constitución para Europa (TCUE) (2004) modifica las posibilidades de participación de las regiones en el proceso de toma de decisiones comunitario. Independientemente de la definitiva entrada en vigor del TCUE, cosa poco probable a día de hoy, el artículo 203 TCE continúa siendo la base jurídica que permite dicha participación regional.

A diferencia de lo ocurrido en el Estado español, que luego describiremos, otros Estados miembros de estructura compleja reaccionaron con determinadas reformas constitucionales (Alemania y Austria) y legislativas (Bélgica), haciendo posible la participación directa de sus regiones en el ámbito decisional comunitario por primera vez. En el caso del Reino Unido ni siquiera fue necesaria la plasmación por escrito.

Alemania procedió a la modificación de su Ley Fundamental de Bonn en 1992. Desde entonces, el artículo 23 regula la participación de los Länder en el ámbito comunitario. La eventual infracción de los postulados de este artículo supone que las normativas correspondientes puedan ser recurridas y, en su caso, declaradas inconstitucionales, lo cual supone una garantía de primer orden para los Estados federados. El artículo 23 designa al Consejo Federal como institución a través de la cual encauzar la participación regional, debiendo ser su opinión (en el ámbito de sus competencias) respetada por el Estado federal.

El propio artículo 23 regula la participación ante el Tribunal de Justicia, siendo posible la transferencia de la representación a un delegado del Länder designado por el Consejo Federal bajo la coordinación del Gobierno Federal.

El límite máximo de la participación regional en Alemania viene marcada por lo que se denomina como *transferencia de derechos soberanos*.

En el caso austriaco, la participación de sus Länder también goza de reconocimiento constitucional, ya que, al adherirse Austria a la UE en 1995 (junto con Suecia y Finlandia) había previamente adaptado su Carta Magna al efecto. Así, de manera similar a Alemania, a través de su artículo 23, establece la toma en consideración

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– *El estatuto de la Carta de Derechos Fundamentales de la Unión Europea, proclamada en Niza, de conformidad con las conclusiones del Consejo Europeo de Colonia;*

– *La simplificación de los Tratados con el fin de clarificarlos y facilitar su comprensión, sin cambiar su significado;*

– *La función de los Parlamentos nacionales en la arquitectura europea.*

*La Conferencia, al seleccionar estos temas de reflexión, reconoce la necesidad de mejorar y supervisar permanentemente la legitimidad democrática y la transparencia de la Unión y de sus instituciones con el fin de aproximar éstas a los ciudadanos de los Estados miembros.*

*La Conferencia acuerda que, una vez terminado este trabajo preparatorio, se convoque una nueva Conferencia de los Representantes de los Gobiernos de los Estados miembros en 2004, para tratar las cuestiones antes mencionadas con miras a introducir las correspondientes modificaciones en los Tratados.*

*La Conferencia de los Representantes de los Gobiernos de los Estados miembros no constituirá en ningún caso un obstáculo o una condición previa al proceso de ampliación. Por otra parte, se invitará a participar en la Conferencia a aquellos Estados candidatos que hayan concluido las negociaciones de adhesión con la Unión y se invitará en calidad de observadores a aquellos candidatos que no las hayan concluido.*

obligatoria de la posición común de las regiones en materia de su competencia. El Estado central sigue gozando de un margen de maniobra por razones de interés general en política exterior e integración. Del texto se desprende, incluso, la posibilidad de que se transfiera a los Länder la representación en el Consejo, coparticipando con el representante del Estado Federal.

El texto constitucional austriaco nada dice, por el contrario, en relación al acceso de los Länder al Tribunal de Justicia.

En el caso de Bélgica[9], no fue necesaria una reforma del texto constitucional, ya que la posibilidad de la participación regional se encontraba suficientemente regulada a través del Acuerdo General de Cooperación de 8 de marzo de 1994, firmado por el Estado, las regiones y las comunidades, en virtud del cual un grupo de diferentes ministerios afectados por la política exterior nombra los miembros de la delegación belga, los cuales negocian en posición de igualdad, siendo coordinados por el Ministerio de Asuntos Exteriores. Las prerrogativas de información de que goza la Cámara Federal en los procesos de negociación y modificación de Tratados llegan a extenderse a las Cámaras regionales.

Incluso los Gobiernos regionales belgas pueden comprometer al Estado dentro del Consejo de la Unión en el caso de que alguno de ellos represente a Bélgica. Es cierto que el caso belga es muy particular y consagra, en general, un sistema de relaciones internacionales en el que la competencia interna se proyecta en el escenario internacional.

En cuanto a la posición común de las regiones relativa a materias de su competencia, el gobierno belga está obligado a organizar un marco de negociaciones adecuado que permita alcanzar aquélla.

### *El tratamiento de la cuestión en el Ordenamiento Jurídico español*

Ni la Constitución española de 1978 ni los estatutos de autonomía aprobados en los años posteriores realizan previsión alguna en relación a la participación, ni del Estado ni de las Comunidades Autónomas, en las instituciones comunitarias europeas. Sin embargo, los textos de los nuevos estatutos de autonomía aprobados recientemente, así como los proyectos de los aún no en vigor[10], realizan determinadas previsiones

[9] Incluso antes de la aprobación del Tratado de Maastricht, las Comunidades y las regiones belgas fueron incluidas en la delegación estatal en las dos conferencias intergubernamentales sobre la Unión política y sobre la Unión económica y monetaria, cuyos trabajos terminaron con ocasión del Consejo Europeo de Maastricht.

[10] Así, el Nuevo Estatuto político de la Comunidad de Euskadi dedica su Título VI (arts. 65 a 69) al ámbito europeo e internacional. En concreto, en el art. 65.2 se señala que *De conformidad con la normativa comunitaria europea, la Comunidad de Euskadi dispondrá de representación directa en los órganos de la Unión Europea… en aquellos asuntos que afecten a sus competencias.*

con el fin de articular dicha participación. Esto demuestra que la falta de previsiones constitucionales en este sentido no es óbice para una adecuada participación de las Comunidades Autónomas en los órganos decisorios comunitarios.

Cabe decir que la implicación de los poderes regionales en los asuntos comunitarios puede ser contemplada desde dos ópticas: la correspondiente a la fase ascendente del Derecho comunitario, o fase de formación del mismo, y la fase descendente o de aplicación e implementación del Derecho comunitario.

En relación a la fase descendente, o de aplicación de las normas, es relevante la jurisprudencia del Tribunal Constitucional (Sentencias TCE 252/1988, 64/1991, 76/1991, 236/1991 y 79/*1992): la adhesión de España a la Comunidad Europea no altera en principio la distribución de competencias entre el Estado y las Comunidades Autónomas. Así pues, la traslación de la normativa comunitaria derivada al Derecho interno ha de seguir necesariamente los criterios constitucionales y estatutarios de reparto de competencias.* Por consiguiente, la ejecución del Derecho Comunitario corresponde a quien naturalmente ostente la competencia según las reglas del Derecho interno, puesto que no existe una competencia específica para la ejecución del Derecho Comunitario (STC 141/1993).

En cuanto a la fase ascendente, la evolución en relación con la participación autonómica desde la fecha de la adhesión del Reino de España a las Comunidades Europeas ha venido marcada por la reticencia de los distintos gobiernos españoles a permitir la presencia directa de las Comunidades autónomas en los diferentes órganos decisorios comunitarios. El punto álgido se alcanzó con la presentación de un recurso positivo de competencia por parte del Gobierno central en 1988 por la apertura de una Oficina del Gobierno vasco en Bruselas, cuestión que se zanjó con la sentencia del TC 165/94, de 26 de mayo de 1994. Esta sentencia estableció, entre otras cosas, y según cita Xavier Ezeizabarrena en su libro *Los Derechos Históricos de Euskadi y Navarra ante el Dereho Comunitario*, la distinción entre actividades internacionales y comunitarias, al decir que *cabe estimar que cuando España actúa en el ámbito de las Comunidades europeas lo está haciendo en una estructura jurídica que es muy distinta a la tradicional de las relaciones internacionales. Pues el desarrollo del proceso de integración europea ha venido a crear un orden jurídico, el comunitario, que para el conjunto de los Estados componentes de las Comunidades europeas puede considerarse a ciertos efectos como «interno». En correspondencia con lo anterior, si se trata de un Estado complejo, como es el nuestro, aún cuando sea el Estado (sic) las Comunidades europeas y no las Comunidades Autónomas, es indudable que éstas poseen un interés en el desarrollo de esa dimensión comunitaria.*

La óptica desde la que el Estado ha afrontado el reto de la participación autonómica se ha caracterizado, pues, por el centralismo y la concepción de que la competencia en acción exterior corresponde a la Administración general del Estado. Esta concepción fue corregida por la STC 165/94, que consideraba que la acción exterior de la esfera central del Estado se limitaba a los contenidos del 'ius contrahendi' o del 'ius legationis', es decir, al núcleo duro de las relaciones internacionales.

Teniendo en cuenta estos antecedentes, cabe decir que el Estado comenzó a dar algunos tímidos pasos en 1988 con la creación de una Conferencia Sectorial para asuntos relacionados con las Comunidades Europeas (en adelante CARCE), que, tras una primera fase poco definida, adquirió rango formal en 1992, siendo un foro de encuentro y diálogo regido por el principio de cooperación. Fruto del trabajo de la CARCE surgió el Acuerdo de participación interna de 1994 (en adelante API), que no fue suscrito por Euskadi, limitando la participación de las Comunidades Autónomas a la esfera interna del Estado, excluyendo expresamente la incorporación de representantes autonómicos en las delegaciones españolas ante la UE. En dicho acuerdo se definían las pautas de lo que debía entenderse por posición común, pero su grado de vinculación para el Gobierno central era muy discutible a juzgar por las expresiones utilizadas en el acuerdo: *el Estado tendrá en cuenta de forma determinante… el Estado tomará conocimiento.* Este acuerdo (API) descansa sobre la premisa de que la Administración General del Estado se reserva la totalidad de las actuaciones en el Consejo de Ministros por entenderlas incluidas en su competencia en materia de relaciones internacionales. En 1997 la CARCE pasó a ser regulada por ley (Ley 2/1997, de 13 de marzo –en adelante LCARCE–).

Pero, además de esta limitación de la participación al ámbito interno, el sistema español de participación carece de reconocimiento constitucional a diferencia de los modelos alemán y austriaco. Se basa en un complejo sistema de conferencias sectoriales, cuyas decisiones carecen de fuerza legal. Además, el funcionamiento de las conferencias sectoriales ha sido irregular, descoordinado e incoherente, y el tratamiento de las cuestiones europeas, a menudo, no alcanza un rango prioritario entre las demás cuestiones del orden del día, quedando marginado, por lo tanto, el planteamiento de estos asuntos.

Algunas CCAA, entre ellas Euskadi, trataron durante años de impulsar el desarrollo del asunto de la articulación de la participación de los representantes autonómicos en el Consejo desde diferentes ángulos. Así, el Parlamento vasco, en sesión del 20 de febrero de 1998 aprobó una proposición no de ley en relación con la participación autonómica en la delegación del Estado en el Consejo de Ministros de la Unión Europea. Posteriormente, el 4 de marzo de 1998, la Comisión mixta Congreso-Senado para la Unión Europea adoptó otra proposición no de ley presentada por el Grupo Vasco en el mismo sentido, instando al gobierno del Estado a que se articulasen mecanismos de participación regional en los Consejos de Ministros, demanda adoptada, el 10 de marzo de 1998, por el Pleno del Congreso de los Diputados. Posteriormente, en septiembre de 1999, las CCAA aprobaron una posición común sobre las bases de la participación de representantes de las Comunidades Autónomas en el Consejo de la Unión Europea. En septiembre de 2000 se presentó otra proposición no de ley en este sentido, apoyada por socialistas y nacionalistas; sin embargo, los votos en contra de Partido Popular y Coalición Canaria no permitieron aprobarla.

El 27 de noviembre de 2001 fue la Comunidad Autónoma de Extremadura la que propuso a la reunión de coordinadores de la CARCE un texto en virtud del cual la

delegación española podría incorporar un representante de las CCAA siempre que el Consejo tratase algún asunto de su competencia o interés, graduando la intensidad de dicha presencia en función de si la competencia en la materia era exclusiva o compartida o, incluso, si la razón de la presencia era el mero interés. Este sistema, que finalmente tampoco prosperó al desmarcarse determinadas Comunidades, giraba en torno a las Conferencias sectoriales para su organización y desarrollo.

Posteriormente el Parlamento catalán aprobó la Resolución 1589/VI, de 30 de octubre de 2002, por la que se acordaba presentar a la Mesa del Congreso de los Diputados la Proposición de Ley sobre la participación de las Comunidades Autónomas en la formación de la posición española en asuntos relacionados con la Unión Europea.

La falta de voluntad política del Gobierno central, principalmente entre los años 2000 a 2004, hizo que la participación fuera prácticamente nula hasta finales de 2004.

Con la llegada del nuevo gobierno surgido de las elecciones generales del 14 de marzo de 2004, el sistema de participación experimentó un nuevo impulso, que se concretó en los Acuerdos de la CARCE de 9 de diciembre de 2004. En su virtud, las CCAA participarían en cuatro de las formaciones del Consejo de la Unión Europea, integrándose en la delegación estatal y aprovechando, como cauce, el sistema de Conferencias sectoriales existente y el Acuerdo de Participación Interna de 1994. El sistema asegura una rotación en la participación de las diferentes CCAA e implica la participación de funcionarios en los Grupos de trabajo relativos a las diferentes formaciones, foros donde, a menudo, realmente se elaboran y se toman las decisiones, ya que, en muchos casos, el Consejo de ministros se limita a ratificar lo que ya está acordado en los grupos de trabajo o en el COREPER[11].

Los Acuerdos de 9 de diciembre de 2004 reforzaron, por otra parte, la figura del Consejero autonómico de la Representación Permanente en Bruselas creada en 1997. En virtud de estos acuerdos, el número de Consejeros representantes de las CCAA pasaría de uno a tres, aunque hasta la fecha sólo hayan sido nombrados dos. Dichos consejeros autonómicos de la REPER serían nombrados a propuesta de las CCAA, revisándose además el contenido de las funciones a desarrollar.

El hecho de que la participación se limite a cuatro de las nueve formaciones del Consejo puede entenderse como un primer paso[12]. Esta limitación obedece, según represen-

[11] Según J.M. SOBRINO, en «El marco comunitario de la participación de las Comunidades Autónomas en los Consejos de Ministros de la Unión Europea», en *La participación de las Comunidades Autónomas en los Consejos de Ministros de la Unión Europea,* el COREPER goza de una verdadera delegación de poderes: entre el 70 y el 75 % de los asuntos que examina acaban en acuerdo y pasan a formar el listado de puntos A que son aprobados sin debate por el Consejo de Ministros. Así, sólo entre el 25 y el 30 % de las materias examinadas por el COREPER requieren de posterior discusión. Además, en los Grupos de Trabajo que anteceden a la labor del COREPER se acuerdan el 70 % de las materias que finalmente se integran en el orden del día del Consejo, quedando el 30 % restante en manos del COREPER.

[12] Artículo 2.1 del Acuerdo sobre el sistema de representación autonómica en las formaciones del Consejo de la Unión Europea: *La representación autonómica directa será de aplicación, inicialmente, en las*

tantes de la Administración General del Estado, a que dichas formaciones engloban la mayoría de las competencias de las CCAA y a que son las formaciones comúnmente abiertas a la participación regional en los Estados miembros descentralizados de la Unión. Siendo esto parcialmente cierto, no lo es menos que algunas regiones europeas han participado también en alguna otra formación, y que en el caso de Euskadi (y Navarra) existen importantes competencias, como la que se deriva del Concierto Económico[13], que, siendo anterior a la propia Constitución, sigue sin encontrar vía de expresión en el escenario comunitario, con la consiguiente merma para el bloque de constitucionalidad[14].

Independientemente de las críticas a la limitación a las cuatro formaciones mencionadas, el propio sistema, basado en la rotación y en las Conferencias sectoriales, resulta, hoy por hoy, ineficaz. La acumulación de expedientes en manos de unas pocas CCAA, consecuencia de una muy escasa coordinación entre Conferencias sectoriales y de la limitada influencia de la CARCE en ellas; la desigual capacidad, preparación e incluso interés en la participación por parte de las diferentes CCAA; y la escasa institucionalización y regulación de las Conferencias sectoriales, son algunas de las circunstancias que se han puesto de manifiesto en los meses transcurridos desde la entrada en vigor de los Acuerdos de 9 de diciembre de 2004.

Para paliar en cierta medida estas deficiencias, el pleno de la CARCE ha aprobado el 12 de diciembre de 2006 un documento interpretativo bajo el título de 'Guía de Buenas prácticas', ofreciéndose determinadas directrices que permitan un mejor funcionamiento de este peculiar mecanismo de participación.

Además de la participación regional en el Consejo y en sus grupos de trabajo, y por lo que respecta al ámbito de la Comisión Europea, en 1997 se abrieron a dicha participación los comités de la Comisión (Comitología); participación que ha corrido diversa suerte según se tratara de unos comités u otros, pero que, en cualquier caso, cuenta con un importante margen para su mejora. De los más de trescientos comités existentes tan sólo noventa y cuatro están abiertos a participación de las CCAA, y, como puede imaginarse, los relativos a materias fiscales no se encuentran entre ellos.

En cuanto al acceso de las CCAA ante el Tribunal de Justicia (TJCE), aquéllas pueden presentar recursos a través del Estado. Esta participación está regulada a

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*siguientes formaciones del Consejo de la Unión Europea: Empleo, Política Social, Sanidad y Consumidores; Agricultura y Pesca; Medio Ambiente; Educación, Juventud y Cultura.* El término *inicialmente*, introducido en la última reunión a iniciativa, entre otros, de Euskadi permite la ampliación de la participación a las demás formaciones en una próxima revisión del Acuerdo.

[13] El Acuerdo recoge una cláusula que deja abierta la relación bilateral con el Estado: III Reglas especiales 3. *La participación objeto del presente acuerdo lo es sin perjuicio de los regímenes e instrumentos bilaterales existentes o que pudieran existir con algunas Comunidades Autónomas para el tratamiento de aquellas cuestiones propias de la participación en los asuntos relacionados con la Unión Europea que afectan en exclusiva a dichas Comunidades o que tengan para las mismas una vertiente singular en función de su especificidad autonómica y foral.*

[14] Podríamos mencionar otras competencias, como la de policía (en el caso de Euskadi), que tampoco han encontrado cabida en el sistema, o las materias en las que las CCAA pueden tener un interés razonable.

través de dos acuerdos de la CARCE, el de 29 de noviembre de 1990[15] y el de 11 de diciembre de 1997[16]. El primero de ellos articula la participación autonómica sobre el *principio de colaboración recíproca, no dando posibilidad alguna a la legitimación activa directa de las CCAA, ni a una obligación de subrogación del Estado en defensa de los intereses que su propia Constitución le impone*[17]. Este Acuerdo no va más allá del establecimiento de determinados deberes de información y de la posibilidad para las CCAA de designar asesores para reuniones con representantes del Estado que, a la postre, serán quienes actúen ante el TJCE.

La modificación de 1997 introduce algunos avances y deroga parcialmente el anterior Acuerdo de 1990 (en lo relativo al recurso por incumplimiento y a las cuestiones prejudiciales), si bien sigue siendo insuficiente y tiende a establecer un procedimiento homogéneo para todas las CCAA, lo cual, y dadas las particularidades inherentes a los derechos históricos vascos, que no eran contempladas en el Acuerdo, hizo, entre otras razones, que Euskadi no lo suscribiera.

Algunos autores, como Martín y Pérez de Nanclares, reclaman la necesidad de introducción de cambios en los Tratados en relación con las posibilidades de legitimación activa de las regiones en el recurso de anulación. Así, este autor señala que *el mantenimiento de una interpretación restrictiva respecto de las regiones desentonaría abiertamente con la tendencia manifestada por el Tribunal en otros aspectos al interpretar extensivamente la legitimidad procesal activa de entes que, en realidad, no representan un verdadero interés general, v. gr. al reconocérsela a federaciones de industrias, asociaciones profesionales o sindicatos carentes, en ocasiones, de personalidad jurídica propia*[18].

### *La participación en el Consejo ECOFIN*

Hemos analizado hasta ahora el marco jurídico en el que se incardina el Concierto Económico y las posibilidades de participación de las Comunidades Autónomas en las

[15] Acuerdo de 29 de noviembre de 1990 de la Conferencia Sectorial para Asuntos relacionados con las Comunidades Europeas para regular la intervención de las Comunidades Autónomas en las actuaciones del Estado en procedimientos precontenciosos de la Comisión de las Comunidades Europeas y en los asuntos relacionados con el Tribunal de Justicia de las Comunidades Europeas que afecten a sus competencias. Resolución de 7 de septiembre de 1992 de la Subsecretaría del Ministerio de Relaciones con las Cortes y de la Secretaría del Gobierno, BOE nº 216 de 8 de septiembre de 1992, pág. 30.853.

[16] Acuerdo de 11 de diciembre de 1997 de la Conferencia Sectorial para Asuntos relacionados con las Comunidades Europeas relativo a la participación de las Comunidades Autónomas en los procedimientos ante el Tribunal de Justicia de las Comunidades Autónomas. Resolución de 24 de marzo de 1998 de la Subsecretaría del Ministerio de la Presidencia, BOE nº 79, de 2 de abril de 1998, pág. 11.352.

[17] EZEIZABARRENA, Xabier: «Los Derechos Históricos de Euskadi y Navarra ante el Derecho Comunitario». *Cuadernos Azpilicueta*, nº 19. 2003. Pg. 44.

[18] MARTÍN Y PÉREZ DE NANCLARES, José: *La posición de las CCAA ante el Tribunal de Justicia de las Comunidades Europeas*. IVAP. 1996. Pgs. 76 a 78.

instituciones comunitarias en general desde la doble perspectiva estatal y comunitaria. Ha quedado claro que, a diferencia de lo que en ocasiones se ha sostenido desde la esfera central del Estado, el marco jurídico comunitario no impide, al dejarlo en manos de cada Estado miembro, la integración de representantes de las Comunidades Autónomas en el Consejo de Ministros. Es más, facilita un cauce de participación a través el artículo 203 TCE. Abundando en esta línea, la Resolución del Parlamento Europeo de 18 de noviembre de 1993 llegó a *animar* a los Estados miembros a que facilitasen el que representantes de las Regiones con competencias legislativas participasen en las sesiones del Consejo cuando se tratasen asuntos en los que fuesen competentes. En la misma línea se manifiesta el Comité de las Regiones en la Declaración sobre el papel de las regiones con poderes legislativos en el proceso decisorio comunitario (CDR 191/2001) o en la Resolución sobre los resultados de la Conferencia Intergubernamental de 2000 y el debate sobre el futuro de la Unión Europea (CDR 430/2000).

Queda, por lo tanto, claro que la institución fundamental para la toma de decisiones comunitarias en el ámbito de la fiscalidad se centra en el Consejo, y en concreto en su formación de Economía y Finanzas (ECOFIN), entendiendo por tal, tanto su formación plenaria, como las reuniones del COREPER II y los grupos de trabajo correspondientes a dicho Consejo, y que más adelante se detallan. En cuanto a la Comisión, que normalmente ejerce un discreto papel de impulsor en la materia a través de las propuestas que plantea al Consejo, cabe decir que la participación en los Comités técnicos de la misma puede tener importancia en la medida en que es allí donde se generan los primeros textos que se pondrán a disposición de los Estados miembros a través del Consejo.

No obstante, conviene no olvidar la existencia de foros como la OCDE[19], donde se elabora el soft law, antesala de las futuras regulaciones tanto de los Estados miembros como de las instituciones europeas.

El Consejo ECOFIN se reúne mensualmente, si bien los asuntos del orden del día son previamente trabajados en el Comité de Representantes Permanentes II (COREPER II), donde, a diferencia del COREPER I, se reúnen los Representantes Permanentes de los Estados miembros. Previamente, estos asuntos habrán sido trabajados en uno de los Grupos de Trabajo asignados al ECOFIN:

D.1 Grupo «Cuestiones Financieras»:

a) Recursos propios.

D.2 Grupo de Consejeros Financieros.

[19] *Curiosamente, si se examinan todas la organizaciones internacionales donde se discuten problemáticas de interés directo para las regiones, resulta que las reivindicaciones de participación regional sólo conciernen a unas pocas: esencialmente la UE. Otras como UNESCO, OCDE, FAO, WHO, ILO, no son blanco de las demandas, lo cual supone una auto-limitación de las demandas legítimas de participación.* BENGOETXEA CABALLERO, Joxerramón. *La Europea Peter Pan. El Constitucionalismo Europeo en la encrucijada*. IVAP-Oñati 2005. pág. 165.

D.3 Grupo «Servicios Financieros»:

a) Servicios de pago.
b) Transferencias de Fondos.

D.4 Grupo «Cuestiones Fiscales»:

a) Fiscalidad Indirecta (IVA, Impuestos Especiales, Fiscalidad de la Energía).
b) Fiscalidad Directa (incluidos la fiscalidad del ahorro, los intereses y los cánones).

D.5 Grupo «Código de Conducta» (Fiscalidad de las Empresas):

a) Subgrupo A.
b) Subgrupo B.

D.6 Grupo de Alto Nivel.
D.7 Comité Presupuestario.
D.8 Grupo «Lucha contra el Fraude».

Los Grupos D.4 y D.5 son, precisamente, donde se debaten los asuntos fiscales.

Una de las principales disculpas que los responsables políticos del Gobierno central han puesto para negar el derecho a la participación de las instituciones vascas en el ECOFIN radicaba en que ni el Ordenamiento jurídico constitucional ni el comunitario permitían la presencia vasca en él, motivo éste que se puso especialmente de manifiesto en el proceso negociador que acabaría con la renovación del Concierto Económico en el año 2002, tras un bloqueo de las negociaciones que lleva, por primera vez en la historia, a la prórroga unilateral del Concierto por parte del Gobierno español. Efectivamente, la pretensión vasca de que se incluyera una cláusula que garantizara la participación de las instituciones vascas en los órganos que elaboran y deciden las medidas de naturaleza fiscal fue la principal causa del grave conflicto que se generó durante las mencionadas negociaciones.

Pero es preciso señalar que el difícil contexto político en el que se desarrollaron las negociaciones venía precedido por un largo proceso de judicialización[20] del Concierto Económico, tanto ante los tribunales estatales como en distintos procedimientos que fueron suscitados por diferentes agentes ante la DG Competencia de la Comisión Europea, y que desembocaron en las correspondientes Decisiones y consiguientes recursos de anulación ante el Tribunal de Justicia de las Comunidades Europeas. En este escenario, el Lehendakari realizó una declaración pública en defensa del Concierto

[20] ARANBURU URTASUN, Mikel, *Provincias exentas, Convenio-Concierto, Identidad Colectiva en la Vasconia peninsular (1969-2005)*, Fundación para el Estudio del Derecho Histórico y Autonómico de Vasconia. Serie Echegaray, pág.139: *A partir del Convenio Económico de 31 de julio de 1990 el Estado ha recurrido… cuatro Leyes Forales emanadas del Parlamento de Navarra. En tanto han sido unos ochenta los recursos interpuestos contra las normas forales de los Territorios Históricos de la CAPV. Habida cuenta de la gran similitud en las normas en ambas comunidades, este dato es suficiente para poner en evidencia la intencionalidad política de la institución reclamante.*

Económico el 16 de julio de 1999, reclamando que *se debe propiciar la incorporación de representantes de la Comunidad Autónoma Vasca en los órganos europeos en los que se traten asuntos relativos a la armonización fiscal y a la libre competencia.*

Por su especificidad (limitada al País vasco y a Navarra), la competencia contenida en el Concierto Económico, como se ha dicho anteriormente, probablemente el más característico de los derechos históricos y máximo exponente de la asimetría competencial del Estado español, ha sido siempre tratado, aunque con escaso éxito, en foros bilaterales, como la Comisión Mixta del Concierto[21].

Como se ha recogido anteriormente, el Ordenamiento Jurídico comunitario da cobertura suficiente (artículo 203 TCE) para la adecuada presencia directa de las regiones en las distintas formaciones del Consejo, siendo, por lo tanto, una cuestión de orden estrictamente interno. Igualmente se ha visto que, tras una lenta evolución de casi veinte años, las Comunidades Autónomas han visto reconocido su derecho de participación con la apertura para ellas de cuatro de las nueve formaciones del Consejo de ministros. Este escenario era desconocido en el momento de la negociación del último Concierto, pero, a día de hoy, tras los Acuerdos de 9 de diciembre de 2004 y tras una experiencia de más de un año, en que algunas CCAA han tenido ocasión de participar en el Consejo, parece que la cuestión de la participación en el Consejo ECOFIN es una simple cuestión de voluntad política, y en ningún caso de imposibilidad jurídica.

En cualquier caso, y con el fin de evitar que la representación de las CCAA se limitase ad eternum a las cuatro formaciones del Consejo mencionadas, la representación de Euskadi, entre otras Comunidades Autónomas, exigió en la negociación de los Acuerdos de la CARCE de 9 de diciembre de 2004, la inclusión del término *inicialmente* al establecerse que *La representación autonómica directa será de aplicación,* inicialmente*, en las siguientes formaciones del Consejo de la Unión Europea: Empleo, Política Social, Sanidad y Consumidores; Agricultura y Pesca; Medio Ambiente; Educación, Juventud y Cultura.* (Artículo 2.1 del Acuerdo)[22].

Además, el Acuerdo recoge una cláusula que deja abierta la relación autonómica bilateral con el Estado: III Reglas especiales 3. *La participación objeto del presente acuerdo lo es sin perjuicio de los regímenes e instrumentos bilaterales existentes o que pudieran existir con algunas Comunidades Autónomas para el tratamiento de aquellas cuestiones propias de la participación en los asuntos relacionados con la Unión Europea que afectan en exclusiva a dichas Comunidades o que tengan para las mismas una vertiente singular en función de su especificidad autonómica y foral.*

En realidad, esta cláusula sigue la línea de lo establecido en la Disposición Adicional Primera de la LCARCE: *Aquellas cuestiones propias de la participación en los*

[21] El Concierto contempla la existencia de dos comisiones: la Comisión Mixta del Concierto (artículos 61 y 62) y la Comisión de Coordinación y Evaluación Normativa (artículos 63 y 64). Por el contrario el Convenio únicamente establece una Comisión Coordinadora.

[22] El subrayado es nuestro.

*asuntos relacionados con las Comunidades Europeas, que afecten en exclusiva a una Comunidad Autónoma o que tengan para ésta una vertiente singular en función de su especificidad autonómica, se tratarán a iniciativa de cualquiera de las partes y de mutuo acuerdo, mediante instrumentos de cooperación de carácter bilateral.*

Por lo tanto, la existencia y utilidad de cauces bilaterales para resolver asuntos como los relativos al Concierto (u otros) queda clara, tanto a partir de la LCARCE, como tras la aprobación de los Acuerdos de CARCE de 2004, al hacerse una mención expresa de la vigencia de los mismos. Estos Instrumentos complementan los multilaterales existentes y son conformes con el espíritu de la Constitución, que reconoce y garantiza determinados derechos específicos propios de algunas Comunidades y cuya actualización contempla.

Pero hagamos un repaso del alcance de las demandas realizadas por las autoridades vascas de cara a lograr una participación en el Consejo ECOFIN, ya que creo que el desconocimiento por parte de la opinión pública en general de los términos exactos de la reclamación realizada, acompañada de la correspondiente campaña de desinformación por parte de algunos medios de comunicación, contribuyeron decisivamente a crear un ambiente en el que el logro de un acuerdo sobre premisas racionales se hizo imposible.

Como decíamos, las demandas realizadas con ocasión de las negociaciones para la última reforma del Concierto Económico, cuya vigencia llegaba a su fin al transcurrir los veinte años de duración pactados, se hacían en un contexto de gran crispación política general y con el antecedente inmediato de una década jalonada por un sinfín de demandas, tanto a nivel interno[23] como a nivel comunitario (procedimientos administrativos de ayudas de Estado ante la Comisión Europea y subsiguientes recursos suscitados ante el Tribunal de Justicia de las Comunidades), en las que la propia base o filosofía de la existencia del Concierto se veía en entredicho a la luz de una de las posibles interpretaciones de las ayudas de Estado y la fiscalidad, apoyada, tanto por los representantes de la Comisión Europea, como por la opinión del Abogado General[24]

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[23] Interesa destacar el hecho de que en el caso de la Comunidad Foral Navarra es el Tribunal Constitucional el que entiende de esos recursos, *ya que a este corresponde conocer del recurso y la cuestión de inconstitucionalidad contra leyes, disposiciones normativas o actos con fuerza de ley. No así sucede con las normas aprobadas por las Juntas Generales de los Territorios Históricos, en quienes reside el poder normativo en la materia en la CAPV, que tienen rango reglamentario y los recursos contra ellas se plantean en la Jurisdicción Contencioso-Administrativa. Este hecho ha sido uno de los falaces argumentos que pretenden justificar la profusión de recursos contra las normas tributarias de la CAPV.*

[24] Ante la posición de las partes y del Estado español de considerar que el reparto de competencias en materia fiscal entre el Estado y los Territorios Históricos es contrario a las disposiciones del Tratado en materia de ayudas equivaldría a emitir un juicio de valor sobre la estructura constitucional del Estado español, Saggio decía no poder *compartir dicha opinión. El hecho de que las medidas examinadas sean adoptadas por colectividades territoriales dotadas de competencia exclusiva con arreglo al Derecho nacional parece, como ha señalado la Comisión, una circunstancia meramente formal que no es suficiente para justificar el trato preferencial dado a las empresas comprendidas dentro del ámbito de aplicación de las Normas Forales. De no ser así, el Estado podría fácilmente evitar la aplicación, en*

(Saggio) (Conclusiones presentadas el 1 de julio de 1999 en la cuestión prejudicial planteada ante el TJCE por el Tribunal Superior de Justicia del País Vasco en los Asuntos acumulados C-400/97, C-401/97 y C-402/97 ante el TJCE), y, por supuesto, por algunas CCAA limítrofes. Además, la coordinación emprendida en materia de fiscalidad directa por la Comisión Europea alumbró las directrices en materia de ayudas de Estado y fiscalidad, siendo indicativas de las pautas a seguir por ella en el análisis de los expedientes relativos a las medidas fiscales de los distintos Estados miembros en relación con el Derecho de la Competencia. También el Paquete Fiscal, impulsado por el Comisario de Fiscalidad, Mario Monti (posteriormente asumiría la cartera de Competencia), con sus tres soportes, a saber, la fiscalidad del ahorro, la eliminación de la retención en origen para los rendimientos de capital y la elaboración de un Código de Conducta (encomendado al Grupo Primarolo), y que vió la luz en 1998.

Estos hechos son reveladores de la importancia que la adecuada defensa de la competencia de fiscalidad, a través de la participación directa en el Consejo ECOFIN y del acceso al Tribunal de Justicia, ha adquirido para la instituciones públicas del País Vasco.

Aunque los borradores que se manejaron fueron varios, la demanda de las autoridades vascas se centró, en un ejercicio de posibilismo, en la participación en el Consejo ECOFIN cuando tratasen asuntos relativos a la armonización fiscal y a la libre competencia (en la misma linea de la declaración pronunciada por el Lehendakari en 1999 que hemos mencionado anteriormente), o que correspondiesen al ambito material del Concierto (lo cual sigue la línea del acuerdo alcanzado por unanimidad en 1998 en la Comisión Mixta Congreso-Senado para Asuntos Europeos, anteriormente citado). Además, la delegación española no sería sustituida, sino la representación vasca se integraría en la española tras un acuerdo entre ambos niveles: central y autonómico vasco.

La versión inicial era del siguiente tenor:

*Dada la especificidad que en materia fiscal y otras cuestiones recogidas en el presente Concierto Económico tienen las instituciones del País Vasco y siempre que ello se acuerde bilateralmente, el Estado garantizará a través de los mecanismos que se estimen oportunos, con el procedimiento que se acuerde en la Comisión Mixta de Cupo, y sin perjuicio de la normativa de carácter general, el particular y eficaz modo de intervención y participación de las Instituciones vascas en aquellas Instituciones europeas en las que se traten materias que incidan en los contenidos del presente Concierto.*

Esta previsión, que sería extensible a los distintos niveles, a saber, el Consejo, el COREPER y los grupos de trabajo, no recibió respuesta ministerial alguna, a no ser

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*parte de su propio territorio, de las disposiciones comunitarias en materia de ayudas de Estado simplemente introduciendo modificaciones al reparto interno de competencias en determinadas materias, para poder invocar el carácter «general» para ese determinado territorio, de las medidas de referencia* [Ezeizabarrena, Xavier].

que consideremos como tal la división que se trató de generar en el interior de la delegación vasca, al considerar el Estado la opción de cerrar un acuerdo exclusivamente con uno de los TTHH, en este caso Álava[25], o la amenaza de prórroga unilateral del Concierto, como así ocurrió, en caso de que no se alcanzase un acuerdo.

En cualquier caso, los argumentos más utilizados en contra de la participación directa en el ECOFIN han sido desde los clásicos, y ya rebatidos por la jurisprudencia, relativos al ejercicio de la competencia exterior por parte de la esfera central del Estado, a la imposibilidad dentro del ordenamiento jurídico comunitario de mantener una interlocución válida fuera de la esfera central del Estado, a la función arbitral e integradora de las posiciones autonómicas atribuida a la Administración General del Estado, o al principio de responsabilidad ministerial. En realidad, el único argumento posible parece haber sido el político, ya que parece claro que éstos no son los términos del debate desde una perspectiva jurídico-constitucional.

Así pues, a falta de razones de naturaleza técnico-jurídica, hay que concluir que la razón de la negativa es de índole política y que, con el fin de desbloquear la difícil situación generada por la falta de acuerdo y la consiguiente prórroga unilateral, las instituciones vascas accedieron a sacar la cuestión del orden del día, sin que ello supusiera una renuncia a esa aspiración ni a plantearla en el futuro.

La dimensión política y constitucional del Concierto Económico, que va más allá de su estricto contenido financiero y tributario, y del positivismo con que algunos contemplan este fenómeno, hace que sea necesario que se atienda este aspecto de la renovación del Concierto que quedó suspendido en 2002. Mientras esto no ocurra el equilibrio competencial y territorial diseñado por la Constitución de 1978 seguirá viéndose profundamente afectado.

A día de hoy, y por lo que respecta al aspecto organizativo de la participación, es claro que, tras la aprobación y puesta en práctica de los acuerdos CARCE de 2004, la forma de articular la participación sería, no sólo similar a aquélla sino, incluso, más sencilla, ya que se trataría de ponerse de acuerdo únicamente entre dos (o tres, si Navarra se sumase al acuerdo una vez alcanzado), en lugar de entre veinte (las diecisiete Comunidades Autónomas, además de las Ciudades Autónomas de Ceuta y Melilla y la representación de la Administración General del Estado). La única complejidad vendría dada por la forma de articular la participación o presencia de los TTHH que integran la CAPV. En cualquier caso, y dada la larga y positiva experiencia en la consecución de acuerdos que contempla a los representantes tanto de los Territorios Históricos como de la Comunidad Autónoma del País vasco a través de órganos como el Organo de Coordinación Tributaria de Euskadi o el Consejo Vasco de Finanzas, ambos de carácter interno, no parece que el hecho de tener que designar uno o varios

[25] De facto, este hecho hubiese generado una situación similar a la existente durante el régimen del General Franco, durante el cual los Territorios Históricos de Bizkaia y Gipuzkoa se vieron privados del Concierto Económico por ser consideradas provincias traidoras.

representantes vascos para su integración en la delegación estatal fuera a constituir un problema significativo.

## Resumen final y conclusión

La cuestión de la participación directa de las Instituciones vascas en las instituciones de la Unión Europea (así como en otros organismos internacionales) en materia de fiscalidad, en especial cuando deliberen y decidan sobre cuestiones directamente relacionadas con el Concierto Económico, es una cuestión de justicia y de coherencia con el sistema configurado por la Constitución española de 1978, cuya Disposición Adicional 1ª reconoce y ampara los derechos históricos de los Territorios Forales, siendo el Concierto el más significativo de ellos.

Ni la Constitución, ni los Tratados comunitarios rechazan dicha participación, más bien al contrario, ya que el artículo 203 TCE (introducido en 1992, Maastricht) lo permite, y diferentes resoluciones del Parlamento Europeo y del Comité de las Regiones lo recomiendan, en la búsqueda de una mayor eficacia en la elaboración y aplicación de las políticas comunitarias y de una mayor cercanía a los ciudadanos en aras a una mayor identificación con el proyecto europeo. En el mismo sentido, el propio Libro Blanco de la Gobernanza de 2001 persigue una mejor gestión y mayor calidad de la democracia, con el fin de que la construcción europea sea más identificable para los ciudadanos. En este escenario, la reiterada jurisprudencia del Tribunal Constitucional confirma el derecho que asiste a las Comunidades Autónomas para desarrollar sus competencias incluso en el ámbito exterior, con el único límite de no comprometer el cumplimiento de los compromisos internacionales asumidos por el Estado.

Si bien los acuerdos de la Conferencia de Asuntos Relacionados con las Comunidades Europeas de 9 de diciembre de 2004 posibilitan la presencia directa de las Comunidades Autónomas en el Consejo, el sistema está obligado a superar determinadas dificultades que, además de las rémoras culturales y corporativas existentes en determinados ámbitos de la esfera central del Estado, responden a un método de trabajo que pivota en un sistema de Conferencias sectoriales carente de fuerza, organización, constancia y homogeneidad. Por otro lado, la inexistencia de un Senado como auténtica cámara de representación territorial dificulta aún más la articulación de una adecuada participación.

La participación en el ECOFIN no necesitaría de cauces multilaterales como las Conferencias sectoriales, ni de Cámaras territoriales (al estilo del Senado) al contarse ya con cauces bilaterales, como la Comisión Mixta de Cupo, mecanismos que, por otra parte también se prevén en la Disposición Adicional Primera de la LCARCE. Si a esto añadimos que los planteamientos realizados desde la CAPV jamás han hecho referencia a suplantar la delegación española; sino, muy al contrario, a integrarse en ella, corresponsabilizándose del resultado de los acuerdos finales y limitándose a las

materias que afectaran al Concierto, y previo acuerdo con la delegación oficial; parece evidente que sólo se está pendiente de que un específico momento político despeje los nubarrones de los que se cubrió el horizonte en la crisis vivida durante la negociación del Concierto en 2001, para, una vez más, realizar la correspondiente actualización en virtud de la propia Disposición Adicional 1ª de la CE.

# Los problemas actuales del Concierto Económico

JOSÉ MARÍA IRUARRIZAGA ARTARAZ

*Diputado Foral de Hacienda y Finanzas. Diputación Foral de Bizkaia.*

Buenas tardes:

En primer lugar quisiera agradecer a la Universidad de Deusto y en concreto al Instituto de Estudios Vascos y a sus responsables, el esfuerzo desplegado en la organización, en colaboración con la Asociación para la promoción y difusión del Concierto Económico Ad Concordiam, de estas jornadas sobre el propio Concierto Económico y su papel en la Europa comunitaria.

En mi condición de Presidente de la Asociación Ad Concordiam me van a permitir unas palabras en relación con las actividades y objetivos de nuestra Asociación.

Lamentablemente resulta notorio el desconocimiento que de nuestro más peculiar instrumento de autogobierno adolecen no sólo las Administraciones españolas o comunitarias sino nuestros propios conciudadanos.

Son comunes las encuestas en las que los ciudadanos vascos manifiestan desconocer la existencia, el origen o el contenido del Concierto Económico en porcentajes que se nos antojan inasumibles.

Precisamente la constatación de esta situación fue la circunstancia que animó a la Diputación Foral de Bizkaia a promover en el año 2000 la constitución de la Asociación Ad Concordiam con el objetivo básico de contribuir a la difusión, a la formación y a la información de cuantas materias tienen relación con el Concierto Económico.

A esta iniciativa se sumaron con entusiasmo tanto la Universidad del País Vasco como la Universidad de Deusto.

Desde entonces la Asociación Ad Concordiam ha venido desarrollando actividades de difusión del Concierto Económico. Actividades destinadas tanto al público en general no especializado, como a profesionales, instituciones o asociaciones que de una manera u otra tienen relación con la historia del Concierto Económico, su contenido actual o incluso con el papel que un instrumento que lleva vigente 130 años puede jugar en los nuevos ámbitos donde ahora y en el futuro debe desplegar su eficacia, ya sea en el ámbito de la financiación regional, en sus aspectos financieros o en los tributarios.

Pero, si el desconocimiento entre nuestros conciudadanos del Concierto Económico es una cuestión que desde nuestro punto de vista debemos acometer, ese mismo desconocimiento se traduce en un problema de extraordinaria gravedad cuando afecta a las Instituciones que tienen la capacidad para decidir sobre la legalidad de las decisiones adoptadas al amparo de las competencias que en el propio Concierto se reconocen a las Instituciones del País Vasco.

Y es que, estamos asistiendo a unos momentos en que parece existir una especie de «cruzada» contra el Concierto Económico, planteada en todos los frentes por responsables políticos, empresariales y sindicales de las Comunidades Autónomas limítrofes con Euskadi, tanto ante los Tribunales de Justicia, las Instituciones Comunitarias o mediante cartas dirigidas al propio Presidente del Gobierno Español.

Por eso creemos absolutamente necesario contribuir en la medida de nuestras posibilidades a limitar todo lo que podamos ese desconocimiento que de nuestro peculiar instrumento de autogobierno hacen gala muchas de las decisiones que últimamente estamos soportando, sobre todo a raíz de la controvertida sentencia de 9 de diciembre de 2004 del Tribunal Supremo.

Y no se trata de reclamar impunidad. Hablamos de respeto. Reclamamos el mismo respeto e igualdad de trato para nuestras Instituciones y Administraciones Tributarias que para el resto de Instituciones y Administraciones Tributarias de la Unión Europea.

A ilustrar este loable objetivo entiendo que pretenden contribuir estas jornadas, en las que hemos visto las distintas visiones que unos y otros mantenemos a la hora de enfrentarnos a juzgar el contenido del Concierto Económico o las decisiones que a su amparo se adoptan.

Pero toca hoy hablar del futuro del Concierto Económico en la Unión Europea, y me gustaría plantear unas preguntas en voz alta:

¿Acaso la situación de nuestro Concierto peligra?

¿Es la razón de ese peligro el hecho de que el Concierto Económico es en sí mismo discriminatorio?

¿Es por lo tanto incompatible con la construcción de la Europa unida?

Voy a intentar contestar a esas preguntas de forma sucinta pero rotunda.

En mi opinión es cierto que el Concierto Económico peligra. Su propia existencia está hoy en un grave trance de desaparecer, al menos en lo que se refiere a una de las características que lo hacen un modelo único: la capacidad normativa.

Y ello es así porque, aún cuando en todos y cada uno de los casos en que la Comisión ha adoptado una decisión de incompatibilidad de medidas tributarias adoptadas por los órganos competentes de los Territorios Históricos, ha basado la incompatibilidad de las mismas en la concurrencia de un elemento de selectividad «material» en su diseño, lo cierto es que, en casos como los que se han analizado estos días aquí, ha planteado una interpretación del criterio de selectividad que puede, de prosperar, afectar definitivamente a la capacidad de entes no estatales para adoptar medidas tributarias de contenido distinto a su homólogo en el ámbito estatal.

Efectivamente, en el caso Azores, la Comisión, siguiendo la doctrina elaborada en las conocidas conclusiones del Abogado General Saggio en la cuestión prejudicial planteada por el Tribunal Superior de Justicia del País Vasco, en relación con las Normas Forales del año 1993 de medidas urgentes de apoyo a la inversión e impulso de la actividad económica, ha afirmado que el ámbito geográfico de referencia para determinar si una medida es o no selectiva debe ser siempre el territorio completo del Estado en que la decisión se adopta.

De esta manera cualquier medida de ámbito geográficamente limitado en su aplicación, resulta ser selectiva, por el mero hecho de resultar aplicable precisamente en ese ámbito geográficamente limitado, al beneficiar per se a determinadas empresas o producciones, precisamente a las que les resulta aplicables por operar en ese limitado ámbito territorial.

No hace falta más que sumar dos más dos, para concluir que, de aceptarse tal premisa, todas las Normas Forales adoptadas por los Territorios Históricos resultan cumplir el elemento de selectividad exigido por el concepto de ayuda del artículo 87 del Tratado, precisamente por resultar de aplicación únicamente a aquellos contribuyentes sometidos a la normativa foral, de acuerdo con los puntos de conexión del Concierto.

Esta es la razón de la expectación con que en nuestro país se ha seguido la sentencia del caso Azores, puesto que la eventual asunción por el Tribunal de Justicia de las posiciones de la Comisión en la materia, hubiera supuesto, probablemente, extender el certificado de defunción de la capacidad normativa foral para diseñar su propio sistema tributario, tal y como vienen reclamando, como he dicho, las Comunidades

Autónomas vecinas, y lamentablemente ha asumido el Tribunal Supremo en la ya mencionada sentencia de 9 de diciembre de 2004, contra cuyas consecuencias venimos luchando tan denodada como infructuosamente en los últimos tiempos.

Afortunadamente la sentencia del Tribunal de Justicia en el caso Azores ha sido clara y manifiesta en contra de la opinión de la Comisión y por ende del análisis realizado por el Tribunal Supremo en 2004, afirmando que el marco de referencia no debe necesariamente coincidir con el territorio del Estado miembro considerado, de tal modo que una medida que conceda una ventaja en sólo una parte del territorio del Estado, no pasa por este simple hecho a ser selectiva en el sentido del artículo 87 CE, apartado 1.

El párrafo 58 de la sentencia afirma literalmente:

> «58. No puede excluirse que una entidad infraestatal cuente con un estatuto jurídico y fáctico que la haga lo suficientemente autónoma del Gobierno central de un Estado miembro como para que sea ella misma, y no el Gobierno central, quien, mediante las medidas que adopte, desempeñe un papel fundamental en la definición del medio político y económico en el que operan las empresas.
>
> En tal caso, es el territorio en el que la entidad infraestatal que ha adoptado la medida ejerce su competencia, y no el territorio nacional en su conjunto, el que debe considerarse pertinente para determinar si una medida adoptada por dicha entidad favorece a ciertas empresas, en comparación con otras que se encuentren en una situación fáctica y jurídica comparable, habida cuenta del objetivo perseguido por la medida o el régimen jurídico de que se trate.»

Para ello, y siguiendo el párrafo 62 de la sentencia, la medida ha debido ser adoptada por la entidad subestatal en el ejercicio de facultades lo suficientemente autónomas del poder central, que el abogado general GEELHOED ha identificado con tres tipos de autonomía: CONSTITUCIONAL, PROCEDIMENTAL Y ECONÓMICA.

No voy ahora a profundizar en el contenido e interpretación que de los tres tipos de autonomía plantea el Tribunal de Justicia, labor que corresponde a partir de ahora a los tribunales en que las medidas controvertidas están siendo juzgadas.

Pero lo que si ha quedado claro es que, desde luego, la sentencia ha venido a poner en cuestión la doctrina dictada por el Tribunal Supremo y ha originado serias dudas en el propio seno del Tribunal Superior de Justicia del País Vasco, como demuestra el hecho de que haya decidido, atendiendo por fin las repetidas demandas de nuestra representación procesal, acudir al mecanismo de cooperación previsto en el artículo 234 del Tratado, planteando una cuestión prejudicial a fin de recabar la correcta interpretación de la cuestión del único órgano competente para hacerlo: el propio Tribunal de Luxemburgo.

No creo que vaya a sorprender a nadie si afirmo que estoy firmemente convencido de que el Concierto cumple sobradamente el filtro de autonomía que exige el Tribunal de Luxemburgo.

Es más, creo que si hay alguna entidad no estatal en Europa que cumple esos requisitos de autonomía, esa es precisamente el País Vasco.

Por ello, auguro una larga y fructífera vida al Concierto Económico, un futuro en que las Instituciones competentes del País puedan ejercer sus competencias en igualdad de condiciones, como decía al principio, de cualquier otra entidad, estatal o no, que goce de idénticas capacidades.

El camino no será fácil ni exento de dificultades, dada la virulencia con que últimamente pretende ponerse en cuestión la propia existencia del Concierto Económico, pero estoy seguro de que, más pronto que tarde, la razón se impondrá.

Mientras ese momento llega sigamos celebrando los aniversarios del Concierto Económico, y debatamos y analicemos sobre su presente y futuro, sin olvidarnos del pasado.

Eskerrik asko.

# El futuro del Concierto Económico en la Unión Europea

JUAN ANTONIO ZÁRATE PÉREZ DE ARRILUCEA

*Diputado de Hacienda, Finanzas y Presupuestos de la Diputación Foral de Álava.*

Buenas tardes:

## 1. Agradecimiento

En primer lugar quiero agradecer la invitación que me han efectuado los organizadores de este Congreso Internacional sobre el Concierto Económico vasco y Europa para participar en esta jornada y, en especial, al Instituto de Estudios Vascos, felicitándoles por su iniciativa.

## 2. Planteamiento de la cuestión debatida

Hablar de las relaciones entre la Unión Europea y el Concierto Económico es hacer referencia a una de las cuestiones más actuales, lamentablemente más controvertidas y, desde luego, la más importante que afecta en este momento al texto concertado.

En efecto, el problema fundamental, simplificando lo máximo posible, es determinar si las Instituciones de los Territorios Históricos del País Vasco disponen, en el marco del Concierto Económico, de competencia normativa propia para regular y establecer su propio sistema tributario.

Puede sorprender el planteamiento de esta cuestión; si leemos el artículo 1º del Concierto Económico comprobamos que expresamente se señala que las Instituciones Forales pueden mantener, establecer y regular, dentro de su territorio, su propio régimen tributario.

Ahora bien, la enunciación de este principio general de reconocimiento de la capacidad normativa de las Instituciones Forales se complementa con una serie de principios que también, si bien no de forma exclusiva, se recogen en el propio texto concertado. En efecto, el Concierto Económico establece principios y reglas que deben tenerse presentes a la hora de configurar el sistema tributario de los Territorios Históricos.

## 3. Necesidad de relacionar la capacidad para establecer el sistema tributario con los principios generales y de armonización fiscal

De la unión y coordinación de ambos principios o preceptos es como ha de interpretarse y aplicarse el ámbito competencial normativo de las Instituciones Forales. La enunciación general de la competencia de los Territorios Forales para diseñar su propio sistema tributario debe ponerse en relación directa tanto con los principios, enunciados también con carácter genérico, que rigen el establecimiento del propio sistema tributario, como con las disposiciones que sobre armonización fiscal, coordinación y colaboración con el Estado se contienen en el propio Concierto Económico.

Es por ello que no cabe considerar, de forma aislada, uno sólo de los principios o enunciados generales olvidando el otro, pues ambos se encuentran directa e íntimamente interrelacionados, de tal forma que cualquier interpretación de uno sin el otro conducen necesariamente a un planteamiento incompleto y, por lo tanto, carente de fundamento sólido.

Por lo tanto tan erróneo es considerar que las Instituciones de los Territorios Históricos disponen de amplia competencia normativa para regular su propio sistema tributario, olvidándose de los principios o matices que introducen los principios generales a los que anteriormente he hecho referencia, como pensar que no se ajusta a Derecho cualquier disposición general aprobada por las Instituciones de los Territorios Históricos que no coincida exactamente con la correlativa disposición general aplicable en territorio de régimen común.

Cualquiera de las dos consideraciones anteriores, al olvidar parte del contenido del Concierto Económico, están abocadas al fracaso y no aportan más que confusión en su interpretación y aplicación.

Puede parecer que lo manifestado anteriormente resulta superfluo, pues el Concierto Económico parece claro en su contenido. Sin embargo, son ya muchos los años que se cuestiona el mismo. En mi opinión, este cuestionamiento deriva, precisamente, de posturas que pretenden dar mayor contenido o relevancia a uno de los principios sobre el otro, olvidando la interrelación que existe entre ellos.

## 4. Posición de la Diputación Foral de Álava

La Diputación Foral de Álava siempre ha considerado que el Concierto Económico es un instrumento fundamental en el autogobierno y ha defendido la capacidad normativa y de gestión de las Instituciones Forales que se contienen y derivan del mismo. Esto es: siempre ha considerado que ambos enunciados o principios generales deben analizarse y tenerse presentes a la hora de diseñar el sistema tributario aplicable en Álava.

Precisamente de ello deriva el convencimiento de que los principios de armonización y coordinación con el Estado que se contienen en el propio texto concertado no pueden eliminar o hacer desaparecer, en ningún caso, el contenido de su propia capacidad normativa.

Bajo esta consideración, y por la firme creencia en la vigencia del contenido del Concierto Económico, la Diputación Foral de Álava ha ejercido y comparecido, y así seguirá haciéndolo, en todas cuantas cuestiones han requerido su atención a fin de defender y apoyar su vigencia y su validez. Por lo tanto siempre defenderá el ejercicio de las competencias, tanto normativas, como de aplicación de los tributos, que se derivan del mismo. Pero al mismo tiempo, también ha defendido, y así seguirá haciéndolo, la necesidad de ejercer la competencia, tanto normativa como de gestión, con la mayor de las responsabilidades, respetando los principios generales y de armonización, coordinación y colaboración con el Estado que se contienen en el propio Concierto Económico. Entendemos que no hay mejor manera de defender el Concierto Económico que hacer un ejercicio responsable de las competencias que derivan del mismo, poniendo el énfasis tanto en el principio general que proclama la competencia normativa, como en los principios que delimitan su operatividad.

## 5. Referencia a la Unión Europea en el Concierto Económico

Llegados a este punto, y centrándonos en el tema que nos ocupa, cabe preguntarse cómo se coordina el Concierto Económico con la Unión Europea. Parte de esta pregunta se encuentra respondida en el propio Concierto Económico que establece, dentro, precisamente, de los principios generales que debe seguir el sistema tributario de los Territorios Históricos, el sometimiento a los Tratados y Convenios internacionales firmados y ratificados por el Estado español o a los que éste se adhiera.

De forma particular, se contiene una referencia expresa a la Unión Europea al señalarse que el sistema tributario de los Territorios Históricos debe atenerse a lo dispuesto en los Convenios internacionales para evitar la doble imposición y a las normas de armonización fiscal de la Unión Europea.

Consecuencia de esta mandato, la Norma Foral General Tributaria, aprobada el año pasado por las Juntas Generales de Álava, al regular las fuentes de los tributos, recoge expresamente esta referencia del Concierto Económico y señala expresamente que serán de aplicación las normas que dicte la Unión Europea y otros organismos internacionales o supranacionales a los que se atribuya el ejercicio de competencias en materia tributaria.

Por lo tanto, desde el punto de vista formal, el Concierto Económico resuelve la relación entre la normativa tributaria procedente de la Unión Europea y la capacidad normativa de las Instituciones Forales, de tal suerte que, desde esta perspectiva, no debería plantearse ninguna problemática.

Sin embargo, desde otro ángulo diferente, lo cierto es que se cuestiona, en sí misma, la propia capacidad normativa de los Territorios Forales.

## 6. Sentencia del Tribunal Supremo de 9 de diciembre de 2004

Ejemplo claro es la sentencia del Tribunal Supremo de 9 de diciembre de 2004. Esta sentencia realiza, a mi juicio, un análisis incorrecto del Concierto Económico. Y efectúa este análisis incorrecto precisamente por no coordinar adecuadamente, en su justa medida, los dos principios a que se ha hecho referencia anteriormente: el principio de la competencia general de los Territorios Forales para regular su propio sistema tributario y los principios que rigen el establecimiento del mismo y las disposiciones que sobre armonización fiscal, coordinación y colaboración con el Estado se contienen en el propio Concierto Económico. Su error parte de la premisa de anular artículos de la Norma Foral del Impuesto sobre Sociedades al considerar que tienen diferente redacción a los artículos que regulan la misma materia en territorio de régimen común. Esta sentencia del Tribunal Supremo de 9 de diciembre de 2004, no sólo tiene evidentes errores técnicos, sino que supone emprender un camino diferente al que el propio Tribunal Supremo había seguido en casos anteriores. La doctrina que recoge, supone un desconocimiento del propio texto concertado, al que deja muy mermado de competencias.

## 7. Sobre el caso Azores

Sin embargo, y con posterioridad al citado pronunciamiento del Tribunal Supremo, el Tribunal de Justicia de las Comunidades Europeas, en sentencia sobre el llamado «caso Azores», establece una doctrina que puede arrojar una importante luz a las relaciones entre la Unión Europea y el Concierto Económico.

Partiendo del principio general de que el Tratado de la Unión Europea prohíbe las ayudas de Estado selectivas, esto es, las ayudas que favorezcan a determinadas empresas o producciones, sin embargo se prevé que dichas medidas no constituyan ayudas de Estado si están justificadas por la naturaleza o estructura del sistema fiscal.

En este sentido, el citado Tribunal de Justicia de las Comunidades Europeas considera que para determinar si es o no selectiva una medida adoptada por una entidad de ámbito inferior a un Estado, en concreto, si el tipo impositivo reducido, o distinto, en un determinado tributo es o no una medida selectiva, ha de examinarse si dicha medida ha sido adoptada en el ejercicio de facultades autónomas respecto del poder central. Igualmente, debe determinarse si la medida adoptada se aplica a todas las empresas o producciones establecidas en el territorio sobre el que dispone de competencia la citada entidad infraestatal.

De forma concreta, la sentencia del Tribunal de Justicia de las Comunidades Europeas establece tres criterios que deben reunirse para que una entidad de ámbito inferior al de un Estado pueda fijar un tipo impositivo diferente al que rige en el resto del Estado. Estos criterios son los siguientes:

a) Que se cuente con un estatuto político y administrativo diferente al del Gobierno central.
b) Debe adoptarse la decisión sin que el Gobierno central haya intervenido directamente en su contenido.
c) Las consecuencias financieras de la decisión adoptada por dicha entidad repercuten directamente en ella y no se ven compensadas por el Gobierno central.

## 8. Sobre la aplicación del caso Azores al País Vasco

A la vista de la sentencia del Tribunal de Justicia de las Comunidades Europeas, la Diputación Foral de Álava muestra una comprensible satisfacción, pues de aplicarse esta tesis al País Vasco, el Concierto Económico se encontraría perfectamente encuadrado en la Unión Europea, algo que siempre hemos manifestado y defendido. En efecto, los requisitos que determina al Tribunal de Justicia de las Comunidades Europeas son plenamente aplicables a nuestro territorio, de tal suerte que la conclusión sería reconocer algo que siempre se ha mantenido por parte de las Instituciones Forales: éstas disponen de capacidad normativa para establecer disposiciones de carácter general que configuran su propio sistema tributario.

Ahora bien, queda por determinar si esta tesis se va a aplicar al País Vasco. Esto es, queda por confirmar que los argumentos utilizados en el caso de las Azores, se van a extender también al País Vasco. En el supuesto de que así sea, y desde ese momento, podremos empezar una nueva etapa caracterizada por el reconocimiento público y expreso, a nivel de Instituciones europeas, de la compatibilidad y operatividad del Concierto Económico en el marco de la Unión Europea. Mientras esperamos el pro-

nunciamiento del Tribunal de Justicia considero que hay que ser prudentes y seguir manteniendo la defensa del Concierto Económico en todos los ámbitos que sean necesarios. Junto a esta defensa del texto concertado se deben buscar fórmulas que permitan su fortalecimiento.

## 9. Fortalecimiento del Concierto Económico: blindaje

Entre estas medidas tendentes a fortalecer el Concierto Económico se encuentra la relacionada con lo que se ha venido a denominar, posiblemente mal llamado, el «blindaje» del Concierto Económico.

Digo que mal llamado, porque, tal como he indicado anteriormente, las competencias que derivan del Concierto Económico han de ejercitarse con responsabilidad y respetando tanto el principio general que proclama la competencia de las Instituciones Forales, como los principios que la delimitan. En consecuencia, nada hay que blindar si se ejercen las competencias de forma adecuada. O dicho desde otra perspectiva, un ejercicio incorrecto de las mismas nunca estará, ni deberá estar, blindado.

Cuando en la Diputación Foral de Álava nos referimos al «blindaje» del Concierto Económico queremos hacer referencia a algo tan sencillo y elemental como lo siguiente: si las demás Instituciones que dentro de España aprueban legislación tributaria y lo hacen dentro de un determinado marco constitucional, ¿porqué no disponen del mismo marco o régimen jurídico las Instituciones Forales del País Vasco?

O dicho de otro modo ¿qué sentido tiene que las Instituciones distintas de las del País Vasco que operan dentro del territorio español dispongan de un régimen jurídico diferente al que disponen las Normas Forales de las Instituciones Forales, cuando todas ellas están aprobando la regulación de sus propios tributos sobre los que disponen de competencia normativa?

En definitiva, no parece que, dentro del Estado español, tenga mucho sentido que a las disposiciones generales reguladoras de los tributos y que obligan a los ciudadanos a pagar impuestos, se les aplique diferente régimen jurídico según qué Institución las apruebe.

## 10. Sobre la reforma del Impuesto sobre Sociedades

Es probable que ustedes compartan lo señalado anteriormente, pero, al mismo tiempo, se pregunten, de forma concreta, qué vamos hacer, desde las Diputaciones Forales, con el Impuesto sobre Sociedades.

Como bien saben, la sentencia del Tribunal Supremo de 9 de diciembre de 2004 procedió a la anulación de diversos preceptos del Impuesto sobre Sociedades. Ya he indicado anteriormente que esta sentencia no la podemos compartir, pues parte de un

presupuesto difícil de asumir por parte de la Diputación Foral de Álava. Este presupuesto no es otro que el de realizar un estudio comparativo entre la legislación de régimen común y la de los Territorios Históricos y determinar que todo aquello en lo que exista diferencia supone e implica la anulación de la disposición foral.

Tras esta sentencia del Tribunal Supremo, las Diputaciones Forales del País Vasco, en defensa del Concierto Económico, han adoptado una serie de decisiones que, tras los correspondientes recursos, han generado un marco jurídico en el que la seguridad jurídica se ve claramente afectada.

En estos momentos, la Diputación Foral de Álava considera que junto a la defensa del texto concertado, la seguridad jurídica es un principio, un valor que los contribuyentes demandan en estos momentos. Por lo tanto, pensamos que este principio debe tenerse especialmente en cuenta a la hora de tomar decisiones relacionadas con el Impuesto sobre Sociedades.

La afirmación anterior no debe hacer pensar que la aplicación de la prudencia sea un síntoma de plegamiento a las tesis que sostienen una capacidad limitada de las Instituciones Forales en materia de la regulación del Impuesto sobre Sociedades. En modo alguno se pueden identificar prudencia y responsabilidad con abandono de funciones.

Simplemente se trata de, en estos momentos, dar relevancia a un principio fundamental en cualquier sistema tributario. Se trata de, insisto, en un momento determinado, en este momento determinado, considerar que dar a los contribuyentes algo que están reclamando y a lo que tienen derecho es más importante, o puede serlo, que adoptar medidas que pudieran mostrar un ejercicio, llamémosle diferente, de las competencias normativas.

Miren ustedes: hace ahora un año, en el País Vasco existía un debate sobre el tipo tributario del Impuesto sobre Sociedades que había que aprobar para el ejercicio 2006. En ese debate existían dos posturas: una, partidaria de establecer el tipo por debajo del 32,5 por ciento (tipo que había sido anulado por el Tribunal Supremo) y, otra, que estimaba más conveniente realizar un alza sobre ese tipo del 32,5 %, pero siempre por debajo del 35 por ciento (que era el tipo vigente en territorio de régimen común). Como todos ustedes saben, al final se aprobó en los tres Territorios Históricos el tipo del 32,6 por 100.

Un año después, en la Diputación Foral de Álava consideramos que sería difícil de explicar una medida tendente a establecer un tipo tributario diferente al que hace un año se consideraba como razonable, esto es, sería difícil de explicar el establecimiento de un tipo tributario diferente del 30 por 100. Y sería difícil por la sencilla razón de que habría que responder a la pregunta de qué ha cambiado para que el año pasado por estas fechas el tipo impositivo que se consideraba adecuado era el 30 por 100 y hoy sea uno diferente.

Precisamente, el ejercicio responsable de las competencias normativas, conjugado con los principios que deben inspirar su ejercicio, y de forma especial, tal como he

señalado anteriormente, el principio de seguridad jurídica, me conducen a afirmar que en la reforma del Impuesto sobre Sociedades hay que ser, en estos momentos muy prudentes.

Además considero que una reforma en profundidad del Impuesto sobre Sociedades debe llevarse a cabo en el momento oportuno, tras un análisis de la situación que contemple todas las premisas necesarias. Entre estas premisas se encuentra:

a) El tema del «blindaje» del Concierto Económico,
b) La aplicación de la sentencia de las Azores al País Vasco,
c) La reforma en profundidad del Impuesto sobre Sociedades por parte de territorio común y
d) La aprobación de las normas contables de carácter internacional, las NIC.

Lo anterior se tiene que conjugar, naturalmente, con un estudio en profundidad de las necesidades de nuestras empresas y de nuestra economía. Y de esta conjunción nacerán las medidas que deban adoptarse, que no tienen porqué ser necesariamente iguales a las de territorio común, que podrán originar un tipo tributario diferente al vigente en territorio común, que podrá tener una estructura diferente y que podrá desembocar en el establecimiento de unos incentivos fiscales distintos.

Así por ejemplo, las tres Diputaciones Forales del País Vasco acabamos de aprobar un proyecto de Norma Foral que regula el Impuesto sobre la Renta de las Personas Físicas. Este proyecto diseña un esquema de tributo parcialmente diferente al de territorio de régimen común y, además, establece, por poner un ejemplo, un tipo tributario marginal para el último tramo de base liquidable superior en dos puntos porcentuales al de dicho territorio de régimen común.

¿Y por qué se ha diseñado un Impuesto sobre la Renta de las Personas Físicas de estas características? Porque en el ejercicio de las competencias que derivan del Concierto Económico a las tres Diputaciones Forales nos ha parecido, tras los análisis oportunos, que es el sistema más adecuado desde el punto de vista de la justicia tributaria, de la suficiencia financiera y de la coordinación con el territorio de régimen común.

Este análisis es el que también defendemos para acometer la reforma del Impuesto sobre Sociedades. Análisis que debe tener como especial punto de referencia, tal como he señalado anteriormente, el principio de seguridad jurídica y el de prudencia, sin que ello implique una renuncia a la capacidad normativa de los Territorios Históricos.

Finalmente quiero señalarles que la Diputación Foral de Álava continuará defendiendo la vigencia y operatividad, en toda su dimensión, del Concierto Económico, como señal de identidad y como fundamento de nuestro autogobierno.

Muchas gracias por su atención.

# Modificación del Concierto Económico

JUAN MIGUEL BILBAO GARAI

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## Introducción

Quiero felicitar, en primer lugar, a la Asociación Ad Concordiam y al Instituto de Estudios Vascos de la Universidad de Deusto por la organización de este Congreso Internacional sobre el Concierto Económico. Han conseguido reunir a especialistas de gran relevancia, en materias como la fiscalidad regional en Europa, ayudas de Estado, armonización fiscal europea y Concierto Económico. Ello ha permitido abordar en profundidad, durante tres jornadas, las cuestiones y problemas que realmente afectan hoy día al Concierto Económico en el marco de la Unión Europea.

Voy a centrar mi intervención en las modificaciones que, a mi juicio, necesita la vigente Ley 12/2002, de 23 de mayo, por la que se aprueba el Concierto Económico con la Comunidad Autónoma del País Vasco.

El texto legal vigente del Concierto Económico se articula en tres grandes capítulos:

– El Capítulo primero se refiere a los tributos y en él se recogen las relaciones tributarias, los puntos de conexión para establecer la normativa y la exacción de

los distintos tributos. Tiene 47 artículos en los que se distribuyen los tributos y contribuyentes entre el Estado y el País Vasco.
– El Capítulo segundo se refiere a las relaciones financieras. Artículos 48 a 60. Regula los principios generales sobre el Cupo y los Ajustes a Consumo del IVA y de los Impuestos Especiales de Fabricación. Este capítulo se desarrolla mediante Leyes Quinquenales de Cupo.
– El Capítulo tercero. Artículos 60 a 67. Regula la composición y funciones de los Organos de relación bilateral País Vasco-Estado que son: Comisión de Coordinación y Evaluación Normativa, la Junta Arbitral y la Comisión Mixta de Concierto Económico.

El texto legal vigente del Concierto Económico es del año 2002 y han transcurrido ya cinco años desde su aprobación. Es de sobra conocido que los sistemas tributarios se encuentran inmersos en un entorno cambiante, sujetos a presiones de índole económica y política. En consecuencia evolucionan continuamente para adaptarse al medio en el que están implantados.

La Disposición Adicional Segunda del Concierto Económico prevé que «*En el caso de que se produjese una reforma en el ordenamiento jurídico tributario del Estado que afectase a la concertación de los tributos, se produjese una alteración en la distribución de las competencias normativas que afecte al ámbito de la imposición indirecta o se crearan nuevas figuras tributarias o pagos a cuenta, se procederá por ambas Administraciones, de común acuerdo, a la pertinente adaptación del presente Concierto Económico a las modificaciones que hubiese experimentado el referido ordenamiento. La correspondiente adaptación del Concierto Económico deberá especificar sus efectos financieros*». El propio Concierto prevé, por tanto, la posibilidad de adaptar su contenido a las modificaciones sustanciales operadas en el sistema tributario del Estado, mediante común acuerdo y posterior aprobación por ley.

Si miramos la evolución del anterior Concierto Económico en el periodo 1981-2002, podemos observar que hubo hasta cinco Leyes que recogieron diversas modificaciones y adaptaciones del Concierto Económico.

Cabe señalar en la fecha actual, diciembre de 2006, que si bien es cierto que no ha habido grandes alteraciones en la estructura impositiva del Estado, sí resulta necesario plantear y abordar una serie de modificaciones y adaptaciones del texto legal vigente, como consecuencia fundamentalmente de la aprobación de directivas y reglamentos comunitarios que afectan a los sistemas tributarios en la Unión Europea. Esta actualización del capítulo primero del Concierto Económico resulta necesaria para evitar su obsolescencia y cubrir las carencias derivadas de la evolución de los sistemas tributarios. La no actualización del texto del Concierto Económico supone un empobrecimiento del mismo y dificulta su aplicación a las relaciones tributarias que surgen en la actividad diaria de los operadores económicos.

La tramitación de las adaptaciones del texto legal del Concierto Económico, debería realizarse simultáneamente a la nueva Ley Quinquenal de Cupo 2007-2011 actual-

mente en fase de negociación entre la Administración del Estado y las Administraciones vascas.

Las principales cuestiones a abordar, en una próxima reforma del texto del Concierto Económico, son las siguientes:

## 1. Adaptación derivada de la Directiva sobre fiscalidad del Ahorro

El objetivo de la Directiva 2003/48/CE del Consejo de 3 de junio de 2003 en materia de fiscalidad de los rendimientos del ahorro en forma de pago de intereses, consiste en permitir que los rendimientos del ahorro en forma de intereses pagados en un Estado miembro, a los beneficiarios personas físicas residentes fiscales de otro Estado miembro, puedan estar sujetos a imposición efectiva en este último Estado miembro. Este objetivo posibilita la imposición efectiva de los pagos por intereses en el Estado miembro de residencia del beneficiario.

La Directiva obliga a comunicar la información de forma automática y al menos una vez al año, y se referirá a todos los pagos de intereses efectuados durante ese año por un agente pagador de cualquier Estado de la UE. Señala asimismo que, debido a la existencia de divergencias estructurales, Austria, Bélgica y Luxemburgo no estarán obligados a aplicar el intercambio de información, durante un periodo transitorio. A cambio, estos tres Estados aplicarán una retención a cuenta que alcanzará hasta un 35% y transferirán el 75% de dicha retención al Estado miembro de residencia del beneficiario.

El beneficiario del pago de intereses puede evitar, en estos países, la práctica de la retención si remite a su agente pagador un «certificado de residencia» expedido por las autoridades competentes de su Estado de residencia.

En definitiva, la Directiva instaura un sistema de intercambio automático de información entre todos los Estados miembros. No obstante, durante un periodo transitorio, tres Estados miembros, Austria, Bélgica y Luxemburgo en lugar de proporcionar información deberán aplicar una retención en la fuente.

La Directiva afecta al Concierto Económico en sentido de que las Diputaciones Forales han de garantizar la imposición efectiva de, al menos, una parte de los rendimientos del ahorro obtenidos en otros Estados miembros de la UE por personas físicas residentes en el Estado español: los que han sido obtenidos por personas físicas con residencia habitual en el País Vasco. Para ello, las Diputaciones Forales deberán disponer de información sobre las rentas de este tipo obtenidas por sus residentes en otros Estados de la Unión Europea.

Por otra parte, en la dirección opuesta, deberá canalizarse un flujo de información desde las Diputaciones Forales hacia territorio común y hacia el resto de Estados miembros que contenga los datos facilitados a las Diputaciones Forales por pagadores establecidos en el País Vasco sobre rendimientos del ahorro satisfechos a personas físicas residentes en otros Estados de la UE.

En el entorno caracterizado por la convivencia de los dos sistemas ya señalados –el intercambio de información y el sometimiento a una retención en origen–, la aplicación de la Directiva 2003/48/CE, afecta a las Diputaciones Forales en ambos aspectos:

1. Las Diputaciones Forales deben participar en el sistema de intercambio automático de información en los dos sentidos: como emisores y como receptores de información.

La propuesta que se plantea al Ministerio de Hacienda, es que mediante acuerdo de Comisión Mixta de Concierto Económico deben instrumentarse las fórmulas de participación directa de las Diputaciones Forales en el procedimiento de intercambio automático de información establecido en la Directiva 2004/48/CE. Hemos propuesto al Ministerio de Hacienda que se designe a las Diputaciones Forales como «autoridad competente» a efectos de la aplicación de la Directiva y que tal calificación sea notificada a la Comisión.

2. Las Diputaciones Forales deben participar de los ingresos que Austria, Bélgica y Luxemburgo transfieran al Estado español en concepto de retenciones sobre rendimientos del ahorro satisfechos por agentes pagadores establecidos en estos países a beneficiarios efectivos residentes en el Estado español (75% de las retenciones).

Evidentemente, la consideración de las retenciones practicadas a personas físicas con residencia habitual en territorio vasco como pagos a cuenta del IRPF (introducida a través de las normas forales de medidas tributarias para 2004, con efectos 1-1-2005) afecta a las Diputaciones Forales minorando sus ingresos fiscales por el Impuesto.

Aunque en la práctica no lo harán (la retención es la contrapartida a la «opacidad» de los rendimientos obtenidos), los contribuyentes pueden consignar en sus declaraciones por IRPF unas retenciones que no han sido ingresadas en las respectivas Diputaciones Forales, sino en Austria, Bélgica o Luxemburgo. Una parte de esas retenciones (75%) será transferida al Estado español, junto con las retenciones correspondientes a los residentes en territorio común, no siendo factible la diferenciación entre las correspondientes a residentes en el País Vasco y las de residentes en territorio común dada la opacidad de sus perceptores.

Se genera en consecuencia un déficit fiscal para las Diputaciones Forales que procede equilibrar mediante la imputación al País Vasco de un porcentaje de los ingresos transferidos al Estado español.

La propuesta que hemos planteado al Ministerio de Hacienda es que mediante acuerdo de Comisión Mixta de Concierto Económico se establezca la participación del País Vasco en un porcentaje de las transferencias recibidas por el Estado español en aplicación de lo dispuesto en el artículo 12 de la Directiva 2003/48/CE. Proponemos la utilización del índice de imputación establecido en la metodología de cálculo del Cupo (6,24%).

Por último, en relación con esta Directiva, han de introducirse las modificaciones normativas oportunas que faculten a las Diputaciones Forales para la expedición de los

certificados de residencia a que se refiere el artículo 13 de la Directiva, cuando así se lo soliciten las personas físicas con residencia habitual en territorio vasco. El referido artículo contempla la posibilidad de que los tres Estados que aplican la retención a cuenta no la exijan si el beneficiario efectivo remite a su agente pagador un «certificado de residencia» expedido a su nombre por la autoridad competente del Estado miembro de residencia.

## 2. Establecimiento de punto de conexión en el Impuesto Especial sobre el Carbón

La Ley 22/2005, de 18 de noviembre, por la que se incorporan al ordenamiento jurídico español diversas directivas comunitarias en materia de fiscalidad de productos energéticos y electricidad y del régimen fiscal común aplicable a las sociedades matrices y filiales de Estados miembros diferentes, y se regula el régimen fiscal de las aportaciones transfronterizas a fondos de pensiones en el ámbito de la Unión Europea (BOE núm. 277, de 19 de noviembre de 2005) *crea un nuevo impuesto especial, el Impuesto Especial sobre el Carbón, que no se incluye en la categoría de impuesto especial de fabricación.*

En realidad, de acuerdo con el Concierto Económico, el Impuesto sobre el Carbón, al definirse como *impuesto especial*, nace ya con el carácter de tributo concertado. Así el artículo 33.Uno del Concierto establece que: «*Los Impuestos Especiales tienen el carácter de tributos concertados que se regirán por las mismas normas sustantivas y formales establecidas en cada momento por el Estado*». Sin embargo, es necesario concertar este nuevo impuesto para acordar el punto de conexión que delimite la competencia normativa y exaccionadora de una y otra Administración.

Este impuesto apenas tendrá efectos recaudatorios. La práctica totalidad del consumo de carbón queda cubierta por los supuestos de no sujeción o de exención, pero las obligaciones formales inherentes al impuesto (presentación de declaraciones trimestrales o del resumen de actividades anual) obligan a fijar los criterios de distribución competencial. El hecho imponible del impuesto es la puesta a consumo a disposición del adquirente o el autoconsumo del carbón. El tipo de gravamen es de 0'15 euros por gigajulio.

A la hora de acordar un punto de conexión hemos propuesto al Ministerio valorar especialmente la simplificación de las obligaciones de los contribuyentes y la sencillez en la gestión del impuesto. Se propone el mismo criterio que la normativa estatal utiliza para determinar la inscripción en el registro territorial. Desde un punto de vista de gestión, nos parece el más compatible con la regulación estatal.

De este modo, correspondería a las DD.FF. la exacción de las cuotas correspondientes a operaciones sujetas al impuesto relativas a establecimientos inscritos en las DD.FF., es decir:

i) que el lugar de consumo es el País Vasco, cuando se trate de adquirentes de producto comunitario.

ii) que el lugar de almacenamiento radique en el País Vasco, cuando se trate de revendedores de producto comunitario.
iii) que el domicilio fiscal radique en el País Vasco, cuando se trate de revendedores que no posean instalaciones de almacenamiento.
iv) que la unidad de producción radique en el País Vasco, cuando se trate de productores/extractores de carbón.

En este sentido y al objeto de concertar este impuesto hemos propuesto al Estado la modificación del artículo 33 del vigente Concierto Económico, añadiendo un nuevo apartado al mismo con el citado contenido, que explicita los puntos de conexión del impuesto.

## 3. Modificación del Concierto Económico para delimitar la tributación del nuevo régimen especial del IVA de Grupos de Entidades

La Ley 36/2006, de 29 de noviembre, de Medidas para la prevención del fraude fiscal, ha creado un nuevo régimen especial en el IVA, denominado de Grupo de entidades. Inicialmente no se contemplaba el nuevo régimen especial en la Ley, pero su regulación se incorporó mediante enmienda en el Senado. El nuevo régimen no entrará en vigor hasta el 1 de enero de 2008 y necesita de un desarrollo reglamentario todavía pendiente de realización.

Mediante este nuevo régimen especial se pretende básicamente, que estos «grupos de entidades», definidos de forma similar a los grupos fiscales en el ámbito del Impuesto sobre Sociedades, se beneficien de un régimen de declaración-liquidación consolidada, de forma que la entidad dominante sea la responsable de ingresar o solicitar la compensación o devolución del conjunto de los sujetos pasivos integrados en el Grupo.

El IVA a ingresar o a compensar/devolver se determina únicamente en relación con las operaciones del Grupo frente a terceros, y no por referencias a operaciones intra Grupo que realicen cada una de las entidades miembros. Se evita así que unas sociedades deban ingresar lo que a otras les sale a compensar o devolver, aplicándose una compensación automática intra Grupo. Las entidades que forman parte del Grupo deben seguir cumpliendo con sus obligaciones respecto del impuesto.

Por otra parte el régimen contempla una modalidad «ampliada» que requiere un sistema de contabilidad complejo para controlar los costes de las operaciones intra Grupo.

El Concierto Económico, en sus artículos 27, 28 y 29, prevé los puntos de conexión aplicables en el IVA entre el Estado y el País Vasco, prevé reglas de localización de las operaciones y reglas para la distribución, en exclusiva o en proporción al volumen de operaciones realizado en cada territorio, de la cuota del impuesto. Prevé asimismo reglas para determinar la Administración competente para la inspección del impuesto.

Lo que el Concierto no prevé, obviamente, es criterio o regla alguna para la aplicación de este nuevo régimen por parte de los grupos de entidades que comiencen a operar en ambos territorios.

Nosotros entendemos que el nuevo régimen exige una modificación del artículo 27 del Concierto Económico referente a la exacción del IVA, para recoger el nuevo régimen y evitar las posibles deslocalizaciones del Impuesto debida a la integración de empresas vascas en el citado régimen de Grupos de entidades.

La propuesta de modificación sería que las sociedades dependientes con domicilio fiscal en el País Vasco y volumen de operaciones superior al 25% se excluyan de estos grupos de entidades y tributen individualmente a cada Administración tributaria.

La aparición de un nuevo régimen en el IVA es un tema técnicamente complejo. Habrá que ver qué «grupos de entidades» se acogen a este régimen del IVA y si se producen traslados de tributación de los Territorios Históricos al territorio común o viceversa.

## 4. Modificación de la capacidad normativa en el Impuesto Especial de Determinados Medios de Transporte (IEDMT)

La Ley 25/2006, de 17 de julio, modifica en su artículo cuarto la Ley 21/2001, de 27 de diciembre, por la que se regulan las medidas fiscales y administrativas del nuevo sistema de financiación de las Comunidades Autónomas de régimen común y Ciudades con Estatuto de Autonomía. La modificación del artículo 43 de la Ley 21/2001 que regula el alcance de las competencias normativas permite elevar del 10% al 15% el tipo de gravamen y establece la facultad de las CC.AA. de régimen común de incrementar el tipo impositivo del IEDMT respecto al tipo fijado por el Estado.

En relación con el IEDMT, el Concierto Económico establece en el segundo párrafo del artículo 33. Tres que «… las Instituciones competentes de los Territorios Históricos podrán incrementar los tipos de gravamen hasta un máximo del 10 por ciento de los tipos establecidos en cada momento por el Estado».

Esto significa que, la aplicación de esta medida en el ámbito foral (de manera que las Diputaciones Forales puedan incrementar los tipos de gravamen del IEDMT hasta un 15% en relación con el tipo fijado por el Estado) requiere necesariamente la modificación del Concierto Económico.

## 5. Nuevos acuerdos de cooperación en materia de IVA e Impuestos Especiales de Fabricación

Aunque estos nuevos acuerdos no exigen modificación del texto legal del Concierto sí exigen la modificación de Acuerdos adoptados en Actas de Comisión Mixta de Cupo de 17 de diciembre de 1992 recogido en el Anexo II del Acta nº 2/1992 «Acuer-

do sobre aplicación en el Estado español del Reglamento CEE nº 218/92 sobre cooperación administrativa en materia de IVA» y del Anexo III «Acuerdo de cooperación administrativa en materia de Impuestos Especiales de Fabricación» del Acta 1/1997, de 27 de mayo de 1997.

## 6. Elevación de la cifra de volumen de operaciones que determina la tributación exclusiva a la Administración del domicilio fiscal

La propuesta es consecuente con lo establecido en la Disposición Adicional Sexta del Concierto (actualización al menos cada cinco años). En 2007 se cumplen cinco años desde la última actualización de la cifra del volumen de operaciones que delimita la tributación compartida o exclusiva (elevación de 500 millones de pesetas a 6 millones de euros coincidente con la renovación del Concierto en mayo de 2002).

Para la determinación de la nueva cifra pueden servir de referencia dos indicadores:

i) la definición de pequeña empresa aprobada por la Comisión Europea a partir de 1 de enero de 2005, volumen de negocios de 10 millones euros.
ii) la cifra neta de negocios que en territorio común sirve para acotar el régimen de pymes en el Impuesto sobre Sociedades, 8 millones de euros (aplicable desde 1-1-2005).

## 7. Acuerdo sobre Gasóleo profesional

El artículo cuarto de la Ley 36/2006, de 29 de noviembre, de medidas para la prevención del fraude fiscal que modifica la Ley 38/1992, de 28 de diciembre, de Impuestos Especiales, introduce en ésta un nuevo artículo 52 bis en el que se reconoce el derecho a la devolución parcial del Impuesto sobre Hidrocarburos satisfecho o soportado respecto del gasóleo de uso general que haya sido utilizado como carburante en el motor de los vehículos mencionados en dicho artículo. Se refiere al denominado gasóleo profesional.

Después de las negociaciones habidas en grupos de trabajo con el Ministerio de Hacienda se ha consensuado aplicar el domicilio fiscal del transportista para la devolución del impuesto.

En este sentido hemos propuesto añadir una D.T. al texto del Concierto Económico con el siguiente contenido:

**Disposición Transitoria Octava**

Las devoluciones parciales en el Impuesto sobre Hidrocarburos derivados del establecimiento del tipo reducido especial al gasóleo utilizado como carburante para fines profe-

sionales que autoriza la Directiva 2003/96/CE del Consejo, de 27 de octubre de 2003, por la que se reestructura el régimen comunitario de imposición de los productos energéticos y de la electricidad, se efectuarán por la Administración correspondiente al domicilio fiscal del beneficiario de dichas devoluciones.

## 8. Devolución extraordinaria del Impuesto sobre Hidrocarburos a los agricultores y ganaderos

La Disposición Adicional Primera de la Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios, reconoce el derecho a la devolución extraordinaria de las cuotas del Impuesto sobre Hidrocarburos, satisfechas o soportadas por los agricultores y ganaderos con ocasión de las adquisiciones de gasóleo que hayan tributado por el Impuesto sobre Hidrocarburos al tipo impositivo del epígrafe 1.4 de la Tarifa 1ª del artículo 50.1 de la Ley 38/1992, de 28 de diciembre, de Impuestos Especiales y que hayan sido efectuadas durante el período comprendido entre el 1 de octubre de 2005 y el 30 de septiembre de 2006.

La aplicación del criterio establecido en el apartado dos del artículo 33 del vigente Concierto Económico no resulta eficiente en estos supuestos que el punto de conexión se corresponde con el domicilio fiscal del agricultor o ganadero beneficiario de la devolución, por lo que hemos propuesto la modificación del Concierto Económico, añadiendo una Disposición Transitoria con el siguiente texto:

«Las devoluciones extraordinarias del Impuesto sobre Hidrocarburos para agricultores y ganaderos derivados de la aplicación de medidas para paliar el incremento de costes de los insumos en la producción sufridos en el sector agrario, se efectuarán por la Administración correspondiente al domicilio fiscal del beneficiario de dichas devoluciones.»

## Conclusión

Estas propuestas de modificación de texto del vigente Concierto Económico, que os he comentado, son de orden técnico. Puede decirse que no son de gran relevancia. Quizá la más importante por su posible impacto cuantitativo sea la relativa al régimen especial de Grupos de Entidades en el IVA.

Sin embargo la inclusión de estas modificaciones en el texto del Concierto, supondrá una mejora de la institución, una actualización del mismo, que evitará distorsiones en la aplicación de los sistemas tributarios que conviven en el Estado español. Se evitan riesgos de obsolescencia o carencias en la aplicación de los tributos por los operadores económicos.

Ello contribuirá a que la institución del Concierto esté un poco más asentada de cara al futuro.