THE POWER TO TAX WITHOUT DUE PROCESS OF LAW

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Abstract

This paper provides a case-study analysis that allows the highlighting of any inconsistencies or unequal treatment in adjudication procedures in tax matters, a sector particularly interesting and fruitful for an investigation concerning the tricky balance between the requirements of taxation and the protection of the freedoms and rights of the individual. First of all, tax is not a subject of harmonisation, so the procedural autonomy of the states is even more marked insofar as it is grafted on to a standardisation that varies greatly between the various states. Moreover, in this case European law interfaces with a traditional sort of administration rather than with a national regulatory authority. The methodology used is inductive, starting from an empirical analysis which considers both normative data, and a number of important and recent judgments of the Court of Justice, selected using the criterion of the invoked applicability of the right to be heard in disputes in tax matters. Both national proceedings in implementation of EU law, and composite proceedings in which tax administrations from various Member States intervene are included, in order to highlight any discrepancies related to the type of proceedings adopted.

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1. Introduction[1]

Chief Justice John Marshall said it very clear in the famous Supreme Court case, McCulloch v. Maryland: "The power to tax involves the power to destroy"[2]. When the government exercises its power to tax[3], it is crucial that it may be limited by some constitutional restraint. One of the most important restraint in fiscal adjudication procedures is the respect of the due process of law.

This study is aimed at developing a case study analysis that allows the highlighting of any inconsistencies or unequal treatment in adjudication procedures in tax matters.

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[2] McCulloch v. Maryland, 17 U.S. 327 (1819).

[3] On the power to tax, G. Brennan & J.M. Buchanan, *The Power to Tax: Analytic Foundations of a Fiscal Constitution* (1980), in which the Authors suggest a new paradigm of how governments do behave, considering the power to tax from the perspective of the taxpayers.

This sector, often overlooked by scholars of public law, instead appears to be particularly interesting and fruitful, since it has always represented a field of choice for the tricky balance between the requirements of taxation and the protection of the freedoms and rights of the individual[4].

First of all, tax is not a subject of harmonisation, so the procedural autonomy[5] of the states is even more marked insofar as it is grafted on to a standardisation that varies greatly between the various states.

Moreover, in this case European law interfaces with a traditional sort of administration rather than with a national regulatory authority.

The methodology selected is inductive, therefore the study will start from an empirical analysis, which will not be limited to a survey of the normative data, but will take into consideration a number of important and recent judgments of the Court of Justice.

The selective criterion used to identify the relevant cases was that of the invoked applicability of the right to be heard in disputes in tax matters.

With respect to the type of proceedings being investigated, it was decided to include both national proceedings in implementation of EU law, and composite proceedings in which tax administrations from various Member States intervene, in order to highlight any discrepancies related to the type of proceedings adopted.

This phenomenological analysis will allow us to delineate the concrete explication of one of the most important institutions

[4] As recently affirmed by the European Court of Human Rights, "tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant", European Court of Human Rights, Grand Chamber, 12 July 2001, *Ferrazzini vs. Italy*, appeal no. 44759/98, para. 29. Furthermore, it is known that the Court over time has shown a degree of reluctance to enforce Article 6 of the ECHR in the tax area. P. Craig defined as "complex and unsatisfactory" the criteria developed by the Court to establish the applicability of Article 6 of the ECHR, in the essay *The Human Rights Act, Article 6 and Procedural Rights*, in Public Law, 2003, 753, the quotation is from p. 754. On the applicability of Article 6 of the ECHR to administrative proceedings, see M. Allena, *Art. 6 CEDU. Procedimento e processo amministrativo* (2012).

[5] On procedural autonomy of member States see D.U. Galetta, *L'autonomia procedurale degli stati membri dell'Unione Europea: Paradise Lost?* (2009).

for the protection of individuals, namely the right to a hearing, in tax matters.

2. Empirical analysis

2.1. National procedures for the implementation of European Union law

2.1.1. The *Sopropè* judgment and its (partial) transposition at national level

The Sopropè company imports footwear from the Far East. By virtue of the generalised system of preferences provided for by European legislation, goods from some countries are subject to lower customs duties. In the early 2000s, Sopropè was involved in 52 operations importing footwear, declaring that they were from Cambodia, a country that benefits from the preferential customs treatment. Subsequently, the anti-fraud services of the Portuguese customs authorities (as part of an administrative cooperation mission initiated by the European Anti-Fraud Office – OLAF) launched an investigation to verify the true source of the merchandise. At the end of the control procedure, the customs authority formed the view that the certificates of origin were falsified, and therefore the footwear should not have benefited from the preferential rates.

The administration informed Sopropè of its intention to issue a post-dated recovery measure for the duty, giving the company an eight-day deadline to present its point of view. The company exercised its right, but the authority considered that the documentation produced was not persuasive, and, five days later, issued the recovery measure for the customs duties.

Sopropè appealed against this act both in the first instance (where it was unsuccessful) and at appeal, during which the *Supremo Tribunal Administrativo* decided to suspend proceedings to refer two questions to the Court of Justice of the European Union on the interpretation of the principle of respect for the rights of the defence.

The rules relevant to the case in question are two, one of European origin, the other national. The first is the Community

Customs Code then in force[6], the second is the general Portuguese tax law[7]. For the purposes of the case under consideration, it should be noted that the Community Customs Code in force at the time of this case did not provide for any right of participation for the individual before a decision was made regarding them.

The defensive acts of the Italian Republic, intervening in trials, are mainly aimed at highlighting that EU legislation for the sector does not provide for any right of the taxpayer to be heard during the procedure aimed at establishing the recovery of customs duties.

On the contrary, national law enshrined the right of the taxpayer to participate in tax proceedings, regulating in detail the procedures for exercising this right. In particular, Article 60 of the Portuguese tax law provides for the obligation to notify the taxpayer of the "the draft findings in the report" if, at the end of the investigation, the tax authority intends to issue an unfavourable provision for the taxpayer. This notification has to indicate, in addition to the draft order accompanied by the reasons, "a period of 8 to 15 days to allow the body which has been the subject of the inspection to express its opinion on the draft findings" (Article 60, para. 2).

Sopropè complained about an infringement of its right of defence, given that it had only been granted eight days to present its observations with regard to as many as 52 import transactions which took place over a period of two-and-a-half years. Furthermore, the Portuguese tax authorities had issued the provision to recover customs duties only five days after receiving Sopropè's observations, a circumstance which led to doubts that the administration had adequately considered the observations filed.

With the *Sopropè* judgment[8], the Court of Justice interpreted the principle of respecting the rights of defence, providing very important clarifications under three distinct profiles.

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[6] Reg. (CEE) no. 2913/92 of the Council of 12 October 1992, which establishes a Community Customs Code, as amended by Reg. (CE) no. 2700/00 of the European Parliament and the Council of 16 November 2000.

[7] The general tax law of Portugal, approved by law by decree no. 398 of 12 December 1998.

[8] Court of Justice, 18 December 2008, *Sopropè*, case C-349/07. It is interesting to note that the Court decided to define the case without the opinion of the

Firstly, the Court of Justice stated that the principle of the right to a hearing must be respected whenever the administration intends to adopt "a measure which will adversely affect an individual", since respect for the rights of defence constitutes a general principle of European Community law (para. 36). On this point, the Court declared it was inspired by shared constitutional traditions, while it did not recall Article 41 of the Charter of Fundamental Rights (at the time of the facts of the case the Charter had still not assumed the same legal value as the Treaties, but it had already been initialled).

Secondly, the Court specified that the obligation to hear the recipients of decisions lies with the authorities even if EU sectoral legislation did not expressly provide for this (para. 38).

Thirdly, the Court clarified that respect for the rights of defence required that the recipient of the provision should be able to "effectively" express their point of view, therefore the administration must examine with all the necessary attention, the observations of the person involved (para. 50).

The Sopropè judgment was greeted very favourably by many commentators, who for some time had been highlighting the lack of guarantees to protect the individual in tax proceedings[9].

Instead, the innovativeness of this suspension led to a different reaction in the national tax court, which was concerned with limiting its applicability in order to avoid a general fall in all post-dated recovery measures. In fact, in Italian law, there is no provision for taxpayers being heard prior to the issue of the provision for the recovery of duties. The principle established by the Court of Justice in the Sopropè judgment would therefore have led to the annulment of all the acts of the national customs

Advocate General, a circumstance which usually occurs when the judgment is part of a consolidated case law of the EUCJ, while the *Sopropè* judgment is decidedly innovative.

[9] By way of example, cf. M. Gambardella, D. Rovetta, *Principi generali del diritto comunitario, diritto di difesa e obbligazione doganale:cosa cambia nell'ordinamento nazionale in seguito alla sentenza della corte di Giustizia nel caso C-349/07*, in Dir. Prat. Trib., 4/2009 783; S. Marchese, *Diritti fondamentali europei e diritto tributario dopo il Trattato di Lisbona*, in Dir. Prat. Trib., 1/2012 241; Id., *Attività istruttorie dell'amministrazione finanziaria e diritti fondamentali europei dei contribuenti*, in Dir. prat. trib., 3/2013 493; A. Marcheselli, *Indefettibilità del contraddittorio in ogni accertamento tributario*, in Corr. Trib., 30/2012 2315.

authorities, with obvious repercussions on the Community budget.

To avoid this, the Court of Cassation[10] stated that the principles of the Sopropè judgment cannot be applied to previously issued acts, thus excluding retroactive applicability. This decision, which constitutes an exception to the general retroactive applicability of the judgments of the Court of Justice[11], was justified by pointing out that "the principle stated by the Court concerns a procedural formality whose generalised compliance was not required by the practices of the European Commission". The Supreme Court also recalls the protection of the custody of the customs authorities and European financial needs[12].

Therefore, at national level, the court of last instance considers that an interpretive ruling by the Court of Justice respecting the rights to a defence is not applicable retroactively. To justify this limitation of the scope of a decision by the European court, the national court refers to the need to protect a fundamental resource of the Community budget. In this way, the

[10] Cass., sez. trib., 9 April 2010, no. 8481.

[11] This decision of the Court of Cassation causes a degree of perplexity, as the temporal delimitation of the effects of judgments of the Court of Justice can be established only by the Court of Justice itself. Moreover, this temporal circumscription of the effects cannot contrast with the fundamental principle of judicial protection established by Article 24 of the Constitution, as can be seen from the judgment no. 232 of the Const. Court of 1989, regarding which cf. V. Angiolini, N. Marzona, *Diritto comunitario diritto interno: effetti costituzionali e amministrativi*, (1990), spec. 32 ff. The binding nature of the interpretive judgments of the Court of Justice has been recognised by the Constitutional Court since 1985, with judgment no. 113. On the evolution of constitutional and EU case law as well as on their relationship, we limit ourselves to referring to F. Sorrentino, *Profili costituzionali dell'integrazione comunitaria* (1996).

[12] "Considering that the application of the principle to the proceedings underway would result in a general annulment of any customs decision unfavourable to the importer, with very severe repercussions on a fundamental resource of the Community budget, this Court considers that the preference (not necessarily determined by an active behaviour on the part of Community organs) of the national customs authorities for a Community practice that did not consider it necessary to ensure the right to a hearing in the administrative phase, cannot result, for customs decisions taken before the Sopropè ruling, in the invalidity of such acts". Cass., Sez. trib., 9 April 2010, no. 8481.

administrative authorities prefer a previous Community practice to the protection of the right to a hearing.

2.1.2. The legitimacy of postponing the right to a hearing to a subsequent phase of the claim, the *Kamino* judgment

It is not only the national court that reshapes the applicability of the rights of defence as set out in the *Sopropè* judgment. The same Court of Justice does so in a subsequent decision again related to the post-dated recovery of customs duties.

In the ruling issued on 3 July 2014 in the combined cases C-129/13 (*Kamino*) and C-130/13 (*Datema*), the European court took significant steps backwards, legitimising national laws that provide for the right to a hearing only in a subsequent phase of the process against the provision of the customs authority[13].

The two companies are customs agents who imported goods described as "garden pavilions/party tents", applying the rate of 4.7% for "garden umbrellas". Two years after the import operations, the Dutch customs authorities maintained that the goods in question should be classified as "tents and camping goods" for which the rate is 12.2%, and then requesting the recovery of the duties. Neither company was heard prior to the issuing of orders for payment

Both companies challenged the measure complaining about the lack of opportunity to usefully express their point of view before a damaging act was adopted against them, being unsuccessful both in the administrative complaint, and in the first two degrees of proceedings before the Dutch courts. During the Cassation hearing, the *Hoge Raad der Nederlanden* made a preliminary reference to the Court of Justice, recalling the principle of the respect for the right to a hearing expressed in the *Sopropè* judgment.

The relevant European law for the case is again the customs code in force until October 2013[14]. This establishes that the

[13] On the difference between a pre-deprivation hearing and a post-deprivation hearing, highlighting that the temporal factor is crucial for preventing the harm, R.M. Lipton, *Procedural Due Process in Tax Collection: An Opportunity for a Prompt Postdeprivation Hearing*, 44 U.Chi.L.Rev. 594 1976-1977.

[14] The new Customs Code of the Union, established by Reg. (EU) no. 952/2013, of the European Parliament and Council, of 9 October 2013, instead provides for

calculation of the duties to be recovered must take place within two days from the moment in which the customs authority realises that it is necessary to recalculate the amount (Article 220, para. 1, of the Customs Code). This decision must then be communicated to the debtor. It has already been pointed out that the European legislation previously in force provided no obligation for the customs authority to hear the recipient before issuing the recovery measure. Moreover, as clearly stated by Advocate General Wathelet, "That mandatory time-limit of two days is difficult to reconcile with the obligation to hear the interested party prior to the decision to enter the amount of duty to be recovered in the accounts"[15].

The Dutch law on administrative procedure[16] affirms the right to be heard before a potentially injurious provision is enacted (Article 4.8). However, in proceedings aimed at constituting an obligation of a financial nature, the right to a hearing may be disregarded, provided that the final order can be re-examined at administrative level – during which the person concerned has to be heard – in such a way as to allow for the complete elimination of the negative consequences of the act (Article 4.12).

Furthermore, in a way that is partially similar to what is foreseen in Italian law, the administrative authority at the time of the complaint can confirm a decision taken in violation of a rule or

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the right to be heard. Recital 27 states "In accordance with the Charter of Fundamental Rights of the European Union, it is necessary to provide, in addition to the right to appeal against the decisions taken by the customs authorities, the right of every person to be heard before a decision is taken which could harm them". As a consequence, Article 22, para. 6 of the Code states that "Before making a decision that has unfavourable consequences for the applicant, the customs authorities shall communicate the reasons on which they intend to base the decision to the applicant, who is given the opportunity to express their point of view within a given term from the date on which the applicant receives the communication or is deemed to have received it". This article applies only to decisions taken on request.

[15] Para. 52 of the Conclusions presented by Advocate General Melchior Wathelet on 25 February 2014 in the united cases C 129/13 and C 130/13, Kamino International Logistics BV (C 129/13), and Datema Hellmann Worldwide Logistics BV (C 130/13) against Staatssecretaris van Financiën.

[16] The *Algemene Wet Bestuursrecht*, of 4 June 1992.

general principle if this violation did not cause harm to the interested parties (Article 6.22).

Therefore, in this case, neither European law nor national law provide for the right of the interested party to be heard before a provision for the recovery of customs duties is issued against them.

Furthermore, since the measures in question date back to 2005, the Charter of Fundamental Rights, which only came into force in 2009, does not apply.

The Court of Justice, after recalling that respect for the rights of defence is a fundamental principle of EU law, of which the right to be heard in any proceedings is an integral part[17], comes to a conclusion that seems to contradict the principle just stated.

The reasoning followed by the Court is based on the observation that fundamental rights – and among these the respect for the rights of defence – are not "unfettered prerogatives" (para. 42 of the decision), but may be subject to restrictions.

Such restrictions may be justified on condition that they pass a double test of legitimacy: on the one hand, they must pursue objectives of general interest; on the other, they must be proportionate.

Given this conceptual starting point, the Court of Justice intends to verify whether, in the cases submitted to its examination, the limitation of the rights to defence is justifiable.

So, in the premises to this analysis of justification, the Court betrays a partial approach, when it defines the functional profile of the right to be heard. Indeed, in illustrating the scope of the right to a hearing, the Court emphasises only its collaborative connotation ("to enable the competent authority effectively to take into account all relevant information", para. 38), overlooking the truly defensive and participatory-democratic components.

The effect of this imposition reverberates in the subsequent implementation of the double test of legitimacy performed on the limitations to the right to be heard.

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[17] Para. 28 of the *Kamino* judgment, recalling the *Sopropè* ruling on tax matters and the *M. M. vs. Minister for Justice, Equality and Law Reform* judgment of 22 November 2012, case C-277/11 concerning the recognition of refugee status.

With regard to the general-interest objectives that have to be pursued, the Court places them in the general interest of administrative simplification, which in this case is expressed in the interest of the European Union "in recovering its own revenue as soon as possible" (para. 54). On this point, curiously, the Court of Justice refers to the *Sopropè* judgment, even using the same words, to affirm that this general interest of the Union demands that the controls be carried out promptly. However, it seems appropriate to point out that in the *Sopropè* judgment this statement was made to justify the provision of a short term (between 8 and 15 days) for the taxpayer's exercise of their right to be heard. In this case, the legislation does not provide the right to a hearing at all, postponing it to some point after the act is issued. The Court, therefore, uses the same argument to justify two very different (if not opposed) situations: the interest in promptly recovering revenue is used the first time to justify a short deadline for the exercise of the rights of defence, reaffirmed in their existence, while the second time the Court of Justice uses the same argument to legitimise the lack of provision of a prior hearing.

With respect to the proportionality of the limitation, the Court considers that the deferment of the hearing to the complaint stage may be a proportionate measure to the interest of speeding up procedures, provided certain conditions are met. On this point, the Court refers to a previous judgment[18] with which it had deemed legitimate the imposition of a penalty in the absence of the right to a hearing because the filing of the appeal against the provision made it immediately unenforceable, initiating a process in which the recipient could fully express their right to be heard. Therefore, the immediate automatic suspension of the provision satisfactorily protected the interest of the taxpayer, who was allowed to express their position during the complaint phase.

In the wake of this case law, in the present case the European judge takes a further step towards the restrictions on due process in tax matters. In fact, in the *Kamino* judgment it is specified that in order for the deferment of the hearing to the complaint phase to be considered proportionate – and therefore legitimate – it is not necessary for the filing of the claim to have the effect of automatically suspending the act. It is sufficient – as

[18] Court of Justice, 26 September 2013, *Texdata Software*, case C-418/11.

in the case of Article 244, para. 2 of the Customs Code – that suspension might be granted when there are reasonable grounds for doubting whether the act conforms with the law or there is a risk of irreparable damage to the interested party.

Therefore, according to the Court of Justice, a subsequent hearing, in the context of an administrative appeal, is suitable to guarantee the right to be heard, provided that it is possible to suspend the execution of the provision, even if such a suspension is not automatic, but subject to certain conditions.

In the *Kamino* judgment, the right to a hearing is limited not only in its content (since it is not necessary that the right to a hearing takes place prior to the issuing of the act, a hearing being sufficient in the subsequent second-degree proceedings) but also in the effects connected to its possible violation. According to the Court of Justice a violation of the principle of respect for the rights of the defence involves the annulment of the decision in question only when, without such an infringement, the proceedings could have led to a different outcome (para. 80). Therefore, the failure to comply with a fundamental right, such as being heard before an offending act is adopted against them, entails the annulment of the act only if the proceedings could have had a different outcome if the interested party had been heard.

2.1.3. Limitations on the rights exercisable in the hearing, the *Unitrading* judgment

Shortly after the *Kamino* judgment, the Court of Justice again opined on the matter of the right to a hearing in proceedings for the recovery of customs duties, limiting the rights exercisable by the participants. The case arises from a dispute about the country of origin of the goods (as in the *Sopropè* judgment) in which the customs authority began the debate with the recipient of the provision. The latter, however, complained of a significant limitation of the rights that it could exercise during the procedural investigation.

The Unitrading company had released in free circulation a batch of fresh garlic heads, declaring they came from Pakistan, thus benefiting from a preferential rate. The Dutch customs authorities took a number of samples, and had them analysed by

the laboratory of the American customs authorities [19], who affirmed that it was actually Chinese garlic (to which a higher rate should apply).

Unitrading – in this case invited to participate in the proceedings – had presented three requests to the administration: to repeat the analysis at the American laboratory, to know the details and methodology of the analysis carried out by the American laboratory, and to have the samples examined at their own expense by another laboratory. Only the first of these three requests was granted. The American laboratory confirmed its analysis, refusing to provide any information about the operations they carried out. On the basis of this result, the authority issued a payment notice that Unitrading challenged both during the complaint and in court, after which the Dutch Court of Cassation made preliminary reference to the Court of Justice.

This case highlighted the rights exercisable by the interested parties during the procedure aimed at establishing the real origin of the goods placed on the market. Unitrading, although invited to participate, objected that it was unable to defend its point of view. Indeed, the customs authority based its measure solely on the result of the analyses carried out by the American laboratory, which refused to provide any information about the examinations carried out. This confidentiality was justified on grounds of national security, since it was "law enforcement sensitive information".

Thus, the applicant (as well as the customs authority itself that issued the act) knew nothing about the means and procedures adopted to establish the origin of the merchandise. This lack of information made it impossible to challenge the examination and, therefore, its result. Furthermore, the Dutch Government had denied Unitrading the possibility of having the remaining samples held by the administration examined at their own expense.

The Court of Justice stated that proof of the origin of imported goods can be based "on the results of an examination carried out by a third party, with regard to which that third party refuses to disclose further information *[...], as a result of which it is made difficult or impossible to verify or disprove the correctness of the*

[19] The laboratory of the US Department of Homeland Security, Customs and Border Protection.

conclusions reached, provided that the principles of effectiveness and equivalence are upheld"[20].

Furthermore, in accordance with the procedural autonomy of the Member States, the existence of the right of the interested party to carry out analyses at their own expense must be assessed solely on the basis of national law.

According to the European court, therefore, where the customs authority establishes the adversarial relationship with the taxpayer in proceedings for the post-dated recovery of customs duties resulting from a different country of origin being stated, European Union law and the protection of fundamental rights do not prevent, in principle, the proof of origin being based on analyses made by a third party whose accuracy cannot be verified or refuted (para. 32).

2.2. Composite proceedings, the *Sabou* judgment

Moving the point of view from national proceedings in implementation of EU law to composite proceedings[21] involving tax administrations from different Member States, taxpayers' rights certainly do not enjoy greater protection. In fact, with a recent ruling of the Grand Chamber aimed at interpreting the legislation on cross-border cooperation between the financial administrations of Member States, the Court of Justice stated that there was no obligation to inform the taxpayer or to invite the taxpayer to participate in the witness hearing[22].

The decision originates from the appeal by Mr Sabou against an assessment notice issued by the Prague tax office. Mr Sabou is a professional footballer who in his tax declaration for the year 2004 had deducted substantial expenses incurred in various European countries. These expenses were incurred during negotiations with a view to his transfer to a number of foreign clubs.

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[20] Court of Justice, 23 October 2014, *Unitrading Ltd*, case C-437/13, para. 30, emphasis added.

[21] For a comprehensive analysis of models (and problems) of composite procedures, see G. della Cananea, *The European Union's Mixed Administrative Proceedings*, 68 Law & Contemp. Probl. 197 2004.

[22] Court of Justice, 22 October 2013, *Sabou*, case C-276/12. It seems interesting to note that the Commission challenged the Court's jurisdiction to judge this case, as is apparent from the judgment reaffirming its jurisdiction.

The financial administration of the Czech Republic, doubting the veracity of these expenses, requested information from the tax authorities of the countries where the costs had been incurred (Spain, France, the United Kingdom and Hungary). In particular, the Czech Treasury asked their Spanish, French and British counterparts to contact the football clubs mentioned by Mr Sabou to ask them for confirmation of the negotiations, and they asked the Hungarian Treasury asked to verify the accounting of the company Solomon Group Kft for the invoices presented in connection with their brokerage activities with the foreign clubs.

The tax administrations replied that from their checks the foreign football clubs were unaware of the existence of Mr Sabou, and the Hungarian company was simply an intermediary for services provided by Solomon International Ltd. based in the Bahamas. On the basis of this information, the Czech authorities issue a notice of assessment that Mr Sabou opposed up to the Supreme Administrative Court, which made a preliminary reference to the Court of Justice.

The appellant complained of the infringement of his right to defence in multiple respects. Firstly, the Treasury had not informed him that it had requested the assistance of the foreign tax administrations, not allowing him to participate in the formulation of the inquiries. Secondly, he was not able to attend the witness hearings in the other states. Finally, from the answers provided, it was not possible to infer how the foreign administrations obtained their information[23], thus making it impossible for the taxpayer to challenge its accuracy.

Also in this case there are two relevant rules, one European, the other national.

The first is Directive 77/799/EEC on mutual assistance between the authorities of Member States in the field of direct taxation, which governs the exchange of information between tax administrations in order to allow proper a determination of income taxes. The directive deals with the relationship between the tax administrations of the Member States, establishing mutual

[23] Some administrations indicated the names of the people from whom the information had been requested, others referred generically to the football club. Furthermore, the methods for acquiring the information were not disclosed, whether by telephone, IT means or at a hearing.

obligations, while it does not deal with the relationship between taxpayers and administrations, therefore it does not attribute any rights to the interested parties.

The Czech legislation concerning the administration of taxes, in terms of its relevance here, grants for the taxpayer subject to tax assessment the right to question witnesses and experts during the hearing[24].

The Court substantially had to answer the question about whether or not the taxpayer has the right to be heard during the process of acquiring information from foreign tax authorities.

The Court considered three distinct sources of European law that could (abstractly) attribute such a right in this case, but came to the conclusion that none of them actually protected it.

First of all, obviously, Article 41 of the EU Charter of Fundamental Rights comes to the fore, the applicability of which is excluded for reasons of time, since the assessment notice was issued in May 2009 (para. 25 of the *Sabou* judgment).

Secondly, the Court examines the secondary legislation, or the European sector norms, to ascertain whether this attributes rights to taxpayers. Here too the answer is negative, since Directive 77/799/EEC regulates the exchange of information and the reciprocal obligations between the tax authorities of the States, and does not confer any rights on the interested parties (para. 36).

The third and last attempt to find a procedural right for the taxpayer is to have it descend from the principle of the protection of the rights of defence, thus making use of the general principles.

The Court recalls its own case law formed in the matter of composite proceedings, according to which the right to be heard constitutes a fundamental right[25]. However, the Court of Justice reiterates that this principle applies only to decisions by authorities that may have a negative impact on recipients[26].

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[24] Article 16, para. 4, lett. *e*) of *Zákon č. 337/1992 Sb., o správě daní a poplatků*.

[25] This refers to the judgment of the Court of Justice of 24 October 1996, *Lisrestal*, case C-32/95, on which we limit ourselves to referring to G. della Cananea (ed.), *Diritto amministrativo europeo. Principi e istituti* (2011) esp. 238 ff.

[26] This delimitation of the right to a hearing in tax matters reflects the orientation of the case law of Court of Justice in matters regarding the right to a hearing in general. In fact, the Court of Justice has over time reconstructed the right to be heard, limiting it to decisions that are potentially detrimental to the interested party. This approach was also accepted during the drafting of the

Therefore, the judge wonders whether the decision to request information from the treasury of another state constitutes an injurious act. On this point, the Court provides a rather apodictic reasoning, insofar as it limits itself to recalling the distinction in tax matters between the investigation phase – in which information is gathered – and the stage in which the right to a hearing must be guaranteed – which starts only with the rectification proposal.

From this it follows that the general principle of protection of the rights of defence does not apply to the request for information from another tax administration, even if the replies received form the basis of the assessment notices. Thus, the Court decided that EU law does not confer "on a taxpayer of a Member State either the right to be informed of a request for assistance from that Member State addressed to another Member State [...] or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State".

3. Morphology and functioning of the right to a hearing in adjudication proceedings in tax matters

From the phenomenological analysis carried out, it is clear that there can be a general agreement on the recognition – abstractly – of general principles, such as that of defence. However, there may be – and indeed there are – discrepancies in the sectoral discipline regarding the rights of the defence as well as in their concrete unfolding[27].

In the conclusions of one of the cases examined in this paper, Advocate General Kokott argued that "The constitutional traditions common to the Member States also have included a right to be heard in the context of administrative proceedings only

ReNEUAL Model Code, which provided for the right of all parties to be heard "before a decision is taken that has detrimental effects on them", Article III-23. For the text in Italian, cf. G. della Cananea, D.U. Galetta (eds), *Codice Reneual del procedimento amministrativo dell'Unione europea* (2016).

[27] On the point cf. C. Harlow, *At risk: National administrative procedure within the European Union*, in G. della Cananea, C. Franchini (eds), *Il diritto che cambia, Liber amicorum Mario Pilade Chiti* (2016) 31 ff., esp. 34.

in isolated cases and only recently"[28]. This statement appears questionable in its being formulated in such general terms[29].

In the more limited context of a sectoral analysis, such as the one carried out here on adjudication procedures in the tax area, there have indeed been particularly profound divergences both in the normative discipline of the right to a hearing and in its interpretive reconstruction by the Court of Justice in the light of general principles.

If administrative law in general presents itself as a two-faced Janus[30], since, on the one hand, it constitutes an instrument of control of power, and, on the other, it dictates the coordinates to allow the attribution and exercise of power, the authoritative side appears to prevail in tax matters. The needs of taxation can in some cases justify a different protection of the principle of the right to a hearing. However, "in a democratic society, taxation [...] is based on the application of legal rules and not on the authorities' discretion"[31].

The analysis carried out in this study has made it possible to highlight various inconsistencies and differences in treatment in adjudication procedures in the tax field. In particular, the critical issues that emerge in a more significant way regard the following four profiles.

3.1. Failure to provide the right to a hearing in European tax law

A first critical point is the fact that European regulations pertaining to the fiscal sector often do not provide for the right to

[28] Opinion of Advocate General Juliane Kokott delivered on 6 June 2013 in Case C-276/12, *Sabou*, para. 54, which refers to V. Kai-Dieter Classen, *Gute Verwaltung im Recht der Europäischen Union*, (2008).

[29] For a reconstruction of the *audi alteram partem* principle as a general one of the administrative procedure that has deep historical roots, cf. G. della Cananea, *Due process of law beyond the State* (2016) esp. 35 ff.

[30] As stated by M.P. Chiti, administrative procedures have to pursue a dual purpose, since they must at the same time "support the pursuit of the public interest while seeking to guarantee security for the affected individual". M. P. Chiti, *Are there the universal principles of good government?*, in Eur. Publ. L. 241 1/1995. The judgment quoted is on p. 247.

[31] Para. 7 of the dissenting opinion of Judge Lorenzon in the ECHR *Ferrazzini* judgment, cited in note 1.

be heard in proceedings, even when they are aimed at issuing damaging acts[32].

This gap is found both in regulations governing harmonised taxes (such as customs duties) and in directives governing administrative cooperation for non-harmonised taxes (such as direct taxes).

With regard to customs duties until just a few years ago, the European Customs Code did not provide for any right of the interested party to be heard before a damaging act was enacted against them[33].

In the area of direct taxation, Directive 77/799/EEC on mutual assistance between the tax authorities of Member States was concerned with defining the modalities for the exchange of information, as well as the mutual obligations of the financial administrations, without conferring any right on taxpayers. However, it has been seen that the process of requesting information can lead to unfavourable consequences for the interested party since it constitutes the basis for a possible assessment notice.

The absence of express provisions to protect the right to a hearing in proceedings has been dealt with in the area of customs duties, but not in cross-border administrative cooperation for the exchange of information for the proper determination of direct taxes. In fact, in this regard, there has been no impact at all with the repeal of Directive 77/799/EEC and its replacement with

[32] It might be interesting to consider that defence safeguards were provided even during the Age of inquistion, as demonstrated by M. Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 Am. J. Comp. L. 919 2012.

[33] As stated above in para. 2.1.1., the previous Customs Code did not provide for the right to a hearing before the issue of a post-dated recovery of customs duties. The new European Union Customs Code (UCC) approved with Reg. (EU) no. 952/2013 provides for the right to be heard, regarding which cf. above, note 10. Furthermore, in the Delegated Regulation (EU) 2015/2446 of 28 July 2015 of the Commission integrating the UCC, subsection 1 is dedicated to the "right to be heard", in which are established: the deadline within which the applicant can express their point of view before a decision is taken which might have negative consequences for them, set at 30 days (Article 8), the means for communicating the reasons (Article 9) and the exceptions to the right to be heard (Article 10).

Directive 2011/16/EU currently in force, since this does not grant taxpayers any rights either[34].

3.2. The (contradictory) case law of the Court of Justice and the Court of Cassation

A second profile of criticality can be found in case law (both European and national), which in the tax field reconstructs the right to be heard in a way that is not entirely consistent.

Starting from the case law of the Court of Justice, it can be seen, first of all, that some decisions appear partially contradictory in affirming the very existence of the right to a hearing. The *Sopropè* and *Sabou* judgments are two very significant examples. In both cases, the European law in question did not provide for the right to be heard, while this right was protected by the general tax laws of the states concerned. In both cases, for reasons of time, the Charter of Fundamental Rights could not be applied, therefore it was necessary to resort to the application of the general principle of protection of the rights of defence. But in the *Sopropè* judgment, the Court affirms the existence of the right to usefully express a point of view, whereas in *Sabou* this right is denied.

Furthermore, there is a discrepancy about the time when the right to a hearing has to be guaranteed. If, in the *Sopropè* case, the right to a hearing must precede the emanation of the damaging act, in the *Kamino* case a subsequent protection is considered legitimate, or the postponement of the right to a hearing until the complaint phase.

So too the functional profile of the right to be heard is not uniformly defined at European level, since sometimes the Court of Justice highlights the collaborative component ("to enable the competent authority effectively to take into account all relevant information", para. 38 of the *Kamino* judgment), overlooking out

[34] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation states in Recital 28 that "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". However, despite this statement of principle, the directive does not provide for any rights for taxpayers, being limited to the regulation of relations between financial administrations.

the properly defensive component which emerges instead with greater clarity in the conclusions of the Advocates General[35].

Finally, with regard to the effects deriving from the infringement of the right to a hearing, the CJEU admits that these are defined by national law; the useful effect of EU law does not require that flawed measures are always annulled. An infringement of the rights of the defence would involve the annulment of the damaging act only if the appellant proves that the act could have had a different content[36] (*Kamino* judgment, para 80).

Also on the national side, the case law of the court of last instance appears to be not without contradictions and critical issues.

It has already been pointed out that the Court of Cassation first affirmed – in a questionable manner – the non-retroactivity of the *Sabou* judgment with which the Court of Justice recognised the general validity of the right to be heard in tax-related matters.

Subsequently, with various judgments of 2014, the Supreme Court recognised the right to be heard as a fundamental principle of EU law, which must therefore also be guaranteed in tax matters regardless of whether it is expressly provided for by sectoral regulation[37].

However, this orientation was partially disregarded only a year later. Indeed, with a ruling in 2015 by the Joint Session, the Supreme Court ruled that in the Italian legal system there is a

[35] For example, cf. the Opinion of Advocate General Juliane Kokott presented on 6 June 2013 in Case C-276/12, *Sabou*, para. 55.

[36] The issue of the non-annullability of the measure adopted in violation of the rules on the procedure is examined here under the specific profile of the failure to provide the right to a hearing on tax matters. For the general terms of the question, cf.: V. Parisio (ed), *Vizi formali, procedimento e processo amministrativo* (2004) esp. the essay by F.G. Scoca, *I vizi formali, nel sistema delle invalidità dei provvedimenti amministrativi*, 55; D. Corletto, *Vizi formali e poteri del giudice amministrativo*, in Dir. Proc. Amm. 33 2006; for a comparative framing of the issue with German and European law, D.U. Galetta, *Violazione di norme sul procedimento amministrativo e annullabilità del provvedimento*, (2003); for an analysis of the current national legislation, also in relation to EU law and Article 41 of the Charter, P. Provenzano, *I vizi nella forma e nel procedimento amministrativo. Fra diritto interno e diritto dell'Unione europea* (2015), which also provides a comparative analysis with German and Spanish law.

[37] Cf. Cass., SS. UU., 18 September 2014, no. 19667 and no. 19668; Cass., Sec. V, 5 December 2014, no. 25759.

general right to a hearing in tax matters only for harmonised taxes, or when the tax administration directly applies EU rules. On the contrary, when the administration initiates a proceeding aimed at adopting a provision detrimental to the taxpayer's rights under a national rule, there is no general obligation to hear the taxpayer – and this non-hearing will result in the nullity of the act only if a specific provision explicitly foresees this. This decision of the Court of Cassation derives from the observation that in the European agreement there is a general right to a hearing also in the tax field, the violation of which involves the lapse of the act; instead "the national law, with the legislation of today, does not give the fiscal administration that is preparing to adopt a provision prejudicial to the taxpayer's rights, in the absence of a specific prescription, a general obligation of the right to a hearing during proceedings, leading, in case of violation, to the invalidity of the act"[38]. In the national context, therefore, the taxpayer would always have the right to be heard before the administration adopts an injurious measure in the matter of VAT or customs duties, while they would not have the same right – unless the sectoral regulation expressly provides for it – concerning IRES (corporation tax) or IRAP (regional business tax). This orientation of the Supreme Court raises delicate questions with respect to

[38] Cass., SS. UU., 9 December 2015, no. 24823. The quoted text is contained in the principle of law enunciated by the judgment, which continues: "It follows that, in terms of "non-harmonised" taxes, the Administration's duty to activate the right to a hearing within the proceedings, under the penalty of the invalidity of the act, exists exclusively in relation to the hypotheses for which such an obligation is specifically sanctioned; while in the matter of "harmonised" taxes, where the direct application of the law of the European Union takes place, the violation of the obligation of the right to a hearing within the proceedings on the part of the administration implies in any case, including in the tax field, the invalidity of the act, provided that, in judgment, the taxpayer expresses concretely the reasons they could have asserted, if the right to a hearing had been promptly activated, and which the opposition of said reasons (evaluated with reference to the moment of the lack of the right to a hearing), prove to be not purely specious and such as to configure, in relation to the general rule of fairness and good faith and the principle of a proper trial, a misuse of the defensive instrument with respect to the purpose of the proper protection of the substantial interest for which it was prepared".

multiple profiles, not least that of compatibility with the Constitutional principle of equality[39].

The contradictoriness and confusion are increased by the fact that some provincial tax commissions have not shared the distinction between harmonised and non-harmonised taxes imposed by the judgment of the Joint Session. Therefore, some – but not all – Tax Commissions have overcome this orientation and recognised the right to be heard before the enactment of an imposition act as a general principle applicable to all taxes[40].

3.3. Reverse discrimination in national proceedings implementing EU law

National disciplines in the tax field may present differences, even profound ones, in many ways[41]: the right to be heard can be expressly protected or not[42]; the moment in the proceedings where this right has to be protected, or if it is necessary to guarantee first (and when) that a measure with negative effects be enacted or if a

[39] On the constitutional principle of equality the studies of L. Paladin, *Considerazioni sul principio costituzionale d'eguaglianza,* are still indispensable, in Riv. Trim. Dir. Publ. 897 1962; Id., *Eguaglianza (dir. sost.)*, in Enc. Dir., Vol. XIV, (1965) 519. By making the appropriate distinctions, this situation of unjustifiable inequality of treatment might somehow recall the situation that occurred in the second half of the 1990s, when redress for legitimate interests was foreseen only in the area of procurement (in application of the Community directive), while it was excluded in other sectors, on which subject cf. R. Caranta, *Danni da lesione di interessi legittimi: la Corte costituzionale prende ancora tempo*, in Foro it., I, 3485 1998.

[40] For example, the Provincial Tax Commission of Campobasso stated in two recent judgments that a general obligation to activate the right to a hearing with respect to the adoption of measures that could negatively affect the rights and interests of taxpayers is always incumbent on the financial administration, overcoming the distinction between harmonised and non-harmonised taxes. Provincial Tax Commission of Campobasso, judgment no. 116 of 19 February 2016 and judgment no. 1094 of 20 December 2016.

[41] For a comparative description of the different rights and duties of the tax authorities and taxpayers, cf. the useful OECD study *Tax Administration 2015: Comparative Information on OECD and Other Advanced and Emerging Economies*, (2015). The differences between the 27 countries of the Union with respect to tax-audit procedures and related taxpayers' rights are highlighted in the book by L. Van Der Hel, *Intra-Community Tax Audit* (2011).

[42] For example, in addition to the disciplines mentioned above, the *Abgabenordnung* (German Tax Law) dedicates para. 91 to the hearing of the parties (*Anhörung Beteiligter*).

deferred protection of the same is sufficient, after the emanation of the act; what the function is connected to the participatory institution; what modalities are foreseen, in written or oral form or both; what additional rights are connected to it (access to documents, the right to present briefs and documents, the obligation for the administration to take into account what is expressed by the taxpayer); in which cases there are exceptions to the legal guarantee; what are the consequences for the violation of the right to be heard.

As has been underlined, there are national regulations on tax proceedings that more fully protect the right to a hearing with respect to European sectoral disciplines. In these cases there is a reverse discrimination against the citizens of the Member States with more protective guarantees.

Indeed, in these cases in tax proceedings governed solely by national law, the taxpayer enjoys greater safeguards than in tax proceedings in which EU law applies.

Therefore, the procedural autonomy granted to the Member States can in this area generate an unequal treatment which appears difficult to justify.

Furthermore, in the context of two actions for failure to comply proposed to the Court of Justice by the Commission for the delay of States in making available Community resources (concerning proceedings for the post-dated recovery of customs duties), the Member States had justified this delay precisely with the obligation to respect the rights to defence of the taxpayers. In both cases, the Court clarified that respect for the rights of defence relates solely to the relations between taxpayers and States, while it is not relevant for relations between Member States and the Communities; therefore, it cannot be invoked to justify a delay in the determination of the duties to be collected within the time limits laid down by European Community law[43].

[43] Cf. para. 45 of the judgment of the Court of Justice of 17 June 2010, *Commission vs. Italy*, case C-423/08, "However, although the principle of observance of the rights of the defence applies in regard to relations between a debtor and a Member State, it cannot, as regards the relations between the Member States and the Communities, result in a Member State being entitled to disregard its obligation to enter into the accounts, within the time-limits laid down in the Community legislation, the Communities' own resources

3.4. Failure to apply the right to a hearing in composite proceedings

Also in the composite proceedings provided for by the European legislation on administrative cooperation in tax matters, the right to a hearing is highly restricted, as was shown in the *Sabou* case.

In cross-border cooperation between tax administrations, the taxpayer's right not only to participate, but also to be informed of the initiation of the procedure, is not foreseen. When a tax administration requests information from the Treasury of one or more foreign states – in order to correctly determine the taxes due from a taxpayer – it is not obliged to inform the citizen, even if the replies received will lead to the issuing of notices of assessment.

In this case too, the circumstance of the application of EU law leads to discriminations that are difficult to justify. If Mr Sabou had made the deductible expenses in his own country (the Czech Republic), he would have had the right to participate in the proceedings, also intervening in the hearing of the witnesses, as required by the Czech tax laws. However, since the expenses allegedly incurred were made in other Member States, he not only did not take part in the procedure to verify the correctness of the costs, but was not even informed of the initiation of that procedure.

The Court of Justice justifies these limitations on the right to a hearing by recalling the distinction between the investigation phase and the debate. However, at the end of the investigation phase (in which the right to be heard is not protected), the tax administration issued the assessment notice directly. Therefore, there can have been no debate.

So too in composite proceedings, for nationals of states with statutory tax guarantees there is a difference in treatment that derives from the place where expenses are incurred. Whoever deducts costs incurred in their own country enjoys greater protection than those who had to incur expenses abroad as well.

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entitlement", which recalls the previous judgment of 23 February 2006, *Commission vs. Spain*, case C-546/03, para. 33.

Since what applies is the law of the State where the request is made[44], the taxpayer's rights depend on the rules of the states in which they incurred the expenses. Therefore, in composite proceedings aimed at verifying the expenses incurred in different countries, the taxpayer could be asked to participate by some foreign tax administrations, and not receive any information from others.

And that is not all. In countries with protective tax laws, non-residents (to whom the request for information will be received from the state of residence) will be more protected than residents (who will not receive a similar communication from the state from which the information is requested).

Information from foreign tax administrations constitutes acts within the tax assessment procedure. In many countries it is not possible to challenge acts during proceedings. Thus, the taxpayer is forced to challenge the act from the foreign tax authority together with the final sanctioning act, at a time when the cooperation between the tax authorities has ended and it may be difficult to challenge the content of the document. The difficulty is greater, considering that there is no obligation in relation to the minimum content of the document to be transmitted: the foreign tax authority is not obliged to indicate how it has gathered the information, what procedure it followed, nor has it any obligation to provide motivation.

Furthermore, in the administrative cooperation between tax authorities, only the relationship between taxpayer and the requesting state is considered, while the relationship between the taxpayer and the state to which the request is made is not considered. This appears to be not entirely justifiable, since in the various procedural stages the taxpayer is the holder of various interests to be protected against both states. In the initial phase of the request for information, the individual has an interest (in their relationship with the requesting state) to be informed and possibly to participate in the formulation of the investigations. In the subsequent phase of the inquiry, as well as in the drafting of the response, the individual has an interest (in their relationship with

[44] Article. 6, para. 3 of Directive 2011/16/EU states that "the requested authority shall follow the same procedures as it would when acting on its own initiative or at the request of another authority in its own Member State".

the state to which the request is made) to participate in the investigations and contest the content of the response before an assessment notice can be based on this.

The current European directive does not provide any right to be heard at any stage of the administrative cooperation.

Furthermore, the information received from foreign tax authorities can also be used for purposes other than those for which they were requested[45] and may be forwarded to a third Member State (the right to object to such sharing is recognised to the state to which the request is made, and not to the taxpayer[46]).

Finally, a linguistic aspect should also be emphasised. In fact, if the right to receive a reply in one's own language is protected in the relationship between citizens and European institutions, in the case of reciprocal assistance such a right is not guaranteed. Pursuant to Article 21, para. 4 of Directive 2011/16/EU, answers can be provided "in any language agreed between the requested and requesting authority", so they could also be written in a language that is not understood by the taxpayer.

4. Conclusions

It is clear that even if there can be a general agreement on the abstract recognition of general principles, such as the due process of law, there are discrepancies in the sectoral discipline regarding the rights of the defence as well as in their concrete unfolding.

The analysis carried out has made it possible to highlight various inconsistencies and differences in treatment in adjudication procedures in the tax field. In particular, the critical issues that emerge in a more significant way regard four profiles.

Firstly, European regulations pertaining to the fiscal sector often do not provide for the right to be heard in proceedings, even when they are aimed at issuing damaging acts.

Secondly, the case law of the Court of Justice and the Italian Court of Cassation is contradictory, as it reconstructs the right to be heard in a way that is not entirely consistent.

[45] Article 16, para. 2, Directive 2011/16/UE.
[46] Article 16, para. 3, Directive 2011/16/UE.

Thirdly, in some cases there is a reverse discrimination in national proceedings implementing EU law. In fact, there are national regulations on tax proceedings that provide for higher guarantees with respect to European sectoral disciplines. In these cases in tax proceedings governed solely by national law, the taxpayer enjoys greater safeguards than in tax proceedings in which EU law applies.

Finally, in the composite proceedings provided for by the European legislation on administrative cooperation in tax matters, the right to a hearing is not foreseen. The current European directive does not provide any right to be heard at any stage of the administrative cooperation.