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**Legal Presumptions in National Tax Systems  
(Italy and Belgium) and in EU Law**

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## Scope of the Study

### 1. The concept of (tax law) presumption in a national and European perspective

The *Presumption* represents a concept that has been traditionally considered and studied from the national point of view, within the context of the theory of proof.

In this study, the meaning of the concept will be extensively clarified, taking into consideration the wide academic literature on the topic. For the purpose of setting the stage of the research, it is suffice to say that, in general, it relates to the inductive reasoning that allows the inference from a known fact, an unknown fact<sup>1</sup>.

According to a tradition which dates from the Roman law, presumptions are classified into *presumptions of law* and *presumptions of fact*. The difference between them lies mainly in the source of the presumption, which is the law only in the first case. By contrast, in the second case it is for the judge, for the purpose of the assessment of certain facts, to develop a logic operation by means of which the knowledge of an unknown fact is derived from a known (i.e. proved) fact. Furthermore, legal presumptions are distinguished as either irrebuttable (*iuris et de iure*) or rebuttable (*iuris tantum*), depending respectively on the prevention, rather than the possibility for the party against whom the presumption is provided to give proof to the contrary.

The general notion of presumption has its roots in the civil law, which constitutes a necessary point of reference when (and before) dealing with presumptions within tax law and afterwards in an EU-wide perspective. In this regard, it is possible to outline a general theory of presumptions – in particular, of the legal ones - which keeps value regardless of the single national legal system's structure and is based upon a common juridical European experience<sup>2</sup>. Therefore, the national civil law provisions taken into consideration in this

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<sup>1</sup> H. De Page, *La preuve par présomptions*, in *Traité élémentaire de droit civil belge*, T. III, Bruxelles, Bruylant, 1967, 949, «'Présumer' signifie conjecturer. C'est acquérir une conviction, atteindre une certitude par la voie d'une induction ».

<sup>2</sup> J. Wróblewsky, *Structure and fonctions des présomptions juridiques*, in *Les présomptions et les fictions en droit*, (éds.) C. Perelman, P. Foriers, Bruxelles, Bruylant, 1974, 44, observed that «*Indépendamment de l'analyse et des généralisations des textes formulés dans la langue juridique, la science juridique formule une question fondamentale: «qu'est-ce qu'est la présomption?»*. Such question concerns the essence of the presumption, and according to the Author «*la science juridique presque à l'unanimité distingue praesumptiones hominis, praesumptiones iuris tantum et praesumptiones iuris et de iure. Les dernières sont souvent liées aux fictions. Les présomptions sont parfois comparées à des définitions, à des dispositions iuris dispositivi, à des indices. Les constructions des présomptions sont traitées comme problèmes concernant la preuve, car elles déterminent ce que l'on doit démontrer dans un procès*». These issues will be dealt with in depth in Chapter I.

study represent the basis for the purpose of the analysis of the concept at hand, but they cannot limit the following observations to a narrow range, by excluding the possibility to assign them a general character.

In this study, the civil law framework precedes the examination of the same concept in the field of tax law. As a matter of fact, tax law presumptions do not embody a mere application of the concept of general theory. By contrast, in the domain of taxation legal presumptions show several peculiarities that justify a separate investigation.

Generally speaking, such peculiarities concern the finality of tax law presumptions and the circumstance that they operate only in favour of one of the parties of the (tax) obligation. Indeed, they are introduced with the purpose of simplifying the assessment of the levy, of rendering certain, and speeding up the recovery of the latter and/or preventing tax evasion or tax avoidance. Or, said differently, in order to secure the Treasury interest, which on the other hand corresponds to the collective interest of the covering of public expenses. Accordingly, tax law presumptions are provided in favour of the tax authorities, that is the administrative body entitled to guarantee the application of the tax legislation<sup>3</sup>. Facing the deficit of knowledge on the side of the tax administration as to the relevant fiscal facts realized by the taxpayer, the national legislator intervenes to alter the division of the burden of proof among the parties. This, occurs so as to alleviate the probative burden that ordinarily rests upon the tax authorities, which may rely on tax law presumptions in issuing a tax decision.

Notably, the alteration of the burden of proof does not operate only in a tax trial, which only possibly will take place. In fact, it may be relevant even before and irrespective of the latter, in the context of the assessment procedure run by the tax administration. The latter, as said, may rely upon tax law presumptions in order to motivate a tax decision, for instance a notice of assessment, concerning a certain taxpayer.

The scenario offered by the analysis carried out in this study of two national legal orders, that is Italy and Belgium, shows the existence of several tax law presumptions, in the various fields of taxation, either addressed to the tax authorities and intended to alleviate

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<sup>3</sup> This explains why the existence of presumptions in tax legislation has been considered as corroborating the fact that the burden of proof with regard to the tax claim lies on the tax authorities; a confirmation of the tax administration's burden of proof with regard to the tax claim. In fact, by means of tax legal presumptions, such burden is shifted onto the taxpayer. As regards the rebuttable presumptions, E. Allorio, *Diritto processuale tributario*, Torino, Giuffrè, 1969, 389, who pointed out that the reversal of the onus of proof can be explained in the light, and at the same time is the demonstration, of the fact that the burden of proof is ordinarily put on the tax administration. If this was not the case, it would be without any sense providing in favour of the latter such a simplification.



their probative burden during the administrative procedure, or affecting directly the position of the taxpayer (typically, with anti-abuse rules). Though the use of tax law presumptions by the national legislator is guided by similar finalities and needs (simplification, combating tax evasion or avoidance), the way in which tax presumptions are dealt with, particularly in the light of the Constitutional framework and parameters of Constitutional consistency, may differ. In this view, a comparative key offers the possibility to widen the perspective on tax law presumptions beyond a merely domestic one and to check if and to what extent a common national approach may be construed.

On the other hand, the increasing role of the European Union law in the matter of taxation and its impact on national legislation, even through the rulings of the European Court of Justice, gives rise to the demand of considering the same concept from an EU-wide perspective. Tax law presumptions operate in favour of the tax authorities and to the disadvantage of the taxpayer. As such, they may hinder the exercise of a right or freedom conferred to individuals or legal persons by EU law or to jeopardize the principles, objective or regulation of a certain matter laid down at EU level. As a result, the use of tax law presumptions in the fields covered – albeit differently depending on the sector concerned - by EU law, needs to be investigated with a view of verifying if and to what extent they are consistent with the EU law framework.

Under such framework, indeed, so far tax law presumptions have been discussed by the scholars in a merely fragmented way, either in the context of procedural matters or of the anti-abuse rules.

In the light of the foregoing, the ultimate goal of this study is to construe the EU approach to tax law presumptions. This is in view of determining if and to what extent a common analytical framework may be identified and extracting certain criteria governing the evaluation of compatibility of tax law presumptions with EU law. In other words, the aim is to explore in which way tax law presumptions, which in national systems serve essential needs, are evaluated in the context of the European Union legal order. Once given an overview of the EU law relevant framework, the question to be answered is whether tax law presumptions provided for by the national legislators are ruled on by the EUCJ on the basis of a case-by-case approach, or it is rather possible to identify certain more general criteria or standards.

In order to do so, the concept of tax law presumption is investigated under a twofold comparative perspective, so as the EU experience is confronted with the national one. The

outcomes of the study are finally tested with regard to certain tax law presumptions provided for within the Italian and Belgian tax systems, with a view of verifying the possible concrete impact on the national legislation and on the protection of the European taxpayer.

## **2. Brief note on the methodology**

In this study, the concept of presumption is firstly identified with special reference to the system and legal theory of some of the EU Member States: namely France, Italy, Belgium and concisely, also the United Kingdom. The choice has fallen on these Member States in view of them being representative, respectively, of the civil law systems for the first three and of the common law approach for the latter. Such an initial analysis is intended to verify the existence of a common core concept of presumption, and in particular of legal presumption, in the European context.

Afterwards, when dealing with legal presumptions in tax law, the focus is narrowed to two Member States, that is Italy and Belgium. This, in view of the different level of discussion reached by the relevant tax literature and of the involvement in several cases ruled by the EUCJ. The construction of their approach to the issue is addressed under a twofold direction. On the one side, the Constitutional framework and parameters of evaluation of tax law presumptions' consistency are examined, as the control of Constitutional consistency is the sole limitation for presumptions which are provided for by the law. On the other side, after having drawn some consideration on the issues of the classification and the division of the burden of proof raised by certain estimated methods of assessment, the focus is on some presumptive provisions which are relevant under the EU law perspective and may create problems of conflict with EU law.

The national approach to tax law presumptions construed in this way is then confronted with the European Union's one. One can start to deal with presumptions by referring to the national concept as an "obligatory" step, because of the lack of common European civil law. More particularly, the EU law does not contain a complete and coherent set of rules of evidence, in line with the procedural autonomy of the Member States recognised by the EUCJ. Obviously, absence of rules does not turn into irrelevance of the concept at EU level. On the contrary, as many *ius commune*'s concepts, legal presumption is known in the EU experience. It follows the interest in exploring it from a broader perspective than the

traditional purely national one. This, exactly starting from beneath, i.e. from the national data, is in conformity with the Community *ius commune* experience.

Therefore, the EU approach is construed by examining the relevant framework, in terms of rules and principles, and afterwards by giving an overview of the EUCJ case-law on the matter. In particular, the focus is on customs duties, VAT, and direct taxation, because they embody three different ways in which the EU law may impact on national legal orders. Moreover, the case-law on the issue of the repayment of taxes levied in breach of EU law is dealt with, because it is significant in the reading of the conditions of compatibility of presumptions with EU law.

Two final remarks need to be made, with regard to the methodology adopted in this study. Given the comparative key of this dissertation, the focus is on presumptions established *by and in the law* and not even on presumptions of fact. The latter concern the acting of the (national) tax administration and of the courts; thus, they will be only mentioned with a view of underlining the differences with legal presumptions. Therefore, the investigation concentrates on the conditions of consistency of presumptions established by national legal orders (in their legislation) with the framework of the European Union legal order.

The same comparative key justifies a discussion focused on *national* tax presumptions, as the aim is to test them against the rules and standards stemming from EU law. In this regard, only when dealing with customs duties a reference will be made to some presumptive provisions included in the Customs legislation on which the EUCJ has ruled on, but with the sole view of verifying if a different approach of the Court may be identified.

### **3. Structure of the study**

This study concentrates on the concept of legal presumptions; first in general, afterwards in the context of the Italian and Belgian tax systems and in EU law. Accordingly, it is divided as follows.

Chapter I deals with the notion of presumption, its role, constituting elements and effects. First, such issues are addressed by referring to the civil law systems of France, Italy and Belgium. Ultimately, the outcomes reached are confronted with the notion of presumption that emerges in a common law system; that is, the United Kingdom.

Chapter II deals with the concept of tax law presumptions within two national tax systems. Thus, it is divided into two main Sections, concerning respectively Italy and Belgium. In

each Section, first the stage is set by giving a brief overview of the question and illustrating the relevant Constitutional framework. The most significant Constitutional Court's rulings on the matter are examined, with a view of extracting the criteria of evaluation. At this stage, a reference is made to the issues arising from some presumptive methods of assessment included in both the national legal orders. Ultimately, some legal presumptions in the field of VAT and income taxation are analysed, due to their potential relevance in the context of EU law. Finally, some general conclusions on the possible divergences between the two national approaches and common analytical framework are developed.

Chapter III deals with tax law presumptions in EU law. First, an overview of the EU law framework, with particular regard to the principles of effectiveness and proportionality, is offered. Afterwards, two Sections follow, wherein the EUCJ case-law is examined with a view to extracting the criteria adopted by the Court when ruling on tax law presumptions in the different fields of EU law. Section I concerns Customs duties and Indirect taxation and is in turn divided into three Parts. Part I concerns Customs law, and deals with both presumptions included in the Customs legislation and national tax presumptions. Part II concentrates on VAT, and both substantive and procedural tax law presumptions are examined. Part III deals with the issue of the repayment of taxes levied in breach of EU law. Section II concerns direct taxation, and deals with national tax law presumptions and presumptive regimes.

In Summary and Conclusions an overview of this study is given. The outcomes with regard to the EU law approach to tax law presumptions in comparison to the national one are illustrated. Finally, some of the tax law presumptions included in the Italian and Belgian tax systems are tested against EU law. This, on the basis of the criteria set at EU level that can be inferred from the analysis conducted in Chapter III, with a view to verifying concretely the possible impact on the national legislation and on the degree of protection for the European taxpayer.

## **Chapter I**

# **Around a General Theory on (Legal) Presumptions: An Overview of their Main Features, Functions and Effects**

### **Introduction**

The aim of this first chapter is to offer an insight into the meaning and the relevance of the concept of ‘presumption’, based on the civil law tradition and legal theory, with a view to testing the existence of a common and shared notion, departing from this for a study on tax law presumptions in national contexts and in the EU law experience. Given that the perspective undertaken in this study concentrates on the relationship between legal orders (national and EU), *legal* presumptions will be addressed. It will be shown how, notwithstanding some (negligible) divergences, it is possible to deal with legal presumptions within national tax systems and in the context of EU law on the basis of a common ground.

To this end, the main features, functions and effects of presumptions will be identified by referring to the national legal experience of some EU Member States. The choice has fallen upon France, Belgium and Italy, in view of them being representative of the civil law systems within the European Union and of the examination of tax law presumptions in the Italian and Belgian legal orders which will be conducted in Chapter II of this study. In this regard, it can be observed at the outset that the juridical experience of the 18<sup>th</sup> century shows a homogeneous concept of presumption, mainly because of the common inspiration from the roman-canonical tradition, so that the *Corpus Iuris* is considered to be the pattern of the different European experiences, except for the English one. Moreover, the modern concept of presumption results from the doctrine and the legislation of the pre-revolutionary juridical Enlightenment, and has been developed by the provisions of the Revolution and the Codifications. Indeed, the French Civil Code was used as a model for most of the subsequent codifications, including the Italian and Belgian Codes. The diffusion of the *code Napoléon* beyond France has in this way implied a general support for the concept of presumption, as stated in Article 1349 et seq. of the French Civil Code, which influenced even the German and Austrian juridical experiences during the second

half of the 19<sup>th</sup> century<sup>4</sup>. In the light of this, the notion that can be extracted from the above national experiences will be ultimately tested against the notion which results from the experience of the United Kingdom, the latter being representative of the common law approach.

The scope of this chapter has to be further delimited by underlying that, as said, the focus will be on legal presumptions, meaning those inferences that are laid down in the law rather than being the result of the judge's reasoning. Though the general overview of presumptions given in this Chapter, which includes references to the concept as a whole, might suggest otherwise, the presumptions of fact will be analysed with the sole intent of underlining their different characteristics, role and relevance with respect to legal presumptions. In this regard, two further observations have to be made at the outset.

From the provisions of a number of national civil codes the definition of presumptions and the distinction between presumptions of law (either rebuttable or irrebuttable) and presumptions of fact results. However, it has to be borne in mind that even irrespective of this, legal presumptions embody inferences drawn by the national legislator. In other words, they are expression of the Parliament's power to select the interests worthy of protection and to introduce presumptive provisions in the national legal order as a result of a balancing between those interests. The exercise of the legislative power, though, may not be arbitrary and it is subject to the control of compatibility with the relevant Constitutional parameters. Under this perspective, legal presumptions are usually requested to be based on a rule of experience and in general to comply with the principle of reasonableness.

Finally, it has to be reiterated that the concept of legal presumption finds its roots within the civil law, which is why in this study the general theory is the point of departure. Nonetheless, legal presumptions in the field of taxation do not embody a mere application of the general concept. On the contrary, they show a number of peculiarities which justify a specific study. Such peculiarities will be properly underlined in the following. At this stage, it suffices to say that legal presumptions in the field of taxation are entrusted with a function that is to a certain extent different from that played in the field of civil law<sup>5</sup>. In

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<sup>4</sup> For a more detailed analysis of the evolution of the concept under discussion, with particular attention to the different role of the judge and the principle of free evaluation of the evidence, see F. Cordopatri, *Presunzione (dir. proc. civ.)*, in *Enciclopedia del Diritto*, XXXV, Milano, 1986, in particular at p. 279 et seq. The Author distinguished two segments along the evolution of the concept of presumption: the first one goes from the *Corpus Iuris* to the end of the *ancien régime*, while the second one ensues from the Enlightenment and has been crystallized in the codifications and in the common law.

<sup>5</sup> By way of exemplification, one of the most common legal presumptions provided either in civil law systems and in common law systems as well (where it was born as a common law principle and was then

fact, in the area of civil law they normally regulate the relationships between private parties in favour of one of them, depending on the interest to which the legislator chooses to give a particular protection by alleviating the burden of proof. In the domain of taxation, by contrast, they usually operate to the advantage of one sole party of the tax obligation; that is, the tax authority.

Chapter I is divided as follows: firstly, the main features of the presumption, with particular regard to the constitutive elements and functions will be analysed, taking into special consideration the French, Belgian and Italian systems; secondly, the (probative) effects of legal presumptions will be examined, with particular reference to the impact on the ordinary division of the burden of proof; the effects of legal presumptions on the free evaluation by the judge will be then considered, and this will give the occasion for illustrating the characteristics of the presumptions of fact; thirdly, the question of the nature (whether substantive or procedural) of presumptions will be introduced, as it is still debated also in the field of taxation; ultimately, a brief overview of the concept under discussion in the experience of a common law system, that is the United Kingdom, will be briefly given.

### **1. The constitutive elements of the general notion of *presumption* with particular reference to presumptions of law**

Pursuant to Article 1349 of the French Civil Code '*Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu*'<sup>6</sup>, and the

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codified), concerns the status of a child born by a married woman. It is the so-called 'presumption of legitimacy'. Based on a rule of experience, the husband is presumed to be the father of the child conceived during the marriage. In this case, the goal attained by the legislator is manifestly the protection of the child's interest. Another example: in several countries, legal presumptions of unconscionability with regard to certain standard clauses inserted into contracts are laid down, for the purpose of protecting the 'weak party' of the relationship. Cf. P.A. Thomas, *Evidence*, London, Butterworths, 1972, at p. 164.

<sup>6</sup> '*Presumptions are the consequences that a statute or the court draws from a known fact to an unknown fact*' (official English translation of the French Civil Code). This provision follows blindly the definition developed by R.J. Pothier, *Trattato delle obbligazioni*, new Italian version, Venezia, Antonelli, 1834, 122, ("*un giudizio fatto dalla legge o dall'uomo intorno alla verità di una cosa mediante la conseguenza dedotta da un'altra cosa*") and Domat, *Les loix civiles dans leur ordre naturel; le Droit public, et Legum delectus*, Tome premiere, Paris, 1777, 177 ("*le présomptions sont des conséquences qu'on tire d'un fait connu, pour servir à faire connaître la vérité d'un fait incertain, dont on cherche la preuve*"). The definition included in the Italian pre-unitary codes (Article 1303 of the Codice per il Regno delle Due Sicilie, Article 2316 of the Codice Permeuse, Article 1462 of the Codice Albertino, Article 2391 of the Codice Estense), in the Italian Civil Code of 1865, and in some other national codes (Article 1199 of the Rumanian Code, Article 1952 of the Netherlandish Code, Article 282 of the Ticinese Procedural Civil Code, Article 288 of the 1891 Genevan Code) borrowed the cited Article 1349. The Spanish Code (Articles 1249-1253, repealed), the German

same provision is included in the Belgian Civil Code (Article 1349) as well as in the Italian one (Article 2727).

From this general definition it can be inferred, at first glance, that the structure of every type of presumption implies three fundamental elements, namely:

- a) a known fact, which represents the basis of the scheme (see par. 1.1);
- b) an unknown fact, that is precisely the subject of the presumption, i.e. the theme of the proof (see par. 1.2);
- c) a logical inference between these two facts, whose ground lies in a rule of law or in a rule of experience, depending respectively on the source of the presumption; in both of the cases, however, it basically reflects (*rectius*, it should reflect) the *id quod plerumque accidit*<sup>7</sup> (see par. 1.3).

### 1.1. The known fact (a)

The analysis of the first element at issue (i.e. the known fact) requests primarily to clarify that *fact* stands here for every circumstances or a set of circumstances to which the legislator connects the presumption.

Obviously, its role in the context of a certain presumption depends on the nature of the latter, whether legal or *hominis*: in the first hypothesis, *fact* is the assumption on the basis of which the release from the onus of proof is provided, while in the second one, it is the foundation of the logical process conducted by the judge.

In any event, it is intended as a fact in its own historicity, so that it might include even a subjective element, like will<sup>8</sup>.

More interpretative difficulties rise from the meaning of the adjective *known* referred to the fact, in the extent to which it is not clear whether, in order to benefit from the presumption,

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Procedural Civil Code of 1898 (S 292) and the Austrian Code (S 270) dealt with presumptions without defining them. See in this regard C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, Firenze, F.lli Cammelli, 1924, 91 et seq.

<sup>7</sup> This Latin formulation indicates the normal course of events.

<sup>8</sup> See G. Gentili, *Le presunzioni nel diritto tributario*, Cedam, Padova, 1984, 32, who pointed out that the distinction within the general theory of law between *fact* and *act* – the first being an entity that produces legal effects according to the legal system, the second being a phenomenon that shows a human will - is irrelevant for the purpose of identifying the meaning of the element which is the basis of the presumption. See on this point also H. De Page, *La preuve par présomptions*, in *Traité élémentaire de droit civil belge*, Bruxelles, Bruylant, 1967, 949-950, according to whom, within the practice, the presumption is a sign, any external fact (material or of a man) whose existence is not consistent with the inexistence of the unknown fact. The proof results through an inductive reasoning undertaken on incomplete materials, which are the known facts. “*D’un fait connu, n’ayant aucun caractère probatoire direct, on infère, on induit le fait inconnu*”.



a particularly rigorous demonstration of the fact-base is required, as some Authors seem to suggest<sup>9</sup>.

Indeed, while it obviously refers to a fact that has been proved during the proceedings where the presumption is relied on, or that does not need to be proved as it is notorious<sup>10</sup> or non-disputed<sup>11</sup>, the question arises as to whether it can be considered fully proved when it is the result of certain means of proof such as a presumption *hominis*. In other words, can the latter be the basis of a legal presumption without affecting the degree of certainty of the evidence so reached? One would say that the positive answer to this question ensues from the nature of means of proof assigned to the presumptions of fact by the statutory law, so that a different interpretation would introduce a distinction between the various means of proof that does not result explicitly from the relevant legislation, nor is it in line with the *ratio* of the discipline in the matter<sup>12</sup>.

## 1.2 The unknown fact (b)

The interpretation of the second pole of the presumptive mechanism has not created any particular problems. Indeed, the *unknown fact* can be easily identified as the fact that needs

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<sup>9</sup> The same question underlined in the text with regard to presumptions *hominis* arises for the *arguments of proof* (see Article 116, paragraph 2, of the Italian Procedural Civil Code): can the behaviour carried out by the parties during the proceedings, which is considered by the law as the basis of an argument of proof, be the fact-base of a presumption? Indubitably, such question concerns mainly the presumptions of fact, and it might be relevant within the tax procedure. After having explained the different positions on the theme, G. Gentili, *Le presunzioni nel diritto tributario*, cited above, 34 et seq., took the view of an extensive interpretation of ‘known fact’, especially taking into account the development of the administrative proceedings.

<sup>10</sup> The notorious facts cover those (even potential) cognitions that belong to the set of knowledge of the average citizen in a certain moment and in a certain legal system. According to Article 115, par. 2 of the Italian Procedural Civil Code, they are ‘notions of fact belonging to the common experience’. See on this issue F. Carnelutti, *Massime d’esperienza e fatti notori*, Riv. Dir. Proc., 1959, 639 et seq.; V. Andrioli, *Presunzioni (diritto civile e processuale civile)*, in *Noviss. Dig. It.*, XIII, Torino, 1966, 766; V. Andrioli, *Prova*, in *Noviss. Dig. It.*, vol. XIV, Torino, 1974, at 281; C. Mandrioli, *Corso di diritto processuale civile*, Torino, Giappichelli, 1985, II, 138. Clearly, they are relevant mainly as the premise of a presumption of fact, but also of a legal presumption crystallizing a rule of experience.

<sup>11</sup> Meaning that has not been contested by the adversary. There are, though, some hypotheses when the non-disputation is irrelevant, as pointed out by V. Andrioli, *Prova*, cited above, 274, that is when the written form is required, a matter that is not possible to dispose of is at issue, or the party who would suffer the disadvantage is absent in the proceedings.

<sup>12</sup> In this sense, F. Laurent, *Principes de droit civil*, Bruxelles, Bruylant, 1876, 636, who, disagreeing with Toullier, observed that the presumptions of fact are admitted when the law admits testimony. Since testimony can be relied on against a presumption of law, the same has to be regarding presumptions *hominis*, in accordance with the prevalent doctrine and jurisprudence. In the sense that against presumptions of law the proof can be furnished through all the means of proof provided for by the ‘droit commun’ (included presumptions of fact), E. Brunet, J. Servais and C. Resteau, *Présomptions*, R.P.D.B., 1951, 229. On the contrary, most of the authors (and the predominant national jurisprudence) still deny the possibility to infer a presumption *hominis* on the basis of another presumption *hominis* (praesumptum de praesumpto).

to be proved in order to obtain the application of the relevant provision and the correlative juridical effects.

When assisted by a presumption, the party who would normally bear the burden of proof according to the ordinary rules on the division of this burden, is exempted from furnishing the evidence of the presumed fact, being only requested to demonstrate the existence of the known fact on the basis of every means of proof.

This makes evident that, as it will be clarified below, presumptions do not imply a complete exemption from any probative burden related to the theme of proof, but simply a partial release or an alleviation of the burden of proof. In practice, the party who relies on a legal presumption discharges the onus of proof by giving evidence of the fact *a*, from which the law infers the facts *b* and *c* (in hypothesis, the requirements for the purpose of the application of the provision claimed in the proceedings) while he is exempted from furnishing the evidence of the latter<sup>13</sup>.

To illustrate this, it may be useful to make an example. The presumption of legitimacy of a child born by a married woman during the marriage or under a certain period of time prior to the marriage or subsequent to the end of the marriage, is included in several national systems, albeit under partially divergent forms. When, for instance, such status was contested, the defendant would be assisted by a presumption of legitimacy provided that the facts upon which the presumptive inference is based are proved, e.g. the birth certificate and the period of time envisaged in the relevant legislation.

### **1.3 The source of the reasoning and the reasoning itself as criteria distinguishing presumptions of law from presumptions of fact ... (c)**

After having dealt with the first two components of the concept under discussion, we turn to the core of each presumption, that is, the logical inference linking the known fact and the unknown fact.

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<sup>13</sup> A. Coniglio, *Le presunzioni nel processo civile*, Palermo, w.d., 47, with regard to the effect of legal presumptions on the onus of proof underlined that the different linguistic terms used, especially by the German literature – which has spoken of liberation and reversal of the burden of proof, distribution and facilitation of the proof - is simply the result of a different point of view. Thus, from the perspective of the presumed fact - i.e. a different point of view than that one held in the text (focusing on the position of the party) - it is possible to speak about liberation or exemption from the proof. Critical on the definitions of presumptions in terms of facilitation and alleviation of the burden of proof and of modification of the theme of proof, G. Gentili, *Le presunzioni nel diritto tributario*, cited above, 48, as in his view not every presumption has these effects.

Generally speaking, it consists of a connection based on a rule of experience, or in other terms on the plausibility that a certain circumstance implies the existence of another one according to the normal course of the events (the *id quod plerumque accidit*)<sup>14</sup>.

This logical element, that characterises the presumption as a reasoning permitting to infer some consequences from a certain fact, is what legal and factual presumptions have in common and may justify their unitary legislative definition.

However, many Authors have properly pointed out that the connection under discussion is not always based on a ‘calculation of probabilities’ when dealing with presumptions of law, as it is, on the contrary, possible to assert with regard to presumptions of fact<sup>15</sup>. As a matter of fact, besides the rational content of legal presumptions – so far emphasized - their legislative basis cannot be disregarded, as it denotes their general character in contrast with

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<sup>14</sup> In the literature, there has been a wide debate as to whether the reasoning is inductive or rather deductive. While the common law doctrine believes that both of these schemes are applicable, R. Decottignies, *Les présomption en droit privé*, Paris, 1950, p. 11, observed: “*La présomption suppose donc un double mouvement de pensée. On peut dire qu’elle combine les deux méthodes inductive et deductive par lesquelles l’esprit humain peut découvrir et démontrer ce qui semble la vérité*”. In other words, the reasoning is inductive in the first phase and deductive in the second phase. In this perspective, the connection between two facts includes the finding of a general rule (induction) and then the passage to the unknown fact (deduction). Cf. G. Aron, *Théorie Générale des Présomptions Légales en droit privé*, Paris, A. Pedone, 1895, 5 et seq. Within the Italian doctrine, see S. Patti, *Della prova testimoniale e delle presunzioni (artt. 2721-2729)*, in *Commentario del codice civile Scialoja-Branca, Zanichelli*, Bologna, 2001, 81 et seq., who agreed that the first part of the reasoning requires the use of a rule of experience, because of the reference to what normally happens. See also C. Laurent, *Principes de droit civil*, cited above, 626, according to whom the proof resulting from presumptions consists of a simple reasoning, which is based on a probability touching the certainty. Despite the differences in terms of conditions for the application and effects, the procedure is the same both for legal and factual presumptions, since it consists of a reasoning developed by the legislator or by the judge. Alike, E. Picard, N. D’Hoffschmidt J. De Le Court, *Présomption*, in *Pandectes Belges*, Larcier, Bruxelles, 1904, 819 et seq.; R. Mougenot, *La preuve*, in *Rép. Not.*, T. IV, *Le obligations*, (ed.) D. Mougenot, 2002, 282, says: “*Le mécanisme de la Présomption suppose donc un raisonnement (...) habituellement qualifié d’induction*”. In the case of legal presumptions, the legislator makes the inductive reasoning and accords preference to certain categories of subjects. H. De Page, *La preuve par présomptions*, cited above, 960, pointed out that the presumption of law is a generalization, imposed by authority, of the likelihood. Indeed, “*Du fait que normalement, habituellement, telle circonstance (fait connu) en implique telle autre (fait inconnu) la loi décide que l’induction (...) sera censée se produire toujours*”. In the case of presumptions *iuris tantum*, the law considers the induction to be admissible *generaliter*, but not *peremptory*, while presumptions *iuris et de iure* are introduced when the induction is certain inasmuch as it is held as *peremptory* or there are imperative reasons of public order or general interest. These considerations brought the Author to deem the presumption of law less reliable than the presumption of fact, the former being an artificial generalization of all the specific cases of the same genus, rather than having value for a certain concrete case. Compare also R. Dekkers, *Précis de droit civil belge*, tome deuxième, Bruxelles, 1955, 419, who asserts, regarding the presumption of law, that “*ne diffère nullement de la présomption du juge par sa nature: même inscrite dans un texte, elle reste l’effet d’un raisonnement, d’une induction. La seule différence est que c’est la loi même qui fait l’induction. Dans certains cas, la loi considère l’induction comme à ce point probable, qu’elle ne l’abandonne plus ‘aux lumières et à la prudence du magistrat’ (C. civ., art. 1353): elle la consacre comme une règle générale*”.

<sup>15</sup> *Contra*, but only regarding presumptions *iuris tantum*, C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 312, who, dissenting from Ramponi, asserted that the not-correspondence with the concept of probability becomes true only for the *iuris et de iure* presumptions, which in his opinion are not presumptions.

the reference only to the concrete case when facing presumptions of fact. There are several reasons leading the legislator to introduce presumptive criteria. They may correspond to the need of facing difficulties of proof or favouring one of the parties involved in a certain abstract situation, or they may simply reflect the preference for a certain regulation of the latter<sup>16</sup>.

Especially in the domain of taxation, we will see how legal presumptions are at times the result of certain legislators' choices intended to guarantee the application of the relevant provisions/regime rather than the pure codification of a settled rule of experience. Furthermore, a presumption manifesting the *id quod plerumque accidit* at the time when it was introduced, might then lose this logical basis as a consequence of the change affecting the context of reference. It is particularly in these hypotheses, wherein the presumption does not seem to be inspired by the 'consequential probabilities', that it has to be justified in the light of the protection of deserving public interests, in order to positively overcome the test of reasonableness<sup>17</sup>.

Setting the last consideration aside for the moment, as it will be investigated further in the second chapter, it can be concluded that the structure of the reasoning is likely to be partly different in legal presumptions as compared to presumptions *hominis*. Evidently, this is a corollary of the main difference between them, which concerns exactly the source of the reasoning. While in the first case the presumption often reflects a discretionary evaluation of the legislator, which is not rarely the result of a balance between several interests, the presumption of fact is rather the product of the intellectual process evolved by the judge,

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<sup>16</sup>A. Coniglio, *Le presunzioni nel processo civile*, cited above, 5 et seq., underlined that in the legislative definition of presumptions prevails the logical aspect of the definition, since the process of argumentation of a fact on the basis of the existence of another one is the only link between the two different categories of presumption; L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, Tornino, F.lli Bocca, 1890, 20 et seq., asserted that legal presumptions and presumptions *hominis* have the same logical character, being both a 'calculation of probabilities', so that there is an accidental, rather than substantive, difference between them. However, he then admitted that this is not true in absolute, since sometimes the law presumes not what is likely, but rather what is possible and in case unlikely. In particular, this happens when a presumption is introduced because of the social need or the general interest in a certain regulation of a legal relation. In other hypotheses, the presumption is, according to the same Author, simply the form chosen by the legislator in order to express a legal concept, in accordance with a general rule of law. S. Patti, *Della prova testimoniale e delle presunzioni (artt. 2721-2729)*, cited above, says that in some legal presumptions it is not to find the calculation of probabilities which is generally identified as the basis of the institute, but rather the need for rationalization and simplification. For a critical analysis of the theory of presumptions based on a mere calculation of probabilities, R. Decottignies, *Les présomptions en droit privé*, cited above, 21 et seq.

<sup>17</sup>G. Gentili, *Le presunzioni nel diritto tributario*, cited above, 9, observed that notwithstanding that legal presumptions need to have a rationale in order to be consistent with the principle of reasonableness, they are not a logical discretion, but rather a deontological one, since they aim at providing obligations regarding the decision of the judge, and not at convincing him. On the contrary, the logical moment is the core of presumptions of fact, since they are the result of a mental process.

who cannot disregard the actual degree of plausibility concerning the existence of the unknown fact that is relevant in the pending case.

### **1.3.1 ... and from the direct proof**

The nature of the reasoning and its object have been considered within the doctrine as marking out the difference between the presumption and those means of proof classified as direct proof<sup>18</sup>.

In fact, when dealing with the ordinary proof, there is a direct connection between the means of proof and the disputed fact in the proceedings (*thema probandum*), so that the latter is exactly the object of the proof. Typically, this is the case of the documentary evidence: here the fact which is the *probandum* results directly from the content of the document.

By contrast, facing presumptions a *quid pluris* is needed, which is the logical connection between the known fact (what is proved during the proceedings) and the unknown fact. The latter, despite being a necessary requirement in order to obtain the recognition of a certain right, is not demanded to be (directly) proved. It is assumed to be existent where the known fact is proved, by virtue of a logical inference, normally based on a rule of experience, which connects the known fact and the unknown fact<sup>19</sup>.

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<sup>18</sup> See on this distinction, L.P. Comoglio, *Le prove civili*, terza edizione, Torino, UTET, 2010, 9, who gives an overview of the traditional classifications in the matter of the proof. In particular, the Author quotes the difference between ‘direct proofs’ and ‘indirect proofs’ that is located in the relation between the means of proof and the object of proof. The latter is the principal fact in the first case, while it is a secondary fact in the other case. A further distinction is between “historical proof” and “critical proof”, depending on the circumstance that the probative means represent directly or indirectly the *factum probandum*. Lastly, while “legal proofs” refers to proofs whose efficacy is fixed by the law so that the judge is legally bound, the ‘free proofs’ are submitted to the free valuation by the judge.

<sup>19</sup> In other words, in the first case (direct proof), the burden of proof is fulfilled by giving evidence of the fact x, that is the *probandum*; in the second case (presumptions), after proving the existence of x (the *probatum*), it is further necessary to draw a logical connection, normally based on a rule of experience, with the fact y (the *probandum*), according to which, given x, y is supposed to be existent as well without being directly proved. An overview of the theories about the relation between proof and presumption is in Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 100 et seq. According to the Author, it is possible to identify the following positions: a) an opinion that considers the presumption a mere ‘surrogate’ of the proof (Duranton); b) the majority asserts that while dealing with the proof the disputed fact is determined by belief means drawn immediately on the experience (so that the known fact demonstrates *ipse* the unknown fact) and applied to the same fact, as regard presumptions the disputed fact is established through an induction from other facts already proved (Pothier, Aubry and Rau, Toullier-Duvergier, Demolombe, Garsonnet, Boileux-Poncelet, Larombièr, Bonnier, Thévenin, Bédarride, Baudry-Lacantinerie and Barde, Ramponi, Mattiolo, Scialoia, Borsari, Pacifici-Mazzoni, Scotti, Lomonaco, Framarino dei Malatesta, Chironi e Abello, Bolaffio, Lega, Planiol); c) a third opinion stresses the different role of the known fact, which in the case of presumptions has the specific aim of establishing the existence of another fact (Demante, Ferrini, Carnelutti); d) some authors believe that a written or oral human declaration is always the basis of the proof, whereas the presumption is based on a different fact (Colmet de Santerre; Mourlon, Garsonnet); e) lastly, they are distinguished for the different probative effect: while the first one would guarantee the certainty, the second

For example, consider that the tax administration presumes the existence of a certain amount of taxable income of a taxpayer based on the expenditure met by the latter. The unknown fact (taxable income) is not proved directly, but through the evidence of the expenditure incurred in the tax year concerned and a rule of experience according to which expenditure met are proportionate to the income earned.

Such considerations have brought some authors to ascribe to the presumption a minor probative efficacy in respect to the direct proof<sup>20</sup>. Arguing from the more complex process leading to the evidence (intended as result) it has been said that, unlike the other means of (direct) proof, the former is not able to lead to certainty, but rather to what is only probable. Notwithstanding that this assertion mostly relates to presumptions of fact, where the inductive reasoning is left to the ‘prudence’ of the judge, the general nature of presumptions of law has been considered a marker of their lower level of reliability as well<sup>21</sup>.

As such, this interpretation is not in line with the relevant legislation, where no explicit distinction between direct/indirect means of proof can be found based on the degree of certainty<sup>22</sup>. This is not surprising, given the fact that every means of proof mainly leads to a degree of probabilities which can only tend towards certainty, regardless of the process

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one only the probability (Glück, Toullier-Duvergier, Marcadé, Laurent, and also Baudry-Lacantinerie and Barde). The Author agreed with the dominant thesis, which he considered to be codified by the code, while he criticized the other ones. According to L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, Torino, F.lli Bocca, 1890, 1 et seq., the distinctive criterion between proof and presumption is the different nature of the logical relation by means of which the known fact is connected with the unknown fact.

<sup>20</sup> See H. De Page, *La preuve par présomptions*, cited above, 952 et seq., according to whom “*La preuve par présomptions est et reste une preuve dangereuse, à l’égard de laquelle la plus grande circonspection s’impose.*”

<sup>21</sup> See, for instance, H. De Page, *La preuve par présomptions*, cited above, 953 et seq., according to whom the presumption is an indirect proof, so that it is “*inférieure à la preuve directe que constitue l’écrite, la preuve ‘préconstituée’*”. This is not because of the degree of certainty resulting from the written proof, but rather because while in the latter the external sign forms the proof, in the other case the same sign is subject to interpretation and the reasoning is more conjectural. Moreover, the Author underlined how these considerations hold true even when dealing with presumptions of law, where the law does not always impose in an absolute way the induction introduced; S. Chiarloni, *Riflessioni sui limiti del giudizio di fatto nel processo civile*, Riv. Trim. Dir. Proc. Civ., 1986, 857, who argued the less persuasive *vis* of presumptive proof as compared to the direct/representative proof, on the basis of the fact that the truth of the latter implies automatically the truth of the principal fact perceived or represented, while this necessary relation does not exist for the former, in the extent to which the truth of the known fact and the validity of the rule of experience does not necessarily imply the truth of the unknown fact (*id quod rare accidit*). *Contra*, S. Patti, *Della prova testimoniale e delle presunzioni* (artt. 2721-2729), cited above, 80. Compare also C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, but then the same Author seemed to contradict himself when he said that “*the presumption can be – at equal circumstances -, less sure than the proof*”.

<sup>22</sup> Compare on this issue A. Coniglio, *Le presunzioni nel processo civile*, cited above, 167 et seq., with special reference to the logical activity of the judge and presumptions *hominis*, which clearly represent the core of the discussion about the degree of certainty achievable.

used in order to reach the evidence<sup>23</sup>. In other words, it can be surely recognised that the acquisition as a proof of the fact-theme of proof during a legal proceedings happens directly in the one case and in a mediate way in the other case. Nonetheless, a mechanism having an inferential character is inherent in every evaluation of proof, either direct proof or presumption<sup>24</sup>. Though, admittedly, this ‘inferential moment’ seems to concern the valuation of the proof alleged in the former case, and the forming itself of the proof in the latter.

#### **1.4 Brief outline on the more analytical definition of legal presumptions under the French and Belgian Civil Codes**

On the basis of what has been said in the previous paragraphs, it is evident that the general definition of presumptions is identical in all the civil codes considered so far.

However, when we turn to presumptions of law, it has to be noted that unlike the current Italian Civil Code, the French and Belgian ones include a further article that at first sight provides for a more analytical definition of them.

This is, only apparently, because on the one hand the hypotheses listed are to be considered merely exemplifications. On the other hand, some of them are the heritage of obsolete views, as it is clearly the idea that at the basis of the authority of *res judicata* there is a presumption of truth.

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<sup>23</sup> See R. Decottignies, *Les présomption en droit privé*, cited above, pages 18-19: “*Que la preuve se fasse de l’une ou de l’autre manière, il importe de souligner qu’elle aboutit dans les deux cas à une simple vraisemblance. Il n’y a sur ce point aucune différence à faire entre la preuve par présomptions et la preuve directe. Celle-ci, en effet, ne signifie nullement certitude.*” After having clarified that the direct proofs “*établissent par eux-mêmes l’existence du fait litigieux*” while the indirect proofs “*repose tout entière sur l’idée de déplacement de l’objet de preuve et consiste à se servir de faits voisins ou connexes (...) pour remonter jusqu’à la preuve du fait litigieux*”, he located the difference between them in the foundation of their probative force.

<sup>24</sup> According to A. Carratta, *Prova e convincimento del giudice nel processo civile*, Riv. Dir. Proc., 2003, 43 et seq., the valuation of the probative results consists of a gnoseological operation leading the judge to consider as ascertained the alleged fact X on the basis of the taking of the means of proof Y. This, through a rule of experience pursuant to which it can be considered as probably true, the former facing the second one. The result pursued by the system is the “likely truthfulness” of the factual production obtained as the outcome of an inferential process connecting the factum probans and the factum probandum through the rules of experience. Accordingly, the Author rejected the thesis of a minor persuasive *vis* of the presumptive proofs in respect of the direct proof, because in both of the cases the reasoning of the judge bridges the factum probans with the factum probandum by means of rules of experience, and the result is always the probable truthfulness of the alleged facts. What is important, in his view, is the rational foundation of such an operation – that normally comes together with the use of statutory parameters of judgment - in order to allow an external control.

Pursuant to Article 1350<sup>25</sup> of the (French and Belgian) Civil Code, a presumption of law is that one which is “attached” by a special law to certain acts or certain facts. The same provision then makes reference to the four following hypotheses:

- 1) acts which a law declares void, as presumed made in fraud of its provisions, by their very nature;
- 2) cases in which the law declares the ownership or discharge results from certain definite circumstances<sup>26</sup>;
- 3) the rule of *res judicata*<sup>27</sup>.
- 4) the effect which a law attaches to the admission of a party or to his oath<sup>28</sup>.

The importance of the provision at hand does not have to be overrated, and this is due to the reasons mentioned above.

For our purpose, it is sufficient to highlight the reference, included in the first paragraph of Article 1350 of the French and Belgian civil code, to a ‘special law’, which makes evident that a legal presumption *sine lege* is not possible and moreover that it cannot be established by means of analogy<sup>29</sup>. However, the same conclusion holds true irrespective of the provision at hand, which is merely superfluous. And it could not be different, considering that the articles of the civil code under discussion represent the general definition of the

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<sup>25</sup> The French version of the provision provides as follows: “*La présomption légale est celle qui est attachée par une loi spécial à certains actes ou à certains faits; tels sont: 1° Les actes que la loi déclare nuls, comme présumé faits en fraude de ses dispositions, d’après leur seul qualité ; 2° Les cas dans lesquels la loi déclare la propriété ou la libération résulter de certaines circonstances déterminées ; 3° L’autorité que la loi attribue à la chose jugée ; 4° La force que la loi attache à l’aveu de la partie ou à son serment* ».

<sup>26</sup> This number refers to the cases when the law provides the ownership or the release from an obligation based on certain circumstances.

<sup>27</sup> Literally, “*the authority that the law assigns to the res judicata*”. Only the French civil code gives space, among the provisions concerning presumptions, to an article (Art. 1351) that identifies the object of the *res judicata*: “*L’autorité de la chose jugée n’a lieu qu’à l’égard de ce qui a fait l’objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité*”. Clearly, this is the definition of *res judicata*, which is common to the other Member States, even though in some cases – like in the Italian system – it is not codified. The hypothesis of (irrebuttable) presumption of truth of the *res judicata* is definitively justified in the light of the certainty of the rights and the stability of the juridical order, L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 175, and widely 182 et seq.. For an exhaustive analysis of the presumptions of *res judicata*, see H. De Page, *La preuve par présomptions*, cited above, 967 et seq. A. Bayart, *Peut-on Éliminer les fictions du discours juridique?*, in *Les présomptions et les fictions en droit*, (éds.) C. Perelman and P. Foirers, Bruxelles, Bruylant, 1974, at 29, believes that the ‘*res judicata pro veritate habetur*’ is not a presumptions, but rather a fiction.

<sup>28</sup> The English translation of article 1350 of the French Civil Code is taken from H.S. Dahl and T. Bourdeau, Dahl’s Law Dictionary, third edition, Hein, 2007.

<sup>29</sup> With regard to Article 1350 of the Italian civil code of 1865, which was identical to Article 1350 under discussion, except for the provision of number 4) mentioned in the text, L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 144, where also some examples. Since the law which fixes a presumption belongs to the *ius singulare*, every analogical interpretation, which would imply the application of the same provision to similar cases and to analogous matters, has to be rejected.



matter, whereas every legal presumption obviously finds its origin from a specific statutory provision.

A different question concerns then the boundary between legal and *hominis* presumptions, which cannot always be solved having reference to an explicit legislative provision. Especially in tax law, as we will see later on, the legal provision often generically entitles the tax administration to make use of presumptive criteria, by identifying parameters which the latter can refer to.

## **2. Probative effects of legal presumptions...**

The analysis of the relevant provisions undertaken suggests considering the probative effects assigned to legal presumptions in the perspective of the distribution of the burden of proof, before and in order to distinguish between irrebuttable and rebuttable presumptions. It is a crucial point not only to understand the role played by legal presumptions within the proceedings, but also because it is the pivot of the question concerning the nature of legal presumptions (if procedural or rather substantive).

When dealing with presumptions' probative effects, three different levels need to be considered: the consequences on the position of the party who benefits from the presumption, then on the position of the party who suffers it, lastly the effect (in terms of efficacy) on the evaluation conducted by the judge.

### **2.1 ... under the perspective of the party who benefits from the legal presumption ...**

Under the first profile, there seem to be no distinctions between the two types of presumptions of law. According to Article 1352 of the French and Belgian Civil Codes, as well as Article 2728 of the Italian Code, legal presumptions *dispense from any proof the party in whose favour they are established*<sup>30</sup>.

From a literal interpretation of this provision, one can at first glance infer that the typical effect of legal presumptions operates on the grounds of the distribution of the burden of proof, in the extent to which - as I have already illustrated - the party who normally bears that burden is exempted from furnishing the proof.

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<sup>30</sup> Respectively, “*La présomption légale dispense de toute preuve celui au profit duquel elle existe*” (Art. 1352, par. 1). “*Le presunzioni legali dispensano da qualunque prova coloro a favore dei quali esse sono stabilite*” (Art. 2728, par. 1). As is evident, the formula used in the civil codes taken into consideration is identical.

However, the relation with the burden of proof has more facets when facing rebuttable presumptions. As a matter of fact, although the legislator uses a lone formula to fix the effect of each legal presumption, clearly its significance is very different depending on the type of presumption of law, i.e. whether rebuttable or irrebuttable, being possible for the party who suffers the presumption to furnish proof to the contrary only in the first case<sup>31</sup>.

This having been specified, the analysis of the main doctrine on the matter shows that the ‘dispense from any proof’ under discussion has not been unanimously interpreted as a mere reversal of the burden of proof, which evidently is suited only to rebuttable presumptions.

Indeed, some Authors have even denied that legal presumptions imply any impact on the ordinary distribution of the onus of proof. It has been observed that, when it is said that “*presumptions lay on the adversary the burden of the proof*”, the general effect of all the types of proof is expressed, since there are no differences if it is furnished indirectly (through presumptions) rather than directly. Moreover, this formula does not adapt to irrebuttable presumptions of law. In other words, the shift of the onus of proof would be a mere consequence of the dispensing from the proof provided in favour of one party. Once the latter relies on certain facts which law confers probative value to, then it is to the opponent party (if possible) giving evidence to the contrary, according to the ordinary rules. The reversal of the onus of proof is, in this perspective, merely apparent<sup>32</sup>.

Lastly, other Authors, with an interpretation that seems to be more in line with the comprehensive formula, have supported the thesis that we assist in a change of the theme of proof<sup>33</sup>. This does not consist of the fact which needs to be proved, but rather of another fact from which the existence of the latter is inferred. Such perspective permits pointing out that the introduction of presumptive provisions of law does not entail that the party is

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<sup>31</sup> According to S. Patti, *Della prova testimoniale e delle presunzioni (artt. 2721-2729)*, cited above, 110, this provision refers to both rebuttable and irrebuttable presumptions, since it does not concern the admissibility of the counterproof (as the rubric of the article may suggest) but rather the sufficiency of each legal presumption in order to regard the presumed fact as proved. *Contra*, M. Taruffo, *Presunzioni, sub Art. 2728*, in *Commentario al Codice Civile*, (ed.) P. Cendon, Torino, Giuffrè, 1 ed., Vol VI, 1999, 211.

<sup>32</sup> See L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 41 et seq.. This seems to be also the view taken by L. P. Comoglio, *Le prove civili*, cited above, 652, according to whom rebuttable presumptions imply a merely outward inversion of the onus of proof. In particular, the onus of proving the presumed fact is not shifted with the same object on the counterparty, but it rather ceases thanks to the exemption provided for by the law. The opposite party, on the other hand, bears the same onus of proof (to the contrary) that it would bear also in the absence of the presumption, being requested to give evidence of the facts which are able to hinder the efficacy of the presumed fact.

<sup>33</sup> See G.A. Micheli, *L'onere della prova*, Padova, Cedam, 1966, 197.

wholly relied on from any evidential burden, as the evidence of the known fact has still to be furnished.

## **2.2 ... and in the perspective of the relation with the ordinary rule on the burden of proof**

The choice between the theories referred to in the previous paragraph has not any real practical consequences in terms of the position of each party in the proceedings. Nevertheless, they raise the question of the interrelation between presumptions of law and the rule of the onus of proof.

As is well known, according to this general rule,<sup>34</sup> the plaintiff has to prove the constitutive facts of the right he relies on in the proceedings, while the defendant has to furnish evidence of the facts which his exception is based on. Such a rule is intended to avoid the *non liquet*<sup>35</sup> by distributing the risk of the non-evidence between the parties. In fact, the duty of deciding lies upon the judge even when he is not able to convince himself about the existence of the facts relevant within the proceedings. In doing so, it offers to the judge the criterion for a decision when the facts, on which the juridical effects claimed by one party depend, remain unknown (or, better, undemonstrated).

From these initial considerations, it follows that presumptions and the rule on the onus of proof first of all diverge from the systematic point of view.

While the former normally belong to the probative phase of the proceedings (i.e. to the phase of the forming of the judge's conviction)<sup>36</sup>, the rule on the burden of proof is a rule of judgment. It operates after the end of the probative phase and only when the result of the latter was negative, i.e. the judge does not have enough probative elements furnished by the parties at his disposal.

More particularly, when dealing with legal presumptions, it is possible to assert that their existence renders the ordinary rule on the burden of proof superfluous, in the extent to which the relevant facts in the proceedings are fixed according to the evaluation included

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<sup>34</sup> "*Onus probandi incumbit ei qui dicit*", which means that the burden of proof rests upon the party who asserts a certain fact. "*C'est le grand principe qui règle la répartition de la charge de la preuve en justice*", R. Decottignies, *Présomption en droit privé*, 17 et seq.. Or, with another latinism that is often used to express the same rule: *actori incumbit probatio*.

<sup>35</sup> Such formula, which literally means that 'it is not clear', refers to the absence of sufficient elements for the judge to decide.

<sup>36</sup> This is, however, a generalization, because, as we will see later on, while it can be surely asserted with regard to presumptions of fact and rebuttable presumptions, it becomes questionable when dealing with irrebuttable presumptions. Their substantive nature as well as their efficacy makes the interpreter incline towards a different view.

within the law. In this regard, while it seems to be obvious that legal presumptions derogate to the ordinary distribution of the onus of proof, it needs to be noted that there is no coincidence between the field of action covered by them and that one of other provisions which affect the ordinary distribution of the same onus as well. In other words, if it may be asserted that all legal presumptions affect the distribution of the burden of proof, not every distribution of this burden which is different from the general rule is the effect of a presumption<sup>37</sup>, as it was asserted during the *ius commune*.

Indeed, the same result consisting in the alteration of the ordinary burden of proof can be reached through different legal as well as judicial mechanisms. In the first case, in view of the arrangement that the legislator wants to assign to the substantive interests in play and with the *ratio* of lightening the evidentiary position of one party through the simplification of the situation envisaged in the norm.

The distinction between presumptions on the one hand, and other types of modification of the ordinary rule on the onus of proof on the other hand, is relevant in order to determine the object of the contrary proof that the inversion of the onus of proof puts on the counterparty. It has been argued, in this regard, that facing presumptions the counterparty has to furnish the contrary proof of a fact which is part of the constitutive elements of the relevant provision concerned and is presumed, rather than the “direct” evidence of an impeditive fact (i.e. a fact which is not part of the constitutive elements of the provision and is able to stop any effects of the same provision)<sup>38</sup>.

In addition, while presumptions are normally requested to find their grounds in the *id quod plerumque accidit* (i.e. in the normal course of events), this is not the case regarding a mere inversion of the burden of proof.

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<sup>37</sup> About the distinction between presumptions *iuris tantum* and provisions laying down rules on the division of the burden of proof, compare Patti, *Della prova testimoniale e delle presunzioni* (artt. 2721-2729), cited above, 102 et seq. In his view, the former determine the change of the theme of proof, because they consider facts different from that one which normally produce the juridical effects. This is not the case when dealing with the second type of provisions, whose *ratio*, however, can be explained in the light of the normality of a certain situation as well, like for the presumptions of fact. In both of the cases, the party is relieved from giving evidence of a certain fact, on the one side because it is dispensed according to a particular rule on the distribution of the onus of proof, on the other side because the disputed fact is ascertained by virtue of a presumption. This having been said, the Author recognized that both the legal mechanisms affect the principle of the free evaluation of the proofs and both can be contrasted with the proof to the contrary.

<sup>38</sup> In this way L.P. Comoglio, *Le prove civili*, terza edizione, cited above.

However, similar to what we will see with regard to legal presumptions, the modification of the onus of proof has to be rational. This implies, as it has been highlighted<sup>39</sup>, taking into account the difficulties/impossibilities of proof that the other party – namely, the party who has to furnish the proof to the contrary - has to bear. Where, in particular, it is for this party to give the evidence of a negative fact, then the distribution of the onus of proof ceases to be a mechanism of proof, and it is able to integrate a mechanism of predetermination of the losing party.

### **2.3 ‘Prima facie proof’, ‘pro-term truths’<sup>40</sup>, ‘jurisprudential presumptions’: the modification of the ordinary division of the burden of proof as the effect of concepts other than presumptions of law**

A derogation from the general rule on the distribution of the *onus probandi* represents the main procedural effect of rebuttable presumptions of law<sup>41</sup>, in the extent to which they reverse the burden of proof.

However, the same effect can arise from the substantial discipline of the matter, as well as from the operating of other mechanisms, such as the ‘*prima facie* proof’, the ‘pro term truths’ and the ‘jurisprudential presumptions’. These are solely some of the concepts which are similar to presumptions and result both from the judicial practice or from the doctrine within certain States.

Having dealt with the relationship between presumptions and the onus of proof, it is suggested to define these categories at this point of the research, again under a merely functional perspective, in order to distinguish them from presumptions.

The so-called *prima facie proof* represents a (jurisprudential) notion whose origin has to be found within the German system, and which is related to the *prima facie evidence* of the English law.

Basically, the conditions which are to be met in order for this type of proof to apply are: 1) a party in a litigation meets difficulties in furnishing the direct proof; 2) it is possible to consider *prima facie* (i.e. at first sight) reached the proof according to certain rules of experience; 3) this, unless the counterparty is able to furnish proof to the contrary. Despite

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<sup>39</sup> M. Taruffo, *Presunzioni, inversioni, prova del fatto*, Riv. Trim. Dir. Proc. Civ., 1992, 750, with special reference to the hypothesis in which the different distribution of the onus of proof is due to the judge and not to the law.

<sup>40</sup> The so-called ‘verità interinali’ within the Italian doctrine.

<sup>41</sup> With regard to irrebuttable presumptions, instead, it is more appropriate to speak of a release from the *onus probandi*.

the ordinary means of proof, its *ratio* is not permitting the necessary proof to be reached, but rather allowing the judge to uphold a claim when it is in itself likely to be well-grounded but difficult to prove<sup>42</sup>.

In other countries, for instance within the Italian system, there were some applications of this type of proof by the jurisprudence, especially in the field of the Aquilian responsibility with reference to the *culpa*. In particular, in many proceedings regarding the compensation for damages, the proof of the damaging fact has been considered as sufficient and on the basis of the latter, the *culpa* of the defendant has been presumed according to a rule of experience that a certain event is normally ascribable to the negligence of the defendant. In this way, the plaintiff is released from the onus of proving this negligence.

For our purpose, it is not necessary to deepen the analysis of this concept, but rather to underline the boundary with presumptions (especially the legal ones)<sup>43</sup>. Indeed, despite a part of the German doctrine according to which the *prima facie* proof is the result of a presumption of law<sup>44</sup>, it is evident that the different source of the proof (the judge rather than the law), not to mention other aspects<sup>45</sup>, imposes the exclusion of such a conclusion. But even the thesis of the *prima facie* proof as the result of a presumption of fact is not convincing, as far as the argument of the different known fact (the rule of experience rather than the clues regarding the actual case) does not appear to be enough in order to identify a category different from presumptions<sup>46</sup>. In other words, if the concept of *prima facie* proof

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<sup>42</sup> G. R. Pistolese, *La prova civile per presunzioni e le c.d. massime di esperienza*, Cedam, Padova, 1935, 15. On the same issue see also M. Taruffo, *Presunzioni, inversioni, prova del fatto*, cited above, 736 et seq., who considers the *prima facie* proof a modification/inversion of the onus of proof made by the judge instead of the law.

<sup>43</sup> Boundary line which according to G.R. Pistolese, *La prova civile per presunzioni e le c.d. massime di esperienza*, cited above, 42-43, rested in the different nature of the known fact, which also affects the convincing of the judge and so the probative effects of the presumption, in the extent to which it keeps value only if the counterparty does not prove the inability of the experience to explain the concrete case.

<sup>44</sup> In this regard, again see G.R. Pistolese, *La prova civile per presunzioni e le c.d. massime di esperienza*, cited above, 45, et seq., who explained – for the purpose of criticizing – that this view finds its basis in the nature of customary law assigned to the *prima facie* proof.

<sup>45</sup> Such as the absence of a mandatory character.

<sup>46</sup> Whereas this is the opinion of S. Patti, *Della prova testimoniale e delle presunzioni* (artt. 2721-2729), cited above, 92-94, according to whom in the *prima facie* proof the rule of experience represents the basis of the presumption (of fact) instead of the ‘grave, precise and concordant’ clues. Furthermore, the Author distinguished between the cited category and the ‘Anscheinsbeweis’ of the German experience, which would rather affect the evaluation of the proof: in this case the party has only to give evidence of the appearance of a certain (typical) situation. However, since he made reference to the rule of experience as the criterion on the basis of which the judge considers a fact as proved, the difference with the institute of the *prima facie* proof becomes unclear. Compare G.R. Pistolese, *La prova civile per presunzioni e le c.d. massime di esperienza*, cited above, 42, on the issue. In his perspective, the *prima facie* proof is the result of a presumption. In particular, to be presumed would be the causal relationship between the known fact and the unknown cause.

is the result of a presumption, then there is not any logical reason to distinguish between the former and the normal result of the latter.

The impression is that *prima facie* proof indicates a jurisprudential mechanism that is common in some sectors of the civil law, which determines the relief from the burden of proof for the plaintiff when dealing with a type-case, so that the fact that needs to be proved appears to be evident in the light of the experience. In this case, we do not have a change of the theme of proof, as the party is even released from giving evidence of the known fact. On the contrary, the persuasion of the judge is the result of a ‘likelihood judgment’, which is based on a rule of experience<sup>47</sup>.

Doubt does exist about the utility of this category<sup>48</sup>, and the same remark holds true as regards the *pro-term truths*, in the extent to which there are not any differences worthy of special consideration in comparison with presumptions of law.

According to some Authors, among the presumptions of law (in particular, the rebuttable ones) it is necessary to distinguish between the real presumptions and the improper presumptions. In the latter case, the law would not presume a fact on the basis of the existence of another one, according to the typical presumptive scheme, but it would consider as proved a fact as far as the proof to the contrary is not furnished<sup>49</sup>. The doctrine that has distinguished between proper and improper presumptions makes reference, for instance, to the *bona fide* presumption, as a case in which the law considers a certain fact as proved as long as it is not furnished proof to the contrary. In other words, the known fact is missing here, so that the provision seems not to reflect the normal course of events.

The distinction is not meaningless. However, apart from the observation that the logical inference in presumptions of law very often ends up to be more an interpretative *ratio* than

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<sup>47</sup> According to S. Patti, *Della prova testimoniale e delle presunzioni* (artt. 2721-2729), cited above, 122, the *prima facie* proof does not cause the inversion of the onus of proof, but rather a lowering of the degree of certainty related to the proof normally demanded, the party being allowed to give evidence of the ‘appearance’ of a certain (typical) situation. See also L.P. Comoglio, *Le prove civili*, terza edizione, cited above, 322, who assimilates jurisprudential presumptions and *prima facie* proof under the point-of-view of the results. The first ones are considered as the creation *praeter legem* of *iuris tantum* presumptions, which through the forming of judgment rules different from the one enshrined in Article 2697 of the Italian Civil Code, contributes to integrating the situation envisaged in the norm; pursuant to the second one, the burdened party is allowed to give evidence of the likelihood of the fact produced in the proceedings through convergent clues, while it is up to the counterparty to prove that the disputed fact is different from what appears or its inexistence. Both the jurisprudential mechanisms are however criticized as being a source of uncertainty.

<sup>48</sup> This, also considering the elaboration of the similar concept of ‘jurisprudential presumption’, as we will see later in the same paragraph.

<sup>49</sup> See in this way S. Patti, *Della prova testimoniale e delle presunzioni* (artt. 2721-2729), cited above, 95, with particular regard to the presumption of *bona fide*, where in his view the law considers a certain fact as proved as far as it is not furnished proof to the contrary.

the result of the crystallization of a rule of experience, it appears preferable to classify these provisions as merely legal modifications of the onus of proof or simply as presumptions.

It has to be noted that the above-mentioned concepts are mostly of a pure civil law interest, while they do not seem to be echoed in the area of tax law. In the field of tax law, the scholars have focused on further concepts, among which is the fictions of law<sup>50</sup>.

Within the Italian doctrine, the observation of the use of presumptions by the courts has led to the identification of the concept of jurisprudential presumptions, which are relatively common in the field of tax law and have been the object of the EUCJ's analysis, as we will see later on<sup>51</sup>.

This term refers to a sort of *tertium genus*<sup>52</sup>, which stands in between presumptions of fact and presumptions of law (the latter, fixed by particular provisions and without any possibility of interpretation by analogy)<sup>53</sup>.

As a matter of fact, the type of presumptions at hand is not provided for by law, but at the same time it cannot be classified as a mere presumption of fact, as far as its typical effect is not the assessment of a disputed fact but rather the inversion of the burden of proof. Despite the absence of a legal foundation, it appears to have a general character: on the basis of the circumstance that normally a certain fact is the consequence of another one and in line with the previous jurisprudence, the judge considers the unknown disputed fact as proved without any real ascertainment pertaining to the concrete case, unless the counterparty is able to furnish the contrary proof. In practice, a jurisprudential presumption normally comes into being as a presumption of fact with regard to specific cases. Then, the constant use of a certain presumption, together with its detachment from the peculiarities of the concrete case, determine the typification of the presumption and the forming of a jurisprudential rule<sup>54</sup>.

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<sup>50</sup> See *infra*, paragraph 3.2 of this Chapter.

<sup>51</sup> In particular, in the case C-129/2000, Commission vs. Italy, which will be discussed in Chapter III, Section IV, when dealing with national presumptions under the perspective of EU law.

<sup>52</sup> *Contra* M. Taruffo, *Presunzioni (diritto processuale civile)*, in Enc. Giur., vol. XXIV, Roma, 1991, 1, who disagreed with this qualification, considering that jurisprudential presumptions and rebuttable presumptions of law share the same structure.

<sup>53</sup> G. Verde, *Le presunzioni giurisprudenziali*, Foro It., 1971, V, 177 et seq..The Author pointed out the approach of the judge, who put a question of distribution of the burden of proof, rather than of conviction on the basis of circumstantial evidence. This, he demonstrated with several examples. Among the cases taken into account, the ones concerning the presumptions of gratuitousness of housework done by live-in relatives.

<sup>54</sup> In this way S. Patti, *Della prova testimoniale e delle presunzioni (artt. 2721-2729)*, cited above, 87-92, with special reference to the responsibility *ex lege aquilia* for the defective goods, which follows in the text. The Author underlined the absence of an evaluation in terms of probability related to the presumed fact.



An example that is able to show how a jurisprudential presumption works concerns the responsibility of the manufacturer for the damages caused by his products. *Ex lege aquilia*, indeed – and before the introduction of the EU directive that regulates the onus of proof in the matter - the plaintiff had to give evidence of the constitutive elements of the responsibility, the culpable behaviour included. However, after the judgment given by the Italian Supreme Court in the Saiwa case<sup>55</sup>, where it was stated that the damage can be connected to the defective (i.e. negligent) manufacturing of the product as a consequence of the latter, by means of a logical-presumptive process, there were other decisions in which the manufacturer's culpa was presumed without any real ascertainment in the concrete case.

Hence, the mechanism under discussion is a jurisprudential creation, which however implies the relief from the burden of proof in favour of the party who benefits from the presumed fact, and the shift of the burden of proof on the other party that is still allowed to give evidence to the contrary. This is why it has been considered to be comparable to rebuttable presumptions of law<sup>56</sup>.

In conclusion, the impression is that – like with *prima facie* proof - there is a shifting from the level of the forming of the judicial persuasion to the one of the rules of judgment by the judge of the case, through a sort of abstraction from the concrete case and the use of rules of experience. However, being the persuasion uniform in all the type-cases, the free evaluation of the proof by the judge is affected. Furthermore, it cannot be disregarded that the judicial source of the mechanisms under discussion may raise the question of the compatibility with the legality principle<sup>57</sup>.

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Moreover, the question is not tackled in terms of personal conviction, but rather of distribution of the burden of proof in the light of the reasonableness of the affirmed hypothesis.

<sup>55</sup> Supreme Court No 1270 of the 25th May 1965.

<sup>56</sup> S. Patti, *Della prova testimoniale e delle presunzioni* (artt. 2721-2729), cited above, 89. It is interesting that, as the Author observed, a similar phenomenon can be found within the French system, where also the jurisprudence “creates” presumptions facing difficulties of proof for certain categories of parties. For instance, in the proceedings between the victim of an accident and the insurance company of the person responsible, the latter is charged with the proof of the guarantee's limitations. This, on the grounds of the difficulties of proving the content of the insurance company's obligations by the injured party. L.P. Comoglio, *Le prove civili*, 2010, 322, qualifies jurisprudential presumptions as the *praeter legem* creation of *iuris tantum* presumptions, which integrate the substantive situation envisaged in the norm by identifying rules of judgment different from Art. 2697 of the Italian Civil Code.

<sup>57</sup> Indeed, in some of the decisions where it is possible to identify jurisprudential presumptions, the solution to the case is justified in the light of the relevant legislation.

### 3. Probative effects of legal presumptions under the perspective of the counterparty

#### 3.1 The right to give proof to the contrary: the main criterion in order to draw a distinction between rebuttable and irrebuttable presumptions

According to the perspective chosen, the analysis of presumption's probative effects implies the consideration of the 'second level'; namely, the position of the party to the disadvantage of whom the presumption of law operates.

It is on this ground, indeed, that we gauge the main difference between the two types of legal presumptions, being the counterparty prevented from giving evidence to the contrary when dealing with irrebuttable presumptions. And it is still on this ground that we gather the different impact on the situation envisaged in the norm, which affects the reading of the presumption's nature, if substantive or rather procedural.

Irrespective of the interpretation regarding the main effect of legal presumptions<sup>58</sup>, there is no doubt that both rebuttable and irrebuttable presumptions affect the ordinary distribution of the burden of proof. However, in the second case, the party who does not benefit from the presumption is not allowed to rebut it, by giving evidence to the contrary.

This is the sense of Article 1352, paragraph 2, of the French and Belgian Civil Codes, as well as of Article 2728, paragraph 2, of the Italian one, according to which it is not allowed to give evidence to the contrary against the presumptions on the basis of what the law states the nullity of certain acts or denies the judicial action, unless the law provides for it<sup>59</sup>. And, pursuant only to the former provision, save what is said on judicial oath and admission<sup>60</sup>.

The meaning of the reference to the oath and the admission provided for by the last part of the article at hand in the Belgian and French Civil Code is not clear, and this is why it has been differently interpreted by the relevant doctrine in the past.

In particular, while on the one hand it could mean that these means of proof can always be used in order to hinder an irrebuttable presumption, it might also be intended as confining the proof to the contrary against the latter only to them, or as specifying their probative

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<sup>58</sup> Which has been dealt with in the previous paragraphs, see in particular paragraph 2.

<sup>59</sup> In this case, however, the presumption loses its irrebuttable nature and it has to be classified as rebuttable or mixed.

<sup>60</sup> Indeed, unlike the current Italian provision at hand, the above-mentioned text of Article 1352 makes safe not only the case in which the contrary proof is legally provided for, but also what the same code lays down in the matter of oath and confession: "*sauf ce qui sera dit sur le serment et l'aveu judiciaires*". However, as observed in the text, taking also into consideration the relevant doctrine, this can be considered a difference of little importance in order to gather the characters of irrebuttable presumptions.

force and their nature of irrebuttable presumptions<sup>61</sup>. In fact, it is mostly interpreted in the sense that these means of proof can be opposed to presumptions even when irrebuttable. Since a presumption is fixed in favour of a certain party, it is argued, the latter can waive this treatment through oath or admission, unless the presumption is justified in the light of the public order or the necessity to avoid the fraud<sup>62</sup>.

This having been specified, the focus is on the first part of the abovementioned provision, which is the same in the different civil codes taken into consideration so far.

It includes two categories of irrebuttable presumptions, by distinguishing between:

- presumptions on the foundation of what the law declares the nullity of certain acts;
- presumptions on the ground of what the law prevents from taking legal action and thereby the examination of the claim by the judge.

And it excludes the possibility to rebut these presumptions unless the law does not provide for this.

Apparently, from this text it ensues that presumptions against which the proof to the contrary is denied represent the rule, whereas presumptions that can be rebutted are the exception<sup>63</sup>. However, most of the Authors refer the second paragraph of Article 1352<sup>64</sup> only to irrebuttable presumptions, which are identified through a narrow definition and against which the rebutting evidence is drawn as an exception that needs to be fixed by the law. In this view, irrebuttable presumptions are ‘the exception’, whereas normally the counterparty is allowed to give evidence to the contrary<sup>65</sup>.

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<sup>61</sup> The last interpretation results from the combined provisions of Articles 1350 and 1352. On this reservation R. Decottignies, *Présomption en droit privé*, cited above, 123 et seq..

<sup>62</sup> This seems to be the interpretation chosen by F. Laurent, *Principes de droit civil*, cited above, 640-642, according to whom the provision under discussion allows to give proof to the contrary against irrebuttable presumptions – i.e. the two types provided for by Article 1352 – apart from the case in which a presumption of public order is involved, for instance the presumption of *res judicata*. In the same way De Page, *La preuve par présomptions*, cited above, 966-967; R. Dekkers, *Précis de droit civil belge*, cited above, 421.

<sup>63</sup> In this way H. De Page, *La preuve par présomptions*, cited above, 952. However, the Author then narrowed this opinion to the hypothesis in which the presumption belongs to the two categories laid down in Art. 1352.

<sup>64</sup> In order to facilitate the grasp of the considerations laid down in the text, here is the (French) formula of Art. 1352: “*La présomption légale dispense de toute preuve celui au profit duquel elle existe. Nulle preuve n’est admise contre la présomption de la loi, lorsque, sur le fondement de cette présomption, elle annule certains actes ou dénie l’action en justice, à moins qu’elle n’ait réservé la preuve contraire et sauf ce qui sera dit sur le serment et l’aveu judiciaires*”.

<sup>65</sup> In this sense, C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 188, who argued from the legal provision at hand and moreover from the principle that the proof to the contrary is by rights. As a consequence, the *iuris et de iure* presumption, which is considered to be a proof from the relevant legislation, is exceptional, the proof to the contrary being inadmissible. Accordingly, L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 166 who deduced that the presumption of

It follows from this interpretation that if there is not any provision of law to the contrary, then the presumption has to be considered as rebuttable. On the other hand, reasons of constitutional compatibility together with the consideration that rebuttable presumptions are the majority, lead to support this conclusion.

Concluding on irrebuttable presumptions, it is undoubtedly possible to assert that even though the formula used by the cited civil codes is not coincident, it clearly refers to legal provisions where the presumed fact is fixed on the basis of the sign-fact and in an irreversible way, so that the party who suffers the presumption is not allowed to demonstrate the contrary and to hinder the juridical consequences fixed by the legislator on the basis of the presumption itself.

### 3.2 On the distinction between irrebuttable presumptions of law and fictions of law

Traditionally, the distinction between fictions of law and irrebuttable presumptions of law has been deemed to rest in the fact that while irrebuttable presumptions respond to the *id quod plerumque accidit*, fictions reflect the equalizing of two facts that is not based upon reality<sup>66</sup>.

For instance, the presumption of conception during a marriage, when the birth of the child happens after 180 days from the celebration of the matrimony and before 300 days from

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law admits, as a rule, the proof to the contrary from rational principles besides positive law. In particular, the presumption being based on a calculus of probability, it would be irrational denying the proof intended to show that the abstract probability does not operate in the specific case. See also R. Decottignies, *Présomption en droit privé*, cited above, 94 et seq., to whom I refer for an in-depth examination of the second paragraph of Article 1352, especially as regards the interpretation of the two hypotheses of presumptions listed in the text. See also F. Laurent, *Principes de droit civil*, cited above: “*Donc la preuve contraire est la règle, et l’exclusion de la preuve contraire est l’exception. (...) la règle que nous déduisons du texte de l’article 1352 découle des principes généraux de droit ; en effet, elle forme le droit commun, toute preuve admet la preuve contraire*”. Cf. E. Brunet, J. Servais, C. Resteau, *Présomptions*, R.P.D.B., 1951, 229.

<sup>66</sup> “*Unde fictio nunquam convenit cum veritate, praesumptio vero saepe*”, meaning that the fiction never responds to the truth or real facts, while the presumption often does. Menochius, lib. I, q. VIII, 9 and 10. See Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 50 et seq., where there are also many exemplifications. The Author pointed out that fictions find their basis only in the law, they belong to the singular law and so analogy is not admitted. Moreover, the proof to the contrary cannot be furnished. Compare also C. Forier, *Présomptions et Fictions, Les présomptions et les fictions en droit*, (ed.) Perelman et Forier, Bruxelles, Bruylant, 1974, 8 et seq., according to whom “*Présomptions et fictions, si elles présentent une certaine analogie du point de vue de la vérité, ressortissent pourtant à des catégories distinctes. Les présomptions se rattachent à la théorie de la preuve, les fictions à la théorie de l’extension de la norme en droit, voire à celle de la création ou de la légitimation de celle-ci*”. *Contra*, M. Taruffo, *Presunzioni (diritto processuale civile)*, cited above, 1, who belittled the difference under discussion, by underlining that both fictions and irrebuttable presumptions of law regulate the situation envisaged in the norm “*without explicitly asserting the presumed or artificial truth of a fact*”. F. Canelutti, *Sistema di diritto processuale civile*, I, Padova, Cedam, 1936, 816, distinguished irrebuttable presumptions and *fictio legis* by using the binomial ‘natural equivalence-juridical equivalence’.

the dissolution or annulment of the same matrimony<sup>67</sup> represents an irrebuttable presumption of law. It is clearly a provision based on a rule of experience, according to which, if a child is born during a period of time close to the marriage, then he is likely to have been conceived within the matrimony.

This is not the case, for example, where the law provides that the term of a contract, which did not take place because of the party who was interested in its not-realization, is considered to have occurred<sup>68</sup>. As a matter of fact, here the legislator considers to have happened a certain fact (i.e. the subject of the term) that certainly did not happen.

However, since both the concepts share the same result in terms of substantive juridical effects, the question arises as to whether it has any sense to distinguish between them<sup>69</sup>. In particular, it seems to be decisive the objection that since the counterparty is not allowed to give proof to the contrary<sup>70</sup> – neither with fictions nor with irrebuttable presumptions – then it may happen that in the concrete case even the irrebuttable presumption does not reflect the reality. Consider the previous example: it might be that the conception happened before or after the marriage (i.e. outside it). Nevertheless, if the birth takes place within the abovementioned period of time, the conception is considered to have occurred during the matrimony. And, this is the point, without any possibility of proving the opposite.

Moreover, several Authors are of the opinion that irrebuttable presumptions of law cannot be considered presumptions in a technical sense, being rather more appropriate their classification as a way of regulation of certain situations envisaged in the norms<sup>71</sup>.

These considerations show how, to a certain extent, even irrebuttable presumptions are able to assume the character of *fictio legis* and to have *de facto* the effect of equalizing two facts. Yet, it is possible to still justify a distinction based on the *ratio* of the provision, and on the circumstance that irrebuttable presumptions of law are requested to be based on a rule of experience. Above all, as it will be clear later on when dealing with taxation, the

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<sup>67</sup> Article 232, paragraph 1, of the Italian Civil Code. It is a provision established by other civil codes, in accordance with a favour for the legitimate status of the child and in order to guarantee certainty to such status. Cf. Article 315 of the Belgian Civil Code (*présomption de paternité*).

<sup>68</sup> Article 1359 of the Italian Civil Code. A similar provision is included in many other European civil codes.

<sup>69</sup> A. De Cupis, *Sulla distinzione tra presunzioni legali assolute e finzioni giuridiche*, Giust. Civ., 1982, 227 et seq., who is very critical of the use of fictions. This, in particular, because of the irrationality of the provision fixing a fiction, which in the perspective of the simplification creates a legal truth that is in contrast with the real truth. In his view, it would be more appropriate using the principle of analogy instead of introducing fictions.

<sup>70</sup> *Contra* C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 118, who agreed with Ramponi in saying that identity of the effects does not imply identity of content and structure.

<sup>71</sup> M. Taruffo, *Presunzioni (diritto processuale civile)*, cited above, 1, according to whom legal presumptions are only the rebuttable ones.

distinction appears to keep value in order to identify the parameters, in view of which their compatibility with the relevant constitutional principles has to be evaluated.

### 3.3 Main aspects of the proof to the contrary. The ‘mixed’ presumptions of law

Unlike irrebuttable presumptions, facing a rebuttable presumption the counterparty is allowed to give proof to the contrary, thereby avoiding the related effects.

It has to be firstly noted that the counterparty is always allowed to give evidence of the inexistence of the known fact, which is the base of the presumption of law, being irrelevant in this regard the nature of the mechanism, if rebuttable or irrebuttable.

Secondly, it is noteworthy that the proof under discussion can be *in abstracto* furnished with every means of proof, including presumptions of fact<sup>72</sup>.

Above all, the content of the contrary proof needs to be analysed. The object of this proof, in fact, is not the reasoning in itself. It can rather concern the (in)existence of the presumed fact or the existence of circumstances conflicting with the latter<sup>73</sup>.

Where such circumstances are strictly set out within the relevant legal provision, so that the proof to the contrary cannot be freely furnished, the presumption is classified by some scholars as ‘mixed presumption of law’, with a concept that refers also to the legal regulation of the means of proof which can be used. In practice, while fixing the presumption, the legislator restricts the right of the counterparty to give proof to the contrary, by confining it to certain circumstances laid down within the same provision or to certain means of proof.

While to our purpose the classification of this type of presumptions – whether irrebuttable or, as it seems to be more appropriate, still rebuttable – is of little importance, it is significant that the limits set to the contrary proof’s object affect the judgment of compatibility under the national and under the EU point of view as well, as far as they restrict the taxpayer’s possibility of defence. Thus, as we will see, the parameters used in order to evaluate presumptions of law lead to different outcomes depending also on the

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<sup>72</sup> Among the others, see L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 167 et seq.;

<sup>73</sup> According to C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 243, it is not a proof against the presumption in itself, being not possible to dispute in generic terms the correctness of the consequences inferred from the known facts by the legislator. On the contrary, the party has to give evidence of the circumstances that in the specific case demonstrate that the presumption is not justified. In practice, as explained by L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 167, it is possible to prove that in the pending case the consequence from the known fact cannot be deducted, or that the assumed relation between the latter and the unknown fact does not exist. On the contrary, it is not allowed to give evidence that the consequence is faulty or the relation is illogical.

extent to which the counterparty – who, obviously, in the field of taxation coincides with the taxpayer - is allowed to rebut the presumption or he is not.

#### **4. Probative effects of presumptions of law under the perspective of the judge**

The third level of the analysis on the probative effects of presumptions of law concerns their efficacy in relation to the general principle of free evaluation of the evidence by the judge. As a matter of fact, this principle is limited facing presumptions of law, the judge being obliged to consider the relevant facts ascertained as they are fixed within the law and to rule on the basis of it<sup>74</sup>. In other words, the presumption of law (regardless of its rebuttable or irrebuttable nature) imposes the judge to consider the unknown fact as proved when the evidence of the known fact is furnished by the party who benefits from the presumption.

The limitation to the principle cited above is obviously absolute when dealing with irrebuttable presumptions, since the unknown fact has to be considered as proved by the judge and productive of juridical effects without any possibility to admit the counterparty of demonstrating its inexistence. By contrast, when the counterparty is allowed to rebut the presumption, the judge will evaluate the proof to the contrary without any particular restrictions<sup>75</sup>. However, in the lack of the proof to the contrary, the judge has to hold the unknown fact as proved on the basis of the presumptive provision, without any possibility of considering the same fact not sufficiently proved or asking the party who benefits from the presumption for further proof.

As discussed further in the next paragraph, this effect of ‘legal proof’, meaning the limitations on the free evaluation by the judge, is what distinguishes presumptions of law from presumptions of fact under the perspective of the effects. Clearly, it is a mere corollary of their different source.

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<sup>74</sup> All legal presumptions share the same judicial aim, which is to reduce the discretion of the judge in the valuation of the proofs by simplifying the decision on questions of fact, according to C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 135.

<sup>75</sup> In this case, the free evaluation refers not only to the sole means of proof, but rather to the situation as a whole, since the judge has to decide if the presumption has been overcome. See S. Patti, *Della prova testimoniale e delle presunzioni (artt. 2721-2729)*, cited above, 110 et seq. The Author underlined that when the counterproof is not furnished, the rebuttable presumption of law has the same role of the onus of proof as rule of judgment, being in both the circumstances the principle of the free persuasion of the judge inoperative.

#### 4.1 The effect of ‘legal proof’ as a criterion to distinguish between *presumptiones iuris* and *presumptiones hominis*

Unlike what has been said as regards presumptions of law, the free evaluation of the proof operates when dealing with presumptions of fact, which “are left to the insight and carefulness of the judge”<sup>76</sup>.

This is why in Article 1352 of the French and Belgian civil codes<sup>77</sup> and in Article 2729 of the Italian one<sup>78</sup>, the legislator lays down the conditions of their admissibility<sup>79</sup>, which consist of an evaluation:

- a) of their seriousness, precision, concurrence;  
and in addition that
- b) the pending case falls within the cases in which the oral evidence is admitted by the law.

Thus, the probative effects of presumptions *hominis* are not directly fixed by the law but rather left to the prudent valuation of the judge. Nonetheless, the legislator does not waive to establish some criteria in order to avoid arbitrary decisions; taking into consideration, moreover, that the error of judgement seems to be normally censurable with the cassation appeal<sup>80</sup>.

Actually, only one of the two criteria mentioned above – namely, the conditions provided for the oral evidence (a) - seems to embody a real requisite for the admission of the means of proof under discussion. Whereas the second one – the three requirements that have to be met by the presumption (b) - rather concerns its efficacy<sup>81</sup>. From this perspective, after having ascertained that in the pending case the oral evidence would be admissible, the judge has to examine the presumption *hominis* and verify its seriousness, precision and

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<sup>76</sup> On presumptions of fact see M. Taruffo, *Certezza e probabilità nelle presunzioni*, Foro it., 84 et seq., especially with regard to the presumptive inference. The difficulties in classifying under the same concept legal presumptions and presumptions of fact are pointed out by G. Fabbrini Tombari, *Note in tema di presunzioni legali*, Riv. Trim. Dir. Proc. Civ., 1991, 917.

<sup>77</sup> Pursuant to which “*Les présomptions qui ne sont point établies par la loi sont abandonnées aux lumières et à la prudence du magistrat, qui ne doit admettre que des présomptions graves, précises et concordantes, et dans les cas seulement où la loi admet les preuves testimoniales, à moins que l’acte ne soit attaqué pour cause de fraude ou de dol*”.

<sup>78</sup> Pursuant to which “*Le presunzioni non stabilite dalla legge sono lasciate alla prudenza del giudice, il quale non deve ammettere che presunzioni gravi, precise, concordanti. Le presunzioni non si possono ammettere nei casi in cui la legge esclude la prova per testimoni*”.

<sup>79</sup> Critical of the limitations set for presumptions *hominis* A. Coniglio, *Le presunzioni nel processo civile*, cited above, 209, because they represent restrictions to the free evaluation of the judge.

<sup>80</sup> In order to verify if the reasoning is coherent and logical. R. Mougenot, *La preuve*, cited above, 285. See R. Lupi, *Metodi induttivi e presunzioni nell’accertamento tributario*, Milano, Giuffrè, 1988, 23 et seq.

<sup>81</sup> See L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 257. *Contra* A. Coniglio, *Le presunzioni nel processo civile*, cited above, 210; C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 312.



concurrency, being such requisites necessary in order to ascribe it the value of full proof. Hence, presumptions of fact: (a) apply only when the testimonial evidence would be admissible and (b) they are able to give evidence of the unknown fact if the three requisites concerning the degree of probability – *rectius*, reliability or plausibility - are fulfilled.

Such an interpretation is not consistent with the terms of the law, which explicitly speaks of *admissibility* – or even *exclusion*, in the Italian formula<sup>82</sup> - in both of the cases.

In any event, in practice the issue under discussion does not seem to affect the evaluation of the presumption of fact by the judge, but if ever the logical moment within the legal proceedings in which the consideration of the two conditions is placed<sup>83</sup>. Furthermore, unlike other types of (direct) proof, with regard to presumptions *hominis* it is difficult to distinguish between the phase of the admission and the one of the valuation.

Irrespective of this, it is evident that, in order to consider the unknown fact as proved, both of the conditions laid down in the above-mentioned articles have to be fulfilled. When this happens, the degree of certainty resulting from the presumptions *hominis* cannot be considered as being lower than the one offered by the direct proof<sup>84</sup>.

#### **4.1.1 Presumptions of fact: requisites for admission**

It is now necessary to briefly direct attention to the conditions referred to at the end of the previous paragraph.

In this regard, while the reference to the cases in which the oral evidence is admitted does not raise any particular problems, as they are listed within the relevant articles of the civil codes, the meaning of the three adjectives provided for by the first part of Articles 1352 and 2729 cited above needs to be specified.

Firstly, the *seriousness* is generally intended as referring to the degree of probability of the presumption. In the sense that it has to be such probability that the judge is persuaded about; that is, the (moral)<sup>85</sup> certainty of the (unknown) fact relevant within the proceedings. Secondly, the *precision* seems to concern the logical relation between the known fact and the unknown fact. Being *in abstracto* possible to infer the same consequence from different

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<sup>82</sup> See Art. 2729, para. 2, of the Italian Civil Code.

<sup>83</sup> I.e. the moment of the evaluation of the possibility to admit the proof rather than of the valuation regarding its efficacy.

<sup>84</sup> As it has been already underlined at the beginning of this chapter, dealing with the distinction between direct and indirect means of proof. See, among the others, A. Coniglio, *Le presunzioni nel processo civile*, cited above, 224.

<sup>85</sup> L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 297 et seq.

circumstances, this relation has to be unequivocal, so that the fact that needs to be ascertained represents the only possible effect – or at least the most plausible - of the known fact.

In the end, both of these requisites boil down to the same concept, which concerns the rational plausibility of the presumption, in terms of suitability in indicating specifically the unknown fact without either any doubts nor contradictions.

Lastly, the legislator demands the *concordance* between the various presumptions. If the sense of this requisite might appear quite obvious, especially when there is more than one presumption regarding the same unknown fact, it has nonetheless been the object of uncertainties, particularly within the less recent doctrine. The main question can be summed up as follows: may *one* presumption of fact be enough in order to consider the unknown fact as proved, or instead the reference within the law to *concordant presumptions* implies the necessity of more than one? In this regard, unlike what has been submitted by some French Authors<sup>86</sup>, a not-merely-literal interpretation seems preferable, according to which the provision under discussion does not request the existence of more than one presumption of fact, but simply demands, in such an event, for them to not be in conflict<sup>87</sup>.

#### **4.1.2 Some remarks on the definition of presumptions *hominis* in Article 1353 of the French and Belgian Civil Codes**

Pursuant to Article 1353 of the French and Belgian Civil Codes, "*Les présomptions qui ne sont point établies par la loi, sont abandonnées aux lumières et à la prudence du magistrat, qui ne doit admettre que des présomptions graves, précises et concordantes, et dans les cas seulement où la loi admet les preuves testimoniales, à moins que l'acte ne soit attaqué pour cause de fraude ou de dol*".

Unlike the equivalent Italian formula, the text mentioned above contains, in the last part, a reference to the case in which a certain act is impugned because of fraud or deception. The same reference was included in the pre-unitary Italian codes, but it has not been inserted either in the Civil Code of 1865 nor in the one of 1942.

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<sup>86</sup> R. J. Pothier, *Trattato delle obbligazioni*, cited above, 122.

<sup>87</sup> See L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 313. It has been observed that the mention of the presumption is not technical. It should be rather read as referring to the known fact – namely, the base of the presumption - as it is very possible to face different (proved) circumstances from which a certain unknown fact can be inferred. In this sense, C. Forier, *Présomptions et Fictions*, cited above, 10. On the distinction between presumption and clue, see A. Coniglio, *Le presunzioni nel processo civile*, cited above, 201 et seq.

A literal interpretation would at first glance induce the thinking that in the hypotheses of fraud or deception the judge is allowed to admit presumptions *hominis* even when the law does not admit the oral evidence. However, this interpretation is in contrast with the law – namely, Article 1348 - pursuant to which in the matter the oral evidence is admitted<sup>88</sup>.

Another interpretative option then would be to consider that in the cases under discussion, while the oral evidence is admitted, the presumption is not. But it would be difficult to get the *ratio* of such an exclusion, given the fact that in these cases, more than in others, the use of presumptive criteria is important for the ascertainment of the facts.

Ultimately, an interpretation that would refer the clause at hand to the three requisites listed in the first part of the article has to be rejected, in the sense that when an act is contested on the basis of the fraud or the deception, then the presumption *hominis* can be used irrespective of the fulfilment of those conditions. This would mean obliterating the fundamental parameter of plausibility that each presumption of fact is requested to meet.

The foregoing considerations have brought the majority of the scholars to argue that the formula at hand has been included in Article 1353 by the legislator *ad abundantiam*, without having any particular meaning in the context<sup>89</sup>. So that, for our purpose, it is certainly possible to assert that there are not any relevant differences between the definition of presumption of fact included in the civil codes so far considered.

#### **4.1.3 Presumptions of fact: final remarks**

As has been pointed out at the beginning of this chapter, since the perspective taken in this dissertation is that of the relation between legal systems, presumptions *hominis* are not (directly) relevant to our purpose. Hence, the focus of the research is on presumptions of law, while the analysis of the presumptions of fact, which concern more precisely the ascertainment of a certain fact in a concrete case, is carried out in the extent to which it is functional to the rest.

Notwithstanding that the legislator pools the two types of presumptions under the same formula of Articles 1350 (French and Belgian Civil Codes) and 2727 (Italian Civil Code), they lie on a different level. Indeed, far from being the result of the national legislators'

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<sup>88</sup> See: E. Picard, N. D'Hoffschmidt and J. De Le Court, *Présomption*, cited above, 819. “*Cette réserve ne peut pas être entendue dans le sens d’une restriction de la preuve testimoniale, ni, avec des auteurs, qui s’écartent en cela de l’opinion générale, comme une extension de cet article*”.

<sup>89</sup> See L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 288, where also many references to the French doctrine and the different positions on the issue. Cf. E. Picard, N. D'Hoffschmidt and J. De Le Court, *Présomption*, cited above, 1904, 819.

choice, presumptions of fact rather pertain to the acting of the judge and, when dealing with tax law, also of the tax administration. This is why, as we will see later on, they become relevant only in the extent to which their (constant) application is able to embody a breach of EU Law, for which the responsibility always lies on the Member State involved.

In the light of the foregoing, it is ultimately worthy of attention the issue of the ‘proof to the contrary’ that the party is allowed to give facing a presumption *hominis*.

In this regard, it has to be specified that the use of the term “proof to the contrary” is a simplification, since technically there is not an inversion of the onus of proof. As a consequence, it is not possible to discuss a legal onus to give evidence to the contrary on the party who suffers from the presumption *hominis*.

Besides this terminological remark, it has to be underlined that a substantial aspect distinguishes the subject of the proof to the contrary when dealing with presumptions *hominis* in comparison to presumptions of law. In the latter case, the party is not allowed to give evidence of the unreliability of the presumption, being the inference the result of a legislative choice. On the contrary, in the former case, the same party can dispute the reasonableness of the presumption, namely the likelihood of the presumed fact by contesting the plausibility of the reasoning<sup>90</sup>. Obviously, as with legal presumptions, it is always also possible to demonstrate that the circumstance at the basis of the presumption does not exist or furnish elements supporting the non-existence of the presumed fact.

## **5. The nature of presumptions of law: introduction to the issue**

The analysis of legal presumptions’ probative effects carried out so far - even in comparison to presumptions *hominis* - permits the questioning of their nature, if substantive or rather procedural and to express some considerations.

Notwithstanding this may be at first glance considered a merely theoretical issue, on the contrary, various practical consequences may depend on the answer held.

The reference is, in particular, to the repercussion on the temporal effects of a provision laying down a presumption, on the parameters in the light of which the constitutional compatibility of the relevant presumption is to be examined, and lastly on the types of errors that may be claimed before the Supreme Court.

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<sup>90</sup> R. Decottignies, *Présomption en droit privé*, cited above, 266: “L’adversaire peut librement combattre la vraisemblance qui s’attache à un tel moyen de preuve”. This often happens within administrative proceedings.

As a matter of fact, if a substantive nature is assigned to a certain presumption of law, then the legislation enforceable will be the one that was in force at the time when the relevant fact or the act took place. Differently, if it has a procedural nature, the legislation in force at the time of the proceedings will apply.

Moreover, the distinction at hand is relevant in view of the evaluation of constitutional compatibility of the presumptive provision concerned. For instance, in tax law the substantive nature of the presumption would imply that this evaluation is to be developed in the light of the ability to pay principle, while the procedural nature would demand an analysis focused on the observance of the right of defence and to a fair trial.

Finally, the nature of the presumption is able to affect the type of error that can be claimed before the Supreme Court, where normally only objections on a point of law may be raised. Since presumptions of law clearly find their source within the legislation, this question seems to be without any real concrete interest, being, in any case, always possible to appeal a violation of the relevant provision before the Court.

The aspects mentioned so far represent mere exemplifications and simplifications of the issues that may arise from the nature assigned to presumptions. The aim is to underline the significance of the question, which in this paragraph is only posed. Indeed, as the perspective touches these issues in terms of relevant problems and possible solutions, they will be dealt with when dealing with presumptions from the fiscal point of view.

### **5.1 Main theories on the nature of legal presumptions**

This having been premised, within the doctrine it is possible to identify two main positions on the nature of presumptions of law.

Before analyzing them, however, a further observation is necessary. As a matter of fact, when dealing with irrebuttable presumptions of law, it is difficult not to recognize their substantive nature. As a consequence, the dispute on the nature of legal presumptions mainly concerns the rebuttable ones.

Not much differently from what has been asserted about fictions, irrebuttable presumptions can be considered as a way of regulating a given situation in a norm. This, in order to fulfil certain interests that will be considered when dealing with taxation, is at any rate mostly from a perspective of simplification. In this event, the party against whom the irrebuttable presumption operates is not allowed to give evidence to the contrary, and *de facto* the legislator regulates a certain situation. There are procedural effects deriving from the

irrebuttable presumptions also, if we only consider that the judge is obliged to keep the presumed fact as proved, and the party who benefits from the presumption is released from giving evidence of the latter. However, these consequences can be considered as a corollary – thus, a sort of secondary effect - of the main effect, which is exactly the regulation of the matter by means of a particular legislative technique<sup>91</sup>.

This cannot be asserted for certain with regard to rebuttable presumptions, in the extent to which the impact on the burden of proof that is their principal effect may lead the interpreter to believe that they have a procedural nature, as means of persuasion or evaluation of the judge<sup>92</sup>.

On the contrary, several Authors have supported the substantive nature even of rebuttable presumptions, which are defined as being the result of a legislative technique aimed at simplifying the discipline of a certain situation<sup>93</sup>. In this perspective, the role of the inversion of the onus of proof is belittled, while the focus is on the effects with regard to the material discipline of a certain situation, in the absence of the proof to the contrary. In fact, it is argued, the legislator fixes the regulation of the case, thereby affecting the situation envisaged in the norm and most of all binding the judge to the effects established *a priori* within the provision, unless the proof to the contrary is furnished.

This theory has had the merit of highlighting the substantive effects that rebuttable presumptions of law may have. But it must be borne in mind that such effects occur insofar as the proof to the contrary is not given.

At any rate – and referring to the next chapter for further considerations - since legal presumptions have been traditionally set within the theory of proof, the question of their nature has to be tackled by appreciating also their role within the legal proceedings (and administrative proceedings, in the field of taxation), which cannot be completely sacrificed in the name of the undoubted substantive effects of presumptions.

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<sup>91</sup> In this sense, *ex multis*, M. Taruffo, *Presunzioni (diritto processuale civile)*, cited above, C. Lessona, *Accesso giudiziale, intervento istruttorio, presunzioni*, cited above, 180; *Contra*, however, R. Decottignies, *Présomption en droit privé*, cited above, 92.

<sup>92</sup> Compare R. DEcottignies, *Présomption en droit privé*; A. Coniglio, *Le presunzioni nel processo civile*, cited above, 50 et seq.

<sup>93</sup> *Ex multis* L. Ramponi, *La teoria generale delle presunzioni nel diritto civile italiano*, cited above, 60; L.P. Comoglio, *Le prove civili*, terza edizione, cited above, 653.

## **6. Presumptions and common law systems: is there an autonomous common law concept of presumption?**

Having dealt so far with the concept of (legal) presumption by reference to some of the EU Member States' representative of the civil law systems, the question arises as to whether a common law system, like the United Kingdom, shares the same concept or on the contrary a different and autonomous notion needs to be identified. In the first case, indeed, would it be possible to label a common concept of legal presumption within the European context, on the grounds of then analyzing the EU approach to the latter in fiscal law.

When dealing with this issue – besides the Anglo-Saxon's doctrine tendency to deal with the law of evidence either in civil and criminal proceedings at the same time by underlying the main differences – difficulties lie with the different terminology used at times, which mostly reflects the different operation of the civil trial, as compared to the continental one. However, the terminological differences might be misleading, being necessary to verify if they turn into substantial differences.

For our purpose, it is of interest to investigate only three main aspects, i.e. 1) the principles governing the distribution of the burden of proof; 2) the 'degree' requested in order to satisfy it; and, above all, 3) the category of presumptions, in terms of what they refer to and how they are classified.

### **6.1 A general overview on the burden and standard of proof**

#### **6.1.1 The distinction between evidential burden and legal burden of proof**

The analysis of the rules governing the distribution of the burden of proof is inevitably affected by the peculiarities of the proceedings in the common law systems. In particular, the division between an initial phase regarding the submission of the case and a subsequent stage imposes a distinguishing between the so-called evidential burden from the legal one. In fact, the above distinction seems to be more suited to criminal proceedings, where the judge is called to decide if the evidence is such as to justify the submission to the court of a certain case or to withdraw an issue from the jury<sup>94</sup>. Because nowadays the jury trial in

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<sup>94</sup> More in particular, A. Keane, *The Modern Law of Evidence*, 8<sup>th</sup> edition, Oxford, Oxford University Press, 2010, 80, identifies two hypotheses in which the evidential burden has to be considered by the court: a) at the commencement of the trial in order to determine which party starts; b) during the trial, when the judge states if the evidence adduced is enough for the purpose of leaving the issue before the tribunal of fact. After that, irrespective of the decision of the judge – in the sense of withdrawing the issue from the jury or allowing it to go before the tribunal of fact – the consideration of the evidential burden becomes irrelevant. At this point,

civil proceedings is rare, the role of the evidential burden appears to have mostly lost its relevance.

It is defined as the obligation on a party to adduce sufficient evidence on a fact in issue in order to justify, as a possibility, a finding in his favour by the jury, and thereby to lead the judge to submit the issue to the tribunal of fact. If the submission takes place, then it is up to the jury to decide whether or not the fact has been proved; on the contrary, if the evidence adduced by the party who bears the evidential burden is not enough, then the judge withdraws the issue from the jury, directing them to return a finding on that issue – or, depending on the circumstances, on the whole case - in favour of the other party<sup>95</sup>.

In any event, the discharge of the evidential burden places upon the adversary the obligation – defined as provisional burden – to furnish the counter proof, in order to convince the jury in his favour.

When dealing with civil law proceedings without a jury, which currently are the norm in the English system, “*rarely, if ever, should a judge (...) entertain a submission of no case, although (...) there may be some flaw of fact or law of such a nature as to make it entirely obvious that the claimant’s case must fail, and the determination at that stage may save significant costs*”<sup>96</sup>.

In the light of the foregoing, for our purpose the second kind of burden, namely the concept of legal burden, appears of more interest. It refers to the ‘obligation imposed on a party by a rule of law to prove a fact in issue’<sup>97</sup>, with the consequence that if the same party fails to discharge that burden according to the standard required<sup>98</sup>, then he will lose on that particular issue.

Not differently from what we have seen with regard to the civil law systems, the general rule on the distribution of the burden of proof between the parties to the action, falls to become a rule of judgment, with the aim of avoiding the *non liquet*<sup>99</sup>. In other words, when

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the legal burden counts. He says: “*So far as the court is concerned, the evidential burden requires no further consideration; the only burden remaining at this stage is the legal burden*”.

<sup>95</sup> See A. Keane, *The Modern Law of Evidence*, cited above, 79 et seq., who observes that normally a party bearing the legal burden on a certain fact at the beginning of the proceedings also bears the evidential one, although this is not always the case.

<sup>96</sup> A. Keane, *The Modern Law of Evidence*, cited above, 39, by reference to what has been held by the Court of Appeal in *Benham Ltd v Kythira Investments Ltd*. Diversely, in civil cases tried with a jury “*the judge has a discretion whether to rule on a submission of no case to answer without requiring the defendant to elect to call no evidence (...)*”.

<sup>97</sup> A. Keane, *The Modern Law of Evidence*, cited above, 77.

<sup>98</sup> Which, in civil proceedings, is “*on the balance of probabilities*”, as I will clarify in the ensuing text.

<sup>99</sup> Compare, in this regard, A. Keane, *The Modern Law of Evidence*, cited above, 78, who recalls the case *Stephens v Cannon* ([2005] EWCA Civ 222), where the Court summarized the conditions under which the



the facts in issue have not been proved by the parties, so that the judge is not in the position to make a finding, he will decide by reference to which party bears the legal burden as regards those facts<sup>100</sup>.

The question is then which party bears the legal burden of proof in the concrete case. It seems to be obvious that, in this regard, it is necessary to refer to the substantive regulation of the relevant matter. Given the peculiarity of the system concerned, the rules of substantive law include the ones set out both in precedents and statutes. Hence, the incidence of the legal burden may be fixed within the relevant legislation, or in the precedents<sup>101</sup>. When this is not the case, however, it has been observed that the courts tend to decide “*not on the basis of any general principles but more as a matter of policy given the particular rule of substantive law in question*”<sup>102</sup>, thereby also taking into account the difficulties of proof for the parties of the litigation<sup>103</sup>.

However, the value of the maxim according to which ‘he who asserts must prove’, is generally recognised as the general rule in civil cases. In this view, the legal burden of proof will normally lie on the party asserting the affirmative of a certain issue ‘essential’ in the proceedings. While the defendant - unless he restricts his defence to a mere denial of the counterparty’s assertions - bears the burden of proving the (normally, negative) facts which are able to stop the effects of the former<sup>104</sup>.

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judge could refer to the legal burden in order to make a finding. Firstly, the situation has to be exceptional, although referring to any issue; secondly, a sort of duty of information in favour of the parties is requested; finally, the resort to the above rule is an *extrema ratio*, in the sense that there has to be the reasonable impossibility for the judge to decide.

<sup>100</sup> This is the meaning of the prohibition of the *non liquet*: the judge has to decide in any case, irrespective of the standard of evidence adduced by the parties in the (civil) proceedings.

<sup>101</sup> In addition, the parties themselves can agree on the incidence of the burden of proof, by means of express agreements such as a written contract. Cf. *Levy v Assicurazioni Generali* [1940] AC 791, PC and *Fred Chappell Ltd v National Car Parks Ltd* (1987) *The Times*, 22 May, QBD.

<sup>102</sup> A. Keane, *The Modern Law of Evidence*, cited above, 97.

<sup>103</sup> Similarly to what we have seen, for instance, in some cases of responsibility (involving the proof of fault) brought before the Italian judge. See paragraph 2.2 of this Chapter dealing with *prima facie* proof. Critical on a ‘doctrine’ developed in some cases, which put the burden of proof on the party who has peculiar knowledge or control of the evidence regarding the matter, R.J. Delisle, *Evidence: principles and problems*, 2<sup>nd</sup> ed., Carswell, Toronto, Calgary, Vancouver, 1989, 98. This position would find its root in the considerations expressed by commentators on the law of evidence that, trying to distil from cases some general law, have underlined how the question of the distribution of the onus implies matter of policy, fairness, probability.

<sup>104</sup> This is one of the two senses in which the term burden of proof is used according to E. Cockle and L.F. Sturge, *Cases and statutes on the law of evidence with notes explanatory and connective, presenting a systematic view of the whole subject*, 7th edition, Sweet & Maxwell Limited, London, The Carswell Company Ltd, Canada, The Law Book Company of Australasia, Australia Pty. Ltd., 1946, p. 136 et seq., where some cases law are reported. The Author distinguished among the ‘particular burden of proof’, and the ‘general burden of proof’. The former concerns a particular fact in issue and lies upon the party alleging the affirmative of this fact; its “*incidence (...) or the moment when it shifts may be affected by any relevant presumption*”. The second one seems to coincide with the ‘right to begin’, so that it refers to the party who

An example typically used in the manuals<sup>105</sup> to show the mechanism concerns the action for negligence. Here, the plaintiff has to adduce evidence of the existence of a duty of care, its breach and the loss caused as a consequence, to support his claim for damages; while the defendant has to prove those facts that avert the effects of the affirmative facts, such as the violence suffered by the claimants himself or the contributory negligence.

In this regard, it is worthy of attention that a substantial approach is privileged in order to distribute the burden of proof. This is in the sense that the form of the statement of the case is not decisive in order to determine the incidence of the burden, being necessary to consider the substance and the effect of the allegation<sup>106</sup>.

### 6.1.2 The standard of proof

In order to consider a certain fact as proved, the evidence adduced by the party who bears the legal burden on the relevant issue has to be as such to meet the required standard of proof. This concept refers to the degree of cogency of the evidence alleged, which normally is fixed by the law or finds its ground in the common law.

The connection between the standard of proof and the rule on the distribution of the burden of proof<sup>107</sup> is evident. Once the party who bears the legal burden with reference to a particular issue is identified under the latter rule, it has to be decided by the court if the proof is “enough” for the purpose of taking the fact as having happened. If it is not, and the judge is left in doubt, then he will make a finding against the party who failed to discharge the legal burden borne by him on that certain issue<sup>108</sup>.

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has to begin and who settles the question, thereby normally the plaintiff. On the different meanings given to the term ‘burden of proof’ see also R.J. Delisle, *Evidence: principles and problems*, cited above, 91 et seq.

<sup>105</sup> See A. Keane, *The Modern Law of Evidence*, cited above, 96 et seq.

<sup>106</sup> “Thus a party cannot escape a legal burden borne by him on a particular issue essential to his case by drafting his claim or defence, in relation to the issue, by way of a negative allegation”. See A. Keane, *The Modern Law of Evidence*, cited above, 97, by reference to the case *BHP Billiton Petroleum Ltd v Dalmine SpA* ([2003] BLR 271, CA at [28]). In the same way E. Cockle and L.F. Sturge, *Cases and statutes on the law of evidence with notes explanatory and connective, presenting a systematic view of the whole subject*, cited above, 137: “(...) the substance, and not the mere form, of the pleading is to be considered”.

<sup>107</sup> Which, as we have seen in the previous paragraph, states who has to prove what. A related question concerns which party has the “right to begin adducing evidence”. According to A. Keane, *The Modern Law of Evidence*, cited above, 101, “*In civil cases the claimant has the right to adduce his evidence first, unless the defendant bears the evidential burden on every issue*”. From this we infer that when the legal burden is in issue – which interests us the most – the same principle applies, as it seems to be obvious in the civil law systems as well. On the other view, the question is devoid of any practical relevance if referred to the chronological order, the plaintiff being the one who brings the claim in front of the court. If it is rather intended to identify the party bearing the burden of proof or of the related counterproof, then the nature of the facts in issue count, whether positive or negative. In other words, the sequence proof/counterproof depends on the nature of the facts alleged.

<sup>108</sup> Given the fact that in civil proceedings the judge has to decide in any case.

Having clarified the relevance of the standard of proof in the common law system, the question arises as to the concrete meaning of this merely abstract formula in concrete cases. Within the doctrine, the existence of a general rule, according to which, in civil proceedings the standard of proof is ‘on a balance of probabilities’ is conventionally recognized. This parameter seems to indicate the degree of probability referring to the facts that are object of proof, thereby resting on the preponderance of probabilities. To simplify, it requests that there are more probabilities that the fact in issue occurred than it did not. This holds true even with regard to the discharging of the burden of contrary proof where a presumption of law operates.

There are several exceptions to the general rule, prescribed by the statute law or at common law, requesting a different standard. In some cases, the criminal standard, i.e. ‘proof beyond reasonable doubt’ needs to be met; at other times a (more) exacting civil standard of proof applies<sup>109</sup>. Even more important are those exceptions that are neither crystallized in the statute law nor can be considered as rules apart, being rather expression of the general rule’s flexible application. It has been held by the authorities that the more serious the allegation or the consequences if the former is proved, the more cogent must be the evidence in order to meet the ordinary standard of proof. The flexibility, in this view, does not concern the degree of probability, but rather the strength or quality of the evidence itself<sup>110</sup>. This, on the basis of the assumption that the gravity of the facts requests a stronger evidence in order to overcome the unlikelihood of the allegation, in terms of improbability that it happened. In particular, the jurisprudence shows an inclination to a ductile application of the general rule in very sensible matters, as the matrimonial causes or the behaviour having also a criminal relevance. In these cases, the request of a more cogent evidence is emphasized by the use of adjectives like ‘strong, distinct, satisfactory, irrefragable’, able to prove the fact in issue ‘clearly and unequivocally’<sup>111</sup>, which are intended to express the major strength assigned to the evidence itself.

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<sup>109</sup> For the hypotheses see to A. Keane, *The Modern Law of Evidence*, cited above, p. 106.

<sup>110</sup> See A. Keane, *The Modern Law of Evidence*, cited above, 107, who analyses the case record by reference to three main groups of hypotheses: allegations of crime in civil proceedings; matrimonial causes, miscellaneous, the latter including a variety of issues calling for a higher standard of proof.

<sup>111</sup> Given the fact that the analysis of the single judgments goes beyond the purpose of this dissertation, for the case law I refer again to A. Keane, *The Modern Law of Evidence*, cited above, 197 et seq., where also other matters are subject to a more rigorous standard of proof. Cf. R.J. Delisle, *Evidence: principles and problems*, cited above, 103, where there are also some case law and opinions. The Author, after having said that the burden of persuasion in civil cases normally requires for satisfaction ‘a preponderance of evidence’, unlike the criminal standard, noted that it not unusual for a civil court to adopt a different standard, such as the criminal one or a third one requiring “clear and convincing proof”, depending on the issue concerned.

It is not clear – and the conflicting case law confirms this - what the above major strength of the evidence consists of, if not in terms of more probabilities<sup>112</sup>. On the other hand, the words used to define the character of the evidence requested - as illustrated above – can't be confined to some “delicate” matters. Differently, this would entail the recognition of a weak proof in the rest of the cases. Moreover, the connection between the importance of the fact in issue and the standard of proof requested, on the grounds of the more or less (inherent) likelihood of the former, appears to be illogical<sup>113</sup>, unless it simply turns out in the stress on the necessity of an overall consideration of the elements by the judge.

At any rate, it is most interesting to notice that even in common law the proof seems to be evaluated according to a parameter that can be considered as comparable to the principle of the proof's free evaluation, which is typical of the civil law systems so far considered. Obviously, this is unless the statute law provides differently. It is up to the judge of the concrete case to evaluate the proofs adduced and their likelihood, unless the statute law – or at common law – demands a higher standard or fixes the effects of the proof itself – as the case may be with legal presumptions - once it enters into the proceedings.

## 6.2 Presumptions

Similarly to the civil law systems analysed so far, within the common law system under examination presumptions have been considered in the frame of the theory of proof, more exactly the law of evidence<sup>114</sup>.

In this context, the distinction among direct and indirect evidence – the latter called ‘circumstantial evidence’ - <sup>115</sup> has had the merit of underlying that every presumption is

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<sup>112</sup> In this sense, cf. *Bater v. Bater* [1951] P 35 at 37, CA, where the opinion of Lord Denning was in the sense of the existence of degrees of probability within the standard.

<sup>113</sup> In this sense, *Re B (Children) (Sexual Abuse: Standard of Proof)* [2009] 1 AC 61 HL, where Baroness Hale observed that “*The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied.*”

<sup>114</sup> E. Cockle and L.F. Sturge, *Cases and statutes on the law of evidence with notes explanatory and connective, presenting a systematic view of the whole subject*, cited above, p. 24.

<sup>115</sup> In this sense, if I am not mistaken, A. Keane, *The Modern Law of Evidence*, cited above, 12 et seq., who adds that “*Certain types of circumstantial evidence arise so frequently that they have been referred to as ‘presumptions of fact’ or ‘provisional presumptions’, such as the presumptions of intention, guilty knowledge, continuance of life, and seaworthiness (...)*”. For an explanation of the terminology used when dealing with judicial evidence, E. Cockle and L.F. Sturge, *Cases and statutes on the law of evidence with notes explanatory and connective, presenting a systematic view of the whole subject*, cited above, p. 1-5. In particular, the circumstantial evidence is defined as “evidence of a fact not actually in issue, but legally relevant to a fact in issue”.

based on the grounds of an inference, which, starting from a ‘relevant fact’, allows to induce the existence or non-existence of a fact in issue<sup>116</sup>.

The foregoing results at common law and can be inferred from single statutory presumptions. As a matter of fact, a general provision on the matter is absent in the English law<sup>117</sup>, unlike what we have seen for the other national systems taken into consideration.

“Where a presumption operates, a certain conclusion may or must be drawn by the court in the absence of evidence in rebuttal”<sup>118</sup>. Such definition indicates at first sight that the common law system shares the same concept as the civil law one. As a matter of fact, the distinction among the possibility (may) and the necessity (must) for the court to draw the inference refers to nothing more than to the main division between presumptions fixed by the law and the ones left to the discretion of the judge.

Thus, the notion appears not to differ from the one which results from the civil codes considered in this chapter. In addition, the same consideration can be extended as regards to classification, effects and nature.

Conventionally, presumptions are classified into presumptions of law – rebuttable and irrebuttable – and presumptions of fact. Plus, a further category is added in some manuals<sup>119</sup>, i.e. ‘presumptions without basic facts’.

The main effect concerns, albeit to a different extent, depending on the type of presumption, the distribution of the burden of proof. It consists – using the terminology of the doctrine - in the assistance of a party bearing that burden<sup>120</sup>, in the sense that the reversal of the latter operates in favour of the party normally bearing it. Even if the reference to this effect and to the evidence in rebuttal in the above definition could lead the interpreter to infer the exclusion of irrebuttable presumptions of law, this is not the case. As already stated, common law systems know three kinds of presumptions, as the civil law systems do.

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<sup>116</sup> See E. Cockle and L.F. Sturge, *Cases and statutes on the law of evidence with notes explanatory and connective, presenting a systematic view of the whole subject*, cited above, 142, according to whom “all presumptions in the law of evidence describe a process or a legal consequence whereby we infer the existence of a presumed fact when certain other basic facts have been established by evidence; the inference from the evidentiary fact is usually taken as a result of our own sense of logic or our own sense of experience but at times it may be statutorily or judicially directed to accommodate some extrinsic policy consideration”.

<sup>117</sup> In particular, this is evident by reading the Civil Procedure Rules as well as the different Civil Evident Acts, where no traces can be found as regards to presumptions’ general definition.

<sup>118</sup> A. Keane, *The Modern Law of Evidence*, cited above, 650 et seq.

<sup>119</sup> A. Keane, *The Modern Law of Evidence*, cited above, 654.

<sup>120</sup> A. Keane, *The Modern Law of Evidence*, cited above, 650.

However many Authors consider as real presumptions only the ones fixed by the law and when rebuttable. The focus on the effects, in terms of reversal of the onus of proof, is such that it implies the absorbing in the area of presumptions of the rebuttable ones only. On the contrary, irrebuttable presumptions are considered as rules of substantive law, while the presumptions *hominis* as mere inferences developed by the judge from a combination of facts<sup>121</sup>. This, again, does not differ from the theory supported by a part of the doctrine on presumptions in civil law systems<sup>122</sup>.

### 6.2.1 Presumptions of law

The reversal of the burden of proof is certainly deemed to occur when dealing with rebuttable presumptions of law – sometimes referred to as ‘persuasive’ or ‘compelling’ – as they release the party who relies on them from giving evidence of the presumed fact and at the same time allow the adversary to adduce evidence in rebuttal. In the absence of the latter, as well as when it does not meet the ordinary civil standard of proof on a balance of probabilities, then it is mandatory for the judge to consider the presumed fact as proved on the basis of the proof or admission of another fact, which is the so-called ‘primary’ or ‘basic fact’<sup>123</sup>.

The same effects in terms of reversal of the burden of proof are not completely appropriate when referring to irrebuttable presumptions of law – often defined as ‘conclusive’ - given the fact that the party against whom they operate cannot adduce any proof to the contrary. Precisely the impossibility to rebut the presumption by demonstrating that the presumed fact did not occur, leads the doctrine to consider irrebuttable presumptions as rules of substantive law, although expressed in the form of presumptions<sup>124</sup>. In this view, the

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<sup>121</sup> See Delisle, *Evidence: principles and problems*, cited above, 144; E. Cockle and C.M.Cahn, *Cases and statutes on the law of evidence with notes, explanatory and connective*, 5<sup>th</sup> edition, Sweet & Maxwell Limited, London, etc., 1932, p. 23 et seq.: “Presumptions, or conclusions drawn from certain facts, are frequently stated to be of three kinds- (1) Presumptions of fact; (2) Conclusive or irrebuttable presumptions of law; (3) Rebuttable presumptions of law. But, for the purposes of the law of evidence, the first two may be disregarded”.

<sup>122</sup> See infra, paragraph 5.1 of this Chapter.

<sup>123</sup> What has called in the first part of the chapter ‘known fact’. So that according to R. Egglestone, *Prova, conclusione probatoria e probabilità*, Milano, Giuffrè, 2005, p. 158-159 rebuttable presumptions are rules according to which if the fact A is proved, then the existence of B can be assumed, unless proof of the contrary is adduced. The Author put this type of presumptions in a wider group, including the case in which the judge is ‘obliged’ to consider the fact as proved (with the same effects of presumptions *iuris et de iure*) and the one where A is considered as being proof of fact B.

<sup>124</sup> In this way A. Keane, *The Modern Law of Evidence*, cited above, p. 650, who, alike Taruffo, asserts that rebuttable presumptions are the main concern of the chapter on the matter. See also R. Egglestone, *Prova, conclusione probatoria e probabilità*, cited above, 158, who considered irrefutable presumptions as rules set out by the law.

situation envisaged in the norm is ruled on by the law, not differently from what happens with the other provisions which have a substantive nature as well.

An interrelated question concerns the *ratio* governing the introduction of presumptions. In the doctrine on the matter there is the awareness that although they normally (should) reflect the ordinary course of events, this is not always the case. Especially when dealing with irrefragable presumptions, being the party barred from rebutting them, a problem of correspondence to the actual facts rises. Considerations of public policy and need to regulate the effects of a certain situation come into play, so that the demand of rationality appears to be scaled down<sup>125</sup>.

So far, the brief analysis of the common law context as regards legal presumptions does not show any relevant difference as compared to the civil law one. What is peculiar is the inclusion of presumptions at common law, under the form of principles of law, in the category of legal presumptions, together with the statutory ones. In this regard, it can be observed that a number of presumptions at common law have been regulated within the legislation thereafter. Moreover, when it comes to taxation and in particular to the regulation of the tax obligation, the laying down of clear statutory provisions is essential.

### **6.2.2 Presumptions of fact**

As already mentioned, presumptions of fact – sometimes defined as ‘provisional presumptions’ – refer to the inferences which, starting from a combination of facts, may be drawn by the court, though the party against whom they operate can adduce evidence in rebuttal.

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<sup>125</sup> An example of presumptions where any logic is missing is, according to A. Keane, *The Modern Law of Evidence*, cited above, 650, the presumption that a person is dead if he has not been heard from for over seven years, being a question of legal statement the choice between seven years and a different period of time. Cf. also E. Egglestone, *Prova, conclusione probatoria e probabilità*, cited above, 161-162, according to whom not always presumptions are the result of a generalization. They can be justified in the light of the aim of the legislator to save time and costs by fixing a pre-arranged means of proving fact otherwise difficult to prove, or in terms of social policy, or considering the person more entitled as to the knowledge of the fact in issue. See also J.B. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Rothman Reprints, New Jersey, Augustus M. Kelley, New York, 1969, at p. 314, who observed that the scope of presumptions is not confined to the law of evidence, being them part of the legal reasoning. According to the Author, they “assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument of evidence, or irrespective of it by taking something for granted; by assuming its existence”.

Generally speaking, we face the same concept as in civil law systems. It is indeed classified as part of the so-called ‘circumstantial evidence’, thereby within the category of indirect proof, whose evaluation is left to the discretionary of the court<sup>126</sup>.

This does not mean that the decision of the judge in the part of the reasoning is not censurable at all. On the contrary, it might be reversed on appeal if the judge ignored the presumed fact as inferred from the basic facts and no contrary proof was adduced<sup>127</sup>.

### 6.2.3 Presumptions without basic facts

Presumptions without basic facts are defined as “*merely conclusions which must be drawn in the absence of evidence in rebuttal*”<sup>128</sup>.

Though the terminology could make the interpreter think about a further notion, I am of the opinion that, depending on the provision concerned, they merely represent a regulation of the distribution of the burden of proof or a rule of experience grounding an improper presumption.

In this sense, indeed, lead the examples that can be found in the manuals in order to give concrete shape to the category at hand. It is submitted, for instance, that the presumption of innocence would belong to this type of presumption, but at the same time its nature of a rule relating to the incidence of the burden of proof is recognised.

In conclusion, as has been said about the presumption of *bona fide*, we do not technically face a further type of presumption, being possible to classify the provisions concerned as irrebuttable presumptions of law, or a mere specification on the distribution of the burden of proof between the parties in the civil proceedings.

## 7. Conclusion

The aim of this chapter was to verify the existence of a common concept of legal presumption at European level, by identifying its main features, functions and effects.

The reason why a wide perspective in terms of Member States has been chosen to be considered, which will be narrowed in the following chapter, has been stated many times already. Since the root of the concept resides within the civil/procedural law, then its

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<sup>126</sup> It has been submitted that they represent the expression of judges’ opinion on probabilities: “statements on the effect of decisions by the tribunal according to which from the fact A it is possible to infer the fact B. See R. Egglestone, *Prova, conclusione probatoria e probabilità*, cited above, 159-160.

<sup>127</sup> When, in other words, a strong presumption of fact operates. Cf. A. Keane, *The Modern Law of Evidence*, cited above, 652 et seq.

<sup>128</sup> A. Keane, *The Modern Law of Evidence*, cited above, 654.



analysis precedes the tax law perspective, which will be narrower. But precisely the definition of a fundamental legal concept implies the consideration of different Member States, especially in view of the EU perspective undertaken in the third chapter.

Not surprisingly, the analysis shows a certain uniformity as to the meaning and main characters of presumptions, and of legal presumptions in particular. As we have disclosed in the introductory paragraphs, like many categories of civil law, the one under discussion is the result of a common tradition, which dates from the Roman law.

This is evident when comparing the notion laid down in the civil codes of some continental Member States. The differences that can be traced in the French and Belgian Civil Codes in respect of the Italian one are of little importance, and do not affect the fundamentals of the category. The same can be asserted when looking to the common law system, where the differences in terms of terminology do not turn out to be real obstacles to the construction of a shared concept of legal presumption.

Obviously, the conclusions could be different if the focus was on presumptions of fact, given that they are inferences left to the prudence of the judge.

This chapter shows not only a certain conceptual uniformity at European level, but also an inclination towards the inclusion of legal presumptions under the head of proof. In the civil law systems, this approach rests on the systematic regulation of the matter in the civil codes concerned, under the rules on the means of proof. In the common law systems, it seems to be due to the enhancement of the procedural effects in terms of a shifting of the burden of proof, which leads some Authors to confine the term presumption intended as evidence only to the rebuttable ones, whereas the irrebuttable ones and the presumptions *hominis* are respectively considered as rules of substantive law and mere logical inferences that *can* be developed by the judge.

In conclusion, the concept of legal presumption refers to the inference which is developed *by* and *in* the law, based on the normal course of events. This implies that legal presumptions are the result of the national legislator's choice concerning the rules on a certain matter or the distribution of the probative burden between the parties involved. They must, though, be rational and be based on a rule of experience. This is what marks legal presumptions in respect to other similar notions. There is – or, more exactly, there should be - a logical inference connecting the known fact and the unknown fact, the former being demonstrative of the existence of the latter on the basis of a rule of experience, which is missing in the fictions of law, for instance. Finally, legal presumptions are

commonly distinguished between irrebuttable and rebuttable depending on the possibility for the party against which they operate to rebut them. In the light of this, irrebuttable presumptions of law have a marked substantive nature, while this is questioned for rebuttable presumptions of law. They cannot be considered as mere means of persuasion of the judge, because they contain a certain regulation of the situation envisaged in the norm, which applies if the counterproof is not given. Therefore, they may have substantive effects, but their probative/procedural nature cannot be denied, given the impact on the division of the burden of proof.

## **Chapter II**

### **Legal Presumptions in National Tax Systems.**

#### **The Italian and Belgian Case**

##### **1. Legal presumptions in the area of taxation**

The theoretical analysis of legal presumptions, undertaken in the previous chapter, clearly shows the existence of a common concept, which can be considered as part of the *ius commune* at European level. This represents the necessary point of departure of a dissertation on tax law presumptions, both from a national and EU-wide perspective, as they find their general legal definition within the civil domain and the general theory. However, *tax* presumptions reveal several peculiarities respective of the other areas of law, which justify separate attention. Such peculiarities influence the role played by legal presumptions (as they operate only in favour of the tax administration) and the national criteria of constitutional compatibility; moreover, they strengthen the divergence between legal presumptions and presumptions *hominis*, in line with the choice to narrow the investigation to the former.

Indeed, it must be emphasized that presumptions of law and presumptions of fact cannot be placed on the same level.

The presumptions *hominis* consist of a logical reasoning conducted by the judge (or the tax administration issuing a tax decision) in relation to a concrete case. Their application in the area of taxation does not differ much from their use in the area of civil law<sup>129</sup>.

The legal presumptions are legislative provisions which place upon the judge the duty of taking the effect provided therein when the known fact is ascertained<sup>130</sup>, though they are

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<sup>129</sup> This, in general. In fact, it must be taken into consideration that in the field of taxation tax authorities are entitled to make use of presumptions *hominis* in the context of the administrative proceedings. Furthermore, in some Member States, the peculiarity of the authority entitled to draw the inference is alongside the different standard requested in order to consider the unknown fact as proved. This is the case in Italy, where the tax administration, under certain conditions set up by the law, is allowed to rely on presumptions even when the requisites of seriousness, precision, corroboration – pursuant to Article 2729, para 2, of the Italian Civil Code - are not completely met. See Article 39, para 2, of the Presidential decree No 600/1973, (where the different hypotheses are listed) on the tax assessment of individuals' income stemming from the exercise of an enterprise, which applies also to persons other than individuals pursuant to Article 40, and Article 41 on the *ex officio* tax assessment.

<sup>130</sup> In this sense G. Gentili, *Le presunzioni nel diritto tributario*, cited above, p. 9. So that unlike presumptions of fact, legal presumptions consist of a deontological judgment, as it is not intended to convince the judge, but rather to place decisive obligations on him.

likewise requested to have a logical basis in terms of correspondence with the principle of reasonableness and a rule of experience. To simplify, it can be said that they often end up to be no more than choices of the tax legislator regarding the regulation of a certain situation, or, to put it otherwise, they are an expression of the legislator's preference for a certain regulation of the matter. In this regard, given the specialty of the tax obligation, where the creditor is the State and for the collection of a levy responding to public interests, they are normally established only in favour of the tax administration, thereby to the detriment of the taxpayer. This, in view of simplifying the ascertainment of one or more elements of the tax obligation and to secure the tax recovery. Clearly, the assessment of the relevant fiscal facts – falling into the taxpayer's sphere - would be hard if the tax administration was not 'assisted' by presumptions during the administrative proceedings and the trial as well. On the other hand, this stresses the importance of fixing certain limitations to the operating of legal presumptions, in order to 'protect' the taxpayer from abuses in their application. In other words, legal presumptions respond to basic public interests, which justify the interference of the tax legislator on the ordinary distribution of the burden of proof. Such interference, however, cannot be arbitrary. On the contrary, as underlined in the first chapter and as results from the Constitutional jurisprudence to be discussed below, they have to comply with certain criteria pertaining primarily to their structure and to their rationality.

Accordingly, the reconstruction of (a) national approach to legal presumptions will be conducted by examining the constitutional framework and case-law on the one side, and the main presumptive provisions in force (having EU relevance, given the perspective chosen in this dissertation), on the other side.

Both these aspects need to be explored. To that end, the tax law systems of two Member States are taken into particular regard in this dissertation, though without renouncing the expression of general considerations on the overall attitude manifested by Members States when coping with legal presumptions. As disclosed in the introduction, the impossibility to deal with 28 tax systems suggests a narrowing of the framework to two significant national experiences, as clarified below.

## **2. Why Italy and Belgium: the reasons for a comparative-based reconstruction of the national approach**

The reconstruction of the national approach to tax law presumptions demands a close examination of the tax law system(s) concerned, thereby the choice of one or more national contexts that can be considered noteworthy.

Given the impossibility of dealing with all the Member States, the choice has fallen to Italy and Belgium, mainly in the light of two criteria.

Firstly, the different interest for the topic shown by the scholars within the two national experiences.

As a matter of fact, many authoritative Italian authors have analysed in-depth presumptions in tax law. In many contributions, legal presumptions have been distinguished from other boundary legal concepts, their effects in terms of interaction with the burden of proof, their nature as well as their consistency with the relevant constitutional principles have been the subject of several reflections. This is probably also due to the large attention traditionally given to the concept also within the civil/procedural law literature and above all to the numerous (at time broadly argued) judgments of the Italian Constitutional Court on the matter.

By contrast, the Belgian doctrine seems to have neglected an analysis of tax law presumptions able to abstract itself from the contingent tax legislation, and thereby to express general principles. It mostly focused on presumptions of fact, which are widely used by the Belgian tax administration in order to prove the relevant fiscal facts belonging to the sphere of the taxpayer<sup>131</sup>, or it examined presumptive measures under a different perspective<sup>132</sup>. In addition, there are very few decisions of the Belgian Constitutional Court. Only recently, indeed, it has ruled on legal presumptions, mostly by rejecting the issue of unconstitutionality, as will be shown later on. At any rate, the dominant disregard of the doctrine and the existence of few decisions of the Belgian Constitutional Court do not correspond to a minor need for an exploration of the issue.

The foregoing makes in this way interesting an analysis of these two national contexts under a comparative key. In particular, a contribution may be brought to the issue of the role of tax law presumptions in the Belgian tax system, which includes several presumptive

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<sup>131</sup> On the other hand, generally speaking, the role played by presumptions of fact in the context of the administrative procedure and in the trial is fundamental, considering that it would be impossible for the tax administration to prove everything, i.e. all the facts entering into the chain of the reasoning.

<sup>132</sup> For instance, the perspective of the abuse. As we will see, within the Belgian tax system a number of legal presumptions are included in anti-abuse measures.

provisions worthy of attention, through the use of the conceptual parameters elaborated as regards to the Italian one.

Secondly, precisely the reconstruction of the national framework is functional to the subsequent examination of the EU approach to national tax presumptions, mainly as it results from the EUCJ rulings on the matter. In this view, it has to be noted that both Italian and Belgian tax law presumptions have been repeatedly the subject of the EUCJ judgments, and some of their presumptive provisions and regimes in force are to be checked in the light of EU law. In this regard, the examination of the national context will also show how and in which extent the EU approach is potentially able to impact on the drafting of the national legislation.

Accordingly, this chapter is devoted to the examination of legal presumptions in the context of the two national tax systems mentioned above. In particular, the major degree of academic literature in terms of interest in the topic suggests the Italian tax system should be dealt with, and after that a Belgian approach should be identified in a comparative perspective.

### **3. A brief note on the methodology**

Before dealing with tax law presumptions within the first of the two Member States under examination, a few words on the scheme that will be adopted for the purpose of individualising the national approach should be written.

First of all, it has to be highlighted once again that tax law presumptions are the result of a legislative choice, so that the inference cannot in principle be contested by the taxpayer. The latter may contend either that the known fact did not occur, or – if the presumption is rebuttable and thereby the contrary proof is envisaged – the existence of the unknown fact, for instance by proving circumstances incompatible with it. The only way to raise doubts on the inference itself is to contend the constitutional inconsistency of the provision laying down the presumption. In other words, it falls within the national legislator's power the introduction of any presumptive measures, but it encounters the limitations resulting from the relevant constitutional principles, which are placed on the last step of the normative hierarchy. This explains why the examination of the constitutional framework and case-law plays a fundamental role in the re-construction of the national approach to tax legal presumptions. It is on this level that we gather the criteria of compatibility (conditions for their 'tenure') of tax law presumptions in the national legal order.

Generally speaking, the classic parameters of evaluation are represented by the ability to pay principle (Italy) or the principle of equality (Belgium), the defence rights, marginally also the values of legal certainty and good administration; above all, the general principle of reasonableness, which condenses all of them. The relevance of one or more of these parameters in a concrete case depends on several factors. One would say, for example, the rebuttable presumptions of law to be evaluated in the light of the ability to pay rule (or equality) and the right of defence, whereas the irrebuttable ones to be considered only in view of the former – otherwise, they would be constantly in conflict with the Constitution –, though this is not always the case. Yet, one would expect the presumptive provisions regarding the acting of tax authorities in the context of the administrative procedure to be checked under the aspect of the observance of the taxpayers' defence rights and the value of good administration, albeit we will see that this is not always the case. Not least, more pragmatically, the way in which the referring court submits the question of compatibility in the order of reference to the Constitutional Court might influence the criteria of evaluation. Second, as disclosed at the end of the first chapter, the traditional (in civil law) distinction among substantive norms (and presumptions) and norms (and presumptions) concerning the trial is enriched in tax law with more facets. It suffices to recall that legal presumptions operate invariably in favour of the tax authorities and that prior to the legal proceedings before the judge a pre-trial phase may take place<sup>133</sup>. Notwithstanding several theories – which have been put forward by the scholars - aiming at classifying tax law presumptions under one label or the other one are conceivable and could be argued, in my opinion a case-by-case approach is preferable for this purpose. This being said, it has also to be noted that, looking at national presumptive provisions in force, a distinction should rather be made among procedural and substantive presumptions under the following terms.

On the one side, there are those legal presumptions which regard the powers of the tax authorities in the context of the administrative proceedings, thereby implying the exercise of such powers for them to apply to the concrete case. It is very much debated if certain estimated assessments belong to this group. In fact, they are generically regulated within the legislation, but the connection between known fact and unknown fact does not seem to correspond to a logical-argumentative scheme, so that they end up to be means designed

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<sup>133</sup> The legal proceeding before the judge indicates the (tax) trial. The phase that precedes the trial refers to the possible hearing of the taxpayer before the tax authorities prior to the issuing of a tax decision (for instance, a notice of assessment). In this dissertation, the procedure conducted by the tax authorities will be referred to with the following terms: administrative procedure or tax procedure.

for the formal fixing of the facts rather than tools for the demonstration of how the facts occurred<sup>134</sup>.

On the other side, there are those legal presumptions which may apply irrespective of the acting of the tax authorities, and in this terms may be defined as being substantive. Under this category may be included not only provisions which reflect the traditional scheme of a legal presumption, as typically those in the matter of tax residence, but also certain regimes (like CFC, limitation to the deductibility of costs, thin capitalization, transfer pricing) which may represent anti-avoidance rules formulated as rebuttable presumptions where the conditions of application are presumed. In this regard, the EUCJ case-law shows how the European Court employs at times a non-technical use of the concept of presumption, so that the range of hypotheses included under that concept at EU level is broadened. This would suffice to justify their consideration in this dissertation. Moreover, the classification and more in general the scheme of reasoning adopted by the EUCJ appears to have an influence on the way in which such regimes or provisions are construed or amended by the national legislator.

#### **4. Scope and purpose of Chapter II**

In the light of the above considerations, in this Chapter the Italian and Belgian tax systems will be separately examined with a view to give an insight into the national approach to legal presumptions. The aim is to explore under a comparative key the way in which legal presumptions are discussed and dealt with in two different national tax systems, with a view to notice possible diversities. This analysis will show that, notwithstanding some divergences, under both national systems legal presumptions are perceived as irremissible means for simplifying and securing the assessment/recovery of the tax obligation and the prevention of tax evasion or avoidance, i.e. for safeguarding the ‘fiscal interest’<sup>135</sup>. The control as to their non-arbitrary and rational nature is entrusted with the Constitutional Court, and is basically conducted on the basis of a parameter which concentrates on the

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<sup>134</sup> See G.M. Cipolla, *La prova tra procedimento e processo tributario*, cited above, 644 et seq. Said otherwise, they seem to be addressed to the ascertainment of the normal/average taxable income/turnover rather than to the effective income/turnover. The reference is to the statistical studies provided in the Italian income tax code and the taxation based on comparison with similar taxpayers provided in the Belgian income tax code. As it will be mentioned later one, due to their nature they might raise doubts of compatibility with the principle of legality, in the extent to which the determination of essential elements of the tax obligation is left in the hands of non-normative sources.

<sup>135</sup> With this formula, the budgetary interest of the Treasury is indicated in the dissertation.



legal presumption itself (its structure, its being in line with the normal course of events, its being proportionate to the aim pursued, the room for contrary proof, etc.).

Since the national approach, as construed in this Chapter, will be then confronted with the EU-wide perspective, the focus will be mostly on the areas of VAT and direct taxation (with regard to provisions applicable to cross-border situations involving EU Member States). As to the VAT, it goes without saying its importance both at a national level, manifestly for budgetary reasons, and at EU level, as it is fundamental for the functioning of the internal market. Besides the area of customs duties, it is the field where the major degree of harmonization has been reached. In fact, national rules of the matter embody the implementation of the Directive No 112/2006, which lays down the model of reference for the national legislator. Thus, the tax law presumptions are to be tested against a rule established in advance by the EU legislator, where the principles in the light of which carrying out the evaluation of compatibility and the necessary balancing are set forth. As to direct taxes, the EUCJ has reiterated in its judgments that they fall outside the scope of EU law, except for limited areas that have been harmonized by means of directives. Nonetheless, Member States are requested to exercise their sovereignty in accordance with EU law. The lack of positive integration in this domain has brought the EUCJ to draw basic criteria of compatibility which at times embody alternative models of regulation of certain matters in respect of the national provisions, so as to reach a *minimum* harmonization. This holds true as regards tax law presumptions as well.

Other areas of taxation will not be dealt with in this second chapter, either because the national provisions basically give merely execution to the regulation set out almost altogether at EU level (customs duty), or because of the limited scope and partial harmonization (excise duties), or again because of the pure internal relevance (e.g. registration duties, inheritance tax except for cross-border situations involving the exercise of the free movement of capital).

Chapter II is divided into Section I and Section II, dealing respectively with the Italian and Belgian tax systems. Each Section is divided as follows: first, after a brief introduction, the constitutional principles, in the light of which the evaluation of compatibility with the constitutional framework is carried out, are illustrated; afterwards, the most significant rulings of the Constitutional Court are examined with a view to explaining the reasoning surrounding the judgment of consistency with the national system; at this stage, a brief

mention is made to some estimated methods of assessment raising questions of classification. Ultimately, some of the most interesting presumptive provisions in force are discussed, with a view to the subsequent EU-wide perspective.

## **Chapter II - Section I**

### **Legal Presumptions in the Italian Tax System**

#### **1. Tax law presumptions in the context of the administrative proceedings and the tax trial**

Placed among the means of proof by the civil legislator, legal presumptions share with every kind of ‘tax proof’ the mutual interferences between administrative procedure<sup>136</sup> and tax trial. The question as to whether a character of means of proof - and all the more of proof – can be assigned to them in the context of the administrative proceedings has been the subject of an in-depth debate within the Italian literature. This, due also to the circumstance that they are provided by the law and may have effects on the regulation of the elements of the tax obligation.

It is still an open question that is not confined to legal presumptions only, but as just said, concerns (in theory) all the proofs admissible in tax law. In this regard, considering the prohibition of oath and oral testimony, together with the unusual use of the admission that ends up being a different distribution of the burden of proof, it remains the presumption of fact and the documentary proof.

In brief, the query is: if a proof is defined as ‘means of ascertaining the truth’, can this be asserted as regards legal presumptions which the tax administration relies on in the course of the administrative proceedings?

The tax administration is the authority entitled to re-determine the tax due as the result of the verifications carried out with regard to a certain taxpayer, and therefore it can't be

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<sup>136</sup> It has to be clarified that ‘administrative procedure’ (or sometimes ‘administrative proceedings’ or ‘tax procedure’) refers in this dissertation to the procedure carried on by the tax administration which, starting from the tax audit, might flow into a tax assessment. It belongs to the *genus* of the administrative procedures, which indicate a series of activities – carried out by the public administration and regulated by the Law N° 241/1990 - that normally terminate with a final administrative measure having the character of imperativeness and enforceability. The legal proceedings (or tax proceedings, or tax trial), instead, refers to the proceedings before the judge, which begins with an action brought against a decision issued by the tax administration and ends with a judgment.

considered as impartial. Once excluded that its role in this phase is comparable to the one of the judge during the trial, meaning that it is not neutral, then it is not clear to whom the tax administration has to prove what and to what extent.

Unlike every party of a private-law relationship, the tax administration has to operate in compliance with the law, that is to say that it has to ascertain the *if* and *quantum* of the (higher) tax due with the observance of the principles of legality and good administration. In doing so, however, it is entitled to exercise some penetrating powers, which place it in a situation of supremacy over the taxpayer. And this, without being requested to hear<sup>137</sup> the latter, which could only fully guarantee the protection of its right of defence in the administrative stage.

In the light of such peculiarities characterising the means of proof within the administrative proceedings, different theories have been put forward, which in this dissertation can only be mentioned briefly: from the one based on the presumed legitimacy of the administrative act, by now outdated, to the one according to which the tax administration has to state clearly the means of proof on the basis of which the notice of assessment is issued, to the intermediate one that ascribes to proofs in the administrative proceedings a para-cognitive function<sup>138</sup>.

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<sup>137</sup> Since in the Italian tax system it is not possible at the moment to identify a general, constitutionally protected, principle according to which the tax administration has to inform the taxpayer about an ongoing procedure involving him and possibly leading to the issuing of a tax assessment, it is left to the choice of the public party the possibility for the individual to raise exceptions or contesting data in this phase. This, except for those cases – recently, they are increasing – when the discipline of a certain method of assessment ensures that the debate is compulsory, under the sanction of nullity of the act elevated without having invited the taxpayer to produce elements. In any case, the administrative procedure affects the subsequent (only possible) trial where the notice of assessment issued by the tax authorities is in hypothesis contested by the taxpayer. As said, since the Italian tax system does not include a compulsory debate between tax administration and taxpayer in the context of the administrative procedure, it is very often in the trial that the latter can exercise his right of defence and (try to) rebut any legal presumptions used by the former to motivate the tax assessment. The legal proceedings level, that is to say the tax trial, embodies in this way the last level. In this context, the tax administration may rely on the legal presumptions relevant in the case and the judge must decide according to the effects fixed by the presumptive provision applicable. Hence, dealing with legal presumptions at national level implies the consideration of different “contexts” in which they are called on to operate, and this should be always be borne in mind thereafter.

<sup>138</sup> Given the EU-wide perspective of this study, it is not possible to deal in depth with the question of the nature of legal presumptions and their role in the administrative procedure. *Ex multis*, see G.M. Cipolla, *La prova tra procedimento e processo tributario*, cited above, in particular at p. 309 et seq.; G. M. Cipolla, *La prova nel diritto tributario*, Dir. Prat. Trib., 2009, 545; Cf. G.A. Micheli, *Aspetti e problemi della prova e della decisione nel processo tributario*, Riv. Dir. Fin. 1940, 220; R. Sacco, *Presunzione, natura costitutiva o impeditiva del fatto, onere della prova (aspetti diversi di un fenomeno unico o fenomeni autonomi?)*, Riv. Dir. Civ., 1957, 399, in particular at 408 et seq.; F. Tesaurò, *Profili sistematici del processo tributario*, Padova, Cedam, 1980, 55; G. Tinelli, *Presunzione (diritto tributario)*, in Enc. Giur., vol. XXIV, Roma, 1991, 1 et seq. ; G. Tinelli, *Prova (diritto tributario)*, in Enc. Giur., vol XXV, Roma, 1991, 1 et seq. ; U. Perrucci, *La prova nel diritto tributario*, Boll. Trib. 1996, 1173, in particular at p. 1193; P. Russo, *Problemi della prova nel processo tributario*, Rass. Trib., 2000, 375 et seq.; C. Glendi, *Il giudice tributario e la prova per*

### 1.1 The role of legal presumptions in the administrative proceedings

Without expanding further on the question as to whether legal presumptions may be considered as means of proof in the context of the administrative procedure before the tax administration, a few considerations should be emphasized.

It has to be recognised that the inclusion of legal presumptions among the means of proof within the civil code appears not to fit with the administrative procedure. This is also a corollary of the ambivalent nature of legal presumptions - i.e. substantive-procedural - and of the different role played by the tax administration, which is in a position of supremacy in the first case and one of the parties in the context of the trial. On the other hand, the typical effect of rebuttable presumptions – the reversal of the burden of proof on the taxpayer – actually operates entirely in the trial, the seat where the taxpayer is normally able to give proof to the contrary. In fact, the taxpayer has a right to be heard by tax authorities in the context of the administrative proceedings only in some cases.

However, one could say that legal presumptions hold a sort of demonstrative nature even in the phase of the administrative procedure, though it is absorbed by the (duty of) motivation within the tax decision. When contested by the taxpayer in a trial, the latter can normally be integrated with further means of proof, but only if they are related to the same facts that have been alleged. Hence, the tax administration is not forbidden from introducing proofs that did not enter into the impugned tax decision, but the validity of the latter is affected by the absence or insufficiency of the motivation. Though, it should be noted that in fact the tax administration issuing a tax assessment very often simply applies the provision setting forth the presumption, barely reporting in the statement of reasons the known fact in addition to the relevant provision of law.

The question concerning the nature of means of proof facing legal presumptions can be easily extended to the phase of the trial. Asserting that the persuasion of the judge is influenced by the legal presumption is no more than a fiction, in the sense that he merely applies it. One could say that the judge is persuaded on the occurrence of the unknown fact through the bounding inference drawn by the legislator. But still, it is no more than a fiction.

The last consideration strengthens the difficulties in supporting in practice the definition as means of proof of legal presumptions. Since the administration/judge is obliged to hold the

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*presunzioni*, Riv. Dir. Fin. e Sc. Fin., 1985, 593; C. Glendi, *L'istruttoria nel nuovo processo tributario*, Dir. e Prat. Trib., 1996, 1117; F. Gallo, *Motivazione e prova nell'accertamento tributario: l'evoluzione del pensiero della Corte*, Rass. Trib., 2001, 1088; F. Gallo, *L'istruttoria nel sistema tributario*, Rass. Trib., 2009, 25 et seq.

effects as they are provided for by the applicable presumptive provision, its role of persuasion as to the truthfulness of the facts is questionable. At most, it could be argued, legal presumptions represent the proof intended as result, being the reasoning developed by the legislator. In this way, the classification as means of proof – or, that is the same, as way of persuasion – fits altogether only to presumptions of fact.

In my opinion, notwithstanding the actual application of legal presumptions may raise doubts in this sense, the probative (or demonstrative) character is what distinguishes legal presumptions (both irrebuttable and rebuttable) from boundary notions, among which are fictions<sup>139</sup>. The lack of knowledge as to the relevant fiscal facts realized by the taxpayer and the correlative difficulties of proof on the side of the tax administration grounds their introduction and is (or should be) immanent in the inference.

## **1.2 The effects of tax law presumptions and the burden of proof**

Dealing with legal presumptions in general in the first chapter, it has been shown how their main effects concern the distribution of the burden of proof between the parties, and consequently the constraints to the evaluation made by the judge.

Alike in the other areas of law, the general rule on the distribution of the burden of proof applies in tax law. Article 2697 of the Civil Code provides that “*the party who wishes to assert a right before a court is to provide evidence of the facts on which the right is founded. The party who objects that such facts are non-effective or that the right itself has changed or expired is to provide evidence of the facts in which the objection is founded*”.

This conclusion is the result of the overcoming of the presumption of legitimacy referred to the administrative decisions. Born in the field of administrative law, the presumption of legitimacy has been embraced in tax law as referred to the tax decision. In this view, it was up to the taxpayer to demonstrate that the tax claim, which was presumed as being legitimate, was undue.

Heritage of an overcome idea on the administrative body, this theory cannot be supported either when dealing with the activity of the Public Administration, which very often is

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<sup>139</sup> *Contra*, F. Moschetti, *Il principio della capacità contributiva*, Padova, Cedam, 1973, 269, according to whom unlike the presumptions of fact, the presumptions of law are mandatory rules non-necessarily linked to a logical-deductive reasoning and aimed at securing a certain substantive regulation of a situation. As a consequence, legal presumptions cannot be deemed as being proofs. Cf. also G.A. Micheli, *L'onere della prova*, Padova, Cedam, 1966, 168; G.A. Micheli, *Le presunzioni e la frode alla legge nel diritto tributario*, Riv. Dir. Fin. Sc. Fin., 1976, 396.

discretionary, nor with regard to the operating of the Tax Administration, which is always bound to law. With regard to the latter, in particular, it is sufficient to recall that although the action of the tax administration has to comply with the principles of impartiality and good administration (Article 97 of the Constitution), nonetheless it is a body having authoritative powers, thereby entitled to enact decisions directly affecting the (especially economic) sphere of the taxpayer. In the relationship subtended by the tax obligation, the tax administration is a *public* party with the task of guaranteeing the collection of the tax due. But it remains a party. As a result, when laying a tax claim the tax administration bears the burden of proving the correlative foundation, firstly in the tax decision itself with the statement of reasons and afterwards in the tax trial as well<sup>140</sup>.

This holds true irrespective of the fact that, in the context of the trial, the litigation is started up by the taxpayer. Despite the circumstance that the latter brings the action, indeed, he only formally plays the role of the plaintiff. In fact, the taxpayer contests the tax claim as laid out in the tax decision issued by the tax administration. By contrast, the tax administration embodies the plaintiff in a substantive sense, given that it lays the tax claim. Of course, this is not always the case, as when the claim is lodged by the taxpayer – for instance, asking for the refund of an undue tax, or the recognition of tax reliefs and so on – then he also represents the plaintiff from the substantive perspective, with the correlative burden of giving evidence as to the existence of the demanded right, whereas the tax administration is the defendant.

In conclusion, it appears to be self-evident among the scholars and the case law the operating of the general rule on the distribution of the burden of proof within tax proceedings<sup>141</sup>. In such context, it lies on the party that has the interest of proving the alleged fact, irrespective of its formal position (whether as plaintiff or defendant) in the proceedings.

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<sup>140</sup> As regards to the rebuttable presumptions, E. Allorio, *Diritto processuale tributario*, Torino, 1969, 389, points out that the reversal of the onus of proof can be explained in the light, and at the same time is the demonstration, of the fact that the burden of proof is ordinarily put on the Tax Administration. If this was not the case, it would be without any sense providing in favour of the latter such a simplification. Cf. F. Maffezzoni, *La prova nel processo tributario*, Boll. Trib. 1977, 1677, who supported the non-application of the ordinary rule on the burden of proof to the tax trial; Cf. L.P. Comoglio, *Oneri e mezzi di prova nel processo tributario: temi sempre attuali*, in *Studi in onore di Enrico De Mita*, Napoli, Jovene Editore, 2012, 213.

<sup>141</sup> See in this regard, G.M. Cipolla, *La prova tra procedimento e processo tributario*, cited above, 527 et seq., who offers an overview of the issue and refers to the possible mitigations, such as the reference to the concrete case and the rule of the best placed.

As the “substantive” affects the “procedural” (and *vice versa*), the lack of information by the side of the tax administration about the (possible) theme of proof has led the legislator to introduce derogations to the general rule. In this perspective, the finality of tax legal presumptions consists in lightening the probative position of the tax administration on the one hand, and in simplifying the assessment of one or more elements of the tax obligation on the other hand.

## **2. A brief note on the perspective chosen**

Once a brief account of the debate still agitating the Italian academic doctrine has been given, it has to be underlined that the above-mentioned questions are overshadowed when the perspective is the one of the relation between legal systems.

This being the case, the parameters of investigation are rather the foundation of the presumptions concerned, their object also as regards to the contrary proof possibly envisaged, the requested reasonableness and their efficacy. Alongside these issues, the judgments of the Constitutional Court are examined, in order to discover the criteria of constitutional compatibility adopted in connection with the interests achieved by the relevant legal presumptions. The aim is in fact to infer from these data the overall Italian approach, again in the perspective of the relation within legal systems.

To that end, three main steps need to be taken in the current section.

Firstly, in order to set the stage the parameters governing the consistency of legal presumptions within the Italian legal order are illustrated. The principles of ability to pay, the right of defence, the rule of reasonableness embody the main criteria in the light of which the evaluation of the structure of legal presumptions is conducted by the Constitutional Court.

How and to what extent the nature (whether irrebuttable or rebuttable, substantive or procedural) of the single legal presumptions affects such evaluation is explored through the reference to the main Constitutional Courts’ rulings on the matter. As we will see, the Court has on several occasions clarified under which conditions legal presumptions are admissible in the national legal order and in doing so has drawn the boundary with other concepts.

Afterwards, a brief mentioned is done of some estimated methods of assessment in order to give an insight into the questions of classification that may rise at national level.

Ultimately, the most relevant legal presumptions in force are illustrated, with a view to testing some of them against the general criteria resulting from the analysis of the Constitutional framework and in a perspective serving as a means for a subsequent EU analysis.

The attempt is to give an insight in a matter rich with academic and jurisprudential contributions.

Such analysis will be conducted combining the reference to rulings dealing with presumptive provisions in various areas of taxation no more in force with references to the current provisions in the light of the criteria inferred and in view of the subsequent consideration of the EU framework. Indeed, given the following EU perspective, these current provisions concern taxes where a positive or (at least) negative harmonization can be found. The reference is primarily to the VAT: in particular, the legal presumptions in the context of the bank investigations and the presumptions of supply and purchase. Secondly, to the direct (income) taxation: in particular, to the presumptions in the field of tax residence, the CFC legislation and the transfer pricing.

### **3. The Italian Constitutional Court's evaluation on tax law presumptions**

The Italian tax system includes several legal presumptions, concerning the taxable event, the tax base, or the juridical definition of an element included in the situation envisaged in the norm<sup>142</sup>.

Drawing up a list of all the presumptions put under the magnifier of the Constitutional Court so far or anyway currently in force would not add much to the attempt of identifying the national approach to the matter. Thus, in the following paragraphs the focus will be on the more significant rulings of the Constitutional Court, starting from the ones that highlight the demand of a rational basis both for presumptions and for similar concepts. After that, the reference to some presumptive provisions or regimes included in the Italian legal order is justified in the light of explaining the working of the presumptive scheme or in view of the potential relevance at EU level.

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<sup>142</sup> Cf. G. Falsitta, *Appunti in tema di legittimità costituzionale delle presunzioni fiscali*, Note to Const. Court 3 July 1967, n. 77, Riv. Dir. fin. Sc. Fin., 1968, 5, distinguished between a) presumptions concerning the taxable base; b) presumptions concerning a constituting element of the parameter; c) presumptions concerning the juridical definition of the tax event; d) presumptions concerning the tax event or one of its elements. For an overview of the Italian Constitutional Court's trends, also as regards to tax law presumptions, see E. De Mita, *Guida alla giurisprudenza costituzionale tributaria*, Milano, Giuffrè, 2004, 3 et seq.



It must be noted at the outset that the Italian tax system's scenario offers different types of presumptions, some of which raise problems of classification. Generally speaking and with a certain degree of approximation, it is possible to distinguish those presumptions (irrebuttable, but also some rebuttable ones) that appear to have a substantive nature and to operate irrespective of a possible assessment or trial, on the one hand; on the other hand, those presumptions that have a more marked procedural nature, because they concern the powers of assessment and recovery of tax authorities, and as such imply the acting of the latter and operate in the context of the administrative proceedings.

With respect to such distinction, and more exactly to the distinction between substantive and procedural provisions, the Italian Constitutional Court has in the abstract asserted that solely the former may be questioned in the light of the ability to pay principle<sup>143</sup>. Yet, the examination of the decisions handed down on legal presumptions concerning the tax assessment shows that the Court has in several occasions ruled on them in the light of that substantive parameter, in this way implicitly admitting the possibility to apply the latter also with regard to the administrative procedure<sup>144</sup>. By contrast, the Court confines the scope of the right of defence to the context of the trial, and not even to the phase of the administrative procedure<sup>145</sup>. In practice, in this view the right of defence of the taxpayer is not violated insofar he has the possibility to bring an action to the court.

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<sup>143</sup> See the following ordinances: Const. Court 2 March 1990, No 108; Const. Court 8 July 1992, No 322. All the judgments of the Italian Constitutional Court can be found at [www.cortecostituzionale.it](http://www.cortecostituzionale.it). See F. Moschetti, *Il principio della capacità contributiva*, cited above, p. 45, 287. According to the Author, the irrebuttable presumptions of law, even when rational, are always in contrast with the Constitution, in particular with the ability to pay principle. This, because they connect the payment to persons, facts, or amounts, whose existence neither is ascertained, nor will be ascertained. As such, they do not guarantee the contribution of everyone being commensurated with his actual capacity to pay. By contrast, the rebuttable presumptions of law, when based on criteria of normality and rationality, may represent a balance between the two interests protected by Article 53 of the Constitution. On the one, side, they do not exclude that the contribution of everyone to the public expenses is proportionate to the actual ability to pay; on the other side, they can prevent tax evasion or avoidance, i.e. that taxpayers do not fulfil their duty of contribution.

<sup>144</sup> See *infra*, the judgments concerning the synthetic method of assessment and the banking presumptions.

<sup>145</sup> *Ex multis*, see the ordinance Const. Court 2 February 1988, No 130. A. Marcheselli, *Le presunzioni nel diritto tributario: dalle stime agli studi di settore*, Giappichelli, Torino, 2008, 70, underlines that when facing procedural issues, in particular when the law establishes limitations to the ascertainment of the effective tax event or taxable amount, the Constitutional principles concerning the defence should be considered. That is, Articles 24, 113, 111 for the trial, Article 97 for the administrative stage. In these cases, Article 53 and 3 of the Italian Constitution are only indirectly infringed.

### 3.1 The reasonableness as an unavoidable feature of each legal presumption

In line with the purpose of underlining the main features of tax legal presumptions in relation to the constitutional framework, the necessary compliance with the principle of reasonableness has to be dealt with. While drawing a distinction between legal presumptions and presumptions of fact in the first chapter, it has been pointed out that the former very often turn out to be a regulation given to a certain situation mostly in order to secure the ‘fiscal interest’, that is to say the interest of the State to the collection of the tax due and to tackle tax evasion.

This does not mean, however, that the legislative choice can flow into free will. Both rebuttable and even irrebuttable presumptions, indeed, are always requested to have a rational basis and to reflect the logical coherence as to the inference connecting the known fact to the unknown fact.

The principle of reasonableness is considered to be a general criterion that should inspire the legislation, thereupon a parameter of constitutional compatibility that is constantly recalled by the Constitutional Court in its decisions.

When dealing with taxation, the content of this rationality or reasonableness criterion appears to be the result of the interaction between Articles 3, 53 and even of Article 24 of the Italian Constitution. As it is well known, the first one establishes the equality (both formal and substantial) principle<sup>146</sup>, the second one prescribes the ability to pay principle, while the latter deals with the right of defence and more in general with the judicial protection of rights.

In other words, the impression is that the evaluation of a certain presumption’s rationality by the Constitutional Court be the result of the consideration of three elements, not always jointly:

- a) the possible discrimination rising from the presumptive provision among different categories of taxpayers (Article 3);
- b) the basis of the taxation, i.e. definite – rather than fictitious - indices of ability to pay (article 53, para. 1);
- c) the possibility for the taxpayer to rebut the presumption (Article 24, para. 2).

As it will be clear later on, in most of the Constitutional Court’s cases on tax presumptions the reference to the first two parameters occurs, as the relevant presumptive provision is

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<sup>146</sup> As clarified in Const. Court No 120/1972 “*Equal situations have to be regulated by equal tax regimes and different situations by an unequal tax treatment*”.

able to indirectly affect the taxable event, or the taxable amount, or more in general the definition of a certain element of the tax obligation. In other words, it may have substantive effects.

While this is – generally speaking – unanimously asserted as regards to irrebuttable presumptions, it holds true also with regard to rebuttable presumptions, even when they have a marked procedural nature. For instance, the estimated method of assessment analyzed below has been put under the magnifier of article 53 as well, as it is in between a method of assessment and a determination of the taxable base.

As regards the third parameter, the possibility for the taxpayer to rebut a certain presumption could “save” the relevant provision from a negative ruling, if interpreted as an instrument able to bring taxation back to reality. Since, however, this aspect concerns the distribution of the burden of proof, the constitutional framework on this matter will be deepened later on, after having clarified the position of the Court as regards the first two parameters that normally represent the “measure” of the reasonableness.

### **3.2 Tax law presumptions: admissibility on condition of rationality**

The Italian Constitutional Court has ruled on the compatibility of tax presumptions several times.

Since from the very first decisions, it has been said that legal proofs<sup>147</sup> and tax presumptions - as to the event giving rise to the tax obligation, the taxable base, or the juridical qualification of a certain tax element - do not contrast in principle with the Constitution. Indeed, it falls within the discretion of the legislator the possibility to lay down those mechanisms that are able to avoid tax evasion and to safeguard the general interest to the tax collection. This, as long as it does not imply an irrational prescription.

It has been considered as unreasonable, for instance, the discipline in the field of ILOR (local tax on incomes) in the extent to which it implied a different treatment of the self-employment incomes in comparison to the wage incomes, without corresponding to a

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<sup>147</sup> See Const. Court 26 June 1965, No 50, on Articles 45 and 48, Royal decree 30 December 1923, No 3270, providing for the predetermination of the means of proof as to the debts deductible from the heritable assets in the field of inheritance tax. In tax law, the legal proof contributes to render precise the public claim and to simplify the procedure in view of the prompt tax collection. This ‘fiscal interest’ receives special protection in Articles 53 and 14, para 2 of the Constitution. Accordingly, “*the material impossibility to give the requested proof turns into an obstacle of mere fact, thereby unrelated to the constitutional issues (...). Nor it can be said that the drawing of a strict legal proof amounts to give a fictitious basis to the levy*” (Const. Court 21 April 1983 No 103, on Article 13, paras 3-4, Presidential decree No 637/1972 in the field of inheritance tax).

different ability to pay. On the basis of a presumption on the existence of a property component justifying the assimilation to the enterprise income, the self-employment income had been deemed subject to ILOR by Article 1, Presidential decree No 599/1973 together with the other types of income<sup>148</sup>, except for the wage income.

Such a presumption was considered by the Court so “*uncontrollable and wholesale to turn out to be unreasonable and thereby prejudicial to the tax equality*”. The common experience shows, indeed, that most of the self-employment incomes miss any patrimonial component<sup>149</sup>.

Though the provision at hand would have been better (technically) qualified as an assimilation rather than a presumption<sup>150</sup>, the decision on ILOR is worthy since the Court confirms that tax presumptions are not unconstitutional in principle, “*but they have to ground on “indices concretely revelatory of wealth”*”, that is on ‘real facts’ even if difficult to ascertain, in order the taxation not to have a ‘fictitious basis’.

The Court took the view of the inconsistency with the constitutional frame<sup>151</sup> also as regards the combination of Articles 18, Law No 25/1951 and 10, Presidential decree No 573/51, on the basis of which, in practice, the direct taxes referred to taxpayers who were not taxed according to the balance sheet were (conclusively) calculated on the basis of the income received in the previous tax period. In this way, it was drawn an irrebuttable presumption as to the receiving of a certain amount of income in the period subsequent to the one in which it had been determined. Unlike the temporary record of the tax debt into the tax roll on the basis of the taxable income produced in the previous tax period<sup>152</sup>, the system at hand did not provide for any balance in the event the income produced was lower, with the risk for the taxpayer of being charged for an unreal income.

This possibility led the Court to consider the provisions as inconsistent with Article 53 that demands the tax levy to be fastened to “*indices concretely revealing of wealth*”, from which the actual ability of the taxpayer to discharge the tax obligation can be inferred. The boundary between legitimate and illegitimate presumptions is identified in the characters of “*rationality and conformity to the data of the common experience*”. Characters that are

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<sup>148</sup> Which the Court defines ‘mixed incomes’, i.e. incomes of capital and labour.

<sup>149</sup> Accordingly, the Court has ruled the constitutional incompatibility of Article 1 – in respect of Articles 3 and 53 of the Constitution - where it does not exclude those self-employment incomes that cannot be assimilated to the enterprise incomes.

<sup>150</sup> Which, if ever, represented the *ratio*.

<sup>151</sup> Const. Court 28 July 1976, No 200.

<sup>152</sup> In principle, indeed, it is likely that the income produced in a tax period tallies with the one that has been declared in the previous tax period, if the source of income persists. Cf. Const. Court 3 July 1967, No 77.

not found in the regulation at hand, since the only index of ability to pay was the income produced in the previous tax period and moreover the taxpayer was not allowed to prove that in the next period a lower income had been produced<sup>153</sup>.

As said in the previous paragraph, the possibility for the taxpayer to rebut the presumption enters the evaluation of the reasonableness, and contrary to what one would expect, it is not confined to procedural provisions or rebuttable presumptions only. When the definition of the tax assumption or tax base do not completely reflect the normality, it represents the means of retrieving the taxation to reality. This shows, among other things, that the Court vests irrebuttable presumptions with a demonstrative character.

On the other hand, the ruling in this cases shows how rationality refers not only to a single element of the presumption, but to the entire scheme. If it is necessary that the premise (known fact) embodies real facts having an economic relevance and referred to the taxpayer, this is not sufficient. It is also indispensable that the result (consequence, unknown fact) be logically connected to the premise, so that the former autonomously reflects the ability of the taxpayer involved to accomplish the tax obligation. In the last case under discussion, the known fact, i.e. the income produced in the previous tax period, represented a suitable index of wealth. From it, however, it could not be logically inferred the income referring to a different tax period. As a result, the unknown fact was not able to reflect a real ability to pay index.

### **3.3 The ‘fiscal interest’**

Despite the cases referred to in the previous paragraph, the evolution of the Constitutional Court’s rulings on tax legal presumptions is marked, especially at the beginning, from a

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<sup>153</sup> Which is why the relevant provisions might be classified also as *factio iuris*. In the judgment the Court made constantly reference to the category of irrebuttable presumptions, except for one time. See also Const. Court 12 July 1967, No 103, where the question referred to the Court was the compatibility of Article 22, para 1, Presidential decree 5 July 1951, No 573 with Article 3 and 53. Facing the lack of the annual tax return in the field of direct taxation, it prescribed the entry into the tax roll of the same amount of income ascertained for the previous taxable period, which was increased of 10% for chattel incomes. The Court split the provision into two norms, and only the second part was found to be inconsistent with Article 53. In this view, the possibility for the tax administration to re-register in the tax roll the same income of the previous taxable period was justified in the light of the omissive behavior of the taxpayer as well as of the existence of incomes for the previous year that grounded the presumption as to the persisting of the same income for the next period. On the contrary, the second part of the provision was found in contrast with Article 53, as long as it provided for the mark-up of 10% on the income of the previous period. This, because the presumption as to an increase of the activity and the correlative profits is considered to be irrational as it is not based on any concrete index and moreover it does not allow the taxpayer to prove that he actually received a lower income.

tendency to prefer the ‘fiscal interest’ over the protection of the taxpayer’s position under the perspective of Articles 3 and 53<sup>154</sup>.

As held in the judgment No 283/87 dealing with the presumptive methods of assessment, the peculiarity of the tax matter is considered as justifying different regulations in respect of the general discipline of presumptions<sup>155</sup>. Such peculiarity can be traced back especially to the interest of the State into the tax collection, which receives a constitutional protection under Article 53 itself according to the Constitutional Court<sup>156</sup>. As a consequence, tax presumptions questioned by the lower courts as to the compatibility with the ability to pay principle have been even considered at times as implementing that principle by avoiding tax evasion.

### 3.3.1 The presumption on the existence of chattels, jewels and money within the estate

The balance between the protection of the taxpayer and the securing of the fiscal interest appears delicate in the field of inheritance tax, as it concerns an event – the transfer of goods or rights *mortis causa* – on which the lack of information by the side of the tax administration is frequent. This is true, in particular, with reference to the taxable base, i.e. the inheritable assets, which might contain movable goods (shares, money etc.) that the heir is interested to hide.

Accordingly, the Legislative decree 31 October 1990, No 346 (the law on inheritance and gift tax) provides for a series of presumptions as to the composition of the inheritable assets. Among these, Article 9, para 2, establishes the presumption of existence of a certain amount<sup>157</sup> of chattels, jewels and money in the inheritable assets<sup>158</sup>.

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<sup>154</sup> See E. De Mita, *Guida alla giurisprudenza costituzionale tributaria*, Milano, Giuffrè, 2004, at p. 340 with particular regard to tax law presumptions.

<sup>155</sup> Though in the decision this refers mainly to the possible derogation of the civil regulation, in particular of Article 2729.

<sup>156</sup> See, *ex multis*, Const. Court 26 June 65, No 50, cited above, where it is held that “*the fiscal interest receives in the Constitution an individual protection (Articles 53 and 14, para. 2); so that (...) it is not one of the undifferentiated interests the public administration has to take care of, but rather a differential interest, which dealing with the regular working of the services necessary to the community’s life affects the existence of the latter (Judgment 4 aprile 1963, No 45)*”.

<sup>157</sup> The percentage calculated on the value of the *de cuius*’ estate is 7,10.

<sup>158</sup> More in detail, they are considered to be included in the inheritable assets in the percentage of 10% of the global taxable net value of the inheritable assets, even if they have not been declared or declared for a lower amount. This, unless from the analytical inventory drawn up pursuant to Article 769 of the Code of Civil Procedure, it results the existence for a different amount. In Article 11, then, it is laid down a presumption of inclusion in the inheritable assets with reference to shares and stocks in general.

In the decision No 109/67<sup>159</sup> the Constitutional Court was questioned on the compatibility of the provision fixing such presumption at that time<sup>160</sup> with Articles 53 and 3 of the Constitution<sup>161</sup>. The Court rejected the question of illegitimacy on the basis of two main considerations:

- a) the provision is in line with the common experience and with logical principles as well, so that the 'juridical certainty as to the existence of the goods' can be asserted;
- b) since the goods concerned are easily concealable and their value difficult to determine, the provision is aimed at rendering precise the tax obligation and collection and to avoid any attempt of evasion.

The decision is regrettable in the extent to which the Court belittled the question on the classification of the presumption at hand<sup>162</sup> and defined the latter as a 'juridical truth' related to 'real facts difficult to assess'.

In this view, it did not find any contrast with Article 53, as the tax obligation is deemed to be related to a concrete index of ability to pay, like the inheritance asset.

It seems that the Court arrested the evaluation of rationality to the known fact (the hereditary succession of an assets), without considering that the result of the presumption is not fully coherent with the premise and does not reflect autonomously an index of economic ability<sup>163</sup>. On the other hand, probably because the lower court did not raise the question of compatibility with article 24 of the Constitution, there is not any reflection on

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<sup>159</sup> Const. Court 26 June 1967, No 109.

<sup>160</sup> Article 31, paras 1, 2, 3, of the Royal decree 30 December 1993, N° 3270 (on the inheritance tax). From the decision we infer that it was interpreted as irrebuttable by the lower court. See on the decision mentioned in the text, G.A. Micheli, *Capacità contributiva reale e presunta*, Giur. Cost., 1967, 1525.

<sup>161</sup> The first two paragraphs of the same article had been addressee of a negative ruling of the Court (Corte costituzionale, sentenza 12 July 1965, N° 69) in relation to article 3 and 53, as the different treatment for the farms in comparison to the commercial and industrial firms were not based on objectively different situations. Indeed, in order to calculate the percentage of existence of chattels, money, jewels, it was considered the gross value when a farm was inherited, while the net value for the commercial and industrial firms. See the comment of V. Crisafulli, *In tema di capacità contributiva*, Riv. Giur. Trib., 2002, at 860. The Author criticizes the circumstance that the Court focused on the issue of equality and disregarded the question of consistency with the ability to pay principle.

<sup>162</sup> "Without investigating here if the presumption is irrebuttable or not, which is insignificant to the purpose of the case". Critical on this point also E. De Mita, *Fisco e Costituzione, questioni risolte e questioni aperte, I (1957-1983)*, Milano, Giuffrè, 1984, 253. When facing rebuttable presumptions, which reverse the onus of proof, the question is the suitability to prove the economic ability on the basis of the common experience. Instead, an irrebuttable presumption rises a problem of assimilation of different facts; in other words, different ability to pay capacities are equalized for tax purposes. Accertamenti fatti su base di valutazioni presuntive

<sup>163</sup> There is indeed the chance that the estate does not include money, jewels or chattels. In this event, the base of the taxation would be fictitious.

the possible proof by the heir that the inheritable assets does not include those goods or it does in a different percentage<sup>164</sup>.

### **3.4 The *id quod plerumque accidit*. The presumption of liberality as to the real estate's transfers between relatives**

Pursuant to Article 26, para 1, Presidential decree No 131/1986 (dealing with the registration duty), the real estate's transfers and the transfers of shareholdings<sup>165</sup> between husband and wife or lineal relatives are presumed to be donations if the global amount of the registration duty and every other tax due in relation to the transfer is lower in comparison to the tax applicable in case of free transfer.

Clearly, the provision is intended to prevent the abuse of civil instruments, in particular the choice of a type of contract that does not reflect the real intention of the parties but is rather due to the aim of avoiding the payment of a higher taxation<sup>166</sup>. The formula of such provision is the result of a Constitutional Court's decision<sup>167</sup> of inconsistency with reference to the norm excluding the proof to the contrary. In particular, the Court ruled on the compatibility of this presumption having an irrebuttable nature when involving husband and wife with Articles 3 and 53 of the Constitution.

The arguments raised by the State legal advisory service in this case were convincing and in line with the previous rulings of the Court, but they have been disregarded. He argued the rationality of the irrebuttable character in the light of the (close) relation between the parties, which could let them establish the proof of the consideration in advance, even when absent. The same kinship or relationship by marriage was considered as justifying the presumption of liberality – meaning the absence of any payment of price - as to transfer of immovable properties or shareholdings. A transfer that in this view was an index of ability to pay equal to the one revealed by donations.

The judgment is worthy for two main reasons. Firstly, the Court recognised that the context in which the presumption applies is changed, so that the provision does not appear

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<sup>164</sup> On the contrary, the question was raised as regards to Article 8, para 2, Presidential decree No 637/72 (on the inheritance and gift tax), that presumed the inclusion of money, jewels, chattels for a certain percentage of the inheritable assets' net value. In the ordinance of reference 19 January 1988, No 21, the Court excluded the relevance of Article 24, thereby of a procedural protection, being rather at issue a substantive matter.

<sup>165</sup> With a value higher than € 180.759,91.

<sup>166</sup> This is a typical hypothesis in which the presumption concerns the juridical qualification that has to be assigned to an instrument (here, the contract), with all the correlative consequences in terms of tax treatment.

<sup>167</sup> Const. Court 20 February 1999, No 41.



reasonable anymore<sup>168</sup>. Indeed, the increasing number of legal separations that are often regulated also by means of property transfers and the current autonomous economic ability of each spouse show how transfers with consideration<sup>169</sup> are not an exceptional event anymore. Secondly, here we can see how the contrary proof enters in the evaluation on the reasonableness. Indeed, the irrationality is confined to the prohibition of the contrary proof, failing the premises that justified the irrebuttable character of the presumption at hand<sup>170</sup>. Accordingly, in this part the provision is found to be not only irrational, but also in contrast with the principles of equality and ability to pay, as the higher taxation is connected to the quality of the contracting parties rather than to a higher concrete ability to pay of the same parties, who are even forbidden from proving the real nature of the contract signed. It obviously follows that the presumption of liberality is to be interpreted as being *iuris tantum*<sup>171</sup>.

#### 4. Irrebuttable presumptions of law and similar juridical notions

On the basis of the distinctions rising from the Constitutional Court's rulings, the Italian scholars have identified several notions that might remind the tax irrebuttable presumptions' scheme. Such distinction is quite peculiar to the Italian experience, as in other national experiences, such as Belgium, the main distinction is with fictions of law.

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<sup>168</sup> In the first chapter it has been observed that legal presumptions codify a rule of experience. As a consequence, when the social environment changes, then the logical ground might fail.

<sup>169</sup> I.e. with a real payment of a price.

<sup>170</sup> Before being modified by Article 25, Presidential decree 26 October 1971 No 634 and by Presidential decree no 131/86, the presumption of liberality was provided for by Article 5, Legislative decree (luogotenenziale) 8 March 1945, No 90, but the contrary proof was allowed. The Court rejected the question of inconsistency with Article 3 and 53 (Const. Court 16 July 1968, No 99) by underlining the difficulties met by the tax administration on the one side, and on the other side the correspondence to the *id quod plerumque accidit*, together with the possibility for the parties to prove the contrary. This, by means of titles having a definite date according to the Civil Code, from which the payment of the price, the origin and the availability of the sum by the purchaser could be inferred. In the field of registration duty cf. Const. Court 14 July 1976, N° 167. The case concerned Article 47, para 5, Royal decree 30 December 1923, No 3269, according to which the machineries of a factory that are not dismantled or moved and remain in the factory are presumed to have been sold to the purchaser, even when they have been excluded from the sale, and notwithstanding the purchaser of the machinery is a person different from the purchaser of the factory. The Court held that if the presumption was interpreted as being irrebuttable, then it was irrational. What was irrational, in particular, was the inference that the machinery was sold together with the factory from the mere fact that the former was in the factory. Instead, the inference could concern at most the existence of an appurtenance link. Moreover, a similar presumption of 'joint' transfer was *iuris tantum* when referred to the appurtenances (in service) of a farm. For a brief comment to the latter decision and to the subsequent solution adopted by Article 23 Presidential decree No 634/72, see E. De Mita, *Fisco e Costituzione: questioni risolte e questioni aperte, I: 1957-1983*, Giuffrè, Milano, 1984, 454-455.

<sup>171</sup> On the scheme of the presumption of liberality, after the constitutional judgment and the legislative amendments, see M. Trimeloni, *Le presunzioni tributarie*, in *Trattato di diritto tributario* (ed.) A. Amatucci, Padova, Cedam, 2001, 734-735.

In my opinion, these distinction stresses the importance of recognising to irrebuttable presumptions an, albeit limited, demonstrative character. In the sense that the known fact is in this view representative of – i.e. implies – the unknown fact that is expression of economic capacity. In this limited extent a demonstrative nature can be ascribed to irrebuttable presumptions, in order to distinguish a category having a demonstrative nature from categories where a statistical-mathematical or imperative evaluation prevail.

Firstly, this – tough weak – probative nature distinguishes irrebuttable presumptions from legal definitions (or legal exemplifications) which delineate the taxable situation. In this case there are not two facts, but rather one only fact described within the norm covering the notion. For instance, Article 2, para 2 of the Italian income tax legislation (hereinafter also TUIR)<sup>172</sup> can be included in this category<sup>173</sup>, as it provides that “*for the purpose of income taxes it is considered to be resident the persons who for the majority of the tax period are registered in the register of the resident population or have in the State territory the domicile or the residence according to the civil code*”<sup>174</sup>. Here, the circumstance of the registration, the domicile, or the residence in the State for a certain period of time are facts that identify the qualification of residence for fiscal purposes.

The same provision, however, could be an example of another notion drawn by the tax law doctrine, which is the ‘equalization’. It consists of the “*application of the regulation regarding certain facts to different situations*”<sup>175</sup>, normally because they reveal the same ability to pay capacity. Thus, Article 2 at hand could be also read as putting on the same level the situation of the taxpayer who has habitually resided for the entire year to the one of the taxpayer who meets the conditions laid down by para 2.

Many provisions could at the same time be read as fixing an irrebuttable presumption or a legal definition, an equalization or even a fiction. The evaluation has then to rest on the *ratio* of the norm under discussion and on the interests into play.

We are certainly out of the field of presumptions when a provision extends a certain general regulation to hypotheses unrelated to the general definition, on the basis of a

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<sup>172</sup> Presidential decree No 917/1986.

<sup>173</sup> Although, as observed by A. Marcheselli, *Le presunzioni nel diritto tributario: dalle stime agli studi di settore*, Torino, Giappichelli, 2008, 74, this provision can be read as a definition, a presumption, or an equalization. Therefore, the Author suggests to distinguish between the different notions having regard to the *ratio* of the norm.

<sup>174</sup> Article 2 is very interesting – and it will be subject to examination later on – as par. 2-bis provides for a rebuttable presumption of residence.

<sup>175</sup> A. Fedele, *Le presunzioni in materia di imposta di registro ed INVIM*, in *Le presunzioni in materia tributaria. Atti del Convegno Nazionale di Rimini del 22-23 Febbraio 1985*, (ed.) A. E. Granelli, Rimini, Maggioli, 1985, at p. 103.

consideration of a similar economic significance. Many examples can be found in this regard, with reference to all those provisions both in income taxation and VAT that define a certain type of income, operation or category of subjects involved by drawing a general definition and afterwards the ‘assimilated cases’ are listed. For instance, consider Article 2 of the Italian VAT legislation (hereinafter also Presidential decree No 633/72): in the first paragraph it is stated that the transfers of goods are those transfer deeds for a consideration that imply the transfer of the right of ownership or the setting/transfer of beneficial rights on every kind of goods; the second paragraph covers a list of hypotheses that “*are moreover transfer of goods*”. They include cases like the free transfer of goods produced by the firm (No 4) or their allocation to personal use by the entrepreneur (No 5), which miss some elements requested by the general definition of the first paragraph (in the examples, the consideration).

#### **4.1 Irrebuttable presumptions and legal definitions**

The Italian Constitutional Court has dealt with the so called ‘legal definitions’ (or evaluation, qualifications, typifications) in the judgment No 131/1991<sup>176</sup>. The case concerned Article 76, para 3, No 2), Presidential decree No 597/73 (on income taxation), which considered to be made “*in any event with speculative purposes and without any possibility of proof to the contrary*” the purchase (not for private use)-and-selling of immovables within a period of 5 years. The gains accrued by means of speculative operations were included into the taxable base when they did not belong to the category of enterprise income and considered as ‘diverse incomes’<sup>177</sup>. The judge of the lower court had raised the inconsistency of this provision with Article 3, para 1 and 24, paras 1 and 2, as the taxpayer was prevented from proving the absence of the speculative purpose. This, even when the personal use of the immovable property did not depend on the purchaser, like in the case of the main proceedings<sup>178</sup>, but rather on circumstances beyond his control.

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<sup>176</sup> Const. Court 26 March 1991, No 131.

<sup>177</sup> The ‘diverse income’ is one of the six categories of income that nowadays are listed in Article 6 of Presidential decree No 917/1986, on income taxation. The adjective ‘diverse’ refers to the fact that this category includes certain hypotheses on condition that they do not belong to other types of income, so that it is residual in respect of the others.

<sup>178</sup> The parties had bought an apartment in order to move in – as a house residence – but because of the tenant’s resistance they had to sell it and buy another one for the same purpose.

Now, while the same provision had been classified as an irrebuttable presumption<sup>179</sup> in a previous ordinance by the Constitutional Court, on the contrary in the decision No 131 the Court opens to a different category and qualifies it as a ‘legal evaluation’. In this view, the provision identifies two conducts – purchase and selling of the same good – that when occurring within a period of 5 years are considered as a single behaviour with a speculative aim. The overall operation is in this perspective the condition of a taxable gain according to the evaluation made by the legislator<sup>180</sup>. It follows that the provision under discussion cannot be assumed as in contrast with the right of defence, because it has a merely substantive nature. As a matter of fact, when dealing with legal evaluations or qualifications the only examination of the Constitutional Court is confined to the parameter of reasonableness, in terms of correspondence to the socio-economic reality and suitability as to the aims pursued<sup>181</sup>.

In the case at issue it could be reasonably argued that the law simply laid down a legal definition of an operation having a speculative purpose to which a certain tax treatment was related. In this perspective, the speculative purpose is not an unknown fact inferred from the purchase and selling within a close period of time, but rather an element of the taxable event. In other words, the legislator fixes what a speculative operation is (purchase and selling in 5 years) and prescribes the fiscal consequences (taxable gain as individual income, unless it is classifiable as enterprise income).

In line with this approach it is worthy to recall the view taken by an Author<sup>182</sup> when the Court had not ruled in the case No 131 yet, and that seems to have been adopted in the decision. Correctly, he put the attention on the interpretation of the speculative purpose. If it stood for a psychological attitude, in the sense that the purchaser intended to get a profit from the operations –, then it would be impossible for the tax administration to prove. Thus, I add, this would have explained the use of the presumptive scheme. However, he preferred an objective interpretation, according to which the speculative purpose represents the “*suitability of the specific operation conducted to realize a gain*”; such suitability can

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<sup>179</sup> See Const. Court, ordinance 6 dicembre 1989, No 528. It was found not irrational in view of the correspondence to the socio-economic reality. Cf. Const. Court, ordinance 10 marzo 1988, N° 298.

<sup>180</sup> See M. Trimeloni, *Le presunzioni tributarie*, 2001, 734 cited above, 743. He stresses that in this view the speculative purpose is not a consequence deduced from the two behaviors according to the *id quod plerumque accidit*, but rather the unifying element of qualification, which render them a single (complex) tax situation that is source of income.

<sup>181</sup> In the case the Court rejected the question (‘not founded’) because these aspects had not been raised by the ordinance of the lower court.

<sup>182</sup> E. De Mita, *Fisco e Costituzione: questioni risolte e questioni aperte, II (1984-1992)*, Milano, Giuffrè, 1993, 864.

result from a series of circumstances – like the type of good involved, the period of time between the two operations etc. - that render the overall operation objectively speculative. In his view, the speculative aim is a character of the global operation. As a consequence, Article 76 does not provide for irrebuttable presumptions, but it rather “*codifies objective criteria revealing the suitability of the operation carried out to realize a gain*”. The interpretation followed is able to affect the ruling of the Court. In the first case – subjective interpretation – the Court should find the provision as being in contrast with the Constitution, in line with the jurisprudence on irrebuttable presumptions demanding the admission of the contrary proof<sup>183</sup>. In the second case, the provision could be considered as constitutionally inconsistent only if the speculative character of the overall operation is not based – in Article 76 – on a rational justification, meaning that the objective criteria that should reveal *ex se* the speculative nature of the operation are not suitable.

More general considerations in terms of protection of the taxpayer lead to prefer an interpretation of the provision under the scheme of the presumption. The known fact would be the purchase-and-selling of the immovable for not-private use within 5 years; the inference would be based on the rule of experience according to which when a certain immovable is bought without being used for personal purposes and it is sold in a relatively short period of time, then the purchaser aims at making profits; the unknown fact would be the speculative purpose, which the law regulates under a certain tax treatment. In this sense brings also a literal argument, that is the reference to the prohibited contrary proof included in the same provision.

Such an interpretation can also be supported by reference to the position expressed by the Court a few years subsequent to the decision No 131 mentioned above. When referred to about the same provision it has again classified it as an irrebuttable presumption of law and has rejected the question of inconsistency with Articles 3 and 53 by underlying the rationality under the perspective of the correspondence to the *id quod pleumque accidit*<sup>184</sup>. Instead, the question of the classification so far analysed has been ‘solved’ by the legislator of the Presidential decree No 917/1986, by opting for a clear ‘legal definition’. Indeed, Article 67 of the text on income taxation includes a list of gains that are considered to be as ‘diverse incomes’. Among those, there are – though with some exceptions - the gains

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<sup>183</sup> The Author refers to the decision No 200/76 commented in the text.

<sup>184</sup> Const. Court 22 July 1999, No 346.

realized through the selling (for a consideration) of immovables that have been purchased or built within the previous 5 years, without any mention to the speculative purpose<sup>185</sup>.

#### 4.2 Normative predeterminations

Legal presumptions need to be distinguished from the so called ‘normative predeterminations’, which refer to forfeiting criteria of determination as to the taxable base<sup>186</sup>. The main difference rests on the absence of a logical inference and on the fact that they are mostly intended to simplify the ascertainment of the taxable amount.

There seems not to be unanimity within the scholars as to the range of hypotheses covered by the category at hand, which in any case is not homogeneous. This is not the seat to list all the hypotheses taken into consideration. It is, however, worthy to refer to a couple of hypotheses the Constitutional Court has ruled on and that might rise uncertainties as to their nature.

Among those, I agree in classifying as a predetermination the cadastral regime, as it consists of a determination *ex ante* of the normal income ascribable to a certain immovable

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<sup>185</sup> Cf. Const. Court 20 July No 315, where the Court clarifies that ‘gains’ stand for a growth in the exchange value of a certain good during the period of time from the moment in which it enters in the estate of a person and the moment in which it leaves that estate. From the same decision we infer that the tax obligation rises when the sum is received.

<sup>186</sup> As to the predeterminations see L. Tosi, *Le predeterminazioni normative nell'imposizione reddituale: contributo alla trattazione sistematica dell'imposizione su basi forfettarie*, Milano, Giuffrè, 1999, 14 et seq. It has to be noted that the notion construed by the Author is broader than the one in the text. He deals with those “(...) instruments having a normative source, either the legislation or the regulation, pursuant to which a datum established *ex ante* or anyway definable with fixed criteria is meant to take the place of the real datum, being the former relevant for the purpose of the taxation instead of the latter”. As to the object, they might concern a single or all the positive or negative items, the taxable base, or the tax due. Their application happens through the acts provided for the accomplishment of the tax obligation, i.e. tax return or tax decision. The range of hypotheses covered is wide, as it includes the provision of a fix amount of tax due, of coefficients applied to (accounting) indicators especially in order to determine revenues and remunerations, or the reference to an average/normal value for the calculation of the income. By way of exemplification, the category includes very different provisions: from the transfer pricing to the cadastral income, from the redditometro to the tax treatment of smaller enterprises, from the statistical studies (studi di settore) to the substitute taxation, from the minimum tax to the forfeiting of certain expenditure. As a result, the Author gives a narrow notion of legal presumption, which is confined to those categories characterized by a logical-argumentative connection between the known and unknown fact that is based on the observation and representation of the reality, thereby on a rule of experience. Accordingly, the predetermination share the legal presumptions’ scheme (inference between two facts) and the effects (in terms of reversal of the burden of motivation and proof and binding evaluation by the judge), but they have a different content. Indeed, the inference consists of “the direct application of criteria that are merely functional to the achievement of the aim pursued by the legislator” (p. 28). This would make them border on fictions, assimilations, typifications, legal exemplifications, as they imply “a regulation fully built on the normative level regardless of, or even in contrast of, the actual reality” (at p. 30).

property<sup>187</sup>. Similarly, the forfeiting of some costs – according to a fix percentage – may reflect a certain predetermination rather than the result of a logical inference.

As to the forfeiting determination of the taxable income, however, the Constitutional Court has on the contrary shown to consider it within the genus of legal presumptions. In particular, when questioned on the compatibility of a provision fixing the value of the immovable properties for the purpose of registration duty and INVIM (tax on gains from the transfer of immovables) with Articles 3, 53 and 24 of the Constitution, the Court has asserted the legitimacy of presumptions in tax law – that include the ‘automatic or flat-rate assessment’ - with the only limitations given by the need to have a not-fictitious basis<sup>188</sup>. In this regard, the reference to the cadastral income – revalued with the use of proper coefficients - would be a safe index revealing the ability to pay<sup>189</sup>. Moreover, the Court does not consider the provision as introducing a new system of determination of the taxable values, but rather a limitation to the power of assessment of the tax officers when they consider that the value of the goods that has been declared by the taxpayer is not adequate. In this way, they are prevented from doing a higher evaluation as long as the value has been declared in an amount that is not lower of the one determinable automatically<sup>190</sup>.

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<sup>187</sup> Among the six categories of income, the land income refers to the income of lands and buildings that are placed in the territory of the State and are or have to be registered in the respective cadastral register, with attribution of a cadastral rent (Article 6, para. 1, let. a), Articles 25 et seq., TUIR). Unlike the other types of incomes, the ones at issue are determined according to the cadastral outcomes. As a result, the taxation is on a ‘average ordinary income’ that can be gained in normal conditions from properties having the same characters (in terms of quality, category, class), instead of on the real income got from the land or building concerned. Such a tax treatment has been traditionally intended to promote the production and in general the exploitation of the land, as well as to lighten the administrative fulfillments of the small farmers. Plus, the determination of an ordinary (annual) income is possible in view of the source: the property immovable, which is considered to give rise to a relatively stable income. See G. Falsitta, *Manuale di diritto tributario. Parte speciale: il sistema delle imposte in Italia*, Padova, Cedam, 2009, p. 128 et seq.

<sup>188</sup> In the text the question put to the attention of the Court has been simplified, as it has been examined in different occasions and with reference to further constitutional parameters. For a broader examination see M. Trimeloni, *Le presunzioni tributarie*, cited above, 736-739.

<sup>189</sup> See Const. Court, ordinance 23 dicembre 1987, No 586, dealing with Articles 52 and 79, para. 1, Presidential decree No 131/86 on the registration duty. Cf. Const. Court, ordinance 10 dicembre 1987, No 482, on the taxation of the income from an estate and the agrarian income according to the cadastral system (‘tariffe d’estimo’).

<sup>190</sup> Const. Court 26 ottobre 1995, No 463, on Article 12, Law decree 14 marzo 1988, No 70, converted into Law 13 maggio 1988, No 154, which facing the transfer of buildings that were not registered in the cadaster yet allowed the taxpayer to ask for the attribution of the cadastral rent at the moment of the cadastral registration and thereby the determination of the tax due on the basis of the ‘automatic evaluation’ pursuant to Article 52, Presidential decree No 131/86. An automatic evaluation that consisted of multiplying the cadastral income by 100. The Court confirms the scheme followed in the previous ordinance No 586/87, by asserting that “*the flat or automatic evaluation as to the goods’ value provided for by article 52 DPR n° 131 of the 1986 is a mere simplification of the system on the determination of the values and it is ascribable to the general criterion of the use of presumptions*”.

More doubts rises the inclusion of the standardized methods of assessment<sup>191</sup> within the category of the predeterminations. We will see that they do not follow either the scheme of legal presumptions nor the one of presumptions of fact, so that they seem to have an hybrid nature. Their inclusion among the predeterminations can be excluded, mainly because they operate within the tax proceedings as methods of re-assessment of the taxable income rather than means of determination of the latter irrespective of the taxpayer's behaviour. Moreover, though they cannot be considered as codifying a rule of experience, they have a logical basis and – a least in part – are the result of the observation of the reality.

### **5. Irrebuttable and rebuttable presumptions of law in the field of taxation with particular reference to the right of defence**

In the first chapter the difference between irrebuttable and rebuttable presumptions of law has been highlighted when dealing with the effects in terms of derogation to the ordinary distribution of the onus of proof.

As intuitive, the distinction is based on the possibility to give proof to the contrary, which concerns only rebuttable presumptions. This explains why most of the scholars ascribe the latter to the genus of the means of proof<sup>192</sup>, whereas irrebuttable presumptions are mostly dealt of as mere rules of law or *fictio iuris*<sup>193</sup>.

When referring to *tax* presumptions, this distinction needs to be specified taking into account the scheme of the tax obligation.

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<sup>191</sup> Which L. Tosi, *Le predeterminazioni normative nell'imposizione reddituale: contributo alla trattazione sistematica dell'imposizione su basi forfettarie*, cited above, p. 35, inserts. With particular reference to the 'redditemetro' and in general those instruments that establish a relation between expenditure indices and income of the taxpayer, he identify two inferences: 1. Availability of certain goods thus meeting of expenditure for their maintenance; 2. meeting of expenditure thus possession of a proportionate income. The first inference is *lato sensu* presumptive, but it meets the difficulty in collecting average (or ordinary) data having a sufficient degree of verisimilitude. Moreover, the second inference is a mere political choice, as there are not rules of experience that allow to infer the amount of income from the expenses met by single taxpayers.

<sup>192</sup> *Contra* M. Trimeloni, *Le presunzioni tributarie*, cited above, 706-707, who gathers the ambivalent nature of irrebuttable presumptions. On the one side, they contribute to the forming of the tax situation within the provision; on the other side, they lay down binding criteria both for tax administration and judge. As a matter of fact, the tax administration has to operate by assuming only those facts that are the consequences of a certain premise in the presumptive provision and following the procedural iter that the provision implies; similarly, the judge has to develop a "cognitive representation" of the same facts having regard to the pre-determined result fixed in the presumption. Thus, the Author ascribes a probative efficacy to the irrebuttable presumptions as well, though he clarifies (p. 702) that the analysis of the single presumptions's nature should follow a case by case approach, having regard to the structure of the tax concerned and the related method of assessment. F. Tesaro, *Le presunzioni nel processo tributario*, Riv. Dir. Fin., 1986, 189, and in particular at 195, The Author supports the probative nature of both rebuttable and irrebuttable presumptions. In this view, the parameters of constitutional consistency should be Article 24 on the right of defence, and in general those provisions that lay down guarantees concerning the trial.

<sup>193</sup> *Ex multis*, see F. Moschetti, *Il principio della capacità contributiva*, cited above, p. 267-8-70.



Technically, there is a rebuttable presumption when a provision of law provides for a certain fact (x) to be representative of another one (y) that is the tax event (or the taxable base, or another element of the tax obligation). Given x, the tax administration relying on the presumption does not have to prove the tax event, as long as the premise (x) is proved. The burden of proof is therefore shifted on the taxpayer, who has to prove that the taxable fact (y) did not occur, if he wants to avoid the effects of the presumption.

Instead, when facing an irrebuttable presumption, given a certain fact (x) another one that is the taxable fact is presumed, without any possibility to prove the contrary. Thus, in practice, those two facts are equalized, in the sense that x produces the effects that normally ensue from y. As a result, technically there is not a reversal of the burden of proof, but clearly the ordinary distribution of this burden is affected, at least if a – though weak – probative nature is recognised to irrebuttable presumptions as well.

In which way this distinction impacts on the parameters of reference in the evaluation of constitutional compatibility developed by the Constitutional Court can be already inferred from the cases referred to in the dissertation, and more in general from the nature of the provisions concerned.

As a matter of fact, given the predominant substantive feature of irrebuttable presumptions, they are requested to be in line with Articles 3 and 53 of the Constitution. Though they also produce effects within the procedure and the trial, the Constitutional Court normally excludes Article 24 of the Constitution to apply. In some decisions, the prohibition to rebut the presumption is taken into consideration, but as said it enters the evaluation of the presumption's rationality, rather than be confronted with Article 24. The focus, in other words, is not on the right of defence, but rather on the risk that the taxation would cover an ability to pay that is not effective, as it is instead requested by Article 53.

On the contrary, rebuttable presumptions are evaluated not only under the light of Articles 3 and 53, but also 24 of the Constitution. The possibility for the taxpayer to give proof to the contrary, indeed, raises the question of the limitations to that proof laid down within the law. When such a question is put to the attention of the Court, the latter is called to verify if the taxpayer is in concrete able to rebut the presumption – mostly, with reference to the context of the trial - or if the difficulties in giving the counterproof (*probatio diabolica*) renders impossible the exercise of the related right.

### 5.1 Irrebuttable presumptions of law and Article 24 of the Constitution on the right of defence

As said in the previous paragraph, when dealing with irrebuttable presumptions the Court generally does not examine the question of compatibility with Article 24, which refers to the jurisdictional safeguard of rights. Given their substantive nature, they are rather considered under the light of Articles 53 and 3 of the Constitution.

This approach seems to follow also from some decisions handed in the field of coercive tax collection, which are interesting as both an irrebuttable presumption and limitations to the proof within a proceedings were at issue<sup>194</sup>.

The provision concerned prevented the spouse and the closest relatives<sup>195</sup> of the tax debtor from bringing the third party's appeal in order to prove that they were the real owner of the movable properties found in the residence of the owed<sup>196</sup> and that had been pawned in relation to the unpaid tax. This in view of the irrebuttable presumption of law pursuant to which the debtor was considered to be the owner of all the movable properties existent in his residence<sup>197</sup>.

In one of the first decisions on the provision at hand the Court focused on the scope and frame of the presumption, which it classified as a provision of "material law". In this view, though it directly affected the access to the appeal having an impact on the collector's procedure, nevertheless it fell in the discipline governing the property guarantees of the tax obligation<sup>198</sup>. When asked whether the provision was in contrast with Article 24, para. 1, the Court excluded any violation by arguing that "*it [Article 24] guarantees the protection before the tribunal with regard to subjective rights that are considered as regulated by and with the limitations resulting from the substantive law*". In fact, according to the Court the access to the tribunal was denied in view of the balance of rights and interests worthy of protection developed by the legislator. In the case at issue, the protection of the public

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<sup>194</sup> See in this regard M. Trimeloni, *Le presunzioni tributarie*, cited above, 746 et seq.

<sup>195</sup> Relatives and relatives in law within the third degree.

<sup>196</sup> Or the person jointly liable to tax. In other words, the debtor of a certain tax that had not been paid.

<sup>197</sup> See Article 207, let. 1, Presidential decree 29 January 1958, No 645 (text on direct taxation, now abrogated). The provision made safe the goods that had been set up as a dowry before the annual tax return or the tax assessment notice. But the institution of a dowry was so anachronistic that it was an exception with few chances of application.

<sup>198</sup> Const. Court 16 July 1964, No 42. "*Indeed, it is up to the substantial identifying those goods that are the guarantee for the creditor's rights*". The Court was also questioned as to the compatibility of Article 207 with Article 42, para 2, of the Constitution on the protection of the property right. But the question was rejected also under this point, as it has been considered in the discretion of the legislator the balancing between the protection of the right of property (of the spouse and relatives) and the tax collection. Cf. Const. Court 26 novembre 1964, No 93.

interest connected to the tax execution prevailed on other interests, so that the provision was justified in the light of securing the execution of the tax debt and avoiding fraudulent operations<sup>199</sup>.

Therefore, the violation of Article 24 of the Constitution was excluded<sup>200</sup>.

However, in a next decision<sup>201</sup> the Court found Article 52, para. 2, let. b), Presidential decree 29 settembre 1972 No 602 (on tax collection of income taxes) to be in contrast with the Constitution where it did not provide that the debtor's spouse could appeal with reference to the movable properties, save for those received through a deed of gift having a definite date prior to the wedding<sup>202</sup>. In this case, the Court was questioned about the compatibility of the presumption under discussion and the related prohibition of appeal in the light of Articles 3 (as to the reasonableness and disparities) and 24 of the Constitution<sup>203</sup> (as to the judicial protection of the property right).

The decision is interesting in the extent to which the Court seems to request the proportionality of the measure at hand with the purposes sought by the legislator. Firstly, the Court confirmed the prime importance of a prompt collection of the tax debt, which justified the provision at hand. Nonetheless, it added that the protection of this interest was not unlimited but it rather found a 'rational limitation' in the correspondence with the aims pursued. The latter cannot consist of the execution of the tax debt anyhow, "*even with the expropriation of goods that, certainly and without any risk of avoidance, do not belong to the defaulting taxpayer*". Instead, according to the Court, the aim was to render prompt the collection of the unpaid direct taxes by means of the expropriation of movable properties that were presumed to be in the debtor's possession because of the place where they were found. In this frame, the prevention from appealing for the spouse could not be reasonably justified in the light of the public interest. As such, it "*exceeds the measure of the special*

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<sup>199</sup> The Court explained: "*Thus the legislator has not excluded, in contrast with Article 24 of the Constitution, the defense in front of the court with reference to a juridical situation that has been recognized in the law, but it has rather provided for a guarantee of the tax obligation's accomplishment through a norm that belongs to the substantive regulation of the tax relation and considering the situation of the existence of the movable property in the residence of the owed (...)*".

<sup>200</sup> Cf. Const. Court 24 ottobre 1995, No 444: "*The Court has repeatedly stated since from the decision No 42 of 1964 that the discipline under constitutional compatibility evaluation does not deal with the defence in the proceedings*".

<sup>201</sup> Const. Court 27 luglio 1994, No 358, that was handed after the coming into force of the D.P.R. 29 settembre No 602/73 on tax collection. In practice, the

<sup>202</sup> In practice, the provision under examination presumed that the movable properties found in the house of the debtor during a procedure of execution were considered to be of the latter, and the spouse could provide otherwise under only by producing a deed of gift prior to the wedding.

<sup>203</sup> Plus Articles 31 (on the protection of the family), 41 (on the private economic initiative) and 47 (on the saving) of the Constitution, which are not of particular interest to our purpose.

protection that needs to be secured to the prompt execution of the tax debt, as well as the need to prevent and avoid fraud and shams<sup>204</sup>. While a reasonable limitation as to the contrary proof and to the third party's appeal<sup>205</sup> represented a measure coherent with the purpose pursued with the presumption at hand, an utter prohibition did not<sup>206</sup>. This, in particular, when the chattels subject to execution had been received by the spouse before the wedding for donation, like in the case of the main proceedings.

Even if in the decision it is not clearly expressed the parameter in the light of which the inconsistency with the Constitution has been found, it seems that Articles 3 and 31 have been considered<sup>207</sup>, whereas Article 24, para 1, is not at issue. In this view, if a limitation can be found, then it concerns the right itself and not the possibility to proceed for the protection of the assumed right.

## **5.2 Rebuttable presumptions of law and proof to the contrary: introduction to the main issues**

Currently, most of the legal presumptions laid down within the Italian tax system are rebuttable. Much less is the number of irrebuttable presumptions, if we leave out those provisions that could be more precisely classified as legal definitions, exemplifications and so on.

The examination of the Constitutional Court's rulings on irrebuttable presumptions shows how, especially in the most recent decisions, they are basically found to be in contrast with the Constitution. This, depending on the case, in the extent to which they lack rationality or they might enable the taxation of an ability to pay that does not correspond to reality, as the taxpayer is prevented from giving evidence to the contrary.

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<sup>204</sup> See also Const. Court 27 dicembre 1996, No 415, with regard to the taxpayer's relatives, wherein the findings on the position of the spouse are extended to the taxpayer's relatives. On the basis of the same arguments, the provision under discussion is found to be unconstitutional where it does not provide that the third party's appeal can be bought when dealing with goods that have been brought with a public act having a definite date prior to the taxable event. Cf. G. Fabbrini Tombari, *L'art. 52 d.p.r. 29 settembre 1972 n. 602 e la giurisprudenza della Corte Costituzionale*, Note to Constitutional Court 27 December 1996, No 415, *Foro It.*, 1997, 699.

<sup>205</sup> Which is what is provided for the other third parties by Article 65, Presidential decree No 602/73, being them allowed to prove to be the owner of the good concerned only through a public act or a certified private contract having a definite date prior to the delivering of the tax roll.

<sup>206</sup> Though the possibility to distinguish the position of the spouse in comparison to the others belongs to the discretion of the legislator, the prevention from applying the court "*cannot be so absolute to put in practice the spouse, in relation to the distraint, in the same position of the jointly liable to tax*".

<sup>207</sup> As in the ruling the Court refers to the lack of reasonableness and coherence with the need to favour the forming of the family.

From the latter consideration it does not follow, *a contrario*, the compatibility with the Constitution when facing rebuttable presumptions. Given the fact that the regulation of the proof to the contrary comes into play, the evaluation of the Court is very often extended to the parameter stated by Article 24 of the Constitution. As said when discussing of the general approach of the Constitutional Court, rebuttable presumptions of law are not evaluated solely with reference to parameters concerning the defence, like Article 24 (right of defence), Article 97 (principle of good administration), Article 111 (right to a fair trial). In fact, it results that similarly to irrebuttable presumptions, the rebuttable ones are to be evaluated in view of:

- a) Article 3, with reference to the rationality (i.e. the coherence between known fact and unknown fact and the conformity to the *id quod plerumque accidit*) and to the possible disparities that cannot be objectively justified;
- b) Article 53, as to the effectiveness of the ability to pay, in the sense that the taxation is levied according to the actual taxpayer's capacity to contribute to public spending;

The limitations as to the type of proof that the taxpayer is allowed to give may be in contrast with the judicial protection that is guaranteed by Article 24 of the Constitution. The circumstance that the presumption can be rebutted is not sufficient for the purpose of overcoming the constitutional scrutiny. When, for instance, the counterproof turns to be a *probatio diabolica*, similar problems faced with irrebuttable presumptions rise. Moreover, the regulation of the contrary proof does not only concern the tax proceedings as a consequence of the appeal brought by the taxpayer against the notice of assessment, but it also counts during the administrative proceedings.

In the following paragraphs, a series of rebuttable presumptions of law in force will be examined, some of which raise the question of the limitations to the contrary proof in relation to the constitutional frame so far highlighted. A few of them have been already ruled on by the Constitutional Court.

In accordance with the order of work illustrated, the focus will be on some of the most interesting legal presumptions in force, both in the area of VAT and direct (income) taxation, with an eye to the subsequent examination of the EU context. But before turning to such provisions, it is suggested to deal with some presumptive methods of assessment. The interest is not justified in view of any EU relevance, but rather because of the questions of classifications and of compatibility also with the principle of legality that they

might arise. They reflect indeed the difficulties of classification when dealing with presumptive measures. Notably, some methods of assessment are envisaged in the Belgian tax system, but their nature (of legal presumptions) as well as their compatibility with the parameter of legality have not been dealt with by the scholars.

## 6. An outline on the estimated methods of assessment

As it is obvious, the first element that should identify tax legal presumptions is the legal foundation. This implies that the inference needs to be drawn by a provision of law, or, as regards the Italian system, of a law decree or a legislative decree, which are equivalent.

Where presumptions deemed as being legal and affecting the tax debt are laid down in secondary normative provisions or left to the discretion of the tax authority, then they may be in contrast with Article 23 of the Italian Constitution. According to the latter, indeed, “*No personal or property obligation can be imposed unless on the basis of the law*”<sup>208</sup>.

As is well known, Article 23 is unanimously considered as covering not every element of taxation. Hence, not every item of the tax obligation need to be regulated by the law, but only the ones defining the *an debeatur* (the tax event) and the persons liable to taxation. Instead, provisions on the tax base (*quantum debeatur*) or tax rate can be included in secondary normative provisions as long as the criteria are laid down in a legislative provision.<sup>209</sup> Furthermore, from analysis of the major literature and constitutional judgments, it follows that Article 23 applies to substantive provisions only, so that the tax proceedings and the tax recovery do not necessarily have to be regulated in detail within the law<sup>210</sup>. It follows that measures affecting one of the essential elements of the tax

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<sup>208</sup> The original formula says: “*Nessuna prestazione personale o patrimoniale può essere imposta se non in base alla legge*”.

<sup>209</sup> A literal argument in this sense is considered to be the wording “on the basis of the law” included in Article 23. Of course, in this dissertation it is not possible to exhaust the topic of the legality principle. Thus, we refer, *ex multis*, to A. Fedele, *Riserva di legge*, in *Trattato di diritto tributario*, (ed.) A. Amatucci, I, *Il diritto tributario e le sue fonti*, Padova, Cedam, 1994, 157-203. S. Cipollina, *La riserva di legge in materia fiscale nell’evoluzione della giurisprudenza costituzionale*, in *Diritto tributario e Corte costituzionale*, (eds) L. Perrone and C. Berliri, Napoli, Edizioni Scientifiche Italiane, 2006, 163-184.

<sup>210</sup> A. Fedele, *Rapporti tra i nuovi metodi di accertamento ed il principio di legalità*, in *Il nuovo accertamento tributario tra teoria e processo*, (ed.) C. Preziosi, Roma, ETI, 1996, 46, explained that there are two main theories: according to the first one Article 23 concerns the part of the discipline of the tax identifying its specific characters and function; the second one enlarges the legality principle to all the aspects of taxation, though with a different severity depending on the subject of the discipline. The Author agreed on the fact that the law must cover the choices on the distributive criteria of the public load, so that it must certainly cover the substantive provisions (i.e. regarding tax events, persons liable to tax, tax base, tax rate), but it cannot be excluded the inserting of interests relating to those criteria in the formal discipline of the relevant tax (i.e. regarding the activity of the tax administration and the taxpayers, the tax collection, the fiscal cases, etc.). Thus, in his view Article 23 should apply not only to provisions having a substantive nature, but even to a discipline having a formal function, because of the partial protection guaranteed to

obligation cannot either be included into secondary normative sources nor left to the tax administration's discretion, without being inconsistent with Article 23 of the Constitution.

With regard to certain estimated assessments envisaged in the Italian legislation<sup>211</sup>, the question arises as to the nature of the presumption laid down in ministerial decrees

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substantive interests (like equity, distributive justice, safeguard of the so-called 'fiscal interest'). It follows the necessity of a legal rule on the criteria and also the limitations to the choices related to the structural elements of the taxation. He submitted this position with regard to two hypotheses: a) legal discipline of the proof; b) provisions regarding the tax assessment "aiming, more than to the complete realization of the legislative choice as to the persons liable to tax, the tax event, the tax base and the tax rate, instead to directly affect the behaviours of the mass of the taxpayers according to mean parameters". Among the second type of provisions, basically the so-called 'redditemetro' and the 'studi di settore' are considered. A. Fedele, *I principi costituzionali e l'accertamento tributario*, Riv. Dir. Fin. Sc. Fin., 1992, 463.

<sup>211</sup> Such standardized methods of assessment are provided for by legislative provisions, but the concrete formulation of the fact base is generally left to administrative regulations, as well as the inference that mostly ends up to be no more than a statistical data processing. Cf. A. Di Pietro, *Rilevanza sostanziale delle "nuove" procedure di accertamento*, in *Il nuovo accertamento tributario tra teoria e processo*, in *Il nuovo accertamento tributario tra teoria e processo*, (ed.) C. Preziosi, Roma, ETI, 1996, 29, observed that the presumption, strengthened by the legal foundation, is more and more introduced in the context of the derogations to the ordinary methods of assessment, in view of the efficiency of the tax proceedings. Such objective prevails over the efficacy that generally characterizes the substantive rule and over the impartiality that should qualify the administrative function of tax assessment. From this perspective, the clues assume almost the shape of proof, and the Constitutional Court, when involved, tends to prefer the interest to the tax collection facing objective difficulties of investigation and control on the side of the tax authority. The Author underlined how the Court, when requested to judge on the compatibility of legal presumptions within tax assessment, has always evaluated the legal proof not only under the profile of the impartiality and the right of defence, but also of the coherence with the ability to pay principle. It follows a substantive effect that needs to be kept under consideration while examining the different methods of assessment of recent introduction (such as, 'minimum tax', 'coefficienti presuntivi', 'redditemetro'). From the 1970s and through the evolution of the Italian tax system, several types of presumptive instruments of assessment followed one upon the other, crossing different areas of taxation, mainly income tax – both individual and enterprise's – and valued added tax. Though they differ in terms of addressee or methodology applied, they share the same problems as to the compatibility with fundamental constitutional principles, not least Article 23 of the Constitution. In particular, they raise the same demand of debate and consideration of the taxpayer's defensive arguments during the administrative proceedings prior to issuing of the tax assessment. In general, they are tools of assessment that the tax administration is entitled to use in the context of the tax audit in order to detect the hidden taxable base or some component of the latter. They are based upon presumptive criteria pertinent to the relation between expenditure or factors of the production on the one side and taxable income or certain components of the latter on the other side. They fall within the category of the so-called 'non-analytical methods of assessment', which differ from the ordinary ('analytical') methods of assessment and are characterised by the possibility for the tax administration to have recourse to presumptions of fact in the re-determination of the overall income, irrespective of the single types of income or accounting items, facing the lack of information due to the omissions on the side of the taxpayer or the unreliability of the bookkeeping. Though concerning the powers of investigation of the tax administration, they might end up affecting the structure of the tax obligation and thereby impacting directly on the behaviour (in terms of obligations) of the taxpayer, particularly where he is not in the position to prove that the result of the method concerned does not correspond to reality. For instance, when the 'studi di settore' apply, the taxpayer has to choose between comply with the results of such statistical studies concerning the relation between indicators of normal economic activity and the gross revenue, or disregarding them with the risk of receiving a notice of assessment and thus being requested to prove that they do not apply in his specific case. In this regard, it has been observed that it appears questionable the rigid distinction, referred to the structure of the tax, between substantive provisions on the one side, and provisions concerning the tax assessment on the other side, which may be inferred from some judgments of the Constitutional Court. Although the latter are to be evaluated mostly in the light of Articles 24 and 97 of the Constitution rather than 53, the risk for procedural provisions to affect in concrete the structure of the tribute is real. In the last event, they should also be considered in the light of Article 23, in the extent to which they are able to affect aspects covered by the legality principle. See

(generally, regulations having a normative character issued by an administrative body) in accordance with a certain legislative provision generically referring to the presumption. In this regard, it goes without saying that from the perspective of the taxpayer under investigation facing a presumption of fact is very much different than confronting a legal presumption. The former is left to the prudence of the judge (or is developed by the tax authority) and the inference cannot be crystallized in a normative provision. Where the tax authority has recourse to a presumption of fact, it cannot simply apply the latter when issuing a notice of assessment, being rather requested to justify the use of that inference in relation to its characters of seriousness, precision and concordance<sup>212</sup>. More generally, the re-determination of the tax due needs to be supported by a range of probative elements, the automatic reference to a presumption of fact alone not being enough for this purpose. The sufficiency of the motivation inserted in the tax decision might then be subject to evaluation by the court before which the taxpayer lodged an appeal.

### 6.1 The assessment based on the taxpayer's spending capacity ('redditometro')

The assessment based on the taxpayer's spending capacity ('redditometro') belongs to the *genus* of the synthetic method of assessment<sup>213</sup>, being provided by Article 38, para 5,

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M. Basilavecchia, *Metodi di accertamento e capacità contributiva*, Rass. Trib., 2012, 1108. Cf. L. Tosi, *Profili di costituzionalità della parametrizzazione del reddito*, in *Il nuovo accertamento tributario tra teoria e processo*, Roma, ETI, 1996, 43, who, with particular reference to the 'studi di settore' (at that time just introduced by the law and on the way of the elaboration by the Commission in charge) raised the question of their real nature, in order to clarify if a provision formally on the tax assessment hides in fact a substantive way of determination of the income by use of parameters. As a matter of fact, since the ability to pay principle implies the reference to an actual economic aptitude, all the methods of determination of the income with the use of parameters, though surreptitiously introduced under the form of provisions on the assessment procedure, tend to contrast with some constitutional principles (like Article 23, 24, 53). In this regard, it is relevant the means and the subject of proof available by the taxpayer: "*in other words it is necessary to put article 53 of the Constitution in connection with article 24 of the Constitution*". Though the taxpayer is in theory guaranteed the exercise of the right of defence, the Author questioned the concrete possibility to contest the outcome of the 'studi di settore', considering that the probative value of his bookkeeping is excluded. It follows a certain difficulty of proof on the side of the taxpayer, especially with regard to "normal" events that, albeit affecting the conduct of a business, are not documentable. He is allowed to make use of presumptions, and then it's up to the judge to rule on the plausibility of the contrasting presumptive arguments. But precisely this judgment of verisimilitude would be not in line with the constitutional frame, according to the Author.

<sup>212</sup> As requested by article 2729 of the Civil Code.

<sup>213</sup> The 'synthetic' method differs from the ordinary one due to the possibility given to the tax administration to re-determine the overall (personal) income regardless of the single categories laid down in Article 6, Presidential decree No 917/86 (TUIR) and having recourse to presumptions of fact on condition that they are serious, precise, concordant. The general rule governing the rectification of the tax return by the tax administration is the analytical consideration of the single categories of income. Both of the methods – 'synthetic' and 'analytical' – provided for by Article 38, Presidential decree N° 600/1973, imply that the overall income declared in the tax return appears to be below the actual one, or that the deductions from the income and from the tax as included in the tax return are not due. Where the overall assessable (i.e. estimated) income exceeds for at least one upon five the one declared (i.e. reported in the tax return), the tax



Presidential decree No 600/73<sup>214</sup>, where it refers to a ministerial decree for the definition of the “*inductive content of ability to pay indices*”, on the basis of which the whole individual income can be determined. In execution of such provision laying down a general inference between expenditure and taxable income, a decree of the Minister of Economic and Finance has been enacted (D.M.<sup>215</sup> 10 September 1992), which in fact positively identifies the fact base<sup>216</sup>.

Such decree draws up a list of goods and services<sup>217</sup> having a peculiar attitude to show a qualified ability to pay of the taxpayer, in view of the expenditure that are likely to be met for their maintenance. Through the use of parameters and multipliers connected to each element of the catalogue<sup>218</sup>, these expenses are quantified and the presumable income that is ascribable to the taxpayer is inferred. In other words, once a certain taxpayer is selected, the tax administration identifies which one of the goods/services listed in Table A are in his availability during a certain tax period, on the basis of the information included in different “databases” (tax registry, traffic control authority, etc.) or a questionnaire filled in by the same taxpayer. Each good and service corresponds to a certain coefficient, which through the use of a maths formula, leads to the calculation of the global income.

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administration is entitled to use the ‘synthetic’ method, that can nowadays be divided into two subspecies. Firstly, pursuant to Article 38, para 4 –modified by Article 22, Law decree 31 May 2010 No 78 - the tax administration may synthetically determine the overall income of the taxpayer on the grounds of every kind of expenditure incurred during the taxable period concerned. This provision – according also to the Authors commenting on its recent introduction – seems to put forward a very general legal presumption, which infers the income produced/possessed during a certain taxable period from the costs incurred in the same period. A confirmation may be traced reading the rest of the provision, where it is made safe the proof (by the taxpayer) that those expenses have been financed with income different from the ones earned during the relevant tax period, or with exempt income, or with incomes subject to the definitive withholding taxes or again legally excluded from the taxable base forming. Secondly, when the same pre-conditions occur and with the same possibility of contrary proof for the taxpayer, the tax administration is also entitled – pursuant to Article 38, para 5 - to make use of “the inductive content of ability-to-pay indices” as identified in a decree of the Minister of Economics and Finance every two years, through the analysis of representative taxpayers and divided also in the light of family units and geographic area. This is precisely what is commonly known as ‘redditometro’, which is traditionally distinguished from the above method of (pure) ‘synthetic’ assessment as it specifically refers to expenses met for the use and maintenance of certain goods and services.

<sup>214</sup> The Presidential decree No 600/73 is the Italian legislation governing the assessment of income taxes.

<sup>215</sup> Italian acronym for Ministerial decree.

<sup>216</sup> The nature of such decree has been the subject of academic debate, where two main positions have been expressed. On the one side, there are those who consider the provision as having the form of a regulation (i.e. a normative source); on the other side, there are those who assert its nature of administrative general act. To support the former view, one could rely upon the general and, above all, abstract character of the provision and from the fact that it is enacted by a subject having a policy function. On the other hand, it should be noted that the reference to a ministerial decree for the definition of the indices of ability to pay may be read in the sense of a de-regulation of the matter. Indeed, these indices originally were identified by the law (Article 2 of the Presidential decree No 600/73).

<sup>217</sup> See Table A, alleged to the decree.

<sup>218</sup> And revised every two years.

The analysis of the Supreme Court's rulings on cases involving the application of the assessment based on the taxpayer's spending capacity shows a tendency to consider the presumption at the basis of the instrument as being legal<sup>219</sup>. This, mainly arguing from the circumstance that the inference is established by Article 38, Presidential decree N° 600/73, which refers to a ministerial decree for technical elements only, and above all that it represents a means for 'capturing' the normal income (i.e. ascribable to the taxpayer based on the normal course of events).

Such an interpretation affects the efficacy of the inference resulting from the 'redditometro'. As a matter of fact, in this view the tax administration is not obliged to refer to further probative elements, being the result of the redditometro sufficient in order to issue a tax assessment<sup>220</sup>. Similarly, the burden of proof in a possible trial is shifted on the taxpayer. As a consequence, the judge has to hold such result as proved, unless the taxpayer gives proof to the contrary. In this regard, in view of the legal nature of the inference, the Supreme Court has on different occasions denied the possibility of contesting the inference itself. The taxpayer may prove that the expenses have been met with incomes that are exempt or are subject to a definitive withholding tax, or (after Law decree No 78/2010) with incomes different from the ones possessed during the tax period concerned, or legally excluded from the taxable base. More generally, the national courts, in accordance with some circular letters of the tax administration<sup>221</sup>, allow him to prove that the income has not been produced as such, it is lower, or, of course, that the expenses have not occurred. In other words, the proof to the contrary can concern the fact base (for instance, the possession of a second residence) and the presumed fact (the amount of income inferring from the expenses according to the parameters), but not the inference, precisely because it has been fixed by the law.

In line with this case-law of the Supreme Court are a couple of Constitutional Court's decisions, where the legal nature of the presumptions resulting from Article 38 is incidentally asserted. These decisions confirm that, as said above, the Constitutional Court

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<sup>219</sup> See the following ordinance: Supreme Court 20 December 2011, No 27545.

<sup>220</sup> See, *ex multis*, Supreme Court, VI civil division, 20 October 2012, No 18604, where the "*confirmed jurisprudence of this Court*" is recalled in order to assert that when the income is determined by means of the redditometro the tax administration is relieved from any further proof as to the fact-indices of a higher ability to pay identified in the redditometro and put at the basis of the tax claim. It's up to the taxpayer, then, proving that the presumed income does not exist or it does but in a different amount. Accordingly, Commissione tributaria regionale di Bari, sez. XIV, 15 May 2009, No 61.

<sup>221</sup> See Circular letter 9 August 2007, No 49/E.

evaluates presumptive provisions concerning the assessment procedure in the light of a substantive parameter, that is the ability to pay principle.

In the first ruling dating 1987<sup>222</sup> and referring to the synthetic methods of assessment, the Court underlined how the availability of certain goods (secondary houses, horses, ships etc.) represents, on the basis of a rule of experience, a sure index of ability to pay. Hence, it is able to ground a presumption according to which the person who possesses those goods or benefits from those services have a correspondent (taxable) income, though it is not possible to analytically identify the source of the latter<sup>223</sup>. From this perspective, from the proof of the availability of those goods, the constituting element of the tax obligation justifying the tax claim is inferred. As a consequence, the Court finds that such presumption fixed by the law is fastened to facts that are certain proof of ability to pay.

With particular reference to the assessment based on the taxpayer's spending capacity ('redditometro'), in a second decision<sup>224</sup> the Constitutional Court has defined it as being a means that lets the tax administration determine the presumable income of the taxpayer on the basis of parameters – as indentified in a ministerial regulation - which in the light of settled rules of experience are indices disclosing his income.

If the foregoing has been the prevailing opinion among the scholars as well<sup>225</sup>, very recently some signals of an opposite interpretation emerge from the last decisions of the

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<sup>222</sup> Const. Court, 23 July 1987, No 283. Critical on this ruling G. Tinelli, *L'accertamento sintetico del reddito complessivo ai fini dell'IRPEF nella giurisprudenza costituzionale*, in *Diritto tributario e Corte costituzionale*, cited above, 380. In his view, the Court has lost the chance to define the demonstrative mechanism peculiar to the synthetic method as a legal presumption based on the demonstrative reliability of the expenditure, to which the law connects a sort of inversion of the burden of proof on the existence and amount of the taxable income. The questions of compatibility would have been better framed.

<sup>223</sup> I.e. the type of income.

<sup>224</sup> Constitutional Court, 28 July 2004, N° 297, according to which the taxation is anchored to certain – in the sense of proved – facts and within certain limits fixed by the law, in particular having regard to contrary proof and threshold.

<sup>225</sup> See A. Di Pietro, *Rilevanza sostanziale delle "nuove" procedure di accertamento*, in *Il nuovo accertamento tributario tra teoria e processo*, cited above, 33-34, who excluded that the legal (rebuttable presumptions) introduced with the new methods of assessment ('minimum tax', 'coefficienti presuntivi', 'redditometro') have a merely probative efficacy. In his view, in particular, the use of normal facts and averages quantities – that end up to be a formalization of a normative choice - on which the presumptions are based on, "increase the distance between the profile of the violation and the one of the assessment" and contribute to the deviation from the actual income and to the weakening of the substantive law that is more and more characterized by a case-by-case formulation. In fact, the averages "end up to steer also the taxpayer's choices when determining the taxable base. In this way they take, though indirectly, a substantive efficacy which as much as the compliance with the average implies the inapplicability of the sanctions". In other words, the procedural provisions do not exhaust their function in the rules on the tax authorities' activity of control and assessment, but they more and more affect the behaviour of the taxpayers. And just because of this vested substantive efficacy – especially on the determination of the taxable base - the Author considered it as necessary to fix the criteria governing the calculation of the taxable base, and above all to secure the observance of the legality principle (Article 23 of the Constitution) as well as of the economic ability principle (Article 53 of the Constitution). On the other hand, the Author warned that the wide use of

Supreme Court and of the lower courts. In particular, it has been ruled that the assessment with the ‘redditometro’ “tends to determine, through the use of presumptions of fact, the presumed global income of the taxpayer by means of the indices of ability to pay established by the ministerial decree every two years”<sup>226</sup> and more clearly that “the redditometro with an uncritical and tabellar application of the parameters is (...) only a presumption of fact about a superior ability to produce income, thereby ability to pay, which in order to apply for the tax recovery has to be accompanied and supported by circumstantial and recorded fact-checking on the real and actual ability to produce income of the taxpayer under assessment”<sup>227</sup>.

Though at present there seems to be a contrast within the case-law as to the nature to assign to the presumption resulting from the use of the assessment based on the taxpayer’s spending capacity, it has to be recognised that the evolution of the instrument tends towards a mere presumption of fact, which the tax administration has to support with other probative elements in order to issue a notice of assessment.

In this sense it leads the provision – after the Law decree No 78/2010<sup>228</sup> – to a compulsory debate between tax administration and taxpayer with the purpose of letting the latter

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legal presumptions based on means is able to alter the traditional relationship between substantive provisions and procedural provisions. The risk is that this over-use might stifle every discretionary power of the tax administration, confined to the application of provisions, while on the side of the taxpayer the new presumptive procedures might overcome the importance of the substantive provisions. Accordingly, A. Fedele, *Rapporti tra i nuovi metodi di accertamento ed il principio di legalità*, cited above, 47, saw in the provisions on the tax assessment under discussion an inclination to steer tax administration and taxpayer not to the precise observance of the taxable base discipline, but rather to results included in means-bracket divided for categories of taxpayers and fixed with several techniques. Here is the insert of substantive interests – related to equity in the distribution of the tax burden and to a safer tax collection – within a procedural discipline. The legality principle should operate also with regard to the latter discipline, being thus requested the setting of criteria and limitations by the law. In his opinion, the evolution of the legislation on the assessment seems in contrast with that principle, as long as “it extends the operativeness of the secondary sources without assuring the choices of the tax administration have a sufficient ‘base’ in the primary source”.

<sup>226</sup>Supreme Court, tax division, 20 December 2012, No 23554. This, according to the Court, already under Article 38 in force before the Law decree No 78/2010, converted into the Law No 122/2010.

<sup>227</sup> Provincial court of Sondrio, 25 March 2011, No 24.

<sup>228</sup> The amendments introduced by such decree mostly affect the threshold requested in order to use the synthetic method - 20% instead of 25% in terms of difference between the income declared and the one ascertainable during one taxable period instead of two - and the consideration of the investment expenses, which are normally assessed with the pure ‘synthetic’ method. As to the latter, Article 38 included a rebuttable presumption according to which the expenditure were met with incomes produced in constant quotas in the year when they were met and in the previous four. This presumption has been abrogated, and the new para 4, Article 38, mentioned above, generally refers to ‘expenses of any kind’, so that the consideration of the assets investments is left to the interpretation of the tax administration and eventually of the judge. As to the redditometro, Article 38, para 5, as modified after 2010, refers, for the content of a ministerial decree, to a significant sample of taxpayers, explicitly distinguished also as to the composition of the family and the geographical area. On the basis of this provision, very recently – with a decree of 24 December 2012 – a new ‘redditometro’ has been introduced, much more detailed as compared to the previous one dated 10 September 1992. While the latter contained a short list of goods and services

produce data or information relevant for the assessment, and the necessary start of the ‘assessment with adherence’<sup>229</sup>. The possibility for the taxpayer to contest the results of the ‘synthetic’ method already during the administrative proceedings before the tax administration may be interpreted as a sign of a minor (probative) efficacy. From this perspective, the tax administration is not bound by the outcome of the ‘redditometro’, being rather requested to add further probative elements, in order to render the presumption serious, precise, concordant. In addition, the importance given with the ministerial decree of 2012 – enacted in execution of the Law decree No 78/2010 - to statistical surveys and socio-economic studies, imposes the reference to other probative elements in order to gear the data to the concrete case.

### **6.1.1 Some considerations on the nature of the presumption facing the assessment based on the taxpayer’s spending capacity**

As shown in the previous paragraph, several arguments could in theory be raised in favour of both of the hypotheses, namely the nature of legal presumption as well as of presumption of fact. This reflects the difficulty in classifying the instrument at hand.

When the assessment based on the taxpayer’s spending capacity (‘redditometro’) was introduced, the indices expressing the ability to pay were prescribed by the law – Article 2, Presidential decree No 600/73 - so that it was possible to identify a legal presumption with reference to the *if* of the tax claim, at least<sup>230</sup>. In such a framework, the coefficients which Article 38, para 4, made reference to were considered as sufficiently restricting the

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associated with a pro-quota expense and a multiplier, the former includes a table with several items and it consists also in a calculation of the average expenses attributable to the taxpayer. It is not possible yet to express any considerations on the application of the instrument by the tax administration. In this regard, it won’t be necessary to wait very long, since the ministerial decree has been enacted on the basis of Article 38, para 5, as modified by the Law decree of 2010, so that it will concern the tax returns presented after 2009. For our purpose, it appears clear that the introduction of statistics elements in the assessment of the income undermines one of the principal arguments in favour of the legal nature of the presumption at the basis of the redditometro, which was its correspondence to a rule of experience.

<sup>229</sup> In the Italian tax system, it is a method of assessment that implies a sort of ‘agreement’ between tax administration and taxpayer.

<sup>230</sup> As observed by A. Fedele, *Rapporti tra i nuovi metodi di accertamento ed il principio di legalità*, cited above, 48, initially the facts-index, from which the parameters of determination of the taxable base are inferred, were included in a primary source (Article 2, Presidential decree No 600/73), and the nature of these facts was so that the parameters derived implicitly from the primary source. Then the list has been replaced by the reference to the minister as to the indication of the elements revealing the ability to pay. “*It follows a complete lack of predetermination, into primary legal sources, of choices that considering the nature of the effects and aims pursued are likely to involve ‘substantial’ interests, both of ‘distributive’ nature and of ‘fiscal interest’*”. In addition, in the preamble of the decrees approving the ‘redditometro’ there is a progressive reduction of the criteria and sources adopted. This might affect the judicial protection of the taxpayer, when contesting the legitimacy of regulations and general administrative acts in front of the administrative judge.

discretionary power of the tax administration when identifying and evaluating such elements. In other words, under the previous regime the law provided for the fact base that needed to be proved by the tax administration in order to make use of the presumption. To a Ministerial decree<sup>231</sup> it was left the technical rules of experience linking the indices to certain amounts of global income. Especially in view of the general and abstract provisions, the latter were considered as expression of administrative technical discretion having a normative function.

In view of the amendments to the assessment based on the taxpayer's spending capacity, it is nowadays hard to classify it as a legal presumption. It is true that Article 38 fixes the inference between expenditure and taxable income, which has been interpreted as a presumption as to the 'income relevance of the expenses', but this is very general self-evidence. By referring to a regulation for the elaboration of the indices at hand, it has furnished a very spare legal foundation, albeit completed by the limits about the threshold and the adversary proof. With particular regard to the *quantum*, the amount of the income assessed is determined through a maths formula according to the parameters established by a ministerial decree. Thus, the choice as to the coefficient is completely left to the discretion of the Minister and even when possible, it would be difficult for the taxpayer to contest the inference. No criteria are traceable in the law in this regard.

On the other hand, it is a matter of fact that the 'redditometro' implies a mitigation of the burden of proof normally borne by the tax administration. When the latter has proved the existence of certain expenses, it is up to the taxpayer to provide the adversary proof<sup>232</sup>. However, this is not automatic, like it would be facing a legal presumption, as the tax administration is demanded - *rectius*, expected – to adapt the results of the 'redditometro' to the concrete case during the administrative proceedings, irrespective of the data produced by the taxpayer. In fact, when the notice of assessment was enacted by the tax office and appealed by the taxpayer, the judge does not seem to be bound by that result, being in his prudence the reduction of the tax claim. Precisely this last consideration raises doubts about the classification under the label of presumptions of fact, being the reasoning and more in general the scheme of the mechanism normatively predetermined.

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<sup>231</sup> I.e. the Ministerial decree 21 July 1983.

<sup>232</sup> Cf. G. Ferranti, *La prova contraria negli accertamenti del redditometro*, Corr. Trib., 2013, 5.

## 6.2 The assessment based on statistical studies ('studi di settore')

Another standardized method of assessment is the assessment based on statistical studies ('studi di settore'), which grounds on statistical data and socio-economic studies<sup>233</sup>. It concerns only some items of the income (revenues, remunerations and considerations) accrued by entrepreneurs and self-employed workers<sup>234</sup>.

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<sup>233</sup> It is possible to distinguish two main methods of assessment with regard to the income ascribable to enterprises and self-employed persons, which normally are required to keep the accounts. On the one side, there is the 'analytical' method where the rectification of the data resulting from the tax return is based on the books. In fact, it consists of an inspection as to the correct application of the rules governing the determination of the relevant income. In this event, the data included in the books may be overcome only through direct proofs or serious, precise, concordant presumptions. On the other side, the 'inductive' method, where the taxable base may be determined globally regardless of the balance and the books, and possibly with the use of presumptions devoid of seriousness, precision, concordance as well as of data 'whatever collected'. The tax administration is entitled to make use of this method only in the six hypotheses listed in Article 39, para 2, Presidential decree No 600/73, which in brief refers to the failure to declare the taxable income or to the lack/unreliability of the books. In addition, it is possible to identify a third method, which is in-between the two mentioned above and thus defined as 'analytical-inductive. Indeed, the global income is re-determined without disregarding the data of the books, but single assets and liabilities may be determined indirectly when it results *aliunde* that they have been reported incorrectly or not reported in the tax return. It is exactly within the frame of this third method that the 'studi di settore' are generally set. In particular, Article 39, para 1, let. d) counts, where it provides that as regards to the 'enterprise income' of individuals the tax administration carries on the rectification of the tax return if the "*the incompleteness, falseness or inexactitude of the elements reported in the tax return or in the documents enclosed*" results from the examination of the books and accounting records or from the investigations referring to the enterprise involved or from the data collected by the tax administration ex Article 32, Presidential decree No 600/73. In this case, "*the existence of assets not declared or the inexistence of liabilities declared may be inferred also on the basis of presumptions of fact, as long as they are serious, precise, concordant*". Similarly, in the field of VAT it is possible to distinguish two main methods of (re)determination of the taxable base. The 'analytical' one is based on the consideration of the tax return and of the accountancy of the taxpayer involved, while the 'synthetic' one allows the tax administration to re-determine the overall taxable turnover and tax rate through the use of presumptions and regardless of the accountancy, but rather by means of data and information collected. Ultimately, a third method may be identified, which applies when the unfaithfulness, incompleteness, inexactitude of the tax return is indirectly inferred on the basis of the legal presumptions of purchase and transfer, of (qualified) presumptions of fact, or emerges from data and information obtained during the access and examinations carried out towards other taxpayers, as well as from other acts and documents in the tax administration's hands. In this case, the rectification concerns single items relating to taxable operations that have not been reported in the tax return and do not result from the books, but it does not disregard the latter. In this context, Article 62-*sexies*, Law decree No 331/1993 grounds the rectification of single items of income on the inconsistencies between the revenues/remunerations/considerations declared and the ones resulting from the studi di settore.

<sup>234</sup> The field of application of the 'studi di settore' is confined to enterprises and self-employed workers whose business is lower than a certain amount fixed for each sector by the correlative ministerial decree. According to Article 10, para 3-ter, Law 8 May 1998, N° 146, these limits may not be higher than 7,5 millions of euro. See this article and also Article 10-*bis* – the latter introduced by Article 1, para 13, Law No 296/2006 - as to the "*mode of use of the studi di settore within the assessment*" and their periodical revision. The former profile has been modified by the Law decree 4 July 2006, No 223, converted into the Law No 296/2006, which has widened the field by abrogating the threshold of two tax periods of inconsistencies at least and by disregarding the accountancy regime adopted. Further amendments have been introduced by Article 1, Law 27 December 2006, No 296. The same law, on the one hand – para 14, Article 1 - has referred to a ministerial decree (20 March 2007) – the approval of 'economic normality indicators' in order to determine the revenues or remunerations resulting from the studi di settore, for the purpose of the assessment ex Article 10, Law N° 146/98 and the studi di settore adjustment ex Article 2, Presidential decree 31 May 1999, No 195. They are intended to operate until the revision of the studi that will take into consideration the coherence indicators provided for by Article 10-*bis*, para 2, Law 8 May 1998, No 146, and in para 14-*bis* it is

The reference to the considerations shows the transversality of the instrument, being applicable to VAT also. As a matter of fact, it is provided<sup>235</sup> that the tax assessment pursuant to Article 39, para 1, let. d), Presidential decree No 600/73 and 54 Presidential decree No 633/72<sup>236</sup> may be based also on serious inconsistencies between the revenues, remunerations and considerations declared and those ones on good grounds inferable from the characteristics and conditions of exercise of the specific activity undertaken or from the statistical studies ('studi di settore') elaborated ex Article 62-*bis*, Law decree No 331/1993. The assessment at hand has been introduced by Articles 62-*bis* and 62-*sexies* of the Law decree 30 August 1993, No 331, added when converted into the Law 29 October 1993, No 427, with the aim of rendering more effective the tax assessment, especially in relation to enterprises, self-employed workers and individuals exercising a profession. They are mostly the result of economic analysis and statistical data. Simplifying, they are the result of a series of steps that can be summarized as follows:

- collection of data concerning the taxpayers belonging to the different productive sectors (i.e. industries), by having recourse to the tax registry, and also to questionnaires sent by the tax administration;
- elaboration of the data with the aim of reducing the several variables into factors, describing the main elements characterising each sector;
- through the cluster analysis homogeneous groups of taxpayers are formed, which can be considered as representing the organizational model of the sector, by taking care of eliminating the "abnormal" taxpayers;
- determination of the amount of remunerations referring to the cluster's members through a statistical technique;
- correction of the remunerations function depending on the geographical variable;
- allotment of the single taxpayer to one or more clusters with the use of a statistical technique.

As these steps make evident, the peculiarity of the method of assessment at hand already concerns the elaboration of the study, where it moves from the fact to the norm instead of

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clarified that they are experimental and that the higher revenues/remunerations/considerations resulting from them represent merely presumptions of fact. On the other hand, according to para 19, with regard to the taxpayers holder of enterprise's and self-employed worker's income who the studi di settore do not apply to, specific 'indicatori di normalità economica' (indices of economic normality) are identified. They are intended to detect both revenue or remunerations not included in the tax return that can be presumably ascribable to the taxpayer with reference to the conditions of the activity carried on and irregular jobs'.

<sup>235</sup> Article 62-*sexies*, Law decree No 331/1993.

<sup>236</sup> Which include the Italian VAT legislation.



the opposite<sup>237</sup>. In other words, normally we assist with the application of a certain provision to a concrete situation. By contrast, the instrument at hand is elaborated on the basis of the concrete situations and its application in a concrete case does not exactly imply an assumption of the situation in the provision. It rather entails the analysis of the recurring of certain conditions as to the activity carried on, in order to insert the taxpayer under investigation in one or more clusters and verifying if the declared revenues correspond to or deviate<sup>238</sup> from the standards.

Obviously, all this affects the efficacy of the instrument – and thereby any consideration on its nature - as it imposes a debate with the taxpayer already during the administrative proceedings. This, with the purpose of a fair procedure and, above all, of adjusting the result to the concrete case by considering the factors ignored by the study.

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<sup>237</sup> C. Garbarino, *Aspetti probatori degli studi di settore*, in *Rass. Trib.*, 2002, 238; The Author asserted the probative – rather than normative – nature of the presumptions at the basis of the pre-defined criteria for the inference included in the tax assessment; already in C. Garbarino, *Studi di settore, onere della prova, avviso di accertamento*, in *Il nuovo accertamento tributario tra teoria e processo*, Roma, ETI, 1996, 216. Cf. A. Ferrario, *Presunzioni in base a parametri e studi di settore*, Note to Const. Court 1 April 2003, *GT Riv. Giur. Trib.*, 2003. See also L. TOSI, *Profili di costituzionalità*, cited above, 44, who with reference to the methods of assessment introduced in the period 1989- 1995 (i.e. ‘coefficienti presuntivi di reddito e di ricavi’, ‘minimum tax’, ‘accertamento induttivo in base a contributo diretto lavorativo nel 1994’, ‘accertamento in base agli studi di settore nel 1995’) observed that the presumptions used by the tax administration in these hypotheses do not directly refer to the taxpayer under assessment. In his view, by making use of “indices, coefficients and parameters drawn from means of sector, methods of determination of the (professionals’ and smaller enterprises’) income through parameters have been – directly or indirectly – introduced, with the aim of rendering more efficient the tax assessment and the subsequent collection. Contra, with reference to the question of the compatibility of the studi di settore with the legality principle, see A. Fedele, *Rapporti tra i nuovi metodi di accertamento ed il principio di legalità*, cited above, 48-49, who believed that they operate on the side of the organization of the tax administration’s activity and of the taxpayers rather than on the side of the discipline of the legal proof. A certain logical inferential procedure that deduces criteria for the determination of items of income of a taxpayer from the results of previous investigation activities regarding other entrepreneurs of the same sector. In his view, the results are relevant because they can rationalize the activity of the tax administration – by rendering the decision on the measure of the taxable base more persuasive - and contribute to the uniformity of the taxpayer’s behaviour. In other words, they do not fix probative restrictions or rules of judgment. In any case, he did not see a violation of Article 23, because the instrument is provided by the law, where the reference is to the overall activity of control rather than to specific facts and correlative income (like in *redditometro*), though it would be advisable the provision of precise limits and criteria as to the aim of orientation pursued. However, as underlined in the text, the application of the instrument by the tax administration shows a certain automatic use of the results, often without a rational investigation.

<sup>238</sup> Pursuant to Article 62-sexies, para 3, serious inconsistency is requested in order to issue a notice of assessment.

### 6.2.1 Some considerations on the nature of the assessment based on statistical studies ('studi di settore')

When discussing the nature of the assessment based on statistical studies the relevant rules and the interpretation given by national courts offer conflicting arguments in favour of different theories, with consequences in terms of their probative efficacy.

On the one side, the legal nature of the outcome resulting from the application of such statistical studies has been supported<sup>239</sup>. In fact, even in the rulings where they are qualified as presumptions of fact, the Supreme Court has recognised that they simplify the burden of proof normally laying on the tax administration, putting on the taxpayer the *onus* of proving that in the concrete case they do not apply<sup>240</sup>. As we have seen in the first chapter, the shift of the onus of proof normally follows a legal (rebuttable) presumption.

In this regard, it has to be observed that it was possible to identify a legal presumption at most with reference to the presumptive coefficients ('coefficienti presuntivi'), formerly in force, which were regulated by the Law decree No 69/89, while this is hard to argue with reference to the statistical studies. Apart from a legal (but very general) foundation and from the probative effects, it would become a strained interpretation considering this method of assessment as a legal presumption. Mainly because the typical scheme of a legal rebuttable presumption does not occur: a real known and proved fact is missing and the

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<sup>239</sup> A. Fantozzi, *Gli studi di settore nell'accertamento del reddito di impresa*, in *Diritto tributario e Corte costituzionale*, ed.) L. Perrone e C. Berliri, Napoli, Edizioni scientifiche italiane, 2006, 396-397-398, supported the qualification of the 'studi di settore' as a rebuttable presumption. However, he put the attention on the *sui generis* structure of the presumption. The known fact is represented by the structural characteristics of the enterprise activity that are relevant for the purpose of the application of the studio di settore (such as spaciousness of the premises, number of workers and so on), while the unknown fact is the amount of revenue achieved during a certain tax period. The inference is based on the rule of experience according to which if analogous activities achieve a certain amount of revenue, then the same is for the activity under tax assessment. However – and this is the first peculiarity – the selection of the structural characteristics to consider and the mean revenues, is not left to the prudence of the tax administration or the judge, but it rather consists in a statistical-maths function fixed in ministerial decrees. The statistical way of forming affects the contrary proof that the taxpayer is entitled to give in order to avoid the application of the instrument. As a matter of fact, that contrary proof is confined to the circumstances that render the presumption not applicable in the case at hand. Being almost impossible for the taxpayer to prove the different amount of the revenues by contesting the inference – since it is left by the law to the ministerial decrees and in any case requests data not available by the taxpayer – he normally needs to prove those situations not considered by the studio di settore that justify an abnormal running of the enterprise so that the analogy with the “normal” activity considered by the studio appears to be not-reasonable. Thus – and here is the second peculiarity – the contrary proof does not concern the unknown fact, but rather the known fact, that is the analogy between the activity assessed and the “normal” one. “*Under the conceptual point of view, it follows that the presumption at hand (i.e. the “normal” activity has revenues equal to the mean ones of analogous activities) is in fact not open to contrary proof, being only possible to confute only the assumption of the presumption (the normality of the activity under control)*”.

<sup>240</sup> Because, for instance, the inconsistency between the amount of the remunerations as declared in the tax return and the ones resulting from the application of the 'studi di settore' is justified in the light of particular conditions of the activity carried on during the relevant taxable period, or more in general, of circumstances that are the cause of a lower income.

inference is reduced to a statistical function. Moreover, the judge is not bound by the outcome of the *studi di settore*; on the contrary, the free evaluation of proof is operative. More convincing appears the opinion that, on the other side, ascribes the statistical studies to the category of the presumptions *hominis*. This, by giving importance to the circumstance that they not always lead to a precise value, but more often to a values bracket. As a consequence, the tax administration cannot simply rely on the deviation of the declared revenues from the results of the mechanism, when issuing a notice of assessment. By contrast, in the motivation it seems to be requested that there is the reference to other probative elements, able to qualify those results as presumptions being serious, precise and concordant.

This is the interpretation embraced by the Italian Supreme Court in the more recent rulings, with the persuasive strength of the plenary session. In the decision 18 December 2009, No 26635 the Court has ruled that the standardized method of assessment with the statistical studies consists of a system of presumptions of fact, whose seriousness, precision and concordance is not determined by the law only on the basis of the standards. On the contrary, it is the corollary of the administrative proceedings in relation to the debate with the taxpayer, which must be put into operation. The hearing of the taxpayer<sup>241</sup> plays a fundamental role in the adjustment of the statistical elaboration of the standards to the concrete economic situation of the taxpayer. As a consequence, if the tax administration disregards the remarks and data produced by the latter, it has to give account of this in the motivation of the notice of assessment. In addition, the Supreme Court clarifies that, irrespective of the taxpayer's behaviour during the administrative proceedings<sup>242</sup>, he holds the possibility to appeal the notice of assessment and to make recourse to all the types of proof normally admitted in the tax proceedings, presumptions of fact included. Finally, as a confirmation of the just-affirmed nature of presumptions *hominis*, the Supreme Court underlines the principle of free evaluation by the judge as to the applicability of the method at hand – applicability that the tax administration is requested to prove – as well as to the contrary proof produced by the taxpayer.

On a closer view, however, even the second reading of the statistical studies, though supported by the Supreme Court, does not appear satisfactory. They do not follow the

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<sup>241</sup> Pursuant to article 10, par. 3-*bis*, Law No 146/1998 it is compulsory. See also the Circular letter No 31/E of the 22 May 2007.

<sup>242</sup> He can present observations in order to convince the tax administration not to apply the '*studi di settore*' to his concrete case, or he can remain inert, without losing the right to raise arguments in this sense during a tax trial.

typical scheme of presumptions, not even of the *hominis* ones, which normally are those drawn from a known fact to an unknown fact by the judge (or the tax administration). Here, indeed, the reasoning is drawn elsewhere; though the judge is not bound by the outcome of the statistical studies – and the same seems to be for the tax administration – he does not appear to be able to ignore them. Furthermore, as already said, it is undoubted that they shift the burden of proof on the taxpayer, at least during the administrative proceedings. In other words, once the tax administration verifies the inconsistency between the revenues reported in the tax return and the outcome of the statistical studies, it is up to the taxpayer to raise exceptions. If he does provide elements and the tax administration issues the notice of assessment, it is requested to explain in the motivation why they have been disregarded. But if he decides not to intervene in the debate when invited, the tax administration will be legitimated to issue a notice of assessment only on the basis of the standards. Thus, this certainly results in a lightening of the burden of proof normally laying on the tax administration<sup>243</sup>.

In conclusion, the statistical studies cannot be included within the category of tax law presumptions without forcing the legislative data. They represent a presumptive method of assessment where the outcome is part of a more general presumptive reasoning that demands the reference to further concrete probative evidence in order to be considered as plausible. In the light of this, they might be classified as a ‘weak legal presumption’<sup>244</sup>, by indicating that, albeit their legal foundation, their probative efficacy has to be supported by further probative elements, included the information possibly produced by the taxpayer in the context of the compulsory debate.

As with the assessment based on the taxpayer’s spending capacity, the fact that Articles 62-bis and 62-sexies provide for a very general rule and refer to a regulation for the elaboration of the statistical studies, might create problems of legal certainty. The taxpayers subject to that method, the components of income and the procedure to apply are identified. More vague is the reference to the elaboration of the instrument<sup>245</sup>, which in fact is left to a ministerial decree.

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<sup>243</sup> See G. Corasaniti, *La natura giuridica degli studi di settore ed il problema dell’onere della prova*, Dir. Prat. Trib., 2008, 13; L. Garibbo, *Studi di settore: presunzioni ed onere della prova*, Dir. Prat. Trib., 2011, 3.

<sup>244</sup> The formula is used by G. Frasoni, *Sulle presunzioni legali nel diritto tributario*, Rass. Trib., 2010, 603.

<sup>245</sup> According to Article 62-bis, the tax offices identify significant samples of taxpayers part of the same sectors to be controlled, in order to find the elements characterizing the activity carried on.

## **7. Legal presumptions within the banking inspections**

Similarly to the estimated methods of assessment mentioned above, the nature of the presumptions provided in the context of the tax investigations carried out by the tax authority in the field both of income taxation and VAT is very much debated<sup>246</sup>. In practice, the tax officer may issue the tax demand on the basis of the banking transactions' data resulting from the bank account of the taxpayer under assessment.

In fact, after the progressive abolition of the banking secret the tax administration is now entitled to get information as to the transactions involving the taxpayer from banks and similar financial operators. This type of information represent the known fact from which the existence of evaded revenues or taxable operations is inferred, unless they are registered in the books or the taxpayer gives the proof to the contrary that is requested.

Before examining the questions at issue, it is convenient to show what is stated in the relevant provisions, which deal with the powers of investigation ascribable to the tax administration – in general, thus including tax officers and financial police – during the tax proceedings.

### **7.1 In the field of income taxation**

Pursuant to Article 32, para 1, Presidential decree No 600/73<sup>247</sup> in order to accomplish their tasks the tax officers may:

- ask – upon an authorization by the general or regional director of the tax administration or of the regional commander of the customs officer – to the banks and to a series of listed financial operators for the data, information and documents concerning the relation and financial transactions carried out with their clients (No 7);
- invite the taxpayer – with the indication of the reason - to appear before the tax officer (in person or with a delegate) in order to produce data and information relevant for the purpose of the tax investigations on his position, even with reference to the data collected pursuant to number 7 cited above (No 2).

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<sup>246</sup> The focus will be on income taxation and VAT. It has to be noted, however, that the introduction of Article 53-*bis*, Presidential decree No 131/86 (on registration duty) by Article 35, para 24, let.a), Law decree No 223/2006, has rendered the banking and financial investigations available also for the purpose of the tax procedure in the field of registration duty and mortgage and cadastral taxes (provided for by Legislative decree No 347/90).

<sup>247</sup> That is the Presidential decree containing “*Common provisions in the matter of assessment of the income taxes*”.

The same provision states that these data and elements are the basis for the notice of assessment issued pursuant to Articles 38, 39, 40, 41<sup>248</sup> when the taxpayer does not prove that:

- he has taken them – the data at hand - into consideration when determining the taxable income or
- they do not have any fiscal relevance.

Lastly, it is established that “*on the same conditions the withdrawals or the amount that have been cashed within the aforesaid relations or transactions are also deemed as being revenues or remunerations and put at the basis of the same notice of assessment, if the taxpayer does not indicate the beneficiary and as long as they do not result from the accounting records*” (No 2, 2<sup>nd</sup> indent).

The latter provision, in particular, has been considered as laying down a presumption *iuris tantum* of revenues and remunerations as to the withdrawals and deposits made by the taxpayer on his bank account. The idea supporting the inference is that the transactions – ingoing and outgoing – made within the bank account of the taxpayer and that he is unable to justify are related to the economic activity undertaken (business enterprise or self-employment), thereby they correspond to (evaded) taxable income.

## 7.2 In the field of VAT

Similarly, Article 51, Presidential decree No 633/72 (legislation on VAT) provides the same powers for the Vat officers, as they may:

- ask – upon authorization – to banks and other financial entities for data, information and documents on the relations, financial transactions and services made for their clients (No 7);
- invite the economic operators (entrepreneurs, self-employed persons) to appear before the tax officer in order to produce documents or books, or to give data or explanations relevant for the purpose of the investigation on their tax position, even with reference to the data collected by the tax administration according to the previous provision (No 2).

The data collected pursuant to number 7 are put at the basis of the notice of assessment issued pursuant to Articles 54 and 55<sup>249</sup> if the taxpayer does not prove that:

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<sup>248</sup> Of Presidential decree No 600/73, dealing with tax assessment.

<sup>249</sup> Both dealing with the tax assessment in the field of VAT, respectively the rectification of a non-correct tax return and the assessment facing the lack of the tax return.

- he took them into consideration into the tax returns or
- they do not refer to taxable operations for VAT purposes.

It is lastly clarified that both the taxable operations and the purchases are considered as being carried out “*at the tax rate mainly applied or that would have been applied*”.

Such provision - read together with Article 32 on income taxation - has been interpreted as drawing a presumption *iuris tantum* according to which the withdrawals and deposits that are recorded in the banking account but not in the books stand for revenues that have not been declared or have been used for black purchases. Or, said differently, they correspond to fiscally relevant operations. What is presumed, here, seems to be the inference of the banking transactions in respect of taxable operations within the frame of an economic activity subjected to VAT.

Both of the presumptions under discussion raise several questions, as they are provided within the rules on the tax proceedings – dealing with the powers of the tax administration – but they are likely to affect substantive interests. Besides the traditional question related to their nature<sup>250</sup>, the inference drawn by the legislator between known

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<sup>250</sup> Which does not have a merely theoretical significance. In a few decisions of the Constitutional Court and Supreme Court that will be analyzed in the text under different aspects, the retroactive application of Article 32, paragraph 1, N° 2, second period, has been under examination. Indeed, initially it included only the reference to revenues, which are the positive items of the income from the exercise of an enterprise. The Law No 311/2004 (paragraph 402, let.a), No 1 and 572, Article 1) has extended the presumption to remunerations too, which indicate the positive income from self-employed activity. Since Article 32 at hand has been considered as a procedural provision, then the tax administration has immediately applied the presumption of remunerations as to the banking transactions that self-employed workers could not justify. In other words, the presumption has been used with reference also to tax periods prior to the entry into force of the provision under discussion. As it has been explained in the first chapter, the procedural provisions are regulated by the rule ‘*tempus regit actum*’, in the sense that in order to find out the applicable rule it has to be considered the moment in which the act is done. On the contrary, when a substantive provision is at issue, it has to be considered the discipline applicable when the fact (the tax event giving rise to the tax obligation, here the possess of income) happens. Many self-employed workers who had received a notice of assessment levying a higher tax have contested in the tax trial the constitutional compatibility of the provision where it applies to tax periods prior to 2005. In fact, at that time, the self-employed workers could not predict that the presumption at hand would have applied to them, so that they did not consider to keep the documents requested in order to give proof to the contrary. A proof to the contrary that – as it will be explained in the text – might be ex se very difficult to furnish. Apart from the violation of the principle of equality and right of defence, then, the retroactivity of the presumptions was able to affect the general principle on the protection of legitimate expectations. The latter has been recognized to the taxpayer by article 10 of Law 27 July 2000, No 212, which at the first paragraph states that the relations between taxpayer and tax administration have to be marked by the principle of cooperation and bona fide. Instead, up to now it is not generally recognized to the same principle a fully constitutional protection, though Article 97 of the Constitution could be a basis in this sense, where it provides (1<sup>st</sup> paragraph) that the public offices are organized according to the law in order to guarantee the good performance and impartiality of the administration. The question of the compatibility of Article 32, para 1, No 2, 2<sup>nd</sup> indent, with Articles 3 and 24 of the Constitution has been rejected (rectius, declared as clearly inadmissible for inadequate statement of reasons as to the relevance) by the Ordinance 23 November 2011 No 318, in the light of two considerations. Firstly, in the main case the tax decisions appealed by the taxpayer (a lawyer) were issued because he had not presented the tax return for the tax periods 2003 and 2004; as a consequence, the case fall within the area of

fact and unknown fact is not clear so that the evaluation of rationality is left to the interpretation. Moreover, the peculiarity of the contrary proof requested by the norm ad the circumstance that the debate with the taxpayer is considered as being optional during the tax procedure is able to jeopardize his right of defence, which is very often postponed to the tax trial before the judge.

### 7.3 The inference. Constitutional Court's judgment No 225/2005

The scheme of the presumption laid down by Article 32, para 1, No 2, second indent, has been dealt with in the fundamental decision N° 225/2005 handed by the Constitutional Court<sup>251</sup>.

The judge of the main proceedings observed in the order of reference that the provision consisted of a double legal presumption, which inferred from the withdrawals the existence of purchases and from the latter the accrual of revenues<sup>252</sup>. The result was the relief for the tax administration from the burden of proving the tax evasion. Given that the revenues presumed were deemed as taxable income without any deductibility of the related costs – in practice, equalizing revenues and incomes - the system ended up to be discriminatory towards the taxpayers assessed according to the banking outcomes. Plus, the ‘improper sanction’ in this way imposed was not in line with the ability to pay principle, as far as the taxpayer could be called to meet a higher tax obligation.

The question of inconsistency with Articles 3 and 53 of the Constitution raised by the lower court has been rejected by the Court with a scanty and disappointing reasoning.

The focus is once again on the scheme of the presumption concerned and on its rationality. With regard to the first point, the Court – following the opinion of the State legal advisory service – refers to the more recent jurisprudence of the Supreme Court, which recognizes a deduction of the costs according to a certain percentage from the (higher) income assessed

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Article 41, Presidential decree No 600/73 that allows the use of not-qualified presumptions of fact, and the judge of the main proceedings did not explain why he wanted to refer to the presumptions laid down in Article 32 concerned. Secondly, the Constitutional Court recalls the case-law of the Supreme Court that has always interpreted Article 32 as being applicable also to self-employed workers, even before the amendment in force from the 1<sup>st</sup> January 2005, through a broad interpretation of the term ‘revenues’. See V. Guido, *Profili di illegittimità dell'applicazione retroattiva delle presunzioni bancarie a carico dei professionisti*, *Rass. Trib.*, 2012, 1233 et seq.

<sup>251</sup> Const. Court 8 June 2005, No 225. See the Note of A. Marcheselli, *Prelevamenti bancari non contabilizzati e presunzione tributaria di ricavi: un'occasione perduta*, *Giust. Cost.* 2005, 4005; Critical on the decision G. Frasoni, *La presunzione di ricavi fondata sui prelevamenti bancari nell'interpretazione della Corte Costituzionale*, *Riv. Dir. Trib.*, 2005, 976 et seq.

<sup>252</sup> Before the amendment with Article 1, para 402, Law 30 December 2004 No 311, the provision referred to withdrawals only, whereas then it has been extended to deposits also.



by the tax administration on the basis of the provision at hand. When interpreted in this way, the provision cannot be considered in contrast with Article 53, as it turns out to be a presumption of revenues *iuris tantum* inferred from the existence of withdrawals that have not been recorded in the books. A presumption that may be rebutted by indicating the beneficiary of such withdrawals.

Even more cursory is the appraisal of the rationality of the presumption, which is expressed in the negative. In fact, the Court uses a formula that can be found in many of the recent judgments. It is stated that “*it is not clearly arbitrary*” to assume that the withdrawals from the banking accounts done by an entrepreneur and devoid of any justifications have been allocated to the business (enterprise’s activity) and thereby considered as taxable income, save the related costs.

The approach of the Constitutional Court to the presumption concerned reflects the same followed in previous decisions on similar matters. However, the vagueness of the presumption’s scheme would have requested a closer examination.

Undoubtedly the existence of financial transactions – in particular, withdrawals – recorded in the bank account that a certain entrepreneur cannot justify might represent the index of non-declared revenues in an extent to which they correspond to deposits for the same amount. But as set out in the provision concerned the scheme is not straightforward and it assumes two different steps:

- the first one, from the withdrawals to the investment of the amount in the economic activity (purchases);
- the second one, from the purchases to the revenue.

This, at least, seems to be the inference in the interpretation of the Constitutional Court.

It is not clear why the legislator has not used a more linear inference, like would have been, for instance, the one between withdrawals and costs on the one side and deposits and revenues on the other side. The circumstance that the Court excludes the “clear irrationality” of the presumption under discussion, rather than positively asserting its rationality shows the difficulty in supporting the consistency with the principle of reasonableness<sup>253</sup>. In this view, the qualification of the regulation suggested by the judge of the main case as an improper sanction is not without foundation. The withdrawals are presumed to be revenues, unless the taxpayer indicates the beneficiary.

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<sup>253</sup> Critical on the presumption at hand under the profile of the reasonableness of the reversal of the burden of proof, A. Marcheselli, *Prelevamenti bancari non contabilizzati e presunzione tributaria di ricavi: un’occasione perduta*, cited above, 4005, where some alternative interpretations are advanced.

Given the vagueness of the rationale supporting the presumption, such cooperation should be binding during the tax proceedings and before issuing the notice of assessment. In other words, the debate with the taxpayer is fundamental.

On the other hand, the scanty decision of the Constitutional Court also reflects the incorrect formulation of the question by the judge of the main proceedings, with reference to the choice of the provision under examination and the parameter of evaluation as well. On the first side, the possible taxation of a gross income was not the consequence of Article 32, para 1, No 2, as the latter only presumed the existence of revenue, without averting from the deduction of costs. On the other side, it has been correctly observed that the choice of questioning on the compatibility with Article 53 of the Constitution as to the equalization between revenues and taxable income has overshadowed the parameter of reasonableness and most of all the right of defence<sup>254</sup>.

#### 7.4 Procedural guarantees

The discussion on the rebuttable presumption of law laid down by Article 32, para 1, No 2, 2<sup>nd</sup> indent, cannot disregard a question that have not been coped with by the foregoing decision, but that it is worthy of attention as it has a more general significance.

Unlike irrebuttable presumptions, the rebuttable presumptions allow the taxpayer to give proof to the contrary. However, it is also important to see in which context he is put in the condition to do it. While it is obvious that, in observance of Article 24, par. 2 which secures the jurisdictional protection of rights, the taxpayer can (try to) rebut the presumption during the tax trial, it is not foregone that it may already happen within the administrative proceedings.

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<sup>254</sup> In this sense A. Marcheselli, *Prelevamenti bancari non contabilizzati e presunzione tributaria di ricavi: un'occasione perduta*, cited above, p. 4005, who sets this approach within a tendency of the judges of the main cases to privilege the substantive aspects (by referring to Article 53 of the Constitution) to the detriment of the procedural ones. The ability to pay principle is the parameter of constitutionality referred to substantive provisions in tax law. Whereas “*the administrative and jurisdictional procedures, though they are means for the realization of the substantive right, have an autonomy that is recognized even at the constitutional level*”. Indeed, to the provisions governing the trial Articles 24, 111 and possibly 113 apply; with regard to the administrative procedures, though the Constitutional Court does not recognize a principle of the ‘fair procedure’, nor even on the basis of Article 97, nonetheless the principle of reasonableness *ex* Article 3 has to be met. As a result, a provision that regulated without reasonableness the tax procedure or the tax trial would indirectly affect substantive interests by producing a levy contrary to the capacity to pay, but earlier directly its own constitutional parameters, such as the principle of reasonableness, the right of defence, the right to a fair trial. With special reference to irrebuttable legal presumptions, the Author underlines that they are in line with the principle of reasonableness and the right of defence (in the context of the trial) when they do not render difficult or impossible the exercise of the party’s right. In this frame, the reversal of the burden of proof is rational only in two hypotheses: if the presumed fact is likely or if the onus is put on the party who can more easily bear it.

For instance, Articles 32 and 51 under exam make reference to the record of the requests (of information, documents etc.) done to the taxpayer and the answers received with regard to the banking data collected by the tax administration, so that they seem to imply a debate taking place during the tax procedure. In other words, a literal interpretation of the norms would lead to consider the possibility for the taxpayer to produce data and documents during the tax investigations as being necessary, though the lack of observance by the tax administration is not punished. Nevertheless, the debate has been considered as merely optional rather than compulsory, according to a unanimous jurisprudence of the Supreme Court. As a consequence, a notice of assessment issued without a previous debate with the taxpayer is not deemed as null. In other words, the taxpayer has not the right to be heard in the context of the tax procedure<sup>255</sup>.

It is a regrettable interpretation especially facing such a presumption, which requests the cooperation of the taxpayer for the correct definition of the known fact (withdrawals/deposits)<sup>256</sup>. On the contrary, the taking place of a fundamental phase within the tax procedure is left to the discretion of the public party.

More in general, it has to be observed that, up till to now, the right of the taxpayer to adduce evidence during the tax proceedings, and thereby before the tax litigation, does not find a constitutional protection. As said already, the Constitutional Court has in several occasions clarified that Article 24, par. 2, does not apply to the administrative procedures, but only to the proceedings before the judge. In brief, it is argued, as long as the individual

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<sup>255</sup> *Ex multis*, Supreme Court, tax division, 21 April 2008, 10261. See A. R. Ciarcia, *La valutazione e l'utilizzo della prova nel processo tributario*, Napoli, Satura, 2010, at 111, for case-law references.

<sup>256</sup> Very much critical towards the traditional approach of the Supreme Court according to which there is neither a general nor a constitutional duty to start a debate with the taxpayer within the tax procedure A. Marcheselli, *Contraddittorio e accertamenti bancari: i principi costituzionali e comunitari*, Note to Supreme Court 5 February 2009, No 2752, Rass. Trib., 2009, 1204 and 1211. In the case commented the tax administration had found in the banking account of the taxpayer withdrawals for considerable amount that were considered as being taxable income. The defence of the taxpayer was based on receipts of wins in the lottery, which however did not coincide with the amount of the different withdrawals. The Author focuses on the part of the decision where it is said that “*it is ius receptum in the jurisprudence of the Supreme Court the principle according to which (...) the tax administration is not burdened to start a phase pre-contentious of debate with the taxpayer in order to use the data and elements resulting from the banking and financial investigations*”. In the attempt to confute the ruling of the Supreme Court, the Author observes that even if we suppose that such a duty is not imposed either by the Constitution or by a general provision of law, it does not follow that the debate is not compulsory in the case of the banking assessment. In fact, there is a specific provision (Article 32) that requests the taxpayer to be heard before issuing the tax decision. Moreover, given the difficulties in finding a foundation for the presumption at hand, the debate represents a “*corrective to an unreasonable presumption*” or a “*structural element of the tax assessment procedure*”. A solution denying the debate in the tax procedure would be detrimental both to the principle of impartiality and good performance of the public administration and to the right of defence of the taxpayer in a broad sense. The Author also notes how the jurisprudence in the field of the statistical studies (‘*studi di settore*’) has recognized the importance of the debate as a way of adapting the (presumptive) method of assessment to the concrete economic reality of the taxpayer assessed.

is given the possibility to bring an action and to produce evidence in order to get the protection of his substantive right, then the fundamental norm on the jurisdictional protection may not be considered as violated. It follows a gap as to the protection of the taxpayer facing rebuttable presumptions of law in the phase of the tax procedure.

### 7.5 Proof to the contrary

Alike in most of the tax rebuttable presumptions, the focus has to be on the contrary proof, which directly affects the safeguard of the taxpayer's right of defence and indirectly the consistency with the principles of reasonableness and of ability to pay.

As it will be underlined later on, some of the presumptions of recent introduction show a scheme different in part from the one traditionally described by the civil-procedural doctrine. In this sense, Article 32, para 1, No 2, second period is a very good example. Here the legislator identifies the known fact (withdrawals/deposits), the unknown fact (evaded revenues) and confines the contrary proof to the indication of the beneficiary.

Thus, it seems that the indication of the beneficiary is not technically a contrary proof, as it does not imply that there are not hidden revenues. The taxpayer is requested to prove who the banking transactions are allocated to – for instance, personal uses rather than payment of supplying firms - instead of giving evidence as to the fiscal irrelevance of those financial transfers or that they did not produce any taxable income<sup>257</sup>. In other words, the contrary proof concerns the application of the presumptive scheme to the concrete case – thus, the fact-base - rather than the unknown fact that is considered as proved.

Given the narrowness of the contrary proof, which imposes to keep track of every single financial transaction if not recorded in the books, the violation of Article 24, para 2, of the Constitution, cannot be excluded. This, especially in view of the weak rationality - in terms of correspondence with the *id quod plerumque accidit* - of the legal presumption, which shifts the burden of proof on the private party without letting the latter the availability of every type of proof. The proof, indeed, is restricted as to the object but also as to the kind of evidence, being difficult to imagine something other than the documentary proof.

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<sup>257</sup> A. Marcheselli, *Contraddittorio e accertamenti bancari: i principi costituzionali e comunitari*, cited above, 1206, who wonders if in order to rebut the presumption laid down by Article 32, para 1, No 2, second part, it is sufficient to indicate the beneficiary or it is also requested to prove the fiscal irrelevance of the withdrawal. A literal interpretation of the provision excludes the possibility to prove such an irrelevance without indicating the beneficiary. Thus, it is not enough giving evidence that the fact is not an index of ability to pay, but something more (extraneous to the suitability of the proof) is requested, which is the cooperation with the tax authority. Cf. V. Ficari, *La rilevanza delle movimentazioni bancarie e finanziarie ai fini dell'accertamento delle imposte sul reddito e sul valore aggiunto*, *Rass. Trib.*, 2009, at 1280, supports the substantive nature of the presumption at hand and underlines the difficulties of proof.

Similar considerations can be expressed, *mutatis mutandis*, with reference to the second part of Article 32, para 1, No 2 and Article 51, para 1, No 2, where they prescribe that the banking data can ground a notice of assessment if the taxpayer is not able to prove respectively that he considered them in the determination of the taxable income or its fiscal irrelevance (Article 32) or that he took them into consideration in the tax return or they do not refer to taxable operations for VAT purposes (Article 51)<sup>258</sup>. Both of them have been interpreted as drawing a legal presumption. In the first case, a presumption as to the existence of revenues/remunerations on the basis of the withdrawals/deposits recorded in the bank account. In the second case, a presumption as to the carrying out of VAT taxable operations on the basis of the same data.

Once again, the proof to the contrary concerns the suitability of the known fact to ground the presumption. In other words, the theme of the proof to the contrary belongs to the known fact and it has to happen in order the presumption to operate. If, for instance, the taxpayer has considered a certain withdrawal when calculating the taxable income in the tax return, obviously that withdrawal is not eligible to be the base-fact of a presumption of higher revenues. And the same if the withdrawals are irrelevant from the fiscal point of view; the fiscal relevance represents a character inherent to the known fact, whose (positive) proof should lay on the tax administration rather than – in the negative – on the taxpayer. This is also why the hearing of the taxpayer during the tax procedure is important; precisely in order to enlighten on the reading to give to the data resulting from the bank accounts.

## **7.6 Banking presumptions and VAT**

When questioned on the compatibility of Article 51, para 1, No 2 and 7 of the Vat legislation with Articles 3, 53 and most of all 24 of the Constitution, the Constitutional Court rejected the question with an ordinance<sup>259</sup>. Nevertheless it is interesting as it gives to the Court the occasion to judge on the compatibility of banking presumptions with the right of defence, particularly under the aspect of the contrary proof.

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<sup>258</sup> Moreover, in some decisions of the Supreme Court, it is held that the proof has to concern specifically each operation. See, amongst these, Supreme Court 19 March 2009, No 6617; Supreme Court 21 January 2009, No 1453.

<sup>259</sup> Const. Court, ordinance 6 July 2000, No 260. To be more precise, the question has been found “clearly groundless”, which is a formula used when the Court believes that there are no reasons for analyzing the questions of compatibility rose by the tribunal as they are *icto oculi* without any foundation.

It has to be firstly noted that the Court has not any doubts on the circumstance that the provision at issue – in particular, No 2 – lays down a presumption “*only rebuttable of taxability as to the transactions resulting from the banking accounts*”, which can be overcome by the taxpayer with the proof that such transactions have been considered within the tax return or that they do not refer to taxable operations<sup>260</sup>. A presumption that, according to the Court, is reasonably based on the objective character of those outcomes, which refer to situations where the taxpayer is involved<sup>261</sup>. Moreover, the taxpayer is put in the condition to fully exercise his right to produce documents, data, news and explanations – in other words, to give proof to the contrary - not only in the jurisdictional seat, but also in the administrative seat. Indeed, he is informed about the request by the tax authority of a copy of the bank statement or other documents regarding the bank account sent to the credit institution<sup>262</sup>.

The latter being the circumstance that in practice leads the Court to reject the question, together with the rebuttable nature of the presumption at hand, it needs to be observed that it is not clear how the taxpayer could produce data and documents without the cognizance of an analytical charge. If the tax administration does not invite the taxpayer to do that in order to clarify a certain definite situation/operation, then he could obviously produce documents spontaneously but without a precise charge this could end up to be useless. So that he should wait for a tax decision in order to find out the reasons of the tax assessment and to contest it by starting a tax litigation.

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<sup>260</sup> In line with the majority of the jurisprudence and doctrine. Very recently, the legal nature as to the presumptions laid down by Article 32, No 2 (first part) and 51, No 2 has been denied by A. Marcheselli, *Dati bancari e lotta all'evasione: uno strumento efficace da usare ragionevolmente (Nota a Corte di Cassazione, sezione tributaria, No 3263/2012)*, Corr. Trib., 2012, 1039. The Author asserts that though the structure of the sentence of the provisions – where they state that the banking data are put at the basis of tax decisions unless the taxpayer gives proof to the contrary – is peculiar of a legal presumption, it is preferable a different interpretation. In his view, these provisions empowers the tax administration to infer from the banking data presumptions of fact, which can be prudently valuated case-by-case and ground the tax decision. In this sense would lead: 1) the heterogeneity of the elements that can be inferred by the bank accounts; 2) the vagueness of the norm concerned as to the presumed fact ‘*they are put at the basis of the rectifications*’; 3) the otherwise contrast with the case-law of the Constitutional Court’s decisions on the matter of legal presumptions. In this perspective, the reference to the possibility for the taxpayer to contest the presumption does not represent a contrary proof, but it rather marks the necessity of a debate prior to the tax decision.

<sup>261</sup> So that the provision is in not in contrast with Article 53. In the same sense see Const. Court, ordinance 26 febbraio 2002, No 33, dealing with the probative efficacy of the banking documents collected within criminal investigations and transferred in the tax procedure. The compatibility with the principle of equality is supported with the similar treatment that is prescribed for the tax assessment in the field of income taxation.

<sup>262</sup> As it has been observed by A. Marcheselli, *Dati bancari e lotta all'evasione: uno strumento efficace da usare ragionevolmente*, cited above, 1040, note 5, the Constitutional Court gathers a scale of that right prior to the judicial phase. Otherwise it would have declared the not-relevance of the reference to Article 24 of the Constitution.

The argument of the Court for saving the provision at issue seems to be weak. If such provision is interpreted as legally presuming the existence of taxable VAT operations on the basis of the withdrawals/deposits of the taxpayer concerned, then it is tough to find a rational basis justifying such a reversal of the burden of proof. It is true that when the presumption was applied the taxpayer can appeal the tax decision before the court. In the latter context he can avoid the levy of a higher value added tax by proving that the banking data have been recorded into the tax return or they do not refer to taxable operations. On the other hand, though the Constitutional Court makes reference to the possibility for the taxpayer to interact with the tax administration already in the administrative phase, from the jurisprudence of the Supreme Court it results that the debate in this phase is optional<sup>263</sup>. The question that the Court has not faced is if such a burden put on the taxpayer who consequently is in charge of keeping track of every single transaction can be constitutionally justified with the protection of the fiscal interest.

The answer very much depends also on the qualification of the taxpayer. It is well known that Article 51 - and Article 32 too - applies to enterprises and self-employed persons as well<sup>264</sup>. Obviously, unlike a company, a self-employed worker or a small enterprise meet more difficulties in keeping evidence of all the financial transactions made within their bank account, which is likely to be used also for personal purposes. In this perspective, as it has been correctly observed, advancing the possibility for the taxpayer to rebut the presumption already in the tax procedure and before the issuing of the tax decision could contribute to render the presumption at hand more in line with the right of defence broadly intended and with the general principle of good administration as well. Of course, this would not eliminate all the doubts related to this presumption, especially in view of the kind of burden shifted on the taxpayer.

Furthermore, if we turn out to the EU framework, the doubts on Article 51 under discussion increase, as it will be shown later one when dealing with the criteria of consistency with EU law drawn by the EUCJ in the field of VAT.

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<sup>263</sup> *Ex multis*, Supreme Court, 13 June 2002, No 8422; Supreme Court 29 March 2002, No 4601; Supreme Court 26 February 2002, No 2814; Supreme Court 18 April 2003, No 6232.

<sup>264</sup> This, after Law No 311/2004, which has added the reference to the remunerations. According to the Constitutional Court, however, already the previous version of Article 32 referred to self-employed workers as well, being the term 'revenues' used in a broader sense.

## 8. Legal presumptions of supply and purchase in the field of VAT

In the context of the administrative proceedings in the area of VAT, the tax authorities may have recourse to another type of mixed presumption of law, in order to re-determine the taxable turnover.

They are commonly known as ‘presumptions of supply and purchase’ and represent two different inferences though both related to the presence of goods in the places where the taxpayer carries on his economic activity. In brief, according to the first one the goods that are purchased, imported or produced and are not situated where the taxpayer carries out his operations (or in the ones of his representative) are presumed to have been transferred (i.e. sold). Similarly, the goods that are in one of the places where the taxpayer conducts his activity are presumed to have been purchased. In both of the cases, the taxpayer is allowed to avoid the effects of the presumption by giving evidence of certain circumstances pre-determined by the law as to the object and means of proof.

They were regulated by Article 53, Presidential decree No 633/1972 (legislation on VAT) within the Title dealing with assessment and collection of valued added tax. However, on the basis of the Delegate Law No 662/1996<sup>265</sup>, which referred to a delegated regulation in order to rearrange the discipline at hand, Article 53 has been replaced by the Presidential decree No 441/1997. The goal pursued by the legislator of Law N° 662 was to simplify the rules under discussion, as shown by the indication of “*criteria of adherence to the commercial customs of the different categories of enterprise, by securing the possibility to immediately establish, during the accesses, inspections, verifications, the origin of the goods that are the object of the activity peculiar to the enterprise and that are found in the places of the latter, but without any obligation to introduce further certified books*”. In other words, the government was called to draw a discipline close to the current customs in the sectors concerned and without introducing further administrative burdens on the taxpayers, but at the same time an effective measure in the hands of the tax administration. As it will be clear examining the new rules, however, the Presidential decree No 441/97 has failed in complying with the suggested criteria. Especially the regulation of the

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<sup>265</sup> Article 3, para 137, let. a), of the Law 23 December 1996, No 662 referred to the government in order to enact regulations on presumptions of transfer and purchase pursuant to Article 17, para 2, Law No 400/1988. The idea was to use a normative means more flexible than the law. It needs to be clarified in this regard that Article 17 of the Law No 400/88 deals with the different type of regulations that can be enacted by the government or the single ministers. In particular, the so called ‘delegated regulation’ are provided (para 2) for the discipline of matters that are not covered by the absolute reserve clause and in relation to which a law authorizes the government by fixing the general criteria governing the matter and prescribing the abrogation of the provision in force with effect from the entry into force of the regulation.



contrary proof, which includes a detailed indication of documentary duties, loads the taxpayer with administrative and probative fulfilments that are not in line with the need of simplification<sup>266</sup>. On the other hand, the strict predetermination of the means of (contrary) proof has been considered as being the *ratio* of the presumptions under discussion. It is the result of a balance between the interest to the prompt collection of the taxes on the one side, and the interest to the certainty of the tax obligation on the other side. In this view, it is also in the taxpayer's interest the predetermination of the inference and of the means aimed at overcoming it.

### **8.1 The presumption of supply**

Pursuant to Article 1, para 1, Presidential decree No 441/1997 “*The goods that are purchased, imported or produced and are not found either in the places where the taxpayer carries out its operations nor in those ones of its representatives are presumed to have been supplied. Among these places are included also the secondary seats, branches, (...), plants, stores, storages and transport in the availability of the enterprise*”.

The provision consists of a legal presumption as to the sales realized by a certain taxpayer based on the ascertainment of the physic absence of goods, normally during the access in the places where the activity is carried out. If disassembled, it includes different situations, some of which are alternative, others need to occur at the same time. As to the latter, it has to be noted that the known fact is here a complex situation, given by the combined occurrence of two circumstances: the existence of goods that have been purchased, imported or produced resulting by the books or other documents and the fact that these goods are not found in the principal or secondary seat of the enterprise or at a representative.

While the reference to the second circumstance seems to confine the provision to enterprises only<sup>267</sup>, the generic reference to indefinite ‘goods’ have led to a broad interpretation extended to every kind of goods, though the *ratio* of the provision requests at least a link between the type of goods that are not found and the economic activity carried out. In order the presumption to apply, it needs to be ascertained that these goods have been produced by the enterprise, purchased or imported. Moreover, it has been observed that the meaning of purchase and importation has to be coherent with the notion of

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<sup>266</sup> E. Della Valle, *Le presunzioni di cessione e di acquisto*, Rass. Trib., 1999, 1641; M. Versiglioni, *Presunzioni e prova del fatto ignoto nell'accertamento dell'Iva*, Riv. Dir. Trib., 2000, 139.

<sup>267</sup> *Contra*, Circular letter n. 193/E, 1998.

purchase of goods laid down by Article 2 of the VAT legislation, which requests the transfer of the property right<sup>268</sup>. In other words, the purchase and importation of the goods concerned have to imply the full availability by the taxpayer in order him to be in the condition to (presumably) sell them.

The existence of facts that may alternatively occur are to be proved in a predetermined way. This, in particular, as regards to the availability of secondary seats - among which the means of transport - and to the relation of representation. Pursuant to Article 1, para 3 the availability of secondary seats may result from the registration in a public register or, if not, from the declaration of start up and data variations provided for by Article 35 of the VAT legislation prior to the transfer of goods, or from any other document reporting the destination of the goods towards one of the mentioned places and recorded in one of the VAT accounting records. Similarly, the relation of representation has to result from a public deed, a private registered contract, from a letter that has been recorded prior to the transfer of goods in a provided register in the VAT office or from a declaration to the VAT office ex Article 35.

### 8.1.1 Proof to the contrary

Article 1, para 2, Presidential decree No 441/97 prescribes that the presumption laid down in para 1 does not work if it is demonstrated that the same goods:

- a) have been used for the production, lost or destroyed;
- b) have been delivered to third parties in the course of manufacture, storing, bailment, or on the basis of valuation contracts, or contracts of work, tender, transport, agency, commission or another title that does not transfer the property right.

Thus, the taxpayer can avoid the effects of the presumption at hand by giving a qualified contrary proof. Qualified, in the sense that its object – i.e. the facts that need to be proved – and the means of proof – i.e. the way of proving them – are not free but rather prescribed

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<sup>268</sup> E. Della Valle, *Le presunzioni di cessione e di acquisto*, cited above, 1643. See also A. Amatucci, *La prova dell'acquisto della presunzione di cessione ex art. 53 IVA*, Boll. Trib., 1995, 495 et seq. The Author criticizes the decision of the Supreme Court No 10617 of the 13th December 1994, where it is asserted that the tax administration is not requested to prove the title of purchase, being sufficient the proof of the 'full and autonomous availability' of the goods concerned by the taxpayer. More in general, the Court supports a 'rational interpretation' instead of a literal one of the formula 'purchased, imported, produced' of Article 1, para 1. In his opinion, the source of the purchase is the theme of the proof that the tax administration has to produce in order the presumption to apply. A confirmation of the fact that the proof concerns the property rather than the mere possession or availability of the goods is in Article 53, para 1 (now, Article 1, para 2, No 2, Presidential decree No 441/97) where in order to win the presumption refers to the hypotheses when the goods are transferred to third parties on the basis of a title that does not transfer the property.

by the law. As a matter of fact, with the exception of the use of the goods for the purpose of the production, the presidential decree contains a detailed regulation of the means of proof concerning the happening of the other facts.

For instance, the transfer of the goods to a third party has to result alternatively (a) from one of the books provided for by the Civil Code or by Article 39 of the VAT legislation or from an act that has been registered at the registration office from which the characteristic of the goods and the reason of the transfer may be inferred; (b) from a document of transport indicating also the reason or another document of transfer; (c) from a proper record in one of the VAT books including the description of the goods and the receiver. If the taxpayer alleges the loss of the goods because of fortuitous events, then he has to produce documents issued by a public administration or a substitute declaration of the affidavit issued by 30 days since the event occurred or was known, wherein the value of the goods lost results (para 3). Again, if the theme of (contrary) proof is the destruction of the goods or their transformation into other type of goods having a lower value, then the evidence has to be given through a) a notice to the tax administration offices and to the financial police five days before the operations of destruction and transformation, with all the correlative information as to the procedure and the goods concerned, unless the destruction is set out by the public administration; b) a record written by public officers who were present at the operations, or from a substitute declaration if the cost of the destroyed goods is lower than euro 100000; c) the document of transport of the goods possibly resulting from the operations.

Besides the above mentioned facts, whose proof shows that the transfer did not happen, Article 2, para 2 and 5 provide two more hypotheses that render inoperative the presumption: the gratuitous transfers and the transfer of a stock of goods, on condition that certain obligations are fulfilled. Indeed, Article 2, para 2 prescribes that the transfers provided for by Article 10, No 12), Presidential decree No 633/72<sup>269</sup> are to be proved with a) a written communication from the transferor to the tax administration offices or financial police five days before the deliver with all the information on the goods gratuitously transferred and the final destination, unless the cost is lower than euro 5.164, 57; b) issuing of a delivery document; c) substitute declaration of affidavit issued by the receiver, where the latter certifies the nature and quantity of the goods received. Article 2,

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<sup>269</sup> I.e. the gratuitous transfers – exempt from VAT - towards public bodies, recognized associations or foundations having exclusively aim of care, charity, upbringing, education, study, scientific research and to the ONLUS.

para 5 states that the goods that are not at the firm because of stock transfers or similar operations according to the commercial custom are to result from the invoice or from the transport document including the description of the goods and the signature of the transferee certifying to have received them.

The Presidential decree seems to deal indifferently with all the facts listed so far, by defining all of them as hypotheses of ‘non-operativeness’ of the presumption. Technically, however, only the events of the loss/destruction/use for the production of the goods can be considered as contrary proof, as by proving them the taxpayer disproves the presumed fact (the transfer of goods). By contrast, the events dealt of in para 2 and 5 consist of a transfer of goods – albeit with special characters -, so that the taxpayer is not called to prove a fact incompatible with the transfer. In these circumstances, the legislator decides to exclude the effects of the presumption as long as the taxpayer is able to prove the effectiveness of the special transfer, which does not raise the application of the ordinary VAT regulation<sup>270</sup>.

## 8.2 The presumption of purchase

Pursuant to Article 3, para 1, Presidential decree No 441/97 the goods that are found in one of the places where the taxpayer exercises his operations are presumed to have been purchased if it is not proved that they have been received on the basis of a relation of representation or one of the titles laid down in Article 1.

The provision consists of a rebuttable presumption of law based on the inference that the goods that are found where the activity is carried out and cannot be justified in the light of one of the titles listed in the regulation are likely to have been purchased. Conversely to the presumption of supply, the known fact is the discovery of goods. Similarly, however, it has been observed that among the taxable persons it concerns enterprises only, and more particularly the ones whose activity involves the production and distribution of goods rather than the supply of services<sup>271</sup>.

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<sup>270</sup> According to E. Della Valle, *Le presunzioni di cessione e di acquisto*, cited above, 1653, with paragraph 2 the legislator has intended to pre-determine the procedural fulfillments to prove that a gratuitous transfer in favour of certain subjects took place. As a result, if they are not met, then the transfer is treated as a taxable operation under VAT rather than deemed exempt, as asserted by the tax administration in the Circular letter No 193/E of 1998. Paragraph 5, instead, would be justified in the light of pre-determining the proof of the stock transfers’ object especially when the invoice is not compulsory, i.e. for the retail trade.

<sup>271</sup> As to the type of goods and subjects covered by the presumption of purchase see E. Della Valle, *Le presunzioni di cessione e di acquisto*, cited above, 1654, who refers to the rationale of the provision on the one side (checking the purchases’ turnover) and on the other side to the delegated law, and Article 3, para 2 where it is provided a specific probative discipline as to the origin of the goods “that are the object of the activity peculiar to the enterprise”. See also R. Schiavolin, *Sulla prova contraria alle presunzioni di cessione e acquisto ex art. 53, D.P.R. No 633/1972, Note to Supreme Court, I Division, of the 19<sup>th</sup> June 1987, No 8954*,

As Article 3, para 1, refers to Article 1, the presumption of purchase shares with the one of supply also the rules on the means of proof as to the existence of the relation of representation and to a title that does not transfer the property justifying the availability of the goods by the taxpayer. In addition, Article 3, par. 2, provides a specific regulation for the proof concerning the title of origin of the goods that are the object of the activity peculiar to the enterprise and that are found in one of the places – listed in Article 1, para 1 – where it is carried out. The reference is alternatively then to a) the invoice, the receipt or the receipt for tax purposes; b) the document of transport provided for by Article 1, para 3, Presidential decree No 472/1996 or another valid document of transport. Failing these documents, the presumption can be won through a specially provided record into the daybook or another book kept according to the civil code, or in a specially provided register kept ex Article 39, Presidential decree No 633/1972, or in the purchases journal (Article 25, Presidential decree No 633/72).

### **8.3 Brief conclusions**

There are no doubts on the qualification of the presumptions at hand as mixed rebuttable presumptions of law. Placed in the context of the rules on the tax proceedings in the VAT area, they clearly shift on the taxpayer the burden of proving that the supply/purchase did not happen, both in the administrative phase and during the tax trial. However – this is the core of the question –, the taxpayer is not free as to the means and theme of proof suitable to rebut the presumptions, because they are predetermined by the law.

On the one side, it has been observed that this regime might be in favour of the taxpayer also, as he knows in advance which type of proofs are requested in order to avoid the application of the presumptions of purchase and transfer. Diversely, if the tax

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Rass. Trib., 1998, 793, who found the exclusion of taxpayers carrying out only the supply of services in line with a functional interpretation coherent with the ratio legis that should be adopted in reading the presumptions under discussion. In his opinion, “*the mechanism of these presumptions consists of giving prevalence to the situation of fact, as it appears from the ascertained physical presence or absence of goods, in respect of the accountancy’s outcomes*”. In this way, the legislator aims at facilitating the proof of the real situation to be given by the tax administration by overcoming the accountancy but without allowing an imposition having a fictitious basis, which would be in contrast with the jurisprudence of the Constitutional Court on tax presumptions and ability to pay principle. Accordingly, the Author believes that the probative limitations should not be strictly interpreted and thus the means of proof admissible should be broadly interpreted, especially considering the consequences of the application of Article 53 when the taxable operation did not happen and nonetheless the taxpayer is not in the condition to prove it. He is then very critical with the decision of the Court, which – with regard to the previous regulation of the presumptions at hand - has excluded the suitability of the packing list to overcome the presumption of purchase by arguing from the peremptoriness of the means of (documentary) proof listed in Article 53, para 2 and 3 of the Presidential decree No 633/72.

administration made use of presumptions of fact of the same content there would be uncertainty. On the other side, it has been said that in fact there is not any limitation to the subject of the proof, as the facts that stop the operating of the presumptions exhaust all the hypotheses incompatible with the transfer and purchase<sup>272</sup>.

If it is true that Article 53 formerly and now the presidential decree cover most of the circumstances that might be alleged by the taxpayer in order to disprove the supply or purchase, nevertheless it is not possible to exclude in advance different events that are not included. Moreover, the predetermination of the means of (contrary) proof puts on the taxpayer, in some cases, further administrative burdens. With the result that if they are not accomplished because of negligence, the risk is to legitimate a re-determination of the VAT due that does not correspond to reality<sup>273</sup>. Besides that, normally administrative sanctions apply in relation to a supply realized without paying VAT and to a purchase without issuing the invoice.

Despite the intent of simplification pursued by the delegate law, the presidential decree has introduced an even more severe regulation as to the contrary proof. As a way of exemplification, Article 53 did not provide anything as to the way of proving the loss and destruction of goods as well as their use for the production. Under the current regulation, instead, only the latter event can be freely demonstrated, while the rest are regulated in detail<sup>274</sup>.

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<sup>272</sup> That is the use of the goods for the production, their loss or destruction, or their delivery (to third parties) or receiving on the basis of a title that does not transfer the property. E. Della Valle, *Le presunzioni di cessione e di acquisto*, cited above, 1638.

<sup>273</sup> And this may happen, considering that Article 4, para 2, Presidential decree No 441/97 might be interpreted as allowing the use of the presumptions at hand also on the mere basis of a comparison between different books – thus, without a physical ascertainment (or inventory)- from which the existence or lack of store material emerges. As a matter of fact, the first paragraph fixes the moment when the presumptions of transfer and purchase – given the physical ascertain of the goods - have effects: it coincides with the beginning of the accesses, inspections, verifications. Instead, the second paragraph clarifies that the quantitative differences that emerge from the comparison between the records of the auxiliary store books (ex Article 14, para 1, let. d), Presidential decree No 600/1973) or of the compulsory documents issues and received, and the registered stock “*represent presumption of supply and purchase for the tax period subjected to control*”.

<sup>274</sup> So that the considerations expressed under the previous regime in this regard need to be revised. R. Schiavolin, *Sulla prova contraria alle presunzioni di cessione e acquisto ex art. 53, D.P.R. n. 633/1972*, cited above, 790, who observed that Article 53 “*provides for a range of hypotheses where the balance between fiscal interest and interest of the taxpayer varies: for the material facts (destruction, loss, use for the production) the proof is free, because the concrete circumstance could render impossible to form certain means of conviction; for the situations or juridical relations an accounting proof is requested or a qualified documentary proof*”. In this view, only with reference to some hypotheses the legislator had considered further demands of safeguard of the fiscal interest in respect of the correspondence of the levy with the real ability to pay. What is still topical is the analysis of Article 53 as inspired by the aim of facilitating the tax administration in proving the tax evasion, aim that in the relevant provisions is pursued in different ways. Indeed, “*In fixing rules of legal proof, the legislator cannot disregard the necessity to give to the debtor the*

So far, the Constitutional Court has not happened to judge on the consistency of the presumptions under discussion with the ability to pay principle or the right of defence. In any event, the examination of the jurisprudence on tax presumptions suggests that the question would be rejected. Under the profile of the principle of reasonableness and ability to pay, the Constitutional Court would have easy play to argue that the inference drawn by the legislator is logical and corresponds to a rule of experience, so that it has not a fictitious basis. Under the profile of the right of defence, it would be probably asserted that the taxpayer has the possibility to rebut the presumptions, by giving evidence of the facts listed in the provisions and by keeping documents that he would be mostly due to keep anyway. Therefore, the presumptions of supply and purchase do not appear to conflict with the Constitutional framework. On the other hand, they are based on real facts, which may be assumed as indices of tax evasion, and allow the taxpayer under investigation to give proof to the contrary<sup>275</sup>.

It remains to see if such presumptions are also in line with the EU Law, on the basis of the criteria ensuing from the EUCJ rulings. This question will be answered later on.

## **9. The semi-general anti-avoidance rule in the area of income taxation**

The Italian tax system includes several specific anti-abuse rules in the area of income taxation, which are targeted at tackling tax avoidance and/or evasion when cross-border situations are at issue. Before dealing with them in the following paragraphs, the semi-general anti-abuse rule laid down in Article 37-*bis* of the Presidential decree No 600/73 has to be mentioned<sup>276</sup>.

Article 37-*bis* entitles the tax authorities to disregard single or connected acts, facts, or transactions, which are carried out without valid commercial reasons and are intended to

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*concrete possibility to prove the unfavourable (for him) facts, so that those rules have always to be the result of a balance between the interest of the tax authority and the interest of the taxpayer, which is safeguarded by Articles 24 and 53 of the Constitution”.*

<sup>275</sup> A.E. Granelli, *Le presunzioni nell'accertamento tributario*, Boll. Trib. 1981, 1652, with regard to Article 53 of the VAT legislation, did not see any Constitutional inconsistency, because the taxpayer can establish in advance the means of proof requested by the provision.

<sup>276</sup> In this regard, it has to be noted that the Italian Supreme Court has ruled in a number of decisions handed down in December 2008 in its plenary session (No 30005, 30056, 30057), in favour of the existence of an unwritten general anti-abuse rule stemming from the ability to pay principle. In earlier decisions it had supported the existence of a general anti-abuse rule in the Italian tax system which derived from the general principles of EU law. Notably, it referred to EUCJ cases dealing with VAT (Halifax, Part Service), but argued that the doctrine on the abuse of law was a general and immanent principle that could apply to non-harmonized sectors as well, like income taxes. See R. Cordeiro Guerra and P. Mastellone, *The Judicial Creation of a General Anti-Avoidance Rule Rooted in the Constitution*, European Taxation, 2009, 511.

circumvent obligations and limitations provided under tax law in order to obtain tax savings or refunds otherwise undue.

The scope of the rule is not general, but it rather covers only the operations listed in the same provision. Notably, among these, there are certain operations covered by the Merger Directive (Article 37-bis, para 3, let. e) and the Interest and Royalties Directive (Article 37-bis, para 3, let. f-ter)<sup>277</sup>, which, as we will see in Chapter III, allow Member States to refuse or withdraw the benefits of the Directive when the principal reason or one of the principal reasons is tax evasion, avoidance, or abuse.

The provision might be seen as including a presumption of avoidance with reference to the operations listed in para 3 of Article 37-bis, but from the case-law of the Italian Supreme Court it results that the tax administration is required to demonstrate that the transaction concerned is abusive. In order to disregard the operation carried out by the taxpayer, the tax authorities have to prove the anomalous difference between that transaction and a 'standard' one, which indicates that the former cannot be justified within an economic logic, being rather aimed at achieving an abusive result<sup>278</sup>.

On the other side, the taxpayer is given the opportunity of proving that the transaction carried out is justified by valid economic reasons. Moreover, unlike with the ordinary administrative procedure, in this case the defence rights of the taxpayer receive a special protection. Indeed, Article 37-bis, para 4, provides that the tax authorities must request clarifications from the taxpayer on the transaction concerned before issuing a notice of assessment; pursuant to para 5, such notice of assessment must be motivated in relation to the justification submitted by the taxpayer, otherwise it is null<sup>279</sup>.

## 10. Presumptions in the matter of tax residence

After having illustrated the most relevant procedural presumptive provisions included into the Italian tax system, the focus is now on some substantive presumptive provisions or regimes, which are able to affect directly the position of the taxpayer.

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<sup>277</sup> This letter, in particular, refers to the payments of interests or royalties to EU recipients controlled directly or indirectly by one or more non-EU residents.

<sup>278</sup> *Ex multis*, Supreme Court 21 January 2009, No 1465; Supreme Court, 22 September 2010, No 20030.

<sup>279</sup> Notably, the last paragraph (8) of Article 37-bis allows the taxpayer to apply for a special ruling in order to obtain a declaration from the competent tax authorities that a specific anti-avoidance rule does not apply to the facts indicated in the request. This, when it is proved that in the specific situation no avoidance effects could be gained. In this hypothesis, the burden of proof rests upon the taxpayer, and the specific anti-avoidance rule concerned operated as a sort of rebuttable presumption of law.



Among those, there are the rebuttable presumptions on tax residence of individuals and foreign incorporated companies and entities, which are intended to combat tax avoidance or evasion by charging the taxpayer with the burden of proof as to the reality of the transfer of residence. As intuitive, a more favourable tax treatment can obviously be pursued by moving the residence in order to benefit of a more favourable tax regime. This phenomenon concerns both individuals and companies or other legal entities, the latter being tempted, in particular, by jurisdictions having a lower taxation of capital gains and proceeds.

Generally speaking, the burden of proving the fictitious character of the transfer of residence ordinary lies on the tax authorities. In order to specify the content of such burden, we firstly need to refer to Articles 2 and 73 of the Italian income tax legislation (TUIR), which respectively deal with the individuals and company or other entities subject to income taxation and identify the circumstances that need to occur for the purpose of qualifying a taxpayer as resident in the State's territory.

Starting from individuals subject to income taxation, it is obvious that the qualification of a person as resident or non-resident in Italy affects the tax treatment. While the former are taxed on all the income possessed irrespective of the place where it is produced (worldwide income taxation), the latter are taxed in the extent to which there is a link between the tax event and the State's territory in accordance with the principle of territoriality<sup>280</sup>.

Pursuant to Article 2, para 2, TUIR "*For the purpose of income tax, individuals that for the greater part of the taxable year are registered with the civil registry or are domiciled or resident in the State's territory pursuant to the Civil Code are deemed resident*". Thus, the law provides two different types of event, as the first one (registration in the civil registry) is a formal fact, while the second one (domicile or residence according to the Civil Code) is a situation of fact requesting to be ascertained. They are alternative, meaning that the occurrence of one of them suffices in order to consider the taxpayer as resident in Italy.

Turning to companies and other legal entities, Article 73, para 3 considers them as being resident in the State's territory if, for the greater part of the tax year they have in there their legal seat, their administrative seat or their core business. Alike the criteria fixed by Article

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<sup>280</sup> Laid down by the Delegate law No 825/1971. In other words, the non-resident are taxed only for the incomes produced in the State's territory, where the conditions rising taxation took place. In practice, this happens when a) an activity is carried out or b) a productive good is located in Italy (typically, an immovable property).

2 above, those provided for by Article 73 are alternative, so that the occurrence of one of them suffices for the purpose of qualifying the company or entity as resident.

The legal seat normally results from the entity's deed of incorporation or by-laws, while the administrative seat coincides with the place where the managerial decisions concerning the activity carried on are taken, i.e. where that activity is governed by the board of directors. The last circumstance demands to ascertain the concrete situation, and so does the third alternative. Indeed, it seems that when the core purpose does not result from the deed of incorporation, then the activity actually carried on in the State's territory has to be regarded<sup>281</sup>.

In conclusion, when contesting the transfer of residence, the tax authority is ordinarily requested to disprove the constitutive elements of the situation giving rise to the definition of residence. Simplifying, it has to contest the formal data (like the proper registration, deed of incorporation) or to prove that the domicile, the residence, the place of effective management or the core purpose of the taxpayer is abroad on the basis of tangible data.

### 10.1 The presumption of residence for individuals

On the basis of the above mentioned Article 2 TUIR the residence of individuals is alternatively identified by:

- a) the civil registry (register of the resident population);
- b) the domicile, i.e. the centre of his economic and social interests (Article 43, para 1, Italian Civil Code);
- c) the residence, i.e. the place of regular dwelling (Article 43, para 2 Italian Civil code).

As pointed out in the previous paragraph, the provision does not include a formal circumstance only, but it permits to deem a person as resident when, irrespective of the absence of a formal datum, the dwelling or anyway the main interests (job, family etc.) are in the State's territory. It is sufficient that one of the three listed events occurs in order the person to be considered a resident.

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<sup>281</sup> In this sense G. Falsitta, *Manuale di diritto tributario. Parte speciale: il sistema delle imposte in Italia*, Padova, Cedam, 2009, 262, who refers to Article 5, para. 3., let. d) dealing with partnerships and assimilated organizations. In this view, Article 73, paras. 4 and 5 do not apply in this regards, as they rather deal with the way of identifying the core purpose of entities in order to distinguish commercial entities from non-commercial ones. Once identified the principal activity of the entity, it has to be verified if it is really carried on for the greater part of the tax year in Italy. Cf. P. Valente, *Esterovestizione e residenza*, Milano, IPSOA, 2013, 6, who recalls paras 4 and 5, so that he refers to the Law, the Deed of Incorporation or the By-Laws, or if the core purpose cannot be identified with one of those elements, to the activity actually carried out in the State's territory.

In addition, Article 2, para 2-bis TUIR<sup>282</sup> states that the Italian citizens who have been removed from the civil registry and moved in States or territory different from that identified with a ministerial decree are deemed to be resident, save for the counterproof.

Clearly, this provision has been introduced by the legislator in order to prevent and to tackle the transfer of residence of individuals motivated by the aim of benefiting from a preferential tax treatment. As with Cfc regulation and similar regimes, the legislator has used the technique of a rebuttable presumption that puts the burden of proving that the actual residence is outside Italy on the taxpayer, whereas the tax administration is relieved from the evidence of the fictitious settlement.

Undoubtedly, Article 2, para 2-bis is a rebuttable presumption of law. From the circumstance that an Italian citizen has transferred its residence in a low tax jurisdiction it is inferred the residence in Italy, which implies the fictitious character of the transfer. Its reasonableness is questionable, especially because of its general scope, as the mere moving to a black-listed State is assumed as proving that the residence is still in Italy, thereby adding *de facto* a further situation to the ones listed in para 2.

As to the EU context, the potential inconsistency with the fundamental freedoms could be real if it applied to EU countries. However, after being amended with Article 1, para 83, let. a), Law No 244/2007, para 2-bis refers to States different from that identified by a decree of the Minister of Economics and Finance that has not been enacted yet and that will presumably include the EU Member States. As a confirmation, the ministerial decree still in force that include the States having a preferential tax regime for the purpose of para 2-bis<sup>283</sup> has been recently amended by removing Cipro and Malta from the list<sup>284</sup>.

## **10.2 The presumptions of residence for foreign incorporated companies and other entities**

Since 2006 several rebuttable presumptions have been added within Article 73 TUIR as to the residence of companies, other entities and trusts, with the intention to tackle the phenomenon of fictitious residence consisting of the settlement into a tax jurisdiction

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<sup>282</sup> Introduced by Article 10, para 1, Law 23 December 1998, No 448.

<sup>283</sup> Ministerial decree 4 May 1999. In the previous version of para 2-bis, the reference was indeed to citizens cancelled from the civil registry and transferred in a State having a preferential tax regime identified with a ministerial decree. The only difference is that earlier the reference was to a black-list, while currently to a white list, rectius to the States that are not included into the white list to come.

<sup>284</sup> With Article 2, Ministerial decree 27 July 2010.

guaranteeing capital gains' exemption on participations or anyway a more favourable tax treatment in comparison to the Italian one.

Following a chronological order:

- 1) Para 5-*bis* – introduced by Article 35, para 13, Law decree No 223/2006 converted by the Law No 248/2006 – presumes – save for the counterproof - the existence in the State's territory of the administrative seat of non-resident companies and entities holding direct controlling participations<sup>285</sup> of resident companies and commercial entities if the former are (alternatively):
  - a) controlled, even indirectly, pursuant to Article 2359, para 1, Italian Civil Code, by persons residing in the State's territory;
  - b) administered by a board of directors or other management body, mainly composed by directors residing in the State's territory.
- 2) Para 3, second part, states that – save for the counterproof - trusts and entities having the same content are deemed to be resident in the State's territory when they are established in States and territories different from that included in the ministerial decree ex Article 168-bis TUIR<sup>286</sup> and at least one of the settlers and one of the beneficiaries are tax-resident in the State's territory. Furthermore, trusts established in territories other from that listed in the above ministerial decree are deemed resident when, subsequent to their establishment, a person resident in the State's territory transfers to the trust the right of ownership on immovables or other rights upon the rem or binding purpose on immovables<sup>287</sup>.
- 3) Para. 5-*quater* provides that – safe for the counterproof – companies and entities whose assets is for the most part invested in shares of an Italian closed real estate fund ex Article 37 Legislative decree No 58/1998 and are controlled, directly or

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<sup>285</sup> Pursuant to Article 2359, para 1, Italian Civil Code.

<sup>286</sup> The reference to the ministerial decree ex Article 168-*bis* in para 3, Article 73 TUIR has been introduced by Article 1, para 73, let. e), No 1 and 2, Law 24 December 2007, No 244. Before such amendment para 3 referred to the decree of the Minister of Finance 4 September 1996, which will be in force until the enactment – rectius, the taxable period subsequent to the publication - of the new ministerial decree. In the meanwhile, the white-list included in the ministerial decree 4 September 1996 has been recently updated by inserting Lettonia with Article 1, Ministerial decree 27 July 2010.

<sup>287</sup> Introduced by Article 1, para 74, let. c), Law 27 December 2006 No 296 (Financial Law 2007). Para 74, 75 and 76 have for the first time provided a tax treatment in the Italian tax system of the trust. As well known it is an institution typical of common law countries. Since the Italian legislation does not include a definition, it has to be regarded the notion drawn by Article 2 of the Hague Convention. Trusts are currently included among commercial entities (Article 73, para 5, let.b) and also entities that do not carry out on an exclusive basis an economic activity (let. c) subject to IRES (Italian corporate income tax). Thus, income produced by a trust are taxed according to the discipline of IRES, unless they are imputed to beneficiaries.

indirectly, through trust companies or an interposed person, by persons resident in Italy are deemed to be resident in the State's territory<sup>288</sup>.

Though the listed hypotheses differ in terms of subjective range of application and conditions requested, a similar scheme can be identified. When the residence of a company or other entity is established abroad, but there is a strong link with the State's territory where the persons involved up and down of the chain are resident, then it is presumed to be a fictitious settlement and thereby the foreign entity to be actually resident in Italy.

### **10.2.1 Foreign (sub)holdings, fictitious residence and burden of proof**

Among the presumptions identified in the previous paragraph, to our purpose the one laid down in para 5-*bis* of Article 73 TUIR is worthy of special attention. It concerns the situation of a foreign company or entity that (a) holds a controlling participation of an Italian company or commercial entity and that in turn (b) is controlled by a person resident in Italy or administered by a board of directors who are for the most part resident in Italy. Unlike the presumptions on trust's residence, it does not refer to companies or other entities resident in black-listed States. Consequently, the provision is likely to apply to EU legal entities as well. Not surprisingly, the national tax authorities have considered the issue of compatibility with the freedom of establishment and the EU-pilot Procedure has been activated by the European Commission.

From a merely national point of view, para 5-*bis* represents the attempt to tackle the use of screen-companies established abroad with the purpose of taking advantage of the more favourable taxation of capital gains and proceeds in comparison to the Italian one. The provision seems to fit particularly the so called 'passive holdings', which hold participations of domestic companies/entities without carrying out any economic activity and are resident in tax jurisdictions where they can benefit from preferential tax regimes.

The scheme of the presumption is drawn as follows:

- a) the foreign entity controls a domestic entity AND
  - b) it is controlled by a domestic entity or administered by a board of directors mostly resident in Italy
- the administrative seat of the foreign entity is actually in Italy.

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<sup>288</sup> Introduced by Article 82, para 22, Law decree No 112/2008, converted by the Law 6 August 2008, No 133. M. Antonini, *Un'ulteriore presunzione in tema di residenza fiscale di società ed enti: l'amministrazione finanziaria ancora una volta sollevata (parzialmente) dall'onere probatorio*, Riv. Dir. Trib., 2009, 49.

Since the administrative seat is one of the criteria determining the residence of a company/entity (Article 73, para 3, first part), it follows the re-qualification of the foreign entity as being resident in Italy, thereby the attraction to the domestic system of taxation. Given the difficulty that the tax administration would meet in assessing the real administrative seat, the legislator has presumed that facing the above conditions (known fact) the former is relieved from proving that that seat is actually established in Italy (unknown fact).

The burden of proof is thus shifted on the taxpayer, in the context of possible administrative proceedings and/or the tax litigation. Apart from contesting the conditions of application, the presumption can be rebutted by proving that the administrative seat is actually in the State where the legal seat is established as main decisions are taken there and there is not any rootedness in Italy.

More in detail, as indicated within the Circular letter N° 28/E/2008, the taxpayer is demanded to produce documents that show the managerial autonomy of the foreign sub-holding - for instance, by alleging official managerial acts/contracts taken abroad - or the carrying out of an actual economic activity abroad and so on. It appears that the taxpayer is requested to furnish a positive proof, i.e. the proof of a fact incompatible with the presumed fact rather than the negation of the latter. In other words, the foreign entity is not merely demanded to prove that it has no links with the State's territory, but it has to produce evidence and tangible data certifying the concrete connection with the foreign country.

It has been observed<sup>289</sup> that among the genus of (rebuttable) presumptions, para 5-*bis* can be classified as 'presumption of the fact' which differs from the 'presumption of the effect'. The difference would reside in the unknown/presumed fact. The unknown fact of the former is another fact (administrative seat) that once ascertained causes the application of a further provision (Article 73, para 3 on the residence) which includes it (the unknown fact) as a constitutive element. Instead, the unknown fact of the second type of presumptions is directly the effect (the residence). Example of the latter are para 3, second part, and para 5-*quater* of Article 73 TUIR, in the extent to which they presume the existence of the residence of trusts and immovable funds given certain circumstances.

Such a distinction is not merely theoretical, as the scheme of the presumption has an impact on the contrary proof, which normally tends to disprove the unknown fact. Indeed,

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<sup>289</sup> G. Fransonì, *Sulle presunzioni legali nel diritto tributario*, cited above, 603 et seq.

one thing is disproving a certain fact (existence in Italy of the administrative seat), another thing is disproving all the facts potentially causing a certain effect (legal seat, administrative seat, core purpose). In this view, the limitation to the jurisdictional protection of the taxpayer is maximum in the second case.

One could argue from this the rationality of the reversal of the burden of proof in para 5-*bis* in terms of balance between the jurisdictional protection of the taxpayer and the simplification of the tax authorities position in the assessment. However, as in many of the anti-avoidance presumptive provisions, the rule of experience on which the presumption grounds is weak. It is not clear, for instance, why the residence of the board of directors should be indicative (*rectius*, demonstrative) of the residence of the foreign company.

## **11. CFC rules**

Alike many of the European tax systems, the Italian one contains a CFC legislation aimed at tackling the shifting of taxable base towards tax heavens. As well known, indeed, the mechanism generally consists of the imputation – irrespective of the formal distribution – on the domestic parent of the profits produced by the subsidiary that is resident in a foreign tax jurisdiction where the taxation is much lower. Introduced by Article 1, para 1, Law No 342/2000, it has been recently amended with the Law decree No 78/2009<sup>290</sup> converted into the Law No 102/2009, in line with the guidelines emerging within the OECD. As it will be explained, the amendments mostly concern the range of application of the regime, which has been extended under certain conditions to States included into a white list, and the theme of (contrary) proof.

The result is a provision that reflects the outcomes reached within the OECD and the EU law as interpreted by the EUCJ either. A provision that currently includes a double regime.

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<sup>290</sup> Notably, Article 12 of this Law decree has introduced a rebuttable presumption concerning foreign investments held in tax heavens. Basically, investments and financial activities held by Italian resident individuals, as well as non-commercial partnerships and similarly treated entities, in States with a more favourable tax regime (black-listed States) and in violation of reporting obligations (provided for by the Law decree No 167/90), are deemed to derive from tax evasion. It rests upon the taxpayer the proof that such activities have not originated from non-declared income. Given that such presumption applies as regards to black-listed States, it does not create any particular problems at EU level. See M. Vergani, *Italy: Recent Measures to Fight Tax Evasion through the Use of 'Tax Havens'*, EC Tax Review, 2010, 272 et seq.; M. Antonini, *La presunzione di evasione per investimenti e attività finanziarie detenute in Paesi a fiscalità privilegiata*, Riv. Dir. Trib., 2009, 192. Cf. F. Ciani, “Nuova” presunzione legale di imponibilità da investimenti CFC, Boll. Trib., 2011, 1435.

### 11.1 CFC rules and black-listed States

The first paragraph of Article 167 TUIR prescribes that when a person resident in Italy has directly or indirectly the control of a person that is resident in a State different from those included in the ministerial decree enacted pursuant to Article 168-bis TUIR<sup>291</sup>, the incomes accrued by the foreign subsidiary are imputed, since the closing of the tax period, to the resident person in proportion to the shareholdings. The same holds with reference to stakes in non-resident persons as to the incomes produced by their permanent establishments placed in States different from the ones listed in the above mentioned decree.

In order to fully gather the scope of the provision, three main aspects need be clarified, which concern the subjective, objective and territorial profile.

From paragraph 2 of Article 167 it follows that the persons involved are individuals, limited partnerships, companies as well as public and private bodies carrying on a business, which are resident in the territory of Italy.

As to the definition of the control, paragraph 3 refers to Article 2359 of the Italian Civil Code, which requests alternatively: 1) the majority of the votes exercisable in the assembly; 2) enough votes to exercise a dominant influence into the ordinary assembly; 3) the dominant influence exercised under contractual obligations<sup>292</sup>.

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<sup>291</sup> Article 168-bis, para 1 – introduced by Article 1, para 83, let. n), Law No 244/2007 – refers to a decree of the Minister of Economics and Finance for the identification of the States that allow a suited exchange of information for the purpose of the application of some provisions of the income tax code, a.o. Article 110, para 10 and 12-bis, which will be dealt with later on. Para 2 of Article 168-bis refers to the same decree in order to identify the States that allow a suitable exchange of information and where the level of taxation is not considerably lower than the one applied in Italy, for the purpose of application, a.o. of Articles 167, para 1 and 5, 168, para 1 TUIR. Up till to now, such decree has not been enacted. Pursuant to Article 1, para 88, Law No 244/2007, until the publication of that decree the provisions in force continue to apply. As a consequence, currently it has to be considered the ministerial decree 21 November 2001, that identifies the States or territory having a preferential tax regime (black-list) for the purpose of application of Article 127-bis TUIR that corresponds to Article 167 before the 2003 tax reform. Recently, with the Ministerial decree 27 July 2010, Article 2, Malta and Cipro have been removed from the list. As explained in the preface, this is justified in the light of their being EU Member States and of the recent signature of protocols amending the double taxation conventions in the sense of a broader juridical basis for exchange of information. Plus, the decision of the ECJ (Cadbury Schweppes) on the question of compatibility of CFC rules with EU law is recalled. The Luxembourg 1929 holdings are still included in the list.

<sup>292</sup> It has to be noted that the CFC rule also applies to related foreign companies, i.e. to stakes that do not allow the resident person to control or to exercise a dominant influence into the former. Pursuant to Article 168 TUIR, indeed, Article 167, except para 8-bis, applies also when the person resident in Italy holds, directly or indirectly, a (at least) 20% stake – 10% for listed companies – to the profits of an enterprise, company or different body resident in a State different from that listed in the decree ex article 168-bis. The provision does not operate facing stakes in persons resident in a State included into the cited decree with regard to incomes arising from their permanent establishments located in States different from that listed in the same decree.



Lastly, the reference to the ministerial decree ex Article 168-bis TUIR, which includes the States that allow a suitable exchange of information with the Italian jurisdiction<sup>293</sup>, confines the CFC rules laid down in the first paragraph to those States which fall within the so called black-list in view of the lack of transparency.

Having described the main characters of the CFC legislation drawn by the first paragraph of Article 167, it has to be dealt with the escapes given to the resident taxpayer in order to avoid the application of the regime. For such purpose he is beforehand bound to raise a query (ex Article 11, Law No 212/2000) to the tax administration in order to have an advance tax ruling on the concrete case. In this way, an instrument normally used in order to question the tax authority as to the application of a certain tax provision to a concrete case, is provided for giving the taxpayer the possibility to prove that Article 167, para 1, does not apply to his case.

In particular, pursuant to paragraph 5 the domestic parent may alternatively demonstrate that:

- a) the foreign subsidiary carries on an actual industrial or commercial activity, as its main activity, within the market of the host State; for banking, financial and insurance activities this happens when most of the sources, investments and turnover originate in that State;

This letter does not apply when the proceeds of the foreign subsidiary originate, for more than 50%, from the management, holding or investment of securities, shares, receivables or other financial assets, the transfer or grant of the right to use intangible rights on industrial, literary or artistic property, as well as from the supply of (also financial) services towards persons that directly or indirectly control the foreign subsidiary, are controlled by it or by the same domestic company (para 5-*bis*, introduced by Law decree No 78/2009)<sup>294</sup>.

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<sup>293</sup> Thus, a sort of white list that is still to come.

<sup>294</sup> In other words when, according to the interpretation of the Circular letter N° 51/E, the gross proceeds produced by the CFC result for more than 50% from investments in financial activities (such as dividends, capital gains, active interests, etc), royalties or intra-group services. The *ratio* is to tackle the delocalization of passive income through the localization of their productive assets in low-tax jurisdictions. It is noteworthy that the tax administration supports an interpretation of para 5-*bis* coherent with the EU principles in the matter of anti-abuse, which give the taxpayer the possibility to prove the contrary. In the view taken by the tax authority, limitations introduced by para 5-*bis* represent sort of threshold, above which it is presumed that the CFC is a 'company without enterprise' save the counterproof. Accordingly, despite the literal datum, which in my opinion stops the possibility for the taxpayer to avail the escape of let. a), when para 5-*bis* applies, the tax administration considers the provision at hand as requesting a "strengthened proof" – in the context of a ruling - with regard to the reality of the foreign structure and activity in the market and also the absence of elusive purposes and effects aiming at diverting profits from Italy to tax law jurisdictions. It is evident the non-technical use of the notion of contrary proof supported by the tax administration.

- b) the participation in the non-resident entity is not used to localize income in States different from the ones listed in the ministerial decree ex Article 168-*bis* TUIR.

The relevance of such a (contrary) proof is evident, as the application of the CFC legislation not only affects the moment in which the profits are imputed on the resident parent<sup>295</sup>, but also the levy. In fact, the incomes concerned are subjected to a separate taxation with the average rate applied to the incomes of the resident parent, which may not be lower than 27%<sup>296</sup>.

## 11.2 CFC rules and white-listed Member States<sup>297</sup>

Before discussing the nature of the CFC rules and the correlative safe harbour clauses, the second CFC regime resulting from the amendments brought to Article 167 by the Law decree No 78/2009 has to be dealt with. To our purpose, it is particularly interesting as it extends to EU Member States the CFC rules if certain conditions are met, with all the related questions in terms of consistency with the freedom of establishment. As a matter of fact, paragraph 8-*bis* of Article 167 – added with the anti-crisis decree – provides that the rule of paragraph 1 applies also when the subsidiary is located in a State different from the ones referred to in para 1. In other words, the imputation of profits on the domestic parent irrespective of the distribution applies also to States which allow an adequate exchange of information, thereupon the EU Member States are included. However, two conditions need to be jointly met for this purpose:

- a) the foreign subsidiary is subject to an actual taxation which is less than an half of the one that would have applied if it were resident in Italy<sup>298</sup>;
- b) the proceeds consists for more than 50% of passive income or income from services supplied to controlled or controlling persons (i.e. intra-group services). The formula

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<sup>295</sup> I.e. when they are accrued rather than when they are distributed.

<sup>296</sup> Paragraph 6, Article 167 continues prescribing that they are determined according to the rules of the TUIR on the enterprise income and that the taxes that have been paid abroad are detracted from the tax levied in Italy cause of the application of the CFC rules. Of course, as clarified by paragraph 8, the profits that are then divided up from the foreign subsidiary do not enter the forming of the tax base of the resident parent for the same amount of income already taxed. Otherwise there would result a double taxation.

<sup>297</sup> It has to be clarified that white-list Member States means here States that are not included in the black-list of the Ministerial decree 21 November 2001, as the decree indicating the States that allow a suitable exchange of information referred to by Article 168-*bis*, para 2 TUIR has not been enacted yet.

<sup>298</sup> In order to verify this condition, the Circular letter 51/E clarifies the subject of the comparison that has to be done by the taxpayer for every tax period and the composition of the income to be considered. The comparison between the real foreign taxation and the virtual domestic taxation has to concern only income taxes – as the CFC rule is in the income tax code -, in case considering also the double taxation convention with the foreign State and without calculating IRAP (Italian tax on productive activities).

used to draw this condition is the same of para 5-*bis*, which excludes the operating of the escape laid down by para 5, let. a) facing this type and amount of proceeds<sup>299</sup>. Even when these conditions are fulfilled, the domestic parent can however avoid the application of the CFC rule by giving evidence, through the instrument of the ruling, that “*the settlement abroad does not represent an artificial arrangement aiming at achieving an undue tax advantage*”.

Given the lack of any further indication as to the content of this contrary proof, the only reference is represented by the case-law of the EUCJ and particularly by the decision in Cadbury Schweppes, which is also referred to in the Circular letter N° 51/E<sup>300</sup>. Moreover, it is not clear if the query to the tax administration has to be raised with reference to every taxable period or it holds as long as the same circumstances do not change. The answer depends on the interpretation of the theme of proof. The second alternative is preferable, because the contrary proof concerns circumstances having an objective character<sup>301</sup>.

### **11.3 Some considerations of the nature of CFC rules**

The CFC legislation belongs to the genus of anti-avoidance rules and these are intended to prevent domestic persons from relocate their economic activities in foreign tax jurisdictions where the taxable base is shifted in order to take advantage of the lower level

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<sup>299</sup> S. Garufi, *La nuova disciplina delle CFC*, Rass. Trib., 2010, 619 et seq. observes that the new CFC legislation resulting from the amendments with the anti-crisis decree has the characters of both the jurisdictional and transactional approaches, as it is given relevance to the level of taxation in the host state in comparison to that applicable in Italy and to the nature of the foreign income. Though it is an hybrid model, because once ascertained the prevalence of the passive income on the foreign subsidiary, the domestic parent is taxed on the entire income (passive and active) produced by the former. It follows, in his view, that the new CFC legislation would be more correctly classified as an anti-evasion provision aiming at tackling the fictitious interposition. “*The new provisions thus impose the domestic parent in Italy to verify (or foresee) the type of income that the cfc produces (or will produce), as from the income composition of the latter follows an (irrebuttable presumption) of interposed person.*”

<sup>300</sup> The same being the terminology, it is inferred that “*(...) the legislator has intended to adopt the notion of “wholly artificial arrangement” drawn by the EU institutions.*”

<sup>301</sup> *Contra* S. Garufi, *La nuova disciplina delle CFC*, cited above, 627, who considers it a subjective escape, so that a preventive ruling has to be requested by the taxpayer at the beginning of every taxable period. He points out that the adoption in the formula of such escape of the EUCJ ruling in Cadbury Schweppes case shows that the new CFC rules have been conceived to face tax competition among EU Member States, which are likely to be included into the future white-list), with the attempt to avoid an infringement of EU Law. In the Circular letter No 51/E it is clarified that the ruling is not binding for the taxpayer, who can ignore it and does not lose the possibility to prove later – for instance, in the tax litigation – the conditions to avoid the application of the CFC rule. The efficacy of the ruling is not confined to the taxable period that has been evaluated as long as the circumstances produced do not change. The tax administration also furnishes some indications as to such evaluation: in accordance with the EUCJ decision in Leur Bleum, it has to be case-by-case on the basis of objective elements that can be verified by thirds. By proposing a view similar to that expressed with regard to para 5-*bis*, the tax administration considers paraa 8-*bis* as grounding a presumption that infers from the excess of the threshold the nature of wholly artificial arrangement of the CFC, save counterproof.

of taxation or of the tax deferral (even *sine die*). The means chosen by the legislator in order to face the difficulties that the tax administration would meet if requested to prove the fraudulent arrangement is the alteration of the ordinary burden of proof. It is up to the taxpayer, indeed, to give evidence of the actual character of the establishment abroad, an onus that – *mutatis mutandis* - normally would lay on the tax authorities.

As to the structure, simplifying, a typical CFC rule is built upon the known fact represented by the location of a subsidiary mostly producing passive income in a low tax jurisdiction. From such circumstance it is inferred the artificial character of the establishment, which justifies the different tax treatment in comparison to a national subsidiary. This, unless the taxpayer proves that the establishment abroad is real and it is not due to tax reasons only.

One could say that the unknown fact is not exactly a fact inferred from the base fact, but it is rather implied by the latter, so that the presumptive scheme does not occur. In the sense that the location into a low-tax territory might imply *ex se* the existence of an artificial arrangement and justify a peculiar tax regime. On the other hand, alike other presumptions, the ones in the field of banking inspections for instance, the legislator draws the CFC rules' escapes as exemptions to the application of the regime rather than contrary proofs technically speaking. In this sense leads also the moment in which the taxpayer is firstly called to demonstrate the facts indicated, that is in the context of a ruling and not in a possible trial or during a tax proceedings.

However, the splitting up of the provision shows how the fictitious settlement is the circumstance, though not expressed in the norm, that the legislator presumes on the basis of a rule of experience according to which the relocation of economic activities in low-tax States where mostly passive incomes are produced hides a fraudulent intent and a fictitious arrangement. In this perspective, the contrary proof tends to disprove the presumed fact, i.e. the artificial arrangement, rather than the objective circumstances from which the latter is inferred that are the conditions of application.

At any rate, the formula of the CFC rule confirms the tendency of the fiscal legislator to introduce presumptive criteria that consist of composed regimes implying the presumption of avoidance and the shift on the taxpayer of the onus of proving pre-determined circumstances in order to avoid their application. So that the contrary proof looks more like an exception to the application of the provision concerned rather than an impeditive fact, i.e. a fact that is not compatible with the existence of the presumed event. Despite the

presumptions we are used within the civil-procedural field which are naturally meant to operate in the context of the trial, they show a weak demonstrative character in favour of the prevailing aim of preventing tax abuse of law.

#### **11.4 The proof to the contrary (or safe harbour clause)**

The consideration expressed at the end of the previous paragraph appears primarily from the context in which the taxpayer is put in the condition of producing the circumstances indicated in Article 167 TUIR. Indeed, both the CFC regimes drawn by that Article provide that the domestic parent have to raise a query to the tax administration in order to furnish the evidence requested for the purpose of the non-application.

Hence, unlike other types of tax presumptions, here the contrary proof may be given in a context that is neither the trial nor a running tax proceedings. So that it is not clear, among the other things, what happens if the taxpayer does not raise the request for a ruling in advance. Since it seems to be compulsory, the consequence would be the application of the CFC rules and the loss of the right to give proof to the contrary in a possible tax litigation, at least for the taxable period already closed.

This, in general. More particularly, the escapes provided for by Article 167, para 5, have been criticized by most of the Authors for further reasons<sup>302</sup>.

Paragraph 5 involves black-listed countries only, among which – after the amendments with the ministerial decree 27 July 2010 - there are not any EU Member States any longer. The main change in respect of the previous provision concerns the introduction of the reference to the ‘market’ in let. a). Most of the Authors<sup>303</sup> and industry associations have warned on the impact that a narrow interpretation of this escape would have on the internationalization of the Italian companies. Indeed, a literal interpretation of let. a) would lead to request the domestic parent to prove that the activity of the foreign subsidiary mainly addresses the market of the host State<sup>304</sup>, or that – according to the Circular letter of

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<sup>302</sup> The discussion on the escape laid down by para. 8-ter will be deepened later on in the dissertation, as it echoes the EUCG case law.

<sup>303</sup> A.o., G. Marino, *La nozione di mercato nella disciplina CFC: verso una probatio diabolica?*, Riv. Dir. Trib., 2011, 1113. The Author questions how the new formula of let. a), para 5, Article 167, should be interpreted in order to overcome the presumption of the CFC rule without rendering this a probation diabolica. He is particularly critical towards the interpretation of the concept of ‘market’ adopted by the tax administration in the Circular letter 51/E. On the one side, it is very narrow and not in line with the intention of the legislator, whereas the reference to the market should in his opinion be read as rendering more stringent the counterproof. On the other side, the circular illogically recalls the EU notion of market.

<sup>304</sup> As a consequence, the CFC might be due to show the books.

the tax administration N° 51/E – the sources of that activity are placed in the host State<sup>305</sup>. In this view, the ‘host market’ would turn into a justification of the relocation of the activity in another tax jurisdiction and thereby the genuineness of the activity itself would be proved<sup>306</sup>.

Under this perspective, the proof of the real establishment (premises, staff) and carrying on of an economic activity abroad might not suffice, as long as the same activity could be placed in another jurisdiction. In other words, from some documents of the tax authorities on concrete cases and circular letters it can be inferred that the investigation of the tax administration concerns also the choice of the subsidiary’s location, in order to verify if it is due to tax reasons only. In this way, inevitably a subjective element enters the evaluation of the tax authority<sup>307</sup>.

Moreover, the reference to an actual industrial or commercial activity – apart from the banking/financing/insurance activities - might exclude, for instance, the supply of services or the passive holdings.

Whereas the escape of let. a) is at risk of a narrow interpretation, the one of let. b) requests the proof that from the location in a tax heaven does not follow in practice any advantage as to the taxation of the taxable base. Given the vagueness of the formula, it is necessary to refer to Article 5, para 3, Ministerial decree 21 November 2001 (No 429) according to which the domestic parent has to prove that at least 75% of the incomes pursued by the CFC are produced in non-black listed countries and there they are subject to a ordinary level of taxation<sup>308</sup>.

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<sup>305</sup> As an indication, in the Circular letter N° 51/E the threshold of the purchases and sales in the local market of the host State in order to fulfill the condition is fixed at more than 50%. Moreover, it is clarified that the market concerned not necessarily coincide with the geographical border of the host State. Indeed, depending on the concrete case, it may be extended to the surrounding geographical area that is (economically, politically geographically or strategically) linked to the host territory.

<sup>306</sup> More in detail, in the Circular letter 51/E it is requested the proof of the rootedness of the CFC in the host State plus the availability in loco of a structure suitable to the carrying on of the declared commercial activity and having managerial autonomy. Thus, the physical presence is necessary but not sufficient, as it is also demanded the proof of a connection with the host market, i.e. an economic and social link with the foreign territory. A connection that is explained by referring to the words used by the EUCJ in Cadbury Schweppes: “...its intention to take part, in a permanent and continuative way, to the economic life of a State...- (omissis)-different from the own and to gain benefit...”. The fact that the CFC does not address the local market is considered as a sign of the lack of actual activity in the host State. However, it is clarified that in this case it is possible to appreciate further elements, like the economic-entrepreneurial reasons leading to invest in a low-tax jurisdiction.

<sup>307</sup> See Circular letter 6 October 2010 N° 51/E, where it is requested not only a physical presence (with premises, staff and equipment) but also a rootedness in the phase of the supplying and distribution. It is however clarified that if such a proof is missing, it is possible to consider further elements. In particular, it is assigned relevance also to the subjective element, i.e. the entrepreneurial reasons.

<sup>308</sup> The *ratio* of the escape is to make sure that the CFC’s proceeds are properly taxed. The term of comparison is the levy in force in Italy for the Circular letter N° 51/E. The latter provides for some

#### 11.4.1 Limitation to the deductibility of costs incurred with enterprises resident in black-listed States

Further considerations on the contrary proof to the first CFC regime arise from the consideration of Article 110, paras 10 and 11 TUIR.

Following a similar scheme, paragraph 10 prohibits the deduction of expenses and other negative items met in relation to transactions with enterprises that are resident or placed in States and territories different from that listed in the ministerial decree ex Article 168-*bis* TUIR<sup>309</sup>. The provision does not apply when<sup>310</sup> the enterprise resident in Italy proves alternatively that:

- a) the foreign enterprise “*for the most part carries on a real commercial activity*”;
- b) the transactions realized live up to a real economic interest and they have been concretely put into execution.

Similarly to the CFC rules<sup>311</sup>, the aim of tackling the shifting of taxable base towards low-tax jurisdictions has led the legislator to introduce a presumptive regime as to the existence of a fictitious arrangement facing transactions with parties located into those territories. The mechanism is the same, as the tax administration is relieved from proving the artificial character of the foreign enterprise or of the transactions realized, whereas it is up to the taxpayer the proof of their correspondence to reality.

However, the rule at hand differs from CFC rules under two main aspects.

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exemplifications: the source of the income produced by the CFC is abroad (where there is a permanent establishment or immovable properties taxed in a non-black listed State), the CFC has legal seat in a black-listed State but it carries on the principal activity or is fiscally resident or has the seat of effective management in a non-black listed State where incomes are taxed; the CFC is located in a non-black listed country and operates in a black-listed State through a permanent establishment whose income is taxed in the former State. In general, it has to be regarded the overall taxation on the group with reference to the income produced by the CFC. In any event, it has to be proved the absence of tax avoidance purposes. An index of that is the regular distribution of profits to Italy. G. D’Abruzzo, *Le nuove regole in materia di imprese controllate estere al crocevia tra libertà di stabilimento ed abuso delle forme giuridiche*, Bol. Trib., 2011, 1073, arguing from the provision of paragraph 8-*bis*, Article 167, believes that in order to fulfill the escape of let. b) the CFC incomes have to be charged with (at least) a 50% taxation of the corresponding Italian one.

<sup>309</sup> The current formula of Article 110, para 10 is the result of the amendments by Article 1, para. 83, let. h), No 1), Law No 244/2007. The ministerial decree ex Article 168-*bis* has to be enacted yet. Thus, in the meanwhile it has to be taken into consideration the Ministerial decree 23 January 2002 “*Non-deductibility of expenses and other negative items arising from transactions with enterprises domiciled in States or territory having a preferential fiscal regime*”. Indeed, with Article 2, Decree of the Minister of Economics and Finance 2010 the list included in Article 1, ministerial decree 23 January 2002 has been updated by removing “*Cipro*”, and from the list in Article 3 - concerning certain persons and activities located in the indicated States - “*Malta*” (No 9) and “*Corea del Sud*” (No 3) have been removed.

<sup>310</sup> Apart from merely procedural aspects that are requested, like the separate indication in the tax return.

<sup>311</sup> The interaction of the two different regulations is dealt of in para 12, Article 110, where it is prescribed that paras 10 and 11, Article 110 do not apply to the transactions carried on with non-resident persons which are subjected to Article 167 or 168 TUIR on controlled foreign companies.

First of all, paragraph 10, second part, provides that the deduction is allowed when the transactions are carried on with enterprises resident or located into EU Member States or States of the SEE that are included into the list of the ministerial decree ex Article 168-*bis* TUIR<sup>312</sup>.

Secondly, here the taxpayer is not obliged to raise a query for a ruling. Instead, it is provided that before issuing a tax assessment the tax administration has to serve a notice where the taxpayer is informed of the possibility of giving the above-mentioned proof by 90 days. If the proofs produced are not deemed sufficient to avoid the denial of the deduction, the tax administration has to specifically give reasons in the tax decision issued.

#### 11.4.1.1 Proof as to the transactions' reality

Unlike CFC rules, the limitation to the deduction of the “black-list costs” does not necessarily involve enterprises of the same group. It is, indeed, likely to concern transactions carried out with third parties<sup>313</sup>. This implies a certain difficulty in proving the circumstance laid down by let. a), i.e. the reality of the foreign enterprise, as such a proof requests an active collaboration of the third party, especially in terms of documents' delivery.

It follows the importance of the second escape provided for by paragraph 11, which is fulfilled by giving evidence of the economic interest surrounding the transaction carried on with that party located into a low-tax jurisdiction and also of the concrete realization of that operation. Under this escape, the economical convenience of the operation has to be shown.

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<sup>312</sup> The same is provided by paragraph 12-*bis* of Article 110, which extends the provisions of the previous paragraphs 10 and 11 to the supplies of services from the freelances domiciled in States different from the ones identified by the ministerial decree ex Article 168-*bis*. Afterwards, it is said that the extension does not apply to freelances domiciled in States of the EU or SEE included in the above mentioned list.

<sup>313</sup> When firstly introduced with Article 1, para 2, Law 30 December 1991, No 413 – that added paras 7-*bis* and 7-*ter* to Article 76 TUIR at that time in force – the limitation to deductions of black-list costs applied to the transactions between a resident enterprise and a foreign company that controlled ex Article 2359 of the Civil Code the former or was controlled by the former or by the same company the controlled both of them. Afterwards, with Article 1, Law 21 November 2000, the range of application was extended to all the transactions between resident enterprises and enterprises domiciled in extra-UE tax heavens, irrespective of the control-relation, in line with the recommendations emerging from the OECD report of 1998 on harmful tax practices. At the same time, however, the escape was confined to the circumstance that the foreign enterprise “*carried on principally an actual industrial or commercial activity in the market of the country where it was resident*”. The last amendment was criticized because it rendered the contrary proof difficult for the Italian enterprises. Indeed, they were not allowed to prove the genuineness of the transaction, instead they had to prove that the foreign party carried on a real economic activity that mainly addressed the market of residence. In the light of this, the enactment of the ministerial decree including the extra UE black-listed States had been postponed and by virtue of the Law 28 December 2001 the previously in force escapes were reintroduced.



Once again, it can be observed that the tax authorities' evaluation enters the choice done by the resident person in order to verify if it is guided by fiscal reasons only. This, not only when it is justified in the light of the provision, as with the escape at hand, but also when the law seems to request a merely objective inquiry, as in the escapes discussed in the following paragraph.

#### **11.4.2 Proof of the economic activity's reality in the rules on CFC and on the limitation to the black-list costs' deduction**

The analysis of the tax administration's practice – resulting from circular letters and tax rulings – shows a tendency to standardize the interpretation/application of the escapes provided for by Articles 167, para 5, let. a) and 110, par. 11, notwithstanding the different literal data<sup>314</sup>.

As said, the former requests the proof that the foreign person carries on an actual industrial or commercial activity as its main activity in the market of the State where it is located. Whereas the latter demands the evidence of the carrying on of an actual commercial activity.

Even before the amendment of the first escape, which has replaced the reference to the 'foreign State' with the narrower reference to the 'market' of the same State, the tax authorities used to request a 'rootedness with the territory' where the subsidiary was established. The same holds also with regard to the second escape, even though a reference to the market initially introduced by the Law No 342/2000 has been quickly removed. As a consequence of this interpretation, the resident enterprise may be (and in fact is) called to prove that the foreign subsidiary/party is connected to the host territory. A connection which can result, for instance, from the supplying or clients. And that, in the view taken by the tax administration, is a clear sign of juridical-economic reasons supporting the establishment of a subsidiary or transactions with a party (possibly related) in low-tax jurisdiction<sup>315</sup>.

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<sup>314</sup> *Ex multis*, Circular letter 26 gennaio 2009, No 1/E.

<sup>315</sup> Critical on the assimilation of the two escapes A. Iannacone, *La dimostrazione della "prima circostanza esimente" per disapplicare la normativa CFC e l'art. 110, comma 10 del Tuir: è giustificata una assimilazione delle due norme e quale importanza hanno le interrelazioni dei soggetti non residenti con il "mercato locale" del Paese estero?*, Nota a Risoluzione Agenzia delle entrate – Direzione Centrale Normativa e Contenzioso, 8 aprile 2009 n. 100/E, Riv. Dir. Trib., 2009, 112 et seq., to which I refer for the indication of further documentation. The Author underlines how Article 110, para 11, by referring to a 'commercial' activity covers every activity consisting of the carrying on of a commercial enterprise ex Article 55 TUIR, so that it is broader than the formula used by the CFC regulation (including activities ex

This interpretation is in line with the letter of paragraph 5, let. 5), Article 167 TUIR, as amended, though as unanimously warned a narrow application of the escape would discourage the investments abroad and would go beyond the purpose of fighting against international tax avoidance. As to the second escape – the one provided for by Article 110, para 11 TUIR - the interpretation followed by the tax administration cannot be explained in view of the provision, as the latter does not requests a connection to the host State, for the absence of which the domestic party could not be in any case considered responsible.

### 11. 5 Brief conclusions

It has been observed that the CFC rules imply a sort of shifting of the tax event from the possession of income to the existence of the income<sup>316</sup>, which might be not in line with the ability to pay principle.

However, the main doubts concern, as we will see later on, the EU point of view.

In this regard, it can be already observed that what appears from the provisions under discussion and their recent amendments is the awareness of the Italian legislator about their potential incompatibility with EU law. Indeed, while the ministerial decree ex Article 168-*bis* has to be enacted yet, the black-list included in the ministerial decrees in force has been revised by removing the residual EU Member States. This, with regard to the CFC rule laid down by paragraph 1, Article 167 (CFC) and also as to Article 110, par. 10 (limitation as to the deductibility of costs).

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Article 2195 Civil Code only). Moreover, it does not include any reference to the place where the activity is undertaken, so that this element should not enter the evaluation by the tax administration, in line with the parliamentary evolution of the provision and the *ratio*. The advise expressed by the tax authority in the ruling commented (8 aprile 2009 n. 100/E), goes in the opposite direction. It has to be firstly said that according to Article 11, para 13, Law No 413/91, the taxpayer is exempted from giving proof to the contrary during a tax proceedings when the taxpayer has submitted a query to the tax administration as to the nature and tax treatment of the transaction that is going to carry on, in accordance with Article 21 of the same law. The case concerned a permanent establishment in Italy of a German company, which asked the non-application of Article 110, para 10 with regard to the costs met cause of the transactions with a third company of the same group located in Switzerland. The latter was located into a black-listed State and classified among the mixed companies, i.e. benefiting from a preferential tax treatment to which the Italian limitation as to the costs' deduction applies. The tax administration denied the non-application of Article 110, para 10 as the proof of the existence of an organization (office, staff) and the directional seat in Switzerland was not enough for the purpose of considering the activity (supply of intangible services to foreign clients) carried on in that territory. According to the ruling, in order to consider an enterprise actually located in a certain territory it has to be integrated with it and to take constantly part to the economic life of it. Given the lack of a 'structural connection with the local economy' the tax administration excluded the existence of juridical-economical reasons justifying the establishment of a company in Switzerland. In any case, the taxpayer is given the possibility to accomplish his onus of proof during the tax proceedings, in order to get the deduction of the concerned costs.

<sup>316</sup> G. Fransonì, *L'errore di fondo e le "ragioni" del Fisco*, *Dialoghi tributari*, 2009, 366. In this way it would follow a sort of fiscal neutrality according to S. Garufi, *La nuova disciplina delle CFC*, cited above, 637.

The same awareness has led the legislator to draw the contrary proof to the CFC rule concerning the white-list Member States by making use of a formula used by the EUCJ. It is quite evident how that escape differs from the above mentioned. Clearly, a contrary proof consisting *de facto* into a justification of choice as to the location abroad or the transaction with foreign parties would be unthinkable in the context of the internal market. It has to be investigated, however, in what extent such CFC regulation as interpreted by the national authorities is in line with the EU Law. In particular, the compliance costs put on the domestic parents and the prevention from giving proof to the contrary in front of a judge when the advanced ruling has not been asked, are relevant in that regard.

## **12. Transfer pricing under Article 110, para 7, TUIR**

Dealing with anti-abuse provisions having an international relevance, the national regulation of the transfer pricing must be mentioned.

It has to be immediately said that it is a very complicated issue that cannot be exhausted in this seat, as it implies the consideration of different methods and international standards. To our purpose, it is interesting in the extent to which it appears to consist of a legally defined predetermination of the prices facing cross-border inter-company transactions. Moreover, similarly to the anti-abuse provisions analysed so far it in practice affects directly the position of the taxpayer upon which several (administrative, accounting, documentation) obligations lie, even irrespective of a possible tax assessment.

The rule on transfer pricing is included in Article 110, para 7, TUIR, pursuant to which *“The items of income deriving from transactions with non-resident companies, which directly or indirectly control or are controlled by the [domestic] enterprise, or are controlled by the same company controlling the [domestic] enterprise, are evaluated on the basis of the normal value of the goods transferred, the services supplied and the goods and services purchased, determined according to paragraph 2, if a higher income results”*. Paragraph 2 of Article 110 cited in para 7 refers to Article 9 TUIR, which in turn at para 3 defines the concept of ‘normal value’ as *“the price or consideration established on average for goods and services of the same or similar type, in condition of fair competition and at the same phase of marketing, at the time and in the place where the goods and services have been respectively purchased or supplied or, failing the same time and place,*

at the closest”<sup>317</sup>. Therefore, in the Italian tax system the ‘normal value’ embodies the criterion for determining the arm’s length value of intra-group transactions. It refers to the price that would be applied under fair market conditions.

### 12.1 Transfer pricing and burden of proof

The wording of para 7 gives rise to several questions, in particular as regards the juridical qualification of the rule (whether including an irrebuttable presumption, a rebuttable presumption or a pure legal definition), the effects on the distribution of the burden of proof and the obligations placed upon the parties involved.

At a first sight, the provision is construed as a rule fixing the price of goods and services in case of transactions among related parties, thereby disregarding the (possibly different) price agreed upon by them. As a consequence – this is plain both in the doctrine and in the jurisprudence – it states the juridical criteria that must be followed for the purpose of determining the taxable income to be declared in the tax return, irrespective of the subsequent (only possible) verification by the tax authorities. On the other hand, looking at the provision *per se*, it seems not to affect the distribution of the burden of proof.

In several decisions the Supreme Court ruled in this sense. In particular, it held that the burden of proof lies with the tax authorities pursuant to the general rule (Article 2697 Civil Code). Under this view, the tax office was requested to provide the reasons for the assessment of a higher amount of taxable income, which included not only the proof that the transfer prices were not at arm’s length, but also that the overall tax burden in Italy was greater than that in the states where the related parties were located. Thus, the tax authority had to prove the tax advantage justifying the (abnormal) transfer price. Only once such a proof was fulfilled by the tax authority, it was up to the taxpayer to prove that the transaction was not justified only in view of an undue tax advantage. To support such conclusion, the Supreme Court classified para 7 among the anti-avoidance provisions originating by the EU law doctrine of abuse of law and national anti-abuse legislation. The

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<sup>317</sup> Para 3 of Article 9 TUIR continues by stipulating that, when possible, the normal value is to be determined according to the price list or to the tariff of the purchaser/supplier or, in the absence of them, according to the price list and market list of the Chamber of Commerce or the professional tariffs. For the goods whose price is normatively regulated the provisions in force needs to be regarded. Ultimately, para 4 provides for a special regulation as regards shares and other financial instruments.

transfer pricing rule was thus deemed as combating the ‘manoeuvres on the disclosed price’ and not the concealment of the price<sup>318</sup>.

More recently, the Supreme Court has ruled by explicitly excluding that para 7 contains a (legal rebuttable) presumption as to the receiving of a consideration different from the one agreed upon and thus by disregarding the actual business reasons in the light of which it has been fixed by the parties at a lower amount<sup>319</sup>.

Ultimately, it seems that there has been a sort of *revirement* in the jurisprudence of the Supreme Court on the issue of transfer price under the profile of the burden of proof and the juridical qualification. In a (non-isolated) decision handed down on the 8<sup>th</sup> of May 2013, the Court has held that:

*“It has to be primarily underlined that the so called transfer pricing embodies, under the economic perspective, a distortion of the principle of fair competition. This, in the sense that, transactions involving companies of the same group having their seat in different States take place according to prices that do not correspond to the one quoted in a level playing field. Thus, the phenomenon gives rise to the shifting of taxable base and it permits to remove taxable income from States with a higher taxation. In the light of safeguarding the balanced allocation between member states of the power to tax, domestic rules aimed at combating transfer pricing have been introduced. Such rules adopt the principle of the business transactions’ normal price included in Article 9, para 1, of the OECD Model. The same principle have been adopted in Italy, in the text applicable *ratione temporis*, by Article 76, para 5, D.P.R. n. 917 of the 1986 [now, Article 110, para 7]. Alike in the other States, the Italian regulation of transfer pricing disregards the proof of a domestic higher taxation. As a matter of fact, such regulation is a more advanced defence in respect of the one combating directly tax avoidance. Thus, the tax avoidance does not have to be proved, because such regulation is intended to contrast the business phenomenon *per se*. Indeed, among the elements of the norm combating transfer pricing included in Article 76, para 5,*

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<sup>318</sup> *Ex multis*, Supreme Court, 13 October 2006, No 22023; Supreme Court, 15 May 2007, No 11226; Supreme Court 25 March 2003, No 4317. See P. Valente, *La giurisprudenza della Corte di Cassazione in materia di transfer pricing*, Il fisco, 2012, 7062.

<sup>319</sup> Supreme Court 31 March 2011, No 7343: “*The provision [Article 110, para 7, TUIR] does not contain at all a presumption (in case, a legal one; if iuris tantum, with the possibility of the counter proof) as to the receiving of a consideration different from the one agreed upon by the parties, because it simply states the only legal criteria to be adopted for the evaluation of the specific business transaction for income tax purposes, irrespective of the consideration that has been actually negotiated and thus with the absolute irrelevance of the concrete business reasons that have brought the parties to fix it at a lower amount*”. See M. D’Avossa, *Transfer price e onere della prova*, Note to Regional Tax Court 10 June 2011, No 63, *Rass. Trib.*, 2012, 503 et seq., in particular at p. 507.

*D.P.R. n. 917 of the 1986 there is not the domestic higher taxation. Again, it is not necessary to prove the tax avoidance. Hence, it is only necessary the existence of transactions among related enterprises. Instead, it lays on the taxpayer, according to the ordinary rules on the closeness to the proof as set forth by Article 2697 Civil Code, to give evidence that the transactions took place on the basis of market values which are normal under Article 9, para 3, D.P.R. 917 of the 1986. Pursuant to the latter provision, as well known, normal prices of goods and services are those established in a 'level playing field' with reference, when possible, to price lists and tariffs normally used (Supreme Court No 11949 of 2012; Supreme Court No 7343 of 2011). This does not exclude other means of proof, which nonetheless the taxpayer has not produced. As a consequence, the Regional Tax Court could not expect from the tax authority the proof of the tax avoidance, and in particular the proof of a more favourable taxation pursuant to the foreign legislation and the abnormality of the intra-group transfer prices."*

In line with a similar decision handed in 2012 (No 11949)<sup>320</sup>, the Court appears to qualify the provision as a rule aimed at combating the phenomenon of transfer pricing which undermines the correct allocation of the power of taxation between different States.

Apparently, the tax authorities are not requested to prove the abusive scheme, being rather sufficient to give evidence of the (objective) conditions of application of the transfer pricing rule and, presumably, the divergence between the value declared and the one deemed as being normal. In this case, the taxpayer is charged with the burden of proving that the transfer prices with related parties are in line with those applied to transactions with third parties, and at any rate that they are 'normal' under the meaning of Article 9, para 3 TUIR<sup>321</sup>.

At any rate, there is not a settled case-law on the issues of the nature of the Italian transfer pricing rule and the division of the burden of proof between tax administration and taxpayer.

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<sup>320</sup> Supreme Court, 13 July 2012, No 11949.

<sup>321</sup> It has to be noted that looking at these decisions one can see that in these decisions the issue of the transfer pricing regulation is inextricably related to the one of the deductibility of costs. This brings the Court to assert that the burden of proving the existence and inherence of such costs, which in intra-group transactions implies the proof of the normality of the prices of the goods and services transferred, is placed upon the taxpayer rather than on the tax authorities.

## **12.2 Transfer pricing and anti-avoidance rules**

The Supreme Court's judgments mentioned in the previous paragraph show that up till to now there is not a uniform, settled view of para 7 within the case-law.

In fact, the interpretation of the norm depends on the rationale assigned to the domestic transfer pricing.

On the one side, it could be argued that the provision belongs to the genus of anti-avoidance rules and it presumes that given certain conditions (intra-group transactions involving companies located in different States) transfer prices that would not be established under a level playing field are agreed upon for the purpose of obtaining undue tax advantages. To support such view, one could note that the national legislation does not include a transfer pricing applicable to merely internal intra-group transactions, i.e. where all the parties involved are located in the State's territory. This could mean that the regulation of international situations is aimed at tackling the shifting of taxable base to tax heavens, as they are assumed as implying a higher risk of tax avoidance.

However, we will see that in these cases a further interest enters the evaluation of the legislator; an interest which receives protection at EU level and consists of the proper allocation of the power to tax between different States<sup>322</sup>. Moreover, an anti-avoidance *ratio* would imply the distinction between the States or territories where the foreign related party in an intra-group transaction is located, as with the provisions in the matter of tax residence, CFC rules, deductibility of costs with companies resident in black-listed States.

Thus, the anti-avoidance construction of the domestic transfer pricing is questionable.

It seems to have been set aside in the more recent judgments of the Supreme Court. In these decisions, the Court appears to 'lighten' the tax authority's burden of proving the violation of the provision to the disfavour of the taxpayer, on the grounds that he is the closest to the proofs from which the observance of the 'normal value' standard can be inferred.

In the light of the same reasons, Article 26, Law decree No 78/2010 (converted with amendments into Law No 122 of the 30 July 2010) has introduced in the national tax system specific documentation fulfilments with regard to transfer pricing, which if complied with might be relevant in order to avoid the application of administrative penalties on transfer pricing violations. A further paragraph (2-ter) has been inserted in

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<sup>322</sup> The issue of the transfer pricing will be dealt with later on as the Belgian transfer pricing has been evaluated by the ECJ in the SGI case.

Article 1, Presidential decree No 471/97 (legislation on administrative penalties), pursuant to which the penalties provided for by Article 1, para 2, are not applicable when two conditions are jointly met: a) the taxpayer has filed a communication which has been submitted to the tax authorities together with the tax return, where it has declared that he has appropriate transfer pricing documentation: b) during possible tax investigations, the taxpayer provides the tax authorities with appropriate transfer pricing documentation. Such documentation requirements are not binding, as they have been thought in order to strengthen the cooperation between tax administration and taxpayers. The latter may benefit from the exclusion of the administrative penalties in case of an increase in taxable income due to transfer prices' adjustments, as long as they fulfil the conditions set in para 2-ter and in the implementing measures<sup>323</sup>. On the other hand, the information given by companies as to the transactions with related parties render easier the controls by the tax authorities and more effectively the selection of the taxpayers to put under investigation.

### 12.3 Brief considerations on the nature of the domestic transfer pricing

In conclusion, it has to be noted that from the interpretation of para 7, Article 110, which prevails within the case-law and the scholars<sup>324</sup>, it is certainly possible to infer that such provision does not concern directly the powers of investigation and assessment of the tax authorities. Instead, it is deemed as a rule that affects the determination of the taxable income by the taxpayers in their tax return. In other words, as such the provision does not appear to be a probative (or procedural) one, but it has rather a substantive nature. In fact, given an intercompany transaction involving companies located in different States, it prescribes to consider the market value for income tax purposes, being not relevant for the tax legislator any other value. In this view, the provision could be classified as being an

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<sup>323</sup> Indeed, it has to be clarified that the documentation that needs to be provided by the taxpayer must comply with the requirements specified by the Revenue Agency's detailed regulation, issued on 29 September 2010 (No 2010/137654). See also the Circular letter 15 December 2010, No 58/E. For an in-depth examination of the new documentation requirements introduced with Law decree No 78/2010 see A.M. Garufi, *La nuova disciplina in tema di documentazione dei "prezzi di trasferimento"*, *Rass. Trib.*, 2011, 1444 et seq.

<sup>324</sup> A.M. Gaffuri, *La nuova disciplina in tema di documentazione dei "prezzi di trasferimento"*, cited above, at p. 1468, observes that the transfer pricing differs from the traditional model of tax avoidance behaviour. The latter is characterized by the circumvention of a tax provision, which only formally is abided by. By contrast, the ploy on transfer prices determine an open and direct violation of a legislative provision. If the taxpayer does not declare the market value for tax purposes, he explicitly behaves in contrast with Article 110, para 7 TUIR. In this view, "it is necessary to consider the market price as it was the one actually negotiated and paid. Being this the only amount that can be reported in the tax return, in the end it embodies, in the context of the legislative provision, the real one".



irrebuttable presumption, or more correctly a legal determination or definition of the value: it refers to the normal value as if it was the one negotiated and paid by the parties.

Once having stressed this substantive nature, the consequences in terms of proof to be given in a possible tax trial need to be taken. If the tax administration issues a tax assessment contesting the abnormality of the transfer prices, the taxpayer is requested to prove that the goods or services have been transferred at the market value. By contrast, if para 7 was interpreted as including a rebuttable presumption of law according to which the parties have established a price different from the 'normal' one in view of an undue tax advantage, and thereby authorising the tax authority to re-determine the taxable base on the basis of the 'normal value', then the taxpayer would be requested to prove the absence of any tax avoidance scheme.

### **13. Conclusion**

Before turning to deal with tax law presumptions within the Belgian tax system, and leaving more general considerations for the conclusions to Chapter II, some lines need to be drawn concerning the Italian tax system.

In the Italian experience, the role played by tax law presumptions as means of proof of one or more elements of the tax obligation, in the different context in which such obligation is relevant, has been very much debated by the scholars.

To this debate, an important contribution has surely been derived from the numerous Constitutional Court's rulings on irrebuttable and rebuttable presumptions, from which the parameters of compatibility with the legal order have been progressively laid down. Summarizing, the Constitutional Court employs an examination of the legal presumption (both irrebuttable and rebuttable) concerned which focuses on the rationality of the inference and on the correspondence to the normal course of events.

The most relevant parameters of evaluation are the principle of reasonableness, the ability to pay principle, and the right of defence. In principle, the latter should concern rebuttable presumptions only, otherwise the irrebuttable one would be always inconsistent with the Constitution. The examination of some decisions, however, shows that the absence of the possibility to rebut a presumption may enter the evaluation of rationality of the irrebuttable presumption itself, so that it is found to be non-rational. With regard to rebuttable presumptions of law, the Court does not confine the evaluation to the defence rights of the taxpayer, as one would expect given that they affect the division of the burden of proof, but

most of the time goes to verify if they comply with the ability to pay principle. This is presumably because it gathers the substantive effects on the definition of the tax obligation that may derive from the single presumption concerned. This is evident, for instance, with regard to the estimated method of assessment based on the taxpayer's spending capacity or the presumptions provided in the context of the banking inspections carried out by the tax authorities. The Court checks their compatibility with the principle of ability to pay, apart from the right of defence. Finally, from the decisions of the Court a distinction between irrebuttable presumptions of law and similar notions (typifications, legal definitions, emerges. The former are requested to reflect a rule of experience, while the latter are only requested to be rational.

Yet, several questions concerning the classification of certain presumptive provisions and the consequences in terms of the distribution of the burden of proof are still open. In this Section, only some examples were given, but they are sufficient to mean that classifying certain presumptive provisions is not an easy challenge. For instance, the estimated methods of assessment are in between legal presumptions and presumption of fact, and this affects the extent to which the tax administration may rely on such instruments when issuing a notice of assessment and the taxpayer may contest the presumptive inference. When the provision covers a matter harmonized or concerns cross-border situations, the question has also significant implications in terms of consistency with EU law. A good example of this is the transfer pricing rule. It is formulated as a rule which basically implies that the taxpayers have to report in their books the prices at the arm's length value. This seems to be the more recent interpretation stemming from the case law of the Supreme Court, but there is not settled case-law on the issue. If, by contrast, the provision was interpreted as presuming tax avoidance facing transactions with non-resident related companies, then the tax authorities should at least prove the facts on which the presumption is based and the taxpayer would be allowed to prove not only that the prices agreed upon are at the market value, but also that, irrespective of this, there are commercial reasons justifying the transaction. Similar issues, in particular in terms of the concrete possibility for the taxpayer to give proof to the contrary have been posed dealing, on the one side, with the legal presumptions that in the field of VAT simplify the assessment and detect tax evasion; on the other side, with regard to the specific anti-avoidance rules (tax residence, CFCs) that the Italian legislator has introduced over the last years. Notably, for

some of them, the Italian legislator appears to acknowledge the risk of conflict with EU law, and in fact it has recourse to the formulas stemming from the EUCJ case law.

## **Chapter II - Section II**

### **Legal Presumptions in the Belgian Tax System**

#### **1. Tax law presumptions in the Belgian tax system**

The reasons why the Belgian tax system fits the purpose of this dissertation have been illustrated in the introduction to the second chapter. In that introduction, two main aspects have been emphasized, namely the circumstance that the literature has not yet confronted in a systematic way the topic of legal presumptions in the field of taxation on the one side, and the involvement of several national provisions in the valuation of consistency with the EU law on the other side.

While the latter issue will be dealt with in the subsequent chapter, the focus is now on the first issue, with the attempt to individualise the Belgian approach to tax law presumptions. In doing so, the same methodology adopted for dealing with the Italian tax system will be used. Firstly, the principles governing the compatibility of tax law presumptions within the national legal order are illustrated; afterwards, the main Constitutional Court's judgments are examined in order to highlight the reasoning adopted in the evaluation of consistency with the Constitutional framework; ultimately, in the light of the foregoing the principal tax law presumptions in force are discussed, with a view to their possible relevance in the EU context.

It should be noted at the outset that the Belgian approach may at first sight appear more 'pragmatic' in comparison to the Italian one. This, particularly, as the question of the nature of legal presumptions (whether substantive or procedural) and above all of their role in the context of the administrative proceedings (whether considerable as means of proof) remain in the shadow. Despite this, however, we will see how the overall approach does not differ much from the one identified when dealing with the Italian legal order. Accordingly, they still may be assumed as being representative of the *national* approach to tax law presumptions and confronted with the one of the European Union.

Below, the focus will be first on the Constitutional framework in order to set the stage. Afterwards, some Constitutional Court's decisions dealing with presumptive provisions in the light of the fundamental principle of equality will be examined, with the aim of inferring the scheme adopted in the evaluation of tax presumptive measures' compatibility with the legal order. After that, a brief mention will be made of some estimated methods of assessment, as they give rise to problems of classification. Ultimately, the most relevant presumptive provisions in force will be dealt with. As with the Italian tax system, the focus will be first on VAT, where a number of presumptions are set forth in the context of the administrative proceedings; afterwards, some presumptive provisions and regimes in the field of direct (income) taxation will be examined in view of their relevance at EU level (such as (semi-)general anti-abuse rule, transfer pricing adjustments, thin capitalization).

## **2. Burden of proof, 'probative' legal presumptions and fictions**

Generally speaking, although the Belgian tax literature has not inherited from the civil law doctrine the dispute concerning the nature of legal presumptions, nonetheless it seems to perceive the distinction between those presumptions having a dominant procedural nature, in the sense that they concern the powers of control and inquiry of the tax administration, and those presumptive provisions that may affect the design of the tax obligation. Such distinction, as we will see, emerges from the more recent contributions of the scholars concerning the general anti-abuse clause laid down in Article 344 of the Belgian Income Tax Code (hereinafter also CIR). Furthermore, within the Belgian Constitutional Court's case-law and doctrine a distinction between irrebuttable presumptions and similar notions referred to dealing with the Italian experience (legal definitions, predeterminations, and so on) does not clearly emerge, and is rather overlapped by the distinction between legal presumptions and fictions<sup>325</sup>.

Legal presumptions set out in the Belgian tax legislation are clearly distinguished from both fictions and presumptions of fact, as they are deemed to be means of proof peculiar to tax law. In this view, on the one side, unlike fictions they are not pure rules of substantive law, but they rather belong to the genus of the means for the ascertainment of the truth in

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<sup>325</sup> Both are classified by some Authors under the umbrella of 'vérité fiscale' which takes the place of the reality (i.e. real facts). See J.P. Bours, *Vérité et preuve fiscale*, in *La preuve et la difficile quête de la vérité judiciaire*, (ed.) G. de Leval, Liège, Anthemis, 2011, 236 et seq., where the expression 'présomptions légale probatoire' comes from. Cf. S. Sergier and M. Bentley, *Le droit fiscal se fonde sur des réalités: une fiction?*, R.G.F. 2000, 11 et seq.; J. Kirkpatrick, *Le droit fiscal se fonde sur des réalités*, J.P.D.F., 1969, 161 et seq.; Cf. J.-E. Krings, *Fictions et présomptions en droit fiscal*, in *Les présomptions et les fictions en droit*, Bruxelles, Bruylant, 1974, 162.

the context of a trial and earlier within the administrative proceedings. On the other side, they embody means of proof peculiar to tax law, alongside the means of proof common to other areas of law, amongst which are presumptions of fact.

The last distinction, in particular, would result from the wording of Article 340 CIR<sup>326</sup> and Article 59 of the Belgian VAT Code (hereinafter also CTVA)<sup>327</sup>, as well as from the legislation in the field of registration duty<sup>328</sup> and inheritance tax<sup>329</sup>. These provisions are unanimously interpreted as specifying that, in accordance with the general rule on the distribution of the burden of proof, it lies upon the tax administration the onus of proving the if and the amount of the additional taxation or the contravention to the provisions of the relevant code, and to that end it may have recourse to all the ordinary means of proof admissible, including the report of the tax administration's officers and except for the oath. Such a general rule does not apply and the burden is shifted upon the taxpayer where the tax administration may rely on legal presumptions, which over the last decades the legislator has been increasingly introducing in the view of simplifying the ascertainment of the relevant facts by the tax administration itself<sup>330</sup>.

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<sup>326</sup> Placed under Chapter IV, heading "*Moyens de preuve de l'administration*", it states that "*Pour établir l'existence et le montant de la dette d'impôt, l'administration peut avoir recours à tous les moyens de preuve admis par le droit commun, y compris les procès-verbaux des agents du Service Public Fédéral Finances, sauf le serment. Les procès-verbaux ont force probante jusqu'à preuve du contraire.*"

<sup>327</sup> At para 1 it stipulates that "*L'administration est autorisée à prouver selon les règles et par tous moyen de droit commun, témoins et présomptions compris, à l'exception du serment, et, en outre, par les procès-verbaux des agents du Service public fédéral Finances, toute infraction ou toute pratique abusive aux dispositions du présent Code ou prises pour son exécution, de même que tout fait quelconque qui établit ou qui concourt à établir l'exigibilité de la taxe ou d'une amende. Les procès-verbaux font foi jusqu'à preuve contraire*".

<sup>328</sup> Article 185, Code des droits d'enregistrement provides that "*Indépendamment des modes de preuve et des moyens de contrôle spécialement prévus par le présent titre, l'Administration est autorisée à prouver selon les règles et par tous moyens de droit commun, témoins et présomptions compris, à l'exception du serment, et, en outre, par les procès-verbaux de ses agents, toute contravention aux dispositions du présent titre et tout fait quelconque qui établit ou qui concourt à établir l'exigibilité d'un droit ou d'une amende. Les procès-verbaux font foi jusqu'à preuve contraire. (...)*".

<sup>329</sup> By the same token, Article 105, Code des droits de succession: "*Indépendamment des modes de preuve et des moyens de contrôle spécialement prévus par le présent code, l'Administration est autorisée à prouver selon les règles et par tous moyens de droit commun, témoins et présomptions compris, à l'exception du serment, et, en outre, par les procès-verbaux de ses agents, toute contravention aux dispositions du présent code et tout fait quelconque qui établit ou qui concourt à établir l'exigibilité d'un droit ou d'une amende. Les procès-verbaux font foi jusqu'à preuve contraire. (...)*". The distinction between 'moyens de preuve de droit commun' and 'moyen spéciaux de preuve' results from the code itself, as they respectively head Section I and II of the Chapter XII on the means of proof. Under Section II, as it will be mentioned later on in the text, a series of legal presumptions are set out.

<sup>330</sup> *Ex multis*, J.P. Bours, *Vérité et preuve fiscale*, cited above, 273, observes: "*L'allégeance prétendue au droit commun de la preuve, évoquée dans les articles 340 C.I.R. et 59 C.T.V.A., n'est donc que de façade. Il est vrai que la charge de la preuve du montant taxable d'un revenu pèse sur l'administration. Mais, trop souvent, celle-ci ne recourt aux moyens de preuve du droit commun que lorsqu'ils la servent. Cette administration a été, au fil des décennies, bardée par le législateur de textes spécifiques, de présomptions légales, de forfaits ou de fictions, qui sont autant de façon de travestir la réalité pour en extraire une*

## 2.1 The general rule on the division of the burden of proof in the context of the administrative proceedings

Articles 340 CIR and 59 CTVA cited above, as well as the similar provisions laid down in the legislation on registration duties and inheritance tax reflect (better, imply) the general rule on the division of the burden of proof, which in the Belgian legal order results from the combination of Articles 1315 of the Civil Code<sup>331</sup> and 870 of the Civil Procedural Code<sup>332</sup>. Pursuant to these provisions, the party who claims the execution of an obligation has to prove the facts on which it is based, whereas the counterparty who contests such claim by contending the payment or the extinction of that obligation has to allege the relating facts.

This holds true even when it comes to a tax litigation and the parties are the tax administration and the taxpayer. Similar to what has been illustrated when dealing with the Italian experience, the tax literature has adhered to a substantive approach, by giving relevance to the type of claim lodged (appeal against a tax administration's decision, a request for a reimbursement, etc.) by the taxpayer rather than to the role played in the context of possible legal proceedings before the court. The circumstance that it is always up to the taxpayer to bring an action against the tax administration does not imply that he is always (in the position of) the plaintiff. It has been significantly said that "*L' 'inversion' du contentieux n'induit pas un 'renversement' de la charge de la preuve*"<sup>333</sup>. It follows that, irrespective of the (formal) role vested within the legal proceedings, the party raising the tax claim, normally the tax administration, bears the burden of proving it, while the counterparty – normally, the taxpayer - may submit exceptions.

Having clarified this, it is worth mentioning that, with particular regard to the application of such rule in the context of the administrative proceedings, it has been observed that neither the obligations of cooperation upon the taxpayer nor the *ex officio* method of assessment derogate from it.

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*prétendue 'vérité fiscale'.*" As said in the text, under the profile of the possible divergence between the réalité and the so called 'vérité fiscale', the Author assimilates legal presumptions to other mechanisms, like fictions and flat-rate reckoning of the taxable base.

<sup>331</sup> «*Celui qui réclame l'exécution d'une obligation doit la prouver. Réciproquement, celui qui se prétend libéré doit justifier le paiement ou le fait qui a produit l'extinction de son obligation*».

<sup>332</sup> «*Chacune des parties a la charge de prouver les faits qu'elle allègue*». Cf. A. Decroës, *La procédure judiciaire fiscale*, J.D.F. 2000, 257 et seq.

<sup>333</sup> J.P. Bours, *Vérité et preuve fiscale*, cited above, 238. See Supreme Court 7 August 1941, Pas., 1941, I, 790. Hence, the tax authority bears the burden of proving the amount of the taxable income, while the taxpayer bears the burden of proving the possible deductions, exemptions and in general all the circumstances that may reduce the tax debt.

As to the first ones, in general they consist of obligations related to the delivering of information or documents (such as books, invoices and so on) regarded by the tax authorities as necessary in order to (re)determine the tax debt in the context of the administrative proceedings and before issuing a tax assessment. Though with different wordings, such obligations are laid down in the various codes and their infringement may give rise to administrative fines or to the possibility for the tax administration to have recourse to the *ex officio* method of assessment<sup>334</sup>.

In fact, they represent the other side of the coin in respect to the tax authorities' powers of investigation. Far from entailing the reversal of the burden of proof on the taxpayer, they rather confirm that the tax administration is due to justify its demand for payment.

As to the second one, it applies, for instance in the field of income taxation, in a series of listed hypotheses, among which the omission of the tax return and the infringement to one of the obligations set out in the relevant code. When one of such circumstances (alternatively) occurs, the tax authority is allowed to determine the taxable income presumably attributable to the taxpayer concerned on the grounds of the elements at its disposal<sup>335</sup>. At this point, Article 352 puts on the taxpayer the burden of proving the exact amount of the taxable income<sup>336</sup>, thereby fostering the idea that the method of assessment

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<sup>334</sup> Cf. M. Maus and S. Mercier, A. Delafonteyne (co-author), *Le contrôle fiscal en pratique*, Bruxelles, La Charte, 2009, 143 et seq.

<sup>335</sup> Article 351 CIR provides at para 1 that “*L’administration peut procéder à la taxation d’office en raison du montant de revenus imposable qu’elle peut présumer eu égard aux éléments dont elle dispose, dans les cas où le contribuable s’est abstenu: - soit de remettre une déclaration dans les délais prévus par les articles 307 à 311 ou par les dispositions prises en exécution de l’article 312 - soit d’éliminer, dans le délai consenti à cette fin, le ou les vices de forme dont serait entachée sa déclaration; - soit de communiquer les livres, documents ou registres visés à l’article 315 ou les dossiers, supports, ou données visés à l’article 315-bis; - soit de fournir dans le délai les renseignements qui lui ont été demandés en vertu de l’article 316; - soit de répondre dans le délai fixé à l’article 346 à l’avis dont il y est question.*» Once one of the listed circumstances occurs, the same article sets out upon the tax administration the obligation of notice prior to the issuing of the tax assessment and the right of the taxpayer to submit any observations. Para 2 indeed states that “*Avant de procéder à la taxation d’office, l’administration notifie au contribuable, par lettre recommandée à la poste, les motifs du recours à cette procédure, le montant des revenus et les autres éléments sur lesquels la taxation sera basée, ainsi que le mode de détermination de ces revenus et éléments.*» Ultimately, para 3 reads as follows: “*Sauf dans la dernière éventualité visée à l’alinéa 1<sup>er</sup> ou si les droits du Trésor sont en péril pour une cause autre que l’expiration des délais d’imposition ou s’il s’agit de précomptes mobilier ou professionnel, un délai d’un mois à compter du troisième jour ouvrable qui suit l’envoi de cette notification est laissé au contribuable pour faire valoir ses observations par écrit et la cotisation ne peut être établie avant l’expiration de ce délai.*» If the tax administration issues the tax assessment, thereby disregarding the observations submitted by the taxpayer, then it is requested to justify its decision by virtue of Article 352-bis CIR.

<sup>336</sup> It states that “*Lorsque le contribuable est taxé d’office, la preuve du chiffre exact de ses revenus imposables et des autres éléments à envisager dans son chef lui incombe* » and at para 2 adjusts its aim: “*Toutefois, cette preuve incombe à l’administration si: - le contribuable établit qu’il a été empêché par de justes motifs soit de communiquer les livres, documents ou registres visés à l’article 315, alinéas 1<sup>er</sup> et 2, soit de communiquer les dossiers, supports ou données visés à l’article 315-bis, alinéas 1<sup>er</sup> à 3, soit de*

at hand affects the division of the burden of proof. Instead, it is argued, such burden remains on the tax authority. Given the lack of information due to the non-cooperative conduct of the taxpayer, it may determine the tax obligation by way of presumptions of fact based on the elements available. When receiving a tax assessment under the *ex officio* procedure, the taxpayer may contest the presumptions *hominis* used by the tax authorities (e.g. by contending that they are unreliable, the known fact does not exist etc.) or may give further evidence supporting a different determination of the taxable income<sup>337</sup>.

In fact, the *ex officio* method of assessment does not *per se* (technically) reverse the burden of proof on the taxpayer, but its purpose is to allow the tax authority to determine the income of the taxpayer where it cannot rely upon the necessary documentation, such as the tax return or the accounting records. Nonetheless, it *de facto* exempts the tax authority from proving analytically the composition of the taxpayer's income(s): it may presume the taxable base to be attributable to the taxpayer in a certain amount and it is up to the latter to give evidence to the contrary<sup>338</sup>.

More interpretative difficulties in relation to the division of the burden of proof and to a certain extent in the light of the constitutional framework arise from Articles 341 and 342, as well as Article 344 CIR, which will be discussed later on in this section. Though Articles 341 and 342 (except for the provision concerning non-resident taxpayers carrying on an activity in Belgium) have a merely internal character, it is worthy to concisely deal with them too in order to frame the issue of tax law presumptions in the Belgian legal order,

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*fournir dans le délai les renseignements qui lui ont été demandés en vertu de l'article 316, soit de répondre dans le délai fixé à l'article 346 à l'avis dont il y est question; la taxation a été établie sur la base mentionnée dans l'avis visé à l'article 346 avant l'expiration du délai prévu par ledit article parce que les droits du Trésor étaient en péril.»*

<sup>337</sup> In this way J.P. Bours, *Vérité et preuve fiscale*, cited above, 240-241. He observes that, mainly based on Article 352 CIR, «*Il se dit souvent que, dans l'hypothèse du recours par l'administration à la procédure d'imposition d'office, il y a 'renversement de la charge de la preuve'*». He disagrees, and after having cited Supreme Court 23 May 1959, Pas., 1959, I, 669, holding that “*le montant présumé [de revenus imposable] est le montant déterminé par présomptions. Or, le système par présomptions exclut le système par simple appréciation, fût-elle faite (...) en conscience*» in order to argue that a reversal of the burden of proof is not conceivable, he concludes that «*L'administration conserve donc la charge de la preuve du montant du revenu imposable, même lorsqu'elle recourt à la procédure de la taxation d'office. Lorsqu'il reçoit notification de semblable taxation, le contribuable peut soit faire prévaloir que les présomptions sur lesquelles l'administration s'est fondée sont insuffisantes, voire inexistantes (auquel cas la taxation d'office est arbitraire), soit combattre les présomptions sur lesquelles se fonde le fisc en invoquant d'autres, et donc en apportant la preuve du montant de ses revenus.*» *Contra*, the majority of the scholars. See A. Tiberghien, *Manuel de droit Fiscal 2011-2012*, Bruxelles, Kluwer, 723, according to which the *ex officio* method of assessment implies the reversal of the burden of proof. In accordance with the case-law of the Supreme Court, it is clarified that it does not suffice to merely contest the amount of income as determined by the tax authority, being rather necessary the contrary proof to concern the “*chiffre exact des revenus*”.

<sup>338</sup> Obviously, the tax authority is required to prove the circumstances which ground to the *ex officio* method of assessment, and, where it makes use of presumptions *hominis*, the known facts.



and afterwards to focus on those provisions potentially relevant from the EU law perspective.

### **3. The principle of equality as the main ‘domestic’ parameter in the tax law presumption’s evaluation**

As said in the introduction to the second chapter, the lack of a systematic consideration of tax law presumptions in the Belgian legal order may be explained also in view of the constitutional framework and the relatively recent attribution to the Arbitration Court (afterwards, Constitutional Court) of the task of verifying the compatibility of the legislation with Articles 10 and 11 (in 1989), 170 and 172 (in 2003)<sup>339</sup>, dealing with equality and legality principles.

In the Belgian experience, the principle of equality basically embodies the only criterion in the light of which the consistency of tax law presumptions in respect of the constitutional framework is usually evaluated<sup>340</sup>. It plays a fundamental role, by requesting similar

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<sup>339</sup> In fact, with regard to the range of competences attributed to the Court, three main periods may be distinguished. Initially (1<sup>st</sup> October 1984-16 February 1989) the main task of the Arbitration Court concerned the distribution of competences among the decision-making powers at different levels (national, communities, regions). From 17 January 1989 (when the Special Law 6 January 1989 entered into force) the competence of the Court was extended to the control of the compatibility of single provisions of law (on request through an application for annulment or a preliminary question) with Articles 10, 11 and 24 of the Constitution. Ultimately, after the Reform of the Court by the Special Law 9 March 2003 (entered into force the 21<sup>st</sup> April 2003) it is also competent to verify the compatibility in respect of the entire Title II of the Constitution (“Belgians and their rights”) and the Articles 170 and 172 especially dealing with taxation. All the decisions of the Belgian Constitutional Court, which will be referred to in the text or in the footnotes, can be found at [www.const-court.be](http://www.const-court.be).

<sup>340</sup> It goes without saying that the principle of equality before the levy does not correspond to the ability to pay principle, which in other legal orders (like the Italian one) is laid down in the Constitution and limits the taxing power of the legislator by requesting taxation to be levied in accordance with the taxpayer’s capacity to contribute to public spending. On the role of the ability to pay principle in the European context, see C. Bardini, *The Ability to Pay in the European Market: An Impossible Sudoku for the ECJ*, Intertax, 2010, 2 et seq.; As observed by M. Bourgeois, *Constitutional framework of the different types of income*, in *The concept of tax in EU Member States*, (ed.) B. Peeters, Amsterdam, EATLP International Tax Series, Vol. 3, 2008, 97, the Belgian traditional approach to ability to pay seems to make it a non-legally binding guideline for the legislator. Nonetheless, in the Belgian tax system the ability to pay principle may be extracted from some provisions of the Belgian Constitution. Besides the principle of non-discrimination, Article 16 on the protection of the property right is relevant in this sense. See Arbitration Court 22 June 2005, No 107. Interestingly, this decision contains an explicitly reference to the ability to pay principle of the taxpayer: “B.12.2. *En portant le taux du tarif des droits de succession applicable « Entre toutes autres personnes » de 50 à 60 p.c. pour la tranche de 25.000,01 à 75.000 euros, de 65 à 80 p.c. pour la tranche de 75.000,01 à 175.000 euros et de 80 à 90 p.c. pour la tranche supérieure à 175.000 euros, l’article 1er du décret entrepris aggraverait la pression fiscale atteignant l’ayant droit sans lien de parenté ou de cohabitation légale avec le défunt à tel point qu’elle ne respecterait plus le principe de la capacité contributive du contribuable, ce qui créerait une discrimination entre les ayants droit recueillant un émoulement net supérieur à 25.000 euros*”. In another important point of the same decision the Court found disproportionate the provision of a (high) rate merely justified by budgetary interest: “B.15.6. *En l’espèce, le législateur décrétal a porté une atteinte disproportionnée à la fois au droit du testateur de disposer de ses biens et aux espérances légitimes qu’a le légataire de les recueillir, en fixant un taux qui est sans commune mesure avec les droits fiscaux exigés pour*

situations to be treated in the same way and different situations to be treated differently. When facing tax law presumptions, this implies that they cannot create any discriminations, and if they do, the different regulation has to be objective, reasonable and proportionate. The evaluation of reasonableness and proportionality (in terms of correspondence between means and aims pursued) of the single legal presumption is conducted in the light of the general principle of non-discrimination read in conjunction with the principle, according to which privileges in the matter of taxation are forbidden. Such evaluation concerns not only legal presumptions, but also fictions. Only for the former, however, is the possibility for the taxpayer to rebut the presumption taken into consideration.

It has to be noted that similarly to what has been illustrated with reference to the Italian tax system, the Belgian tax legislation includes some presumptive methods of assessment which have an ambiguous nature, in the sense that the reasoning is only generally drafted at the normative level while the tax authority is entitled to fill in the presumption of content. This holds true, in particular, as regards Articles 341 and 342 CIR, providing respectively the method of assessment by indices and by comparison, the latter being questioned so far under the parameters of equality and proportionality. When examining these methods of assessment, we will see how they might give rise to doubts with respect to the legality principle, also under the aspect of the legal certainty. So far, the question has been put under investigation by the Constitutional Court only with regard to Article 344 CIR, para 1, previous version, as its nature of ‘blanket norm’ was contended.

### 3.1 The principle of equality

The fundamental parameter in the light of which tax law presumptions are to be evaluated is the equality principle. It results from several articles of the Belgian Constitution and it has played a fundamental role before 2003 in order to enlarge the control of the Court, as it was read in conjunction with single rights or freedoms set out by the Constitution or other general principles like the principle of legal certainty and the right of defence.

To be precise, Article 10 provides the principle of equality (before the law), whereas the subsequent Article 11 states the principle of non-discrimination (referring to the exercise of

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*d'autres formes de transferts de propriété et avec ceux qui frappent d'autres catégories d'héritiers. S'il relève des choix politiques du législateur fiscal d'appliquer des taux différents aux différents impôts et de taxer différemment les catégories d'héritiers, il est manifestement disproportionné d'appliquer, en matière de droits de succession, un taux dont aucun objectif propre à la catégorie de contribuables visée ne justifie qu'il soit aussi élevé, en n'ayant égard qu'à l'objectif budgétaire poursuivi". Cf. Y. Hougardy, La capacité contributive, in Liber Amicorum Jacques Autenne, Promenades sous les portiques de la fiscalité, (eds.) E. Traversa and V. Deckers, Bruxelles, Bruylant, 135.*

rights and freedoms). Nonetheless, they have been constantly considered by the Court in its judgments as being inextricably interrelated and express the same (general) principle of equality and non-discrimination. In the case-law involving taxation, these articles are often recalled in conjunction with Article 172, para 1 of the Constitution, which prohibits privileges in tax matters and is therefore considered as specifying the equality and non-discrimination principle in tax law<sup>341</sup>.

It has been observed that in interpreting the principle of equality, the Belgian Constitutional Court has strongly been inspired by the case law of the European Court of Human Rights<sup>342</sup>, in particular where it does not prohibit all the distinctions, but only those ones that cannot be reasonably justified<sup>343</sup>. On several occasions the Court held that:

*“Les règles constitutionnelles de l’égalité et de la non-discrimination n’excluent pas qu’une différence de traitement soit établie entre des catégories de personnes, pour autant qu’elle repose sur un critère objectif et qu’elle soit raisonnablement justifiée. Les mêmes règles s’opposent, par ailleurs, à ce que soient traitées de manière identique, sans qu’apparaisse une justification raisonnable, des catégories de personnes se trouvant dans des situations qui, au regard de la mesure considérée, sont essentiellement différentes.*

*L’existence d’une telle justification doit s’apprécier en tenant compte du but et des effets de la mesure critiquée ainsi que de la nature des principes en cause; le principe d’égalité*

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<sup>341</sup> It stipulates: *«Il ne peut être établi de privilège en matière d’impôt»*. See J. Kirkpatrick, *L’égalité devant l’impôt en droit belge*, Bruxelles, Bruylant, 1975. Further specifications of the same principle may be found in Article 10, para 3, which prevents inequalities based on sex (*“L’égalité des femmes et des hommes est garantie”*) and Article 191 concerning foreigners (*“Tout étranger qui se trouve sur le territoire de la Belgique jouit de la protection accordée aux personnes et aux biens, sauf les exceptions établies par la loi”*).

<sup>342</sup> In this sense J. C. Scholsem, *L’égalité devant la Cour d’Arbitrage*, in *Liber Amicorum Prof. em. E. Krings*, Brussel, E. Story-Scientia, 1991, 773 et seq., in particular at 774: *«Comme on l’a déjà noté à de nombreuses reprises, cette définition s’inspire très étroitement de celle donnée par la Cour Européenne des Droits de l’Homme, notamment dans l’affaire ‘relative à certains aspects du régime linguistique de l’enseignement en Belgique’*. Though, the Author identified two main differences among the two definitions. First, the ECHR refers not only to the aim of the measure, but also to the ‘principes qui prévalent généralement dans les sociétés démocratiques’ in order to check the difference in treatment; second, it requests that ‘il est clairement établi qu’il n’existe pas de rapport raisonnable de proportionnalité entre les moyens employés et le but visé’, where the word ‘clairement’ seems to indicate that its control will concern only measures manifestly disproportionate. As to the first difference, the Belgian Constitutional Court has also referred to the ‘principes in cause’ from the judgment No 25/90 of the 5 July 1990.

<sup>343</sup> As clearly explained by I. Richelle and V. Sepulchre, *Non-discrimination at the crossroads of international taxation - Belgium*, Cahiers de droit fiscal international, Vol. 93A, 2008, 135, in particular at 146: *“The constitutional rule of equality in relation to tax implies that all those in the same situation are equally affected but it does not exclude a distinction being made on the basis of certain categories of individuals provided that the distinction is not arbitrary, i.e. that it can be objectively and reasonably justified. Likewise, the same rules also prohibit categories of individuals in situations which, in the light of the measure considered, are different, being treated in the same way, without an objective and reasonable justification being evident. The existence or non-existence of such a justification must be assessed in relation to the aim and effects of the tax drawn up as well as the reasonableness of the relationship of proportionality between the means employed and the aim sought.”*

est violé lorsqu'il est établi qu'il n'existe pas de rapport raisonnable de proportionnalité entre les moyens employés et le but visé»<sup>344</sup>.

Les articles 10 et 11 de la Constitution ont une portée générale. Ils interdisent toute discrimination, quelle qu'en soit l'origine. Ils sont également applicables en matière fiscale, ce que confirme d'ailleurs l'article 172 de la Constitution, lequel fait une application particulière du principe d'égalité formulé à l'article 10".<sup>345</sup>

With reference to the delicate relationship between the exercise of the legislative discretion and the margin for an interference by the Court, the latter held that:

*“Il n'appartient pas à la Cour d'apprécier si une mesure établie par la loi est opportune ou souhaitable. C'est au législateur qu'il revient de déterminer les mesures à prendre pour atteindre le but qu'il s'est fixé. Le contrôle de la Cour sur la conformité des lois, décrets et ordonnances aux articles 6 et 6bis de la Constitution [now, Articles 10 and 11] porte sur le caractère objectif de la distinction, l'adéquation des mesures au but recherché et l'existence d'un rapport raisonnable entre les moyens employés et l'objectif visé. La Cour n'a pas à examiner en outre si l'objectif poursuivi par le législateur pourrait être atteint ou non par des mesures légales différentes”.*<sup>346</sup>

From this wording we infer that the scheme followed by the Constitutional Court in evaluating single provisions of law normally runs through three main steps: the existence of a difference in treatment, which implies the ascertainment as to the comparability of the categories of persons treated differently<sup>347</sup>; if so, the control of the objective nature of the

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<sup>344</sup> *Ex multis*, Arbitration Court 21 March 1995, No 26, para B.3. Such a definition is «*totalemment centre sur le critère de proportionnalité*» according to T. Afschrift, *L'impôt des personnes physiques*, Bruxelles, De Boeck, 2005, 64 et seq. The same formula is in most of the judgments dealing with the issue, since the first one: Arbitration Court 13 July 1989, No 21.

<sup>345</sup> Among the others, Arbitration Court 8 July 1997, No 37, para B.7.

<sup>346</sup> Arbitration Court 13 October 1989, No 23, para B.2.7. Cf. Const. Court 4 July 1991, No 20: «*Lorsque la loi fiscale vise en même temps des contribuables dont les situations de revenus et d'avoirs sont diverses, elle doit nécessairement appréhender cette diversité de situations en faisant usage de catégories qui ne correspondent aux réalités que de manière simplificatrice et approximative. Il en est ainsi d'autant plus qu'en droit fiscal, l'efficacité des critères et le coût administratif de leur application doivent être pris en considération pour apprécier s'ils sont susceptibles d'une justification raisonnable. Ces éléments sont à prendre en considération pour vérifier si le législateur n'a pas excédé son pouvoir d'appréciation. (...) Il n'appartient pas à la Cour de décider si une mesure prescrite par la loi est opportune, ni de vérifier si le but poursuivi par le législateur pourrait également être atteint par d'autres mesures. (...)*»

<sup>347</sup> As warned in Const. Court 7 March 2007, No 36, where at issue was the distinction between the surviving spouse and the surviving cohabitant *more uxorio* resulting from Article 8, indent 6, 3°, Code de droits de succession, dealing with the taxable base, at para B.4.2. “*In ne faut pas confondre différence et non-comparabilité. La situation juridique distincte dans laquelle se trouvent le conjoint survivant et le cohabitant de fait survivant n'empêche pas que ces deux personnes puissent avoir reçu des rentes et capitaux qui ont été établis par suite de l'intervention de l'employeur du défunt avec lequel elles avaient une communauté de vie*». This leads the Court to reject the exception of incomparability and to turn to the control of the reasonableness of the measure: “*B.6.1. Il appartient au législateur fiscal compétent de fixer la base d'une imposition.*”

criterion on which the distinction is based<sup>348</sup>; ultimately, the possible reasonable justification in the light of the aim pursued, the effects of the measure and the principles in play, which includes the control as to the proportionality of the means employed in relation to the aim sought<sup>349 350</sup>. Instead, at least in its more remote judgments, the Court seems to

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*Lorsqu'il emploie à cet effet des critères de distinction, ceux-ci doivent pouvoir être justifiés de manière objective et raisonnable. B.6.2. La différence de traitement entre conjoints et cohabitants de fait se fonde sur un élément objectif, à savoir que leur situation juridique diffère aussi bien en ce qui concerne leurs devoirs personnels mutuels que pour ce qui concerne leur situation patrimoniale. (...) B.6.3. Le législateur peut, en matière de droits de succession, prendre des mesures qui sont en rapport avec l'objectif, manifesté en droit civil, de favoriser une forme de vie familiale qui implique les droits et obligations précités et qui, à son estime, offre de meilleures chances de stabilité. B.6.4. En n'accordant pas au cohabitant de fait survivant l'avantage que la disposition en cause accorde au conjoint survivant, le législateur a pris une mesure qui n'est pas dépourvue de justification compte tenu de l'objectif rappelé en B.6.3.». See Const. Court 16 February 2005, para B.5.: «Il existe des différences fondamentales entre les travailleurs indépendants, d'une part, et les travailleurs salariés, d'autre part, en ce qui concerne les régimes fiscaux qui leur sont applicables. Ces différences empêchent de comparer à tous égards ces catégories de personnes. La circonstance que l'indemnité de réparation d'une perte temporaire de revenus professionnels soit payée, fixée ou attribuée tardivement par le fait d'une autorité publique ou de l'existence d'un litige peut néanmoins avoir une incidence défavorable sur les impôts à payer, tant pour les travailleurs indépendants que pour les travailleurs salariés. De ce point de vue, ils peuvent être réputés comparables». After having found the situations as being comparable, the Court gave an insight into the ratio legis by referring to the preparatory work: «B.7. En adoptant l'article 93 du C.I.R. 1964, le législateur a voulu éviter les conséquences sévères que l'application rigoureuse de la progressivité de l'impôt des personnes physiques entraînerait pour les contribuables qui recueillent certains revenus ayant un caractère plutôt exceptionnel. Selon les travaux préparatoires, le législateur a voulu « freiner la progressivité de l'impôt, lorsque le revenu imposable comprend des revenus non périodiques» (Doc. parl., Chambre, 1961-1962, n° 264/1, p. 85; *ibid.*, n° 264/42, p. 126)». In the light of such purpose, it did not find the measure as being reasonably justified: «B.10. Le fait qu'il existe des différences fondamentales entre les travailleurs indépendants, d'une part, et les travailleurs salariés, d'autre part, et plus précisément le fait que les revenus des travailleurs indépendants peuvent varier d'une année à l'autre, alors que le salaire des travailleurs salariés est déterminé d'avance et n'est généralement pas soumis à des fluctuations incertaines, ne saurait, contrairement à ce que soutient le Conseil des ministres, justifier la différence de traitement en cause. En effet, le revenu imposable est en l'espèce constitué aussi d'indemnités de remplacement d'une perte temporaire de revenus, qui peuvent varier d'une année à l'autre aussi bien pour les salariés que pour les indépendants». It consequently upheld the preliminary question of inconsistency with the principle of equality. Cf. Const. Court 16 February 2005, No 38.*

<sup>348</sup> In some decisions, the Court verifies, alongside the objectivity of the criterion of distinction, also its 'pertinence' in respect of the purpose attained by the legislator. This seems to concern already the control of the existence of a reasonable justification. See, for instance, Const. Court. 28 March 2007, No 50, at para B.12.1.

<sup>349</sup> In this regard, it should be noted that the need for simplification pursued by the legislator with a certain measure that distinguishes amongst categories of taxpayers is not *per se* disproportionate. See for example, Arbitration Court 7 December 2005, No 181: «B.2. Il appartient au législateur fiscal compétent de fixer le tarif d'imposition et d'en établir les modalités. Lorsqu'il utilise à cet effet des critères de distinction, ceux-ci doivent être objectivement et raisonnablement justifiés. Les tarifs et modalités doivent être appliqués de manière égale pour toutes les personnes qui se trouvent dans une situation équivalente au regard de la mesure considérée et du but poursuivi, sous la réserve que le législateur fiscal doit pouvoir faire usage de catégories qui, nécessairement, n'appréhendent la diversité des situations qu'avec un certain degré d'approximation ». Cf. Const. Court 15 September 2004, No 151, at para B.7.; even more explicitly the Court clarifies that in the decision Const. Court 28 July 2006, No 126: «B.6. Pour ce qui est de la pertinence du critère de distinction employé, il convient d'observer au préalable qu'un législateur ne peut appréhender la diversité des situations qu'avec un certain degré d'approximation. Une telle différence de traitement n'est pas, en soi, inconstitutionnelle, à condition que les critères puissent être justifiés raisonnablement au regard des articles 10 et 11 de la Constitution.»

exclude from its scope the consideration of alternative measures able to attain the same objective but with the observance of the proportionality<sup>351</sup>.

In view of the subsequent exploration of the decisions issued as regards tax law presumptions, it is worth highlighting that the fulcrum of the Court's reasoning is embodied by the objective of the measure<sup>352</sup> and its proportionality in terms of adequacy of

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<sup>350</sup> Basically, similar steps are identified by I. Richelle and V. Sepulchre, *Non-discrimination at the crossroads of international taxation - Belgium*, cited above, at 147, according to whom where a difference in treatment or identical treatment between different distinct groups of individual is criticized, the review of the tax norm should confront three main questions: "(a) Does the tax norm create a difference in treatment between different distinct groups of comparable natural persons or legal entities or identical treatment between different groups of natural persons or legal entities actually in different situations in light of the norm in question? (b) Is the aim that the legislator pursues using the tax norm legitimate? (c) Is there objective and reasonable justification for the difference in treatment or the identical treatment in relation to the legitimate aim pursued in that – either the distinction or identical treatment is based on an objective criterion that is pertinent to reach the aim set in the norm at issue and does not result in effects that are out of proportion in relation to the aim sought (in this case, the tax norm will be deemed not to violate articles 10 and 11 of the Constitution)? – or is the distinction or identical treatment based on a criterion that is not objective or that is not relevant in relation to the aim sought by the tax norm in question or there is no reasonable relationship of proportionality between the effects resulting from the distinction or identical treatment and the aim sought (in this case, the tax norm will be deemed to violate articles 10 and 11 of the Constitution)?" In their opinion "The Constitutional Court should criticize the choice of the legislator only if the distinctions are (clearly) arbitrary or unreasonable and it should accept measures that stay within the limits of the margin of appreciation of the legislator provided that they are reasonably and objectively justified". In this regard, it has to be noted that in certain decisions the Court rules that the difference in treatment "n'est pas dépourvue de justification raisonnable" (a negative statement) which might be read as implying a less strict control in respect of the decisions where it asserts that the provision concerned is reasonably justified (positive statement). Normally, the first formula is accompanied by the premise that in the matter under examination the legislator has a wide discretion or that the Court is entitled to censure the legislator's choices as manifestly unreasonable.

<sup>351</sup> Critical on this point (i.e. with regard to the last part of the paragraph reported in the text) J.-C. Scholsem, *L'égalité devant la Cour d'Arbitrage*, cited above, 785, "Certes, le législateur a le choix des moyens, en opportunité, mais une fois un moyen choisi, il est de l'essence du contrôle de proportionnalité de s'interroger sur la question de savoir si l'objectif n'aurait pas pu être atteint en portant moins atteinte aux droits des particuliers, in casu à la liberté d'association, ce que le requérant soutenaient». The question arises then «Peut-être la Cour a-t-elle voulu indiquer que son contrôle ne serait que 'marginal', qu'il ne sanctionnerait que des entorses manifestes, ce qui à ses yeux n'était pas le cas en l'espèce?».

<sup>352</sup> J.-C. Scholsem, *L'égalité devant la Cour d'Arbitrage*, cited above, 778, observed that «Le but de la loi devient donc le critère principal, sinon unique, du jugement porté en matière d'égalité. On notera ce qui peut apparaître comme un certain paradoxe: lorsqu'il s'agit d'interpréter la norme, la prise en considération de la 'ratio legis', en d'autres termes, l'interprétation téléologique, apparaît comme une démarche subsidiaire; au contraire lorsqu'il s'agit d'en apprécier la validité au regard du principe d'égalité, ce but, en général bien moins clair que la norme elle-même, devient le critère d'appréciation». However, he further noted that at times the approach of the Court appears partially different, for instance in Arbitration Court 5 July 1990, No 25, and «Ici c'est pur de 'raisons particulières (non autrement précisées) que le législateur peut déroger au droit commun, voire créer des exonérations. Le problème est vu comme un problème d'opportunité. Il suffit que la spécificité de la situation régie soit 'objectivement identifiable'. Le but de la loi est certes encore pris en considération mais il est refoulé au stade du contrôle de proportionnalité qui s'enrichit puisqu'il doit prendre en considération les effets de la norme et la nature de principes en cause». In his opinion, the jurisprudential scenario shows that «le 'but de la loi', instrument de mesure premier de l'égalité est un mètre bien flexible et incertain et, dans un certain sens, un 'fausse notion claire'». To support such a conclusion he recalls some leading decisions: «C'est dans l'arrêt 'Biorim' [Const. Court 13 July 1989, No 21] que l'analyse paraît la plus complète et la plus systématique. Dans l'arrêt 'Comines' [Const. Court 23 May 1990, No 18] le but se confond avec une certaine conception de la 'raison d'Etat', qui ne peut guère constituer un instrument de mesure très rigoureux sur le plan juridique. L'arrêt 'Elections européennes' [Const. Court 14

the means chosen with the aim pursued<sup>353</sup>. In this way, the equality principle, as interpreted by the Court, ends up being a parameter of reasonableness of the single legislative provision, similar to Article 3 of the Italian Constitution. In fact, where the Court finds a measure to differentiate between categories of taxpayers, it verifies if it is objective and it can be reasonably justified, taking into consideration the aim and the effects of the measure. At this stage, the Court is called upon to find a balance between the different interests in play<sup>354</sup> (for example, the need to combat tax evasion<sup>355</sup>, to guarantee the collection of the tax due, the need for simplification, the protection of the taxpayer's right of defence or his right to choose the lowest tax route). Such a balance is developed, according to the criteria expressed by the Constitutional Court itself, in the light of the *ratio* surrounding the introduction of the measure and its effects. In practice, more than on the effects, the decisions focus on the goal pursued by the provision concerned. Not surprisingly, most of them include a wide reference to the preparatory works, which are intended to reveal the intent of the legislator. Afterwards, the Court completes the balance between the interests

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July 1990, No 26] *est plutôt centré sur le contexte, son évolution et le caractère de 'loi de circonstance' de la norme attaquée. Enfin, l'arrêt 'Pilotage' [Const. Court 5 July 1990, No 25] met l'accent, du moins à titre principal, sur la spécificité objective de la situation régie».*

<sup>353</sup> For a reference to the evolution of the Constitutional Court's notion of proportionality through its first decisions, see J.-C. Scholsem, *L'égalité devant la Cour d'Arbitrage*, cited above, 784-787. The Author summarized as follows: «*Par le contrôle de proportionnalité, la Cour se dote d'armes formidables. Pour la Cour, serait contraire au principe d'égalité toute loi, décret ou ordonnance dont l'objectif serait incompatible avec les 'principes fondamentaux de l'ordre juridique belge', la Constitution ou les droits et libertés dérivant de dispositions du droit international directement applicables. Violerait aussi la règle de l'égalité, la norme sans rapport objectif et raisonnable avec le but poursuivi ou celle, qui présentant ce rapport, porte cependant atteinte aux principes fondamentaux de l'ordre juridique belge, la Constitution ou les droits et libertés reconnus par le droit international directement applicable ou enfin la norme qui, sans présenter une telle violation, est néanmoins marquée par une disproportion entre le moyens utilisés et le fins poursuivies.*». Again, on the evolution of the notion of proportionality within the Belgian legal order, see P. Martens, *L'irrésistible ascension du principe de proportionnalité*, in *Présence du droit public et des droits de l'homme : mélanges offerts à Jacques Velu*, Tome première, Bruxelles, Bruylant, 1992, 49 et seq., who particularly highlighted the impact of such principle on the role played by the judge. He observed: «*En l'autorisant à apprécier le raisonnable et à mesurer la proportion, on lui donne l'instrument capable de recalibrer la totalité de l'œuvre normative, qu'elle soit réglementaire ou législative. Seule la Constitution échappe à son contrôle. Mais comme elle est riche en virtualités de ce dont elle est avare en clarté, elle est moins un obstacle qu'un tremplin à son audace.*».

<sup>354</sup> Which might also concern non-taxation policy, as for example the purpose of promoting economic investments or to safeguard the environment. See respectively Const. Court 19 September 2007, No 120; Arbitration Court 11 February 2007, No 9.

<sup>355</sup> For example, Arbitration Court 8 July 1997, No 37: «*B.9. C'est au législateur qu'il appartient de déterminer les objectifs qu'il entend poursuivre en matière fiscale. Il peut se soucier de lutter contre un usage anormal qui pourrait être fait de la déduction des revenus définitivement taxés. Ainsi, il est légitime que le législateur refuse que des sociétés puissent bénéficier d'une double déduction à l'impôt des sociétés pour des opérations qui ne seraient menées que pour l'avantage fiscal qu'elles procurent. La Cour doit cependant vérifier si la mesure prise par le législateur peut se justifier objectivement et raisonnablement au regard de cet objectif.*»

by controlling if the means chosen by the legislator fit the purpose attained, or they are rather disproportionate in respect of that purpose.

In conclusion, the equality principle plays a fundamental role in the field of taxation, and, for our purpose, with regard to tax law presumptions. It represents the criterion in the light of which their consistency with the legal order is evaluated, particularly under the aspect of the rationality and the protection of the taxpayer's right of defence<sup>356</sup>.

### **3.2 Equality principle and tax law presumptions: Constitutional Court's line of reasoning**

After having set the stage, the focus is precisely on the scheme followed by the Constitutional Court when confronting legal presumptions in the field of tax law. Notwithstanding it has had only a few occasions to deal with the matter and even in those cases it has come out with very dry reasoning, it is possible to identify a precise approach of the Court to tax law presumptions and to foresee future developments.

Below, some judgments of the Belgian Constitutional Court on presumptive provisions (or at least assumed as such) are illustrated.

At first sight, they follow the same scheme that has been illustrated when dealing with the equality principle in general. In brief, the Court verifies if there is a distinction in treatment of comparable situations and if so, it proceeds to control if such distinction is objective and reasonably justified (meaning also proportionate).

What is peculiar when confronting tax law presumptions is the last step in the line of thought. It includes the core of the balance between the interests in play, which normally are the fiscal interest (to the accurate assessment and recovery of the tax due) and the protection of the taxpayer's rights<sup>357</sup>. As we will see, the possibility to give proof to the contrary, which characterizes most of the legal presumptions provided in the Belgian tax

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<sup>356</sup> For sake of completeness, it should be mentioned that the notion of equality adopted by the Constitutional Court basically matches with the one resulting from the case-law of the State Counsel and of the Supreme Court. For an in-depth exploration of the case-law of the State Counsel see R. Andersen, *Le Conseil d'État et le principe d'égalité en matière fiscale*, in *Protection des droits fondamentaux du contribuable*, (eds) R. Andersen and J. Malherbe, Brussels, Bruylant, 1993, 41 et seq. As regards the Supreme Court's judgments see, E. Krings, *L'égalité en matière fiscale dans la jurisprudence de la Cour de Cassation*, in *Protection des droits fondamentaux du contribuable*, (ed) R. Andersen and J. Malherbe, Brussels, Bruylant, 1993, 63 et seq. Of historical interest is C. Faider, *L'égalité devant la loi*, Pas, 1871, I, II-XX.

<sup>357</sup> See O. Bertin, *Les droits de la défense du contribuable*, in *Les dialogues de la fiscalité*, (eds.) E. Traversa, O. Hermand, E.-J. Navez, V. Deckers, C.-A. Helleputte, Y. Hougardy, A. Lecocq, D. Lequeux, B. Vintras, Bruxelles, Larcier, 2012, 439. Cf. also D. Renders and B. Gors, *Origine et contours des principes généraux de bonne administration*, in *Les dialogues de la fiscalité*, (eds.) E. Traversa, O. Hermand, E.-J. Navez, V. Deckers, C.-A. Helleputte, Y. Hougardy, A. Lecocq, D. Lequeux and B. Vintras, 2012, 393.



system, is assumed by the Court as a guarantee of the latter interest, and thereby as legitimizing almost any legal presumption conceived in view of a reasonable purpose.

### **3.2.1 Arbitration Court No 51/1999**

A question of consistency with the principle of equality was raised before the Court with reference to Article 394, para 1, CIR<sup>358</sup>, in the extent to which, in the field of tax recovery, it draws a distinction among the spouse of a person liable for income taxes on the one side and the spouse of a person owing for other debts, included other types of levies on the other side<sup>359</sup>.

Basically, that provision allows the tax collector to recover the tax due in relation to the taxable income of any of the spouses by proceeding with execution, not only on the common goods, but also on each of their own goods, irrespective of the marriage settlement chosen. Such enforcement proceedings cannot take place, for the tax due in relation to the income produced by a spouse, upon the other spouse's own goods where the latter proves one of the circumstances listed in the same article and concerning the legal status (i.e. the property right) of those goods: a) he possessed them before the marriage; b) they have been inherited or donated by a person other than the spouse; c) they have been purchased by means of funds realized from the selling of similar goods or d) by means of his own income in accordance with the marriage regime<sup>360</sup>.

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<sup>358</sup> Pursuant to which: « *Chacune des quotités de l'impôt afférentes aux revenus respectifs des conjoints ainsi que le précompte enrôlé au nom de l'un d'eux peuvent, quel que soit le régime matrimonial, être recouverts sur tous les biens propres et sur les biens communs des deux conjoints. Toutefois, la quotité de l'impôt afférente aux revenus de l'un des conjoints qui lui sont propres en vertu de son régime matrimonial ainsi que le précompte mobilier et le précompte professionnel enrôlés au nom de l'un d'eux ne peuvent être recouverts sur les biens propres de l'autre conjoint lorsque celui-ci peut établir : 1° qu'il les possédait avant le mariage; 2° ou qu'ils proviennent d'une succession ou d'une donation faite par une personne autre que son conjoint; 3° ou qu'il les a acquis au moyen de fonds provenant de la réalisation de semblables biens; 4° ou qu'il les a acquis au moyen de revenus qui lui sont propres en vertu de son régime matrimonial.* »

<sup>359</sup> The preliminary question was formulated as follows: « *L'article 394, § 1er, du Code des impôts sur les revenus est-il conforme aux articles 10 et 11 de la Constitution, dans la mesure où il pratique une distinction entre, d'une part, les conjoints de personnes débitrices de n'importe quelle dette, autre que des impôts sur les revenus, et, d'autre part, les conjoints de personnes débitrices d'impôts sur les revenus, dans la mesure où les premiers ne peuvent jamais, hormis le cas de fraude, subir le recouvrement sur leurs biens propres, de dettes de leur conjoint, tandis que les seconds ne peuvent échapper à un tel recouvrement sur leurs biens propres, [que] si, d'une part, ils font la preuve du caractère propre de ces biens et où, d'autre part, ils établissent en outre, soit qu'ils possédaient ces biens avant le mariage, soit qu'ils proviennent d'une succession ou d'une donation faite par une personne autre que leur conjoint, soit qu'ils les ont acquis au moyen de fonds provenant de la réalisation de semblables biens, soit qu'ils les ont acquis au moyen de revenus qui leur sont propres en vertu de leur régime matrimonial? ».*

<sup>360</sup> It goes without saying that it needs also to be proved that the tax debt refers to taxable income of the spouse.

Before analyzing the ruling of the Court, it must be observed that the wording of Article 394, para 1, CIR, which is still in force, renders difficult its classification under one category or the other. It is suffice to say that in the order of reference the referring court defined it a fiction according to which the tax debt is always common to the spouses, whereas the party in his observations to the Court designated it as an irrebuttable presumption of fraud or simulation<sup>361</sup>. Both of the categories are not correct. It could be considered a fiction or an irrebuttable presumption if the spouse was not allowed to escape its application. In fact, it seems to embody a reversal of the burden of proof as to the property of the goods (either own or common) in order to secure and speed up the tax recovery. The tax collector is not requested to prove that certain goods, suspected to have been fraudulently transferred to one of the spouses in order to avoid the collection upon them, have been actually purchased with incomes of the person liable to tax. The goods at hand are – arguing from the object of the contrary proof – presumed as being common or bought with incomes produced by the person liable to tax/debtor.

Turning to the content of the decision, after having found the situations at issue comparable, the Court examined Article 394, para 1, starting from the preparatory works and it exhausted the question in a few lines. From the Parliamentary documentation it results that the legislator has intended to secure the tax recovery by preventing the possible arrangements among the spouses with the aim of removing the debtor's goods from the tax recovery's proceedings. The safeguard of the general interest has been pursued irrespective of the marriage regime chosen by the parties, whether separation of property or joint property. Such derogation from the ordinary rules in force in civil law is grounded precisely on the peculiarity of the tax recovery as it is reserved to fuel public expenses and finds its only limitation in Articles 10 and 11 of the Constitution.

In this regard, the Court considered the measure to be coherent with the aim sought; that is avoiding the fraud by the spouses in the field of income taxation. In the latter field, indeed, such an eventuality is more likely than in other areas of taxation. Moreover, based on the

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<sup>361</sup> To support the thesis of the discrimination created by the provision, the appellants interestingly referred to the parliamentary works according to which “*eu égard au caractère exorbitant du droit commun que revêt cette mesure, l'administration prescrira à ses services de ne l'appliquer qu'avec modération et dans les cas de fraude manifeste*”. Moreover, they underlined that the historical circumstances which justified the measure did not occur anymore. By contrast, the Government recalled the decision (Const. Court 5 March 1997, No 11) where the Court has recognised that the tax procedure may derogate to the rules ordinary applicable, in particular as regards tax recovery. From this perspective, “*la règle critiquée a pour seul effet de soumettre le conjoint non débiteur de l'impôt à un régime de preuve plus contraignant qu'en droit commun eu égard à la possibilité de fraude aisément réalisable entre époux; cette règle n'est manifestement pas disproportionnée par rapport à l'objectif d'assurer, de la meilleure manière, le recouvrement de l'impôt*».

circumstance that the non-debtor-spouse may prove the origin of the goods concerned, the Court excluded the non-proportionality of the provision and thus rejected the question of inconsistency with the equality principle.

The approach of the Court appears to be in favour of the fiscal interest (here very much coinciding with the budgetary interest), which in its view justifies a simplification in the tax recovery that affects a person other than the one liable to tax. Though the contrary proof is provided, the provision has more the character of a fiction than that of a rebuttable presumption, because of the lack of a demonstrative (or probative) character with regard to the fact base.

The recourse to a rigid scheme prevented the Court from taking into sufficient consideration further circumstances, like the possible difficulty of bringing up the proof or, as in the case under discussion, the archaism of the provision which is no more grounded on a rule of experience (as regards the spouses' economic relationships). Moreover, the measure aims at avoiding fraud, but it does not include any index thereof. This might raise doubts as to the coherence of the measure with the aim pursued and as to the proportionality of the means chosen, which on the contrary the Court held.

Perhaps the preliminary question would have been more appropriately brought before the Court under this aspect: the provision applies to every spouse without any distinction, and it may thus conflict with the principle of equality where it requests a difference in treatment as regards different situations. Having raised the question of consistency under the assumed inequality created by the provision between a debtor for income taxes and a common debtor to which the civil law rules apply has made the rejection of the question easier for the Court.

### **3.2.2 Arbitration Court No 125/2006**

In a subsequent ruling of the Court, the prevailing interest legitimizing a presumptive provision is the need for legal certainty and to a certain extent also the need for simplification.

The case concerned the consistency of Article 42, para 1, second indent<sup>362</sup>, Law 26 March 1999, with Articles 10 and 11 of the Constitution, where it charged the employee receiving

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<sup>362</sup> Article 42, para 1 provided that *«Les avantages de toute nature obtenus en raison ou à l'occasion de l'activité professionnelle du bénéficiaire, sous forme d'attribution gratuite ou non d'option constituent, dans le chef de celui-ci, un revenu professionnel qui est imposable, lorsqu'il ne l'a pas affectée à l'exercice de son activité professionnelle, au moment de l'attribution de cette option. L'option est, au point de vue fiscal,*

an option on shares by the employer, irrespective of the real possibility to exercise that option<sup>363</sup>.

Indeed, Article 42 stipulated that the advantages under the form of options gathered by the employee on occasion of his professional activity was a business income taxed (on a lump-sum basis) at the time of the assignation of the option. Such assignation, pursuant to the second indent, was considered to have taken place for tax purposes the sixtieth day following the date of the offer, even when the exercise of the option was under (suspensive or resolutive) conditions and unless the beneficiary had notified in writing to the bidder the refusal of the offer.

The substantive nature of the provision directly affecting the position of the taxpayer was not in doubt in the proceedings. To confirm this, one can refer to the circumstance that the new version of the provision was recalled in the decision, with the only purpose of showing that the legislator itself intended to link the taxation to the actual attribution of the advantage. Indeed, the facts of the main proceedings had taken place before the entry into force of Article 404 of the Programme Law 24 December 2002, which has amended the second indent of Article 42, para 1, by providing that in the absence of an in-writing notification with the acceptance of the offer by the sixtieth day from when the latter is done, it is considered as being refused. Irrespective of the rejection of the question by the Court<sup>364</sup>, the legislator has thus amended the provision which had raised doubts of compatibility with the equality principle. The result is a measure that would be more appropriately classified as a presumption of the will, which turns out to be a rule of law that applies when the party does not explicitly express his will on a certain matter: in the previous formula the acceptance was presumed, in the subsequent wording the refusal is presumed unless the party does not explicitly notify his will by a certain time-limit.

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*censée attribuée le soixantième jour qui suit la date de l'offre, même si l'exercice de l'option est soumis à des conditions suspensives ou résolutoires, à moins que le bénéficiaire n'ait, avant l'expiration de ce délai, notifié par écrit à l'offrant son refus d'accepter l'offre».* The question of compatibility with the equality principle concerned in particular the second indent.

<sup>363</sup> The question for a preliminary ruling submitted to the court was: «*L'article 42, § 1er, alinéa 2, de la loi du 26 mars 1999 relative au plan d'action belge pour l'emploi 1998 et portant des dispositions diverses, tel qu'il était rédigé avant sa modification par l'article 404 de la loi-programme (I) du 24 décembre 2002, viole-t-il les articles 10 et 11 de la Constitution coordonnée en ce que les travailleurs auxquels l'employeur attribue une option sur actions sont imposés de la même manière, qu'ils aient ou non la possibilité d'exercer l'option?»*

<sup>364</sup> Which did not consider this circumstance as an index of the lack of rationality with regard to the previous provision. On the contrary, «*La circonstance que la loi-programme (I) du 24 décembre 2002 a instauré une présomption de refus de l'offre, si le bénéficiaire n'a pas notifié par écrit à l'offrant l'acceptation de cette offre, n'est pas de nature à priver la présomption légale présentement en cause de son caractère raisonnable.»*

This having been clarified and turning to the decision, the latter reflects the same pattern described so far. The reasoning verges on verifying the existence of a reasonable justification supporting the same fiscal treatment for employees receiving an option on shares irrespective of the actual exercise of such option. In doing so, as usual the Court has recourse to the Parliamentary works that have accompanied the introduction of the ‘présomption légale d’attribution’. This underlines the following points. First, the provision has been conceived with the aim of securing the legal certainty in the interest both of the taxpayer and the State with regard to the taxation of the options<sup>365</sup>; in fact, the former is aware of the levy upon those benefits which are taxed at a reasonable rate once and for all at the time of the attribution of the option<sup>366</sup>, whereas the latter can count on the related tax revenue. Second, the recipient of the option is in the position to know the risk related to the acceptance (even tacit) of the option in terms of payment of a levy for a right issue that he may not have the possibility to exercise, and thereby to refuse such assignment. From the Parliamentary documents, indeed, it results that the tax event giving rise to the levy is the attribution of the option, which enters the recipient’s patrimony and is charged in the quality of business income under an advantageous tax regime, due also to the difficulties in quantifying the benefits deriving from the attribution of the option. In the light of the foregoing, the Court found the presumption as being reasonable<sup>367</sup>.

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<sup>365</sup> The Court observed: «B.4. L’article 42 de la loi du 26 mars 1999 fixe le statut fiscal des avantages de toute nature obtenus en raison ou à l’occasion de l’activité professionnelle du bénéficiaire, sous forme d’attribution - gratuite ou non - d’option. Le législateur entendait ainsi offrir la sécurité juridique souhaitée concernant le statut fiscal de ces options, comme il ressort des travaux préparatoires cités en B.3. L’alinéa 2 dudit article détermine le moment où l’option est censée attribuée au point de vue fiscal, à savoir le soixantième jour qui suit la date de l’offre. La présomption légale d’attribution au jour ainsi défini s’applique, selon ces dispositions, même si l’exercice de l’option est soumis à des conditions suspensives ou résolutoires, si bien que les bénéficiaires sont imposés de la même manière, qu’ils aient ou non la possibilité d’exercer l’option.»

<sup>366</sup> Thus, the possible advantages resulting from the availability of the option are exempted. In the decision it is explained that “Le régime fiscal applicable à l’attribution d’options conduit à ce que l’effet négatif de l’imposition immédiate de l’avantage obtenu sous forme d’option sur actions, au moment de son attribution, prévue par l’article 42, § 1er, de la loi du 26 mars 1999 - du reste au taux avantageux fixé à l’article 43, §§ 5 et 6, de la même loi - est indissociable de la non imposition de tous les avantages directs ou indirects qui peuvent résulter de l’option accordée, une mesure prévue par l’article 42, § 2, de ladite loi». From the preparatory works it indeed results that «Les principes qui sous-tendent le projet sont donc la confirmation pure et simple du droit commun: l’attribution gratuite de l’option en raison ou à l’occasion d’une activité professionnelle constitue un avantage taxable au titre de revenus professionnels au moment de son octroi, et le seul problème est de quantifier cet avantage. A partir du moment où elle lui a été attribuée, l’option fait partie du patrimoine privé de la personne physique bénéficiaire; dès lors, l’exercice de l’option et la réalisation ultérieure d’une plus-value sur les actions constituent des actes de gestion normale d’un patrimoine privé qui échappent à l’impôt conformément au droit commun (Doc. parl., Chambre, 1998-1999, n° 1912/1, p. 104)».

<sup>367</sup> By summing up the reasoning behind that conclusion, it reads as follows: “B.9. L’objectif poursuivi par le législateur d’offrir la sécurité juridique concernant le statut fiscal de l’attribution d’options sur actions, le régime fiscal avantageux, la connaissance suffisante des effets potentiels de leur attribution et le caractère

### 3.2.3 Constitutional Court No 50/2012

Very recently, the Court has had the occasion of ruling on a rebuttable presumption included in Article 442-*quater*, para 2, CIR, introduced by the Programme Law 20 July 2006. The question of compatibility with Articles 10, 11 and 172 of the Constitution was raised with regard to the difference in treatment between the tax collector (i.e. the Treasury) and the other creditors of a certain enterprise on the one side, and on the other side between the management, depending on the type of tax to be paid by the enterprise<sup>368</sup>. The provision makes the management jointly liable for the withholding tax (on business income) that the enterprises or the legal entities other than companies ('personne morales') have failed to pay, when such omission is attributable to them under the form of the fault, pursuant to Article 1382 Civil Code<sup>369</sup>, committed in managing the entity. In the second paragraph, such fault is presumed, save for the contrary proof, where the failure to pay the withholding tax is reiterated<sup>370</sup>.

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*volontaire de l'acceptation de l'offre constituent une justification raisonnable suffisante de l'identité de traitement à laquelle sont soumis tous les travailleurs auxquels l'employeur attribue une option sur actions, qu'ils aient ou non la possibilité d'exercer l'option».*

<sup>368</sup> More precisely, the question referred to the Court for a preliminary ruling was: "L'article 442*quater* § 2 CIR/1992 tel qu'il a été inséré par la loi-programme du 20 juillet 2006, viole-t-il les articles 10, 11 et 172 de la Constitution en ce que, dans le cadre de la responsabilité des dirigeants d'entreprises, il instaure des règles plus sévères à l'égard du fisc qu'à l'égard des autres créanciers auxquels leur faute causerait un dommage et/ou en ce qu'il soumet les dirigeants d'entreprise à des règles plus sévères, exorbitantes du droit commun, pour le paiement du précompte professionnel par rapport aux mêmes dirigeants pour le paiement des autres impôts (sauf la TVA qui bénéficie d'une disposition similaire) où les règles du droit commun continuent à s'appliquer ? ».

<sup>369</sup> It states : « § 1er. En cas de manquement, par une société ou une personne morale visée à l'article 17, § 3, de la loi du 27 juin 1921 sur les associations sans but lucratif, les associations internationales sans but lucratif et les fondations, à son obligation de paiement du précompte professionnel, le ou les dirigeants de la société ou de la personne morale chargés de la gestion journalière de la société ou de la personne morale sont solidairement responsables du manquement si celui-ci est imputable à une faute au sens de l'article 1382 du Code civil, qu'ils ont commise dans la gestion de la société ou de la personne morale. Cette responsabilité solidaire peut être étendue aux autres dirigeants de la société ou de la personne morale lorsqu'une faute ayant contribué au manquement visé à l'alinéa 1er est établie dans leur chef. Par dirigeant de la société ou de la personne morale au sens du présent article, l'on entend toute personne qui, en fait ou en droit, détient ou a détenu le pouvoir de gérer la société ou la personne morale, à l'exclusion des mandataires de justice. »

<sup>370</sup> It provides as follows : « § 2. Le non-paiement répété par la société ou la personne morale du précompte professionnel, est, sauf preuve du contraire, présumé résulter d'une faute visée au § 1er, alinéa 1<sup>er</sup> ». As recalled in the decision, the same paragraph clarifies the meaning of 'reiterated non-observance' by requesting that "Par inobservation répétée de l'obligation de paiement du précompte professionnel au sens du présent article, l'on entend : - soit, pour un redevable trimestriel du précompte, le défaut de paiement d'au moins deux dettes échues au cours d'une période d'un an; - soit, pour un redevable mensuel du précompte, le défaut de paiement d'au moins trois dettes échues au cours d'une période d'un an». In the following paragraphs, Article 442-*quater* specifies the scope of the provision and the procedure to be followed by the administration for the purpose of ascertaining the liability. It stipulates that: « § 3. Il n'y a pas présomption de faute au sens du § 2, alinéa 1er, lorsque le non-paiement provient de difficultés financières qui ont donné lieu à l'ouverture de la procédure de concordat judiciaire, de faillite ou de dissolution judiciaire. § 4. La responsabilité solidaire des dirigeants de la société ou de la personne morale ne peut être engagée que pour le paiement, en principal et intérêts, des dettes de précompte professionnel. § 5. L'action judiciaire contre les

As usual, the examination of this norm is conducted by referring to the preparatory works of the Law 20 July 2006. From them it results that the provision is intended to put an end to the uncertainties within the jurisprudence and the doctrine as to the responsibility of the management, by setting forth their joint liability for the payment of the withholding tax (on business income) and the VAT<sup>371</sup> when the failure of payment is due to their fault in managing the enterprise. In this way, the interest of the State in collecting the tax concerned and the fair competition between the enterprises are safeguarded. Though such fault is presumed (*iuris tantum*) in case of reiterated failure to pay, the management is allowed to give evidence of the absence of fault. Moreover, the same Article 442-*quater*, indent 5, provides a specific procedure that the tax administration has to comply with for the purpose of collecting the payment upon the management, who must receive notice of that intention.

In the light of the foregoing, the Court recognised that the situation of the two categories of creditors referred to in the order of reference are comparable in principle. Nonetheless, it found the presumption to be reasonably justified in view of the general interest to the collection of the tax due and in view of the interest of the taxpayers paying their tax debts on time to a fair competition. From this perspective, a derogation to the rules applicable in areas other than tax law is legitimate. Ultimately, the possibility given to the management to give proof to the contrary and the provision of a procedure which implies the ascertainment of the responsibility by a judge were deemed as guaranteeing the proportionality of the measure<sup>372</sup>.

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*dirigeants responsables n'est recevable qu'à l'expiration d'un délai d'un mois à dater d'un avertissement adressé par le receveur par lettre recommandée à la poste invitant le destinataire à prendre les mesures nécessaires pour remédier au manquement ou pour démontrer que celui-ci n'est pas imputable à une faute commise par eux. Cette disposition ne fait, toutefois, pas obstacle à ce que le fonctionnaire chargé du recouvrement puisse requérir, dans le délai précité, des mesures conservatoires à l'égard du patrimoine du ou des dirigeants de la société ou de la personne morale qui ont fait l'objet de l'avertissement ».*

<sup>371</sup> As a matter of fact, a similar provision is set forth by Article 93-*undecies* CTVA.

<sup>372</sup> Thus, the Court rejected the question of consistency with the principle of equality. Indeed, “B.7. *La mesure litigieuse n'est pas davantage disproportionnée. Le législateur a uniquement prévu une présomption de faute en cas de manquement répété et cette présomption peut être renversée si le dirigeant prouve qu'il n'a pas commis de faute de gestion. Par ailleurs, l'action en responsabilité doit être intentée auprès d'une juridiction qui doit vérifier si toutes les conditions légales sont remplies pour engager la responsabilité civile du dirigeant. L'accès à un juge exerçant un contrôle de pleine juridiction est dès lors garanti aux dirigeants concernés. B.8. La disposition en cause ne crée pas de privilège ni ne contient une exemption ou une modération d'impôt. Elle n'est donc pas incompatible avec l'article 172 de la Constitution*».

#### 4. An outline on the methods of assessment and the legality of the levy under the Belgian Constitution

Similarly to the order of work followed dealing with the Italian tax system, before examining the most interesting legal presumptions with a view to the subsequent analysis of the EU context, it is useful to refer to some estimated methods of assessment included in the Belgian (income tax) legislation, namely in Articles 341 and 342 CIR. This, because despite the fact that they are plainly classified as legal presumptions, they seem rather to draw a general inference and to leave to the tax authorities or to non-legislative rules to develop the presumption. In this perspective, they might raise a question of compatibility with the principle of legality.

Such principle in the field of taxation results from the conjunct dispositions of Articles 170 and 172, para 1, 2<sup>nd</sup> indent, of the Belgian Constitution. The former, in its first paragraph, provides that “*Aucun impôt au profit de l’Etat ne peut être établi que par une loi*» and the second one completes the principle by adding that “*Nulle exemption ou modération d’impôt ne peut être établie que par une loi*»<sup>373</sup>.

The *ratio* of the principle of legality and the extent to which secondary normative provisions (or even administrative measures) are admitted to regulate the tax obligation have been delineated in various judgments of the Belgian Constitutional Court. First, the Court has confirmed that those Articles reflect the basic rule of democracy ‘No taxation without representation’, thereby requiring that any measure imposing a levy or exempting from a levy, has to be approved by a deliberative assembly democratically nominated, so that any delegation concerning the regulation of essential elements of a certain tax is susceptible of being in contrast with the Constitution.

Second, the Court has clarified the meaning of ‘essential elements’ by indicating on several occasions which items of the tax obligation should be individualized within the law and

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<sup>373</sup> Notably, unlike the Italian wording for the same principle, Article 170 (as well as Article 172 with reference to exemptions) requests any tax to be regulated ‘by the law’ and not ‘by virtue of the law’. As said when dealing with the Italian experience, precisely the use of the second formula in Article 23 of the Constitution has led the literature to qualify the legality principle as being ‘relative’, meaning that not every aspect of the taxation has to be covered by the law. *A contrario*, one could thus argue that the legality principle in the Belgian tax system should concern every aspect of the taxation. If manifestly this cannot be the case, at least in absolute terms, given the impossibility to foresee in the abstract in great detail all the elements forming the tax obligation, one would expect nonetheless (at least) a stricter evaluation. However, the analysis of the judgments handed down on Article 344, para 1, CIR, which will be referred to in the text, shows how the evaluation of compatibility with the legality principle appears to be influenced by the interests in play. When it is about preventing tax avoidance or evasion, the balance with the need to avoid the discretion of the executive or administrative power is in favour of the first (general) interest, and the legality principle is interpreted less strictly.



which may instead be regulated by secondary normative or administrative measures. The above provisions are not interpreted as requesting the law to regulate each aspect of a single taxation or exemption<sup>374</sup>, but rather to contain clear criteria concerning the persons liable to tax and the amount of the levy<sup>375</sup>. More specifically, the essential elements that must be marked at the legislative level are: the persons liable to tax, the tax event, the taxable base, the tax rate and the possible exemptions or tax reliefs<sup>376</sup>. Accordingly, a

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<sup>374</sup> *Ex multis*, Const. Court 21 February 2007 No 32, in the field of VAT. B.7. «*Les dispositions constitutionnelles précitées ne vont toutefois pas jusqu'à obliger le législateur à régler lui-même chacun des aspects d'un impôt ou d'une exemption. Une délégation conférée à une autre autorité n'est pas contraire au principe de légalité, pour autant qu'elle soit définie de manière suffisamment précise et qu'elle porte sur l'exécution de mesures dont les éléments essentiels sont fixés préalablement par le législateur.*» Accordingly, «*B.10. Compte tenu des précisions qu'il fournissait quant à la destination du bâtiment, le législateur pouvait, dans une matière complexe, sans violer le principe de légalité de l'impôt, attribuer au ministre des Finances la compétence technique de définir les critères servant au calcul de la superficie du bâtiment, elle-même établie par le législateur.*» See also Const. Court 17 October 2007, No 131 on Article 56 CTVA which delegated to the government the definition of the criteria for the determination of small enterprises' forfaitaire taxable bases by the tax administration. The Court rejected the question holding that «*B.5.1. L'article 56, § 1er, du Code de la T.V.A. permet de prévoir des modalités simplifiées d'imposition et de perception de la taxe en ce qui concerne les entreprises qui, en raison de leur taille, ne disposent pas d'une organisation comptable suffisante pour permettre l'application du régime général de la T.V.A. (Doc. parl., Chambre, S.E. 1968, n° 88/1, pp. 11 et 51) et auxquelles il est dès lors permis d'opter pour le régime forfaitaire de taxation établi en vertu de la disposition en cause. La diversité des situations dans lesquelles se trouvent ces entreprises est suffisante pour justifier que le législateur s'abstienne de fixer lui-même l'ensemble des règles d'imposition applicables à ces entreprises. B.5.2. Compte tenu de ce que le législateur a lui-même inscrit dans la loi le principe de l'imposition forfaitaire et de ce qu'un forfait vise, par hypothèse, des situations qui se prêtent mal à un règlement par la voie de dispositions générales constituant l'objet d'une loi, le législateur pouvait, dans une matière où domine la diversité des situations et où l'article 24, paragraphe 1, de la sixième directive du Conseil des Communautés européennes du 17 mai 1977 cité au B.1.4 prévoit lui-même la possibilité d'un régime de forfait, attribuer au Roi sans violer le principe de légalité de l'impôt, le pouvoir de régler les modalités selon lesquelles l'administration détermine la base de taxation conformément au principe du forfait inscrit dans la loi.*»

<sup>375</sup> Const. Court 13 March 2008, No 54: «*B.11. Le principe de légalité en matière fiscale inscrit à l'article 170, § 1er, de la Constitution exige que nul ne soit soumis à un impôt sans que celui-ci ait été décidé par une assemblée délibérante démocratiquement élue, seule compétente pour instaurer l'impôt et établir les éléments essentiels de celui-ci. En réservant aux assemblées délibérantes démocratiquement élues la décision d'établir une imposition et la fixation des éléments essentiels de celle-ci, l'article 170, § 1er, de la Constitution constitue une garantie essentielle qui ne peut, en principe, être retirée à certains citoyens sans justification. B.12. La désignation des contribuables et le montant à payer par ceux-ci constituent des éléments essentiels de l'impôt.*» *Le principe de légalité fiscale garanti par l'article 170, § 1er, de la Constitution exige par conséquent que la loi fiscale contienne des critères précis, non équivoques et clairs au moyen desquels il peut être décidé qui est redevable et pour quel montant.*» Cf. Const. Court 30 March 2010, No 32, at para B.10.2.

<sup>376</sup> Const. Court 24 April 2008 No 72: «*B.6. Font partie des éléments essentiels de l'impôt la désignation des contribuables, la matière imposable, la base d'imposition, le taux d'imposition et les éventuelles exonérations et diminutions d'impôt.*» Similarly Const. Court 16 June 2011 No 103, where the Court qualified the levy under examination (an annual flat-rate levy upon companies which was used to finance the social security of self-employed workers fixed by Law 30 December 1992) as a tax rather than a social security levy given that it is intended to cover the general expenditure of public interest. Once found applicable the principle of legality, it held: «*B.6.1. En vertu des dispositions en cause, les sociétés sont redevables d'une cotisation forfaitaire annuelle qui doit être considérée comme un impôt et le Roi est habilité à fixer le montant de cette cotisation, étant entendu qu'elle ne peut être supérieure à 868 euros. Les dispositions en cause reviennent à habiliter le Roi à fixer in concreto un élément essentiel de l'impôt, à savoir le taux d'imposition. Toutefois, le législateur a inscrit dans la loi non seulement le principe de*

delegation to the government is not *per se* inconsistent with the principle of legality as long as it is delimited and it is in execution of criteria established by the legislator<sup>377</sup>. Moreover, such a delegation is admissible if it concerns pure procedural aspects, like the tax return, the controls or the tax collection<sup>378</sup>. Ultimately, where reasons of urgency impose to delegate the regulation of essential elements of taxation, then the law must fix unequivocally the object of delegation and the time-limits between which the measures enacted are to be examined by the Parliament.<sup>379</sup>

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*l'imposition forfaitaire, mais également le montant maximum de cet impôt. Le législateur a uniquement entendu laisser au Roi le soin de fixer le tarif, sur la base de critères qui tiennent compte de la taille de la société. Toutefois, il se déduit du mot «notamment» figurant à l'article 91, alinéa 2, deuxième phrase, en cause, que le Roi pourrait prendre en considération d'autres critères que la taille de la société. B.6.2. En conséquence, la disposition en cause n'est pas compatible avec le principe de légalité inscrit à l'article 170, § 1er, de la Constitution, mais uniquement en ce qu'elle contient le mot «notamment». Cf. Const. Court 13 October 2011 No 150, at No B.2.; Const. Court 27 May 2008 No 83: «B.6. L'article 2 de la loi attaquée [loi du 26 novembre 2006 portant modification de l'article 51 du Code des impôts sur les revenus 1992] habilite le Roi à fixer, par un arrêté délibéré en Conseil des ministres, le montant des frais professionnels forfaitaires, exprimé en pourcentage des rémunérations de catégories déterminées de contribuables, et le mode d'établissement des frais professionnels forfaitaires. Cette disposition revient à habiliter le Roi à fixer des éléments essentiels de l'impôt. Il s'ensuit que, pour que cette habilitation soit compatible avec les dispositions citées au premier moyen, il doit être satisfait aux conditions mentionnées en B.5.2», i.e. «B.5.2. (...) lorsque le législateur se trouve dans l'impossibilité d'établir lui-même tous les éléments essentiels d'un impôt, parce que le respect de la procédure parlementaire ne lui permettrait pas d'agir avec la promptitude voulue pour réaliser un objectif d'intérêt général, il peut être admis qu'il habilite le Roi à le faire, pourvu qu'il détermine explicitement et sans équivoque l'objet de cette délégation et que les mesures prises par le Roi soient examinées par le pouvoir législatif dans un délai relativement court, fixé dans la loi d'habilitation» taking into consideration that «B.9. (...) Les circonstances exceptionnelles qui justifient une habilitation doivent exister au moment où celle-ci est accordée».*

<sup>377</sup> See Const. Court 20 April 2005, No 72, at No B.29 et seq.

<sup>378</sup> A. Tiberghien, *Manuel de droit Fiscal*, cited above, 15. «Les délégations ainsi admissibles concernent l'établissement de règles administratives relatives à la déclaration du contribuable, à l'établissement de l'impôt, au contrôle et au recouvrement de l'impôt, car ces aspects n'affectent pas la dette du contribuable».

<sup>379</sup> See Const. Court 16 March 2005, No 57, on Article 6, 3<sup>rd</sup> indent CTVA. At issue was the compatibility with the legality principle of the such provision in the extent to which it authorized the government to determine the operations giving rise to the tax obligation upon the municipalities, thereby derogating from the first indent of the same article that defined them as being not-liable-for VAT for the activities carried out in the capacity of public authorities. In accordance with Article 6, 3rd indent, which in turn implemented the regulation included in the Sixth VAT Directive, the royal decree 2 December 1970, No 26, qualified the municipalities as liable to pay VAT for the operations carried out in the use of the ports. The Court rejected the observations of the Conseil d'Etat concerning a different interpretation of the concept of 'essential elements' referred to indirect taxation<sup>379</sup> and the circumstance that the rule was in application of the Sixth Directive. It found a balance between the need for a legislative definition of the criteria of taxation (guarantee of a democratic deliberation) and the impossibility of regulating any aspects of such taxation in abstracto as follows: «B.8.1. Il se déduit des articles 170, § 1er, et 172, alinéa 2, de la Constitution qu'aucun impôt ne peut être levé et qu'aucune exemption d'impôt ne peut être accordée sans qu'ait été recueilli le consentement des contribuables, exprimé par leurs représentants. Il s'ensuit que la matière fiscale est une compétence que la Constitution réserve à la loi et que toute délégation qui porte sur la détermination de l'un des éléments essentiels de l'impôt est, en principe, inconstitutionnelle. Le manquement à ces dispositions est, en outre, constitutif d'une violation des articles 10 et 11 de la Constitution. Il implique en effet une différence de traitement injustifiable entre deux catégories de contribuables: ceux qui bénéficient de la garantie que nul ne peut être soumis à un impôt si celui-ci n'a pas été décidé par une assemblée délibérante démocratiquement élue et ceux qui sont privés de cette garantie constitutionnelle. B.8.2. Toutefois, lorsque le législateur se trouve dans l'impossibilité d'établir lui-même tous les éléments essentiels d'un impôt parce que le respect de la procédure parlementaire ne lui permettrait pas d'agir avec la promptitude voulue pour réaliser un objectif

The Court has had the occasion to rule on the compatibility with the legality principle of another provision concerning the assessment in the area of income taxation, that is Article 344, para 1, CIR, which lays down a general anti-abuse rule. The provision will be discussed later on. It has been recently amended in order to render it more effective and the Constitutional Court has very recently handed down a decision on the new version. The new formula is less vague, by virtue of a definition of the constituting elements of the abuse that entitle the tax authority to disregard the act(s) carried out by the taxpayer.

Notably, the Constitutional Court did not deem the old formula in contrast with the legality principle. Article 344, para 1, in the wording before the amendment brought in 2012, stated that the legal qualification given by the parties to a single legal act or to different acts that are part of the same operation could be disregarded by the tax administration where the latter ascertained, by having recourse to presumptions or other means of proof provided for by Article 340 CIR, that such qualification had been conceived with the aim of avoiding taxation<sup>380</sup>. In the judgment No 188/2004<sup>381</sup> the Court was asked if Article 344, para 1, was in conflict with the legality principle, in the extent to which it embodied a ‘blanket norm’, which left in the hands of the executive power, the determination of the tax events, irrespective of the existence of a sham and without securing the right of defence to the taxpayer in the context of the proceedings.

Given the fact that Article 170, para 1, of the Constitution requests the essential elements of taxation to be established by the law, the entire decision is reserved to examine whether the general anti-abuse provision is specific enough as to the conditions for its application or if it rather leaves room for the executive power to affect the circumstances giving rise to taxation<sup>382</sup>. In fact, the provision was silent as to the extent to which the tax administration

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*d'intérêt général, il peut être admis qu'il habilite le Roi à le faire, pourvu qu'il détermine explicitement et sans équivoque l'objet de cette délégation et que les mesures prises par le Roi soient examinées par le pouvoir législatif dans un délai relativement court, fixé dans la loi d'habilitation».*

<sup>380</sup> Cf. T. Afschrift and D. Danthine, *De la licéité de principe des ventes simultanées d'actifs et d'actions d'une société dans le but d'éviter l'impôt*, J.D.F. 2000, 219. With regard to the question as to what extent the previous formula allowed the tax administration to requalify the act of the taxpayer, in particular under the perspective of the similarity of the effects requested by the Belgian Supreme Court, see J.-P. Bours, *L'article 344, § 1<sup>er</sup>, du C.I.R. et les effets juridiques d'un acte : identité, similitude, ou équipollence?*, Note to Supreme Court 4 November 2005, R.G.C.F., 2006, 315.

<sup>381</sup> Arbitration Court 24 November 2004, No 188. The case of the main proceedings originated from the re-qualification for tax purposes of a series of legal acts that in the view taken by the tax administration were planned in order to avoid the application of Articles 7, 32 and 33 of the CIR.

<sup>382</sup> In the latter sense, were the observations submitted by the parties of the main proceedings, which contended that a constitutionally oriented interpretation of the measure implied that it could not affect the content and the effects of the act(s) chosen by the parties, but the qualification only. In this perspective, the tax administration was not allowed to interfere with the arrangements chosen by the parties. In other words, it

could substitute the qualification chosen by the parties with the ‘qualification juridique normale’, using the words of the government in its observation submitted to the Court.

The Court (albeit not explicitly) recognized that it falls within the power of the tax authority the re-qualification of the act(s) as a consequence of the ascertainment of the tax avoidance’s purpose. Nonetheless, it rejected a reading of the measure as generally authorizing the tax authority to determine the taxable event. By contrast, Article 344, para 1, was deemed as being a means of proof intended to let the tax administration consider the circumstances of the concrete case. In other words, the Court opted for a classification of the measure as having a merely procedural nature, thereby referring to the powers of the tax administration only. In the perspective taken by the Court, the measure includes a strict definition of the conditions for its application, with particular regard to the circumstance that the tax administration is requested to prove in order to proceed with the re-qualification and the (contrary) proof that the taxpayer may give in order to escape the measure. The former is required to give evidence of the pure tax purpose justifying the qualification chosen by the parties, whereas the latter is allowed to prove that the operation carried out is justified in the light of financially legitimate reasons. Moreover, the Constitutional judge outlined that the nature of the phenomenon that the measure aims at preventing - i.e. tax avoidance, which is distinguished by the Court from the (still) legitimate right to choose the lowest route - requests a general measure capable of fitting the various forms in which the abuse is realized by the taxpayers. In the light of this, the Court found the measure in line with the principle of legality<sup>383</sup>.

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was permitted to rectify the qualification of the legal acts carried out by the taxpayer, but keeping the same juridical effects.

<sup>383</sup> To this end, the Court made an excursus of the Parliamentary works that had accompanied the introduction of the provision concerned. The results of this are: firstly, that the measure has been introduced in order to restrain the effects of the Supreme Court’s settled case-law, which found legitimate the tax planning on the sole condition that it is based on a real situation, and thus to tackle more efficaciously the increasing recourse to the lever of the legal qualification for the purpose of avoiding the tax due; secondly, that it applies to economic operators in the exercise of their activity; thirdly, that the tax administration is required to prove that the choice of the legal qualification made by the taxpayer is due to the aim of avoiding the taxation which should (normally) apply pursuant to the provision of law circumvented; in parallel, the contrary proof that the taxpayer can give concerns the legal qualification and consists in proving that the latter is justified in the light of ‘legitimate needs having an economic and financial character’; ultimately, the tax administration is to carry out the control of the act(s) by taking into consideration the effects of the operation and the aim pursued; in the light of this, it will be entitled to re-qualify those act(s) so as to secure that the taxation applied corresponds to the normal legal qualification of the operation. For sake of completeness, as regards the Supreme Court’s settled case-law, which the Constitutional Court refers in the decision, the landmark case is Supreme Court 6 June 1961, *Brepols*, Pas., I, 1082, where it was held that taxpayers have the right to perform actions which would result in the most favourable tax treatment, even if the transaction is carried out in a rather unusual manner, provided that they accepted all the legal consequences of their actions. In a subsequent case it was added that the same conclusion is valid even if the

Undoubtedly, a general anti-abuse clause is by its own nature non-specific, as it is intended to cover all the possible ways of avoiding taxation through the circumvention of the (normally) applicable provision of law. With particular regard to Article 344, para 1, at that time in force, the conditions of application and the contrary proof to be given by the taxpayer were indicated, so that it did not represent a delegation to the executive power for the enactment of general acts identifying the taxable circumstances. Nonetheless, the conditions were designed in a very general way ('cette qualification a pour but d'éviter l'impôt'); moreover, the effects of the anti-abuse clause, which in case of various consecutive acts that the tax administration considered as being part of the same economic operation entitled the latter to disregard the qualification given by the parties to any of them and to levy the correspondent taxation, would have deserved a more in-depth examination<sup>384</sup>. Unlike the other elements of the norm, indeed, such effects did not clearly result from the provision itself<sup>385</sup>.

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actions have been performed with the sole aim to reduce taxation (Supreme Court 22 March 1990, *Au Vieux Saint Martin*).

<sup>384</sup> The prevailing interpretation within the scholars and the case-law was in the sense that the tax administration was entitled to re-characterize the acts which has been actually concluded by the parties provided that with the other qualification given the juridical effects of the same act are not affected. See T. Afschrift, *L'évitement licite de l'impôt et la réalité juridique*, 2nd ed., Bruxelles, Larcier, 2003, particularly at p. 293 et seq.; Supreme Court 4 November 2005, F.J.F., 2006; Supreme Court 22 November 2007, Pas., 2097. In line with this strict interpretation of Article 344, para 1, were also the judgments of the Constitutional Court illustrated in the text. In other words, it resulted that a re-classification of a transaction or series of transactions was possible only if the new legal classification led to the same legal consequences as the original one upheld by the taxpayer. Under the condition of the 'observance of the juridical effects' the provision was certainly more in line with the legal certainty, but susceptible to be ineffective, because of the difficulty to identify two alternative qualifications for all the constituting elements of a certain act. In this sense M. Bourgeois and A. Nollet, *L'introduction d'une notion générale d' "abus (de droit) fiscal" en matière d'impôt sur les revenus, de droits d'enregistrement et de droits de succession*, cited above, 4 et seq. The amendment of Article 344, para 1, is justified precisely in view of facing the problems of application of the previous formula. This is clearly stated in the Circular letter 4 May 2012, AAF. No 3/2012, AGFisc No 17/2012, AGDP No 4/2012, where it is also clarified that the nature of the provision is unchanged: "*il s'agit toujours d'un système de preuve et de preuve contraire: la charge de la preuve de l'existence d'un abus fiscal repose sur l'administration et le contribuable peut fournir la preuve contraire que d'autres considérations que l'évitement des impôts sur les revenus justifie sa forme juridique*".

<sup>385</sup> In this perspective, the classification of the measure under the means of proof may be read in the sense of excluding any substantive relevance of the measure. But the reference in the Parliamentary works to the 'normal legal qualification' indicates that the provision is potentially enable to impact on the definition of the tax obligation by overlapping what is 'normal' to the plan that the parties would apply in the absence of such a provision. The Court has confirmed the ruling handed down in the decision No 188/2005 in the subsequent judgment of 16 March 2005, No 60. The case of the main proceedings concerned an operation of own shares buyback realized by a public limited company, which the tax administration had considered aimed at avoiding the withholding tax on income generated by movable assets (*précompte mobilier*) to be applied to the distribution of the dividends. Accordingly, it had qualified the act as a distribution of dividends. The Court ruled in exactly the same way as in its previous decision, thereby confirming the consistency of Article 344, para 1, with the principle of legality. In this perspective, the legislator has delimited the conditions of application of the provision, with the legitimate aim of tackling tax avoidance but at the same time without breaking the principle according to which the taxpayer is allowed to choose the most fiscally convenient arrangement as long as it is justified in the light of economic reasons.

#### 4.1 The estimated assessment based on indices: Article 341 CIR

The estimated method of assessment governed by Article 341 CIR is commonly classified among legal presumptions having a relevant probative nature. It has a purely domestic scope. Nonetheless, it is worthy of attention as it contributes to the understanding of the national approach to legal presumptions. In view of this, the provision is analysed focusing on the nature and effects in terms of distribution of the burden of proof.

Pursuant to Article 341 CIR, the taxable income of individuals and legal entities other than companies ('personnes morales') may be determined by means of signs and indices from which a higher income situation in respect of the income declared in the tax return may be inferred<sup>386</sup>.

As said, the provision is plainly deemed as laying down a rebuttable presumption of law in the hand of the tax administration<sup>387</sup>. Based on certain indices, the difference between the income declared and the higher income resulting from those indices is considered to be taxable income. More exactly, the term 'aisance' included in the formula of the norm suggests that the indices and signs to be considered are inherent to the taxpayer's standard of living, so that from them the existence of a taxable income which has not been declared is inferred. The notion of indices and signs resulting from the administrative practice and the case-law is however very broad, as it covers not only the expenditure incurred by the taxpayer during a certain taxable year, but often the investments as well. More generally, it is accompanied by the evaluation of the overall assets at his availability<sup>388</sup>.

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<sup>386</sup> The first indent provides as follows: «*Sauf preuve contraire, l'évaluation de la base imposable peut être faite, pour les personnes morales comme pour les personnes physiques, d'après des signes ou indices d'où résulte une aisance supérieure à celle qu'attestent les revenus déclarés.*»

<sup>387</sup> See, with regard to Article 341 C. Lenoir, *Les moyens de preuve en matière d'impôts directs*, in *Manuel de procédure fiscale*, Limal, Anthemis, 2011, at p. 237: «*Il s'agit là d'une présomption légale. C'est donc la loi qui, dans ce cas, déduit de faits connus l'existence d'un fait inconnu, à savoir des revenus imposables, non déclarés par le contribuable. De cette manière, le législateur dispense le fisc d'établir le lien entre les faits connus et le fait inconnu. Le contrôleur se limite à démontrer l'existence des faits connus qui serviront de base à la taxation du contribuable sur signes et indices d'aisance. C'est le législateur qui établit le raisonnement par induction (le contrôleur en est donc dispensé) qui permet d'établir le lien entre les faits connus (les signes et indices d'aisances) et le fait inconnu (l'existence de revenus non déclaré par le contribuable)*». See p. 250 as regards Article 342 CIR.

<sup>388</sup> For an in-depth excursus of the judgments on the matter, see by T. Afschrift, *Traité de la preuve en droit fiscal*, 2 ed., Bruxelles, Larcier, 2004, 415 et seq. Notably, he observed that even before the introduction of Article 341, first indent, by the Law 28 July 1938, the tax administration could infer the existence of a higher income by the standard of living of the taxpayer concerned. In other words, such inference embodied a presumption of fact, which was freely evaluated by the judge. On the contrary, the legal presumption included in Article 341 CIR reverses the burden of proof on the taxpayer and the judge cannot disregard the reasoning established within the law: «*Le juge est dorénavant privé de tout pouvoir d'appréciation quant à la validité même du raisonnement, qui permet d'induire d'un certain train de vie l'existence de revenus imposables de l'exercice. Pour autant que l'existence même du fait connu dont est déduite la présomption, c'est-à-dire les signes ou indices d'aisance, soit établie, il en résulte nécessairement sauf preuve contraire,*

Some of the considerations expressed as regards the Italian synthetic method of assessment (and the assessment based on the taxpayer's spending capacity, in particular) hold true with reference to the provision under discussion. Indeed, it is based on the rule of experience according to which there is a correlation between expenditure met and income accrued during a certain taxable period<sup>389</sup>. The law draws an inference between such expenditure (known fact) and the higher taxable income (unknown fact). The difference between the amount of income that is normally necessary to meet such expenditure and the one that has been reported in the tax return is deemed as being part of the taxable base, thereby justifying a notice of assessment wherein the overall taxable base and income taxation are re-determined.

This is the situation, unless the taxpayer gives the proof to the contrary, i.e. he proves that the expenditure which exceeds the income declared has been met with income that has been reported in the tax return or is exempt from (income) taxation. Such counterproof is not predetermined by the law, except when it concerns the selling of movable properties or other financial instruments, as in this case the documents produced need to be 'nominative' and contain the name of the taxpayer<sup>390</sup>.

#### **4.1.1 Conditions of application and proof to the contrary**

Despite other presumptive tools of assessment, like Article 342 CIR, the 'preuve par signes ou indices d'aisance' does not imply any particular condition to be met for its application. As it results from the wording of Article 341 CIR, it applies to individuals and legal entities other than companies. This is, apparently, irrespective of the reliability of the accounting records or the violation of the Income tax Code. As a consequence, the tax

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*apportée par le contribuable, que ceux-ci proviennent de revenus imposables de l'exercice»; Cf. T. Afschrift Propos sur quelques questions actuelles en matière de preuve, R.G.C.F., 2003, 38; M. Baltus, L'étonnante extension du champ d'application de la présomption légale attachée aux signes et indices d'aisance, J.D.F. 1997, 225 et seq., who criticizes the broad interpretation of the legal presumption based on indices which result from the Supreme Court's case-law. In his view, it ends up to be irrational.*

<sup>389</sup> In this sense also J.-P. Bours, *Vérité et preuve fiscale*, cited above, at p. 257, who observes that «L'idée générale exprimée par l'article 341 C.I.R. est la suivante: si, au cours d'un exercice, un contribuable a exposé des dépenses pour un montant supérieur à celui des revenus déclarés, l'administration est en droit de présumer que l'excédent des dépenses par rapport aux revenus provient de revenus non déclarés. Il s'agit là d'une présomption légale réfragable (iuris tantum) et, donc, dont le contribuable peut apporter la preuve contraire, par exemple en démontrant que l'excédent a été financé par des rentrées non taxables (donation, prêt, etc.)».

<sup>390</sup> See the second indent of Article 341 CIR, pursuant to which «Lorsque la preuve contraire fournie par le contribuable se rapporte à des ventes de valeurs mobilières ou d'autres instruments financiers qu'il a acquis au titre de placement, les bordereaux ou documents d'achat et de vente invoqués ne font preuve à l'égard de l'administration des contributions directes que s'ils portent la mention "nominatif" et sont établis au nom du contribuable ou des personnes dont il est l'ayant-droit.»

administration issuing a notice of assessment based on the indices at hand is not requested to justify the recourse to such instrument, being only required to give evidence of the existence and amount of expenditure<sup>391</sup>.

The vagueness of the provision has given rise to several questions, which to a certain extent have received an answer in various decisions of the lower courts and above all of the Supreme Court. Thus, from the jurisprudence we infer that the signs and indices must concern the concrete situation of the taxpayer<sup>392</sup> and for a reasonable period of reference<sup>393</sup>;

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<sup>391</sup> As regards the evidence that has to be given by the tax authority, one of the most debated issues concerns the category in which the higher income is to be placed. The question is whether the tax authority bears the onus of proving not only the existence and amount of the indices, but also the origin of that income, amongst the categories listed in Article 6 CIR. In a number of decisions handed down by the Supreme Court in the past, which were in line with the administrative practice, Article 341 was deemed as including a legal presumption of origin, according to which the amount it refers to is presumed to originate from taxable income accrued during the taxable period by the taxpayer in the exercise of his professional activity. *Ex multis*, Supreme Court, 22 November 1966, Pas., 1967, I, p. 382; Supreme Court 31 October 1967, Pas., 1968, I, p. 310, according to which “*la présomption que constituent les signes ou indices dont résulte une aisance supérieure à celle qu’attestent les revenus déclarés est une présomption légale d’origine, c’est-à-dire que les sommes auxquelles elle se rapporte sont présumées, jusqu’à preuve contraire, provenir de revenus réalisés pendant la période imposable dans l’exercice de l’activité professionnelle du contribuable*»; Supreme Court 8 October 1968, Pas., 1969, I, p. 145; Supreme Court 2 January 1997. Critical regarding this interpretation, which «*reviendrait à introduire une double présomption fondée sur l’article 341 du Code, l’une légale, l’autre née de la jurisprudence*», T. Afschrift, *Traité de la preuve en droit fiscal*, cited above, 463. In more recent decisions, however, the Supreme Court has clarified that under Article 341, the expenditure are presumed to have been met with ‘revenus imposables d’origine indéterminée’, i.e. a further category in respect of the ones listed in Article 6 CIR. See Supreme Court 16 October 2009 (in <http://www.cass.be/>): “*En vertu de cette disposition [Article 247 CIR 1964, now 341 CIR 1992], les dépenses, placements, investissements et accroissements d’avoirs constatés au cours d’une période imposable, considérés comme des signes ou indices d’où résulte une aisance supérieure sont présumés, sauf preuve contraire, provenir des revenus imposables. Cette présomption légale implique que, pour déterminer la base imposable, l’administration ne doit établir ni la provenance ni la nature des avoirs qui justifient la taxation d’après des signes ou indices et, partant, ne doit pas rattacher ces avoirs à l’une des catégories particulières des revenus visés à l’article 6 du code précité. Après avoir constaté que le demandeur avait été, à un poste frontière, trouvé en possession d’un relevé d’avoirs en banque, l’arrêt considère que ces avoirs constituent des signes ou indices d’une aisance supérieure à celle qui résultait de ses revenus déclarés. Il énonce que «*sauf preuve de leur origine spécifique, ces revenus sont réputés être des revenus nets imposables au sens de l’article 6 dont l’origine reste pour le reste indéterminée*».* It follows that they will be subject to the ordinary tax treatment (with a progressive tax rate) and the tax authority is relieved from proving the actual category, unless it has at its disposal enough information to correctly qualify the higher income. In this regard, J.-P. Bours, *Vérité et preuve fiscale*, cited above, 262-263, warns from allowing the tax administration to prove that the higher income falls within the category of ‘professionnel revenus’ (business income) by means of presumptions of fact, as this would imply legitimating a presumptions’ chain (‘cascades de présomptions’). J.-P. Bours, *La nature des revenus dégagés par une situation indiciaire, ou la quadrature du cercle*, Note to Supreme Court 1 October 2004, R.G.C.F., 2005, 261 et seq.

<sup>392</sup> Court of Gand 23 December 1986. Accordingly, the evaluation of the expenses for vital needs when not accompanied with reasons is arbitrary. Court of Anvers 3 December 1996. Among the indices taken into consideration by the tax authorities in order to verify the correlation to the income declared, there are the household expenses (‘dépenses de ménage’), which have given rise to several case-law as they are normally calculated by the tax authority by having recourse to presumptions hominis. Critical to this way of applying the presumptive assessment J.-P. Bours, *Vérité et preuve fiscale*, cited above, at p. 259, as a legal presumption ends up being based on a presumption of fact. In the light of this he considers “*préférer que la situation indiciaire soit établie sans évaluation des “dépenses de ménage” et que l’on se pose ensuite la question de savoir si l’excédent des revenus par rapport aux dépenses est suffisant pour mener un train de vie raisonnable*». The same reasonableness should guide, for the Author, the consideration of an important



he may be asked for information by the tax administration but only on the grounds that there are elements for an assessment based on indices<sup>394</sup>. As said in the previous paragraph, the expenditure taken into consideration are interpreted in a broad sense, comprehensive of expenses met for basic needs and investments. At any rate, the presumptive assessment must be reasonable and not arbitrary, i.e. it has to ground on indices concretely revealing the wealth of a certain taxpayer.

Article 341 CIR sets forth a rebuttable presumption, as it manifestly results from its first wording ('Sauf preuve contraire'). Above, it has been said that the second indent of the same article requests certain formalities when documentation certifying the selling of movable properties or other financial instruments is produced. Apart from this limitation, and given the lack of further indications in the norm, the taxpayer appears to be allowed to rebut the presumption by giving evidence of:

- a) the inexistence of the known fact, for instance by contesting the existence or the amount of the expenditure on which the tax claim is based;

or

- b) the inexistence of the unknown fact, that is the higher income correlated to the expenditure. To this end, he may prove that such income was subject to taxation, or that it is not taxable for the purpose of income taxation (e.g. a donation) and so on.

Such contrary proof may be given by the taxpayer with all the means of proof, including presumptions *hominis* and except for the oath.

As with the indices, the suitability of certain circumstances to rebut the presumption results from the examination of the judgments on the matter<sup>395</sup>. The taxpayer may also give proof to the contrary with regard to the category in which the tax administration inserts the higher income ascertained. In this case, he is required to produce precise elements certifying the nature and origin of the income concerned.

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investment, for instance, as it could be financed with income of different taxable years. Cf. R. Rosoux, *L'évaluation de dépenses de ménage: le maillon faible des décomptes indiciaires*, R.G.C.F., 2002, 3 et seq.

<sup>393</sup> Normally represented by the taxable period.

<sup>394</sup> Tribunal d'Anvers 20 May 2008, F.J.F., 2011, liv. 9, 963.

<sup>395</sup> *Ex multis*, Supreme Court 11 February 2002, (<http://www.cass.be/>), according to which «pour apporter la preuve contraire qui lui incombe, le redevable doit établir par des éléments positifs et contrôlables que cette aisance supérieure provient de ressources autres que celles qui sont taxables aux impôts sur les revenus ou de revenus provenant d'une période antérieure à la période imposable».

#### **4.1.2 Some considerations on the nature of the assessment with signs and indices**

Article 341 CIR embodies a tool, in the availability of the tax administration, for the purpose of proving the existence of a higher income in respect of the one which results from the annual tax return. It is based on the idea that where the expenditure met during a certain taxable year are higher than the amount of income declared, then it may be inferred that the difference consists of taxable income hidden from the tax authority. By means of such instrument, the tax administration is not requested to give evidence of the inference, being only requested to merely prove the known fact, i.e. the expenditure exceeding the taxable income. The burden of proof is shifted onto the taxpayer, who can prove that the presumption cannot be applied to his concrete case, as the income concerned is not taxable or it has been taxed already.

However, Article 341 includes undoubtedly a very general inference. Moreover, the known fact is construed through the necessary investigations of the tax administration. It is up to the latter, indeed, to identify and quantify the indices. In this sense, the provision includes a 'weak' presumption of law, meaning that its efficacy is not that peculiar to a presumption of law. In a possible trial where a notice of assessment was appealed by the taxpayer, the judge would not be obliged to consider the unknown fact as proved once the known fact is produced by the tax administration. In fact, he has a certain discretion in evaluating the suitability of the elements on which the tax claim is based. In several judgments, the assessment has been considered as being arbitrary. For example, it has been held that the tax administration cannot simply apply the presumption by generically referring to the provision at hand and to the expenditure for satisfying vital needs. The tax authority seems to be required to argue and support such allegation<sup>396</sup>.

At any rate, the vagueness of the norm, especially in the definition of the known fact and the related determination of the higher income, imposes the tax administration to have careful recourse to the instrument and taking into consideration all the possible information or documentation even in the hands of the taxpayer, before issuing a notice of assessment. In fact, unlike other legal presumptions that are introduced also in view of securing legal certainty, the risk is that Article 341 be rather a source of uncertainties.

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<sup>396</sup> Court of Anvers, 3 December 1996, F.G.F., 1997, 92.

## **4.2 Estimated assessments based on comparison with similar taxpayers: Article 342 CIR**

A further estimated method of assessment for the purpose of income tax is provided for by Article 342 CIR, which deals with the determination of certain items of income by means of comparison with similar taxpayers. The article includes several provisions.

The first paragraph, first indent, states that, facing the absence of probative elements, the proceeds may be determined through the comparison with the normal proceeds accrued by at least three similar taxpayers, and taking into consideration all the useful information, including the turnover, the investments, the factors of production and so on. The same paragraph entitles tax authorities to establish, through the orchestration with the trade associations, a flat-rate taxation, which may ground an assessment facing a lack of probative elements.

The second paragraph refers to a royal decree for the determination of the minimum taxable proceeds for foreign enterprises. The only indication in this regard concerns the necessary consideration of the elements listed in the first paragraph, first indent, which concern the structure of the enterprise in terms of number of workers, investments, turnover and so on<sup>397</sup>. This part of the norm is worthy of special attention for our purpose and it will be dealt with later on. Indeed, it has been found by the EUCJ (case *Talotta*) to be in contrast with the freedom of establishment in the extent to which it discriminated against foreign enterprises.

The EUCJ judgment, however, concerned a taxable period when the treatment at hand applied to foreign entities only. Since the taxable year 2005, and following that judgment, it has been extended<sup>398</sup> to domestic enterprises and self-employed persons when they fail to deliver the tax return or in case of delay (para 3).

### **4.2.1 The assessment based on the comparison with three similar taxpayers**

The first method of assessment laid down by Article 342, CIR, is based on the comparison with at least three similar taxpayers, for the purpose of assessing the proceeds (more exactly, profits or remunerations) attributable to the taxpayer under investigation. His

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<sup>397</sup> Notably, the provision was deemed as rebuttable by giving evidence of the exact taxable income.

<sup>398</sup> By the Programme Law 11 July 2005.

proceeds are in this way presumed as being comparable to those accrued by taxpayers whose activity shows similar structural elements<sup>399</sup>.

The reference included in the norm to ‘bénéfices’ and ‘profits’ renders evident that it does not concern, unlike Article 341, the overall taxable income, but only these items<sup>400</sup>. It also implies that it applies to persons carrying on a self-employed activity, i.e. enterprises and self-employed persons.

Again, unlike Article 341 CIR, the tax authority is entitled to have recourse to the method at hand only when facing the lack of probative elements<sup>401</sup>. Such circumstance, which has to be proved by the tax administration, normally occurs where the accounting records are

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<sup>399</sup> According to J.-P. Bours, *Vérité et preuve fiscale*, cited above, at p. 263, «*Il s’agit d’une présomption légale réfrangible, reposant sur l’idée, contestable, que les ratios sont comparables entre contribuables exerçant des activités similaires («nivèlement de marges»)*». The Author is very critical also as regards the secrecy covering the subjects of comparison. He illustrates his doubts with the following example: “*Lorsqu’elle affirme, par exemple, que les points de comparaison vendent de vêtements pour enfants et exercent leur activité en banlieue, elle doit être crue et le tribunal ne pourra exiger la production de dossiers des points de comparaison*». In his opinion, this is in conflict with the principle held by the Supreme Court in the judgment 25 February 1982 «*le seule affirmation d’un fait par une partie litigante ne peut tenir lieu de preuve de l’existence de ce fait*».

<sup>400</sup> More exactly, Article 342, para 1 refers to “*les bénéfices ou profits visés à l’article 23, para 1, 1 and 2*”. The former are defined by Article 24 CIR and originate from the carrying on of “*entreprises industrielles, commerciales ou agricoles quelconques*”, while the latter are delimited by Article 27 CIR as “*tous les revenus d’une profession libérale, charge ou office et tous les revenus d’une occupation lucrative qui ne sont pas considérés comme des bénéfices ou des rémunérations*». In this regard, it should be noted that since the beginning, the Supreme Court has gathered the difference between the presumption laid down in Article 342 concerning the amount of taxable proceeds, which has to be used under the conditions provided for by that provision, on the one side, and the presumptions of fact regarding the existence of elements from which the taxable base may be inferred. The tax administration is entitled to make use of the latter without having complied with Article 342 CIR, but of course they do not have the probative value of legal presumptions, as the judge is free to evaluate them. It held that “*ne recourent pas au mode spécial de preuve prévue par (...) [now, Article 342, CIR], mais à une présomption de l’homme, l’arrêt qui invoque une comparaison avec des redevables similaires aux seules fins de déterminer un élément servant à établir la base imposable*» (Supreme Court 23 October 1975, Pas., 1976, I, 240. Likewise, Supreme Court 25 February 1982, J.T., 1982, 545, with note of T. Afschrift.

<sup>401</sup> Under the same conditions the tax administration may determine the taxable base on a flat-rate basis, which is established in cooperation with the trade associations. This method embodies a special way of assessment through comparison with similar taxpayers. In this case, the tax authority has to prove the lack of probative elements and also that the activity carried out by the taxpayer under assessment falls in one of the categories for which the forfait may be applied. On the side of the taxpayer, from the case-law it results that he can only avoid the application of the forfait by proving the existence of exceptional circumstances. On the other hand, given the unreliability of the accounting records, he is not likely to be capable of proving his effective income. Of course, he may contest such unreliability, which is the condition for the application of the forfait. The tax administration regularly provides, after a debate with the groups concerned (for example farmers, retail traders, artisans), for the forfait to be considered, which normally last three taxable years. It remains, however, possible for the tax administration to disregard the amount established in this way and to prove the real taxable income, if higher. The same procedure may be followed by the tax administration with reference to certain expenditure, which normally cannot be justified by means of probative documentation. Article 342, para 1, 4<sup>th</sup> indent, states as follows: «*L’administration peut également arrêter, d’accord avec les groupements professionnels intéressés, des forfaits pour l’évaluation des dépenses ou charges professionnelles qu’il n’est généralement pas possibles de justifier au moyen de documents probants*».

unreliable, or more in general where the documentation necessary in order to verify the correct determination of the items of income concerned is considerably inaccurate<sup>402</sup>.

On several occasions, the courts have ruled regarding the suitability of the proof given by the tax administration for justifying the use of the assessment by means of comparison<sup>403</sup>. From this case-law we infer, for instance, that the accountancy or bookkeeping has a probative value if it is kept regularly and it is precise and verifiable, while this is not the case where it contains serious mistakes or fraud<sup>404</sup>. Again, the tax authorities violate the principle of good administration if they do not contest the reliability of the accountancy for years, but they suddenly take another view on occasion of a tax investigation regarding the income of previous taxable years.

Once the condition of the absence of probative elements occurs, the tax administration is entitled to re-determine the proceeds on the basis of the normal profit and remuneration of (at least) three similar taxpayers. An evaluation of similarity is thus the result of a comparison which rests on certain significant aspects regarding the economic activity carried on, like the type of activity, the turnover, the number of employees and so on. As clarified in the jurisprudence, it implies the consideration of the same taxable year and of taxpayers whose income has been determined analytically and not on a flat-rate base. Above all, the reference to the 'normal' proceeds attributable to the taxpayers compared need to be stressed, as it reflects the core of the assessment under discussion.

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<sup>402</sup> Supreme Court 12 November 1980, Pas. 1981 (I.P. 302-310); Supreme Court 7 January 1993, Pas. 1993 (I., p. 25), where the Court held that in order to prove the unreliability of the documents enclosed in the tax return, the tax administration cannot simply make reference to the result of the comparison with similar taxpayers.

<sup>403</sup> See Supreme Court 26 November 1968, Pas., 1969, I, 302, which requested the taxable base to be determined on the basis of "*des revenus normaux de redevables similaires, reconnus judicieusement choisis*", meaning that the elements of comparison need to be as such to lead to a proper and reasonable evaluation of the proceeds. Indeed, "*le juge du fond apprécie souverainement la pertinence et la valeur probante des points de comparaison choisis pour déterminer les revenus professionnels du contribuable*" (Supreme Court 30 March 1965, Pas., 1965, I, 809). In general, from the jurisprudence of the Supreme Court and of the lower courts it results that the notion of similarity is broadly interpreted. Thus, "*il suffit que la comparaison soit faite avec les profits normaux de redevables qui exploitent une entreprise du même genre, offrant des points de similitude suffisants*" (Supreme Court 10 March 1970, Pas., 1970, I, 610), being not requested that "*le redevable, prise comme élément de comparaison, fasse le commerce des mêmes marchandises que le contribuable intéressée et encore moins le commerce du même article*" (Supreme Court 16 May 1967, Pas., I, 1075). Such comparison is provided "*avec les revenus normaux d'entreprises similaires, et non point avec ceux entreprises exploitées dans des circonstances identiques*" (Supreme Court 18 March 1967, Pas., 1967, I, 869), so that the determination of the taxable base "*implique une certaine latitude dans la comparaison, des bénéfiques de redevables similaires présentant nécessairement des discordances*" (Supreme Court 16 November 1965, Pas., 1966, I, 350).

<sup>404</sup> See in this regard, B. de Clippel, *La comptabilité probante en matière de contributions directes (examen de jurisprudence)*, R.G.C.F., 2003, 9 et seq.

The tax administration cannot generally refer to similar taxpayers, instead being required to give reasons for the assumed similarity by making explicit the elements considered. This, also in accordance with Article 346 CIR, which puts upon tax authorities the obligation of notifying the taxpayer under inquiry with the amount of proceeds of the three similar taxpayers and the elements on the basis of which the proceeds referred to him are proportionally determined. Nonetheless, such provision has to be read in conjunction with the secrecy covering the identity of the three taxpayers deemed by the tax authority to be similar, which might render difficult the exercise of the right of defence by the taxpayer involved, at least in contesting the similarity.

As a matter of fact, the provision is commonly interpreted – and all the more so after the recent decision of the Constitutional Court discussed below - as allowing the taxpayer who receives a notice of assessment based on comparison with similar taxpayers, to give proof to the contrary. First of all, he can certainly contest the absence of the condition for the presumptive assessment to apply, i.e. the unreliability of the accountancy. Moreover, he can also contest the recurring of the similarity, which grounds the determination of his proceeds. This is not an easy challenge, though, as it encounters in fact the limitations due to the acknowledgement of the other taxpayers considered in the comparison. In other words, since the tax authority is prohibited from revealing the identity of the taxpayers that enter the comparison, the defence of the taxpayer under assessment may only concern the elements explicitly referred to by the tax authority (type of activity, turnover etc.) and aim at asserting the specificity of his situation (for instance, the activity is carried out in a suburb, the taxpayer had personal problems or an exceptional event occurred etc.).

One could question whether the taxpayer is allowed to give evidence of the actual amount of the proceeds, thereby contesting the result of the comparison. At any rate, given that such method of assessment applies when the accounting records are unreliable or so is the documentation alleged in the tax return, this type of proof would be unlikely to be given by the taxpayer.

#### **4.2.2 The minimum taxable proceeds for domestic enterprises and self-employed persons**

Whereas the minimum taxable proceeds for foreign enterprises will be dealt with later on, a few considerations need to be made as regards the same method of taxation applied to enterprises and self-employed persons who are established in Belgium.

As disclosed already, initially such a presumptive method of determination of the proceeds concerned only those enterprises established abroad and operating in the Belgian market, with regard to the proceeds accrued on the Belgian territory. From the taxable period 2005, the same treatment has been extended to national taxpayers, given certain conditions. The result is a provision perhaps in line with the indications included in the EUCJ judgment *Talotta*, but with a questionable *ratio* at national level. As we will see, in the cited case, the European Court of Justice has found Article 342, para 2, CIR as being discriminatory towards foreign enterprises in respect to national ones, because only for the former such method of determination of the proceeds was laid down.

Currently, Article 342, para 3, empowers the tax administration to apply the minimum taxable proceeds established by a royal decree implementing para 2, also to domestic enterprises and self-employed persons when the tax return has not been delivered or it has been submitted but with a delay. Thus, Article 182 of the Royal decree giving execution to Article 342, para 2 CIR, regulates the minimum taxable proceeds upon a) the foreign enterprises operating in Belgium which are taxed according to the procedure of comparison provided for by para 1, first indent, Article 342 and b) the Belgian enterprises and self-employed persons in case of an absent or delayed tax return. In practice, this provision includes different criteria for calculating the amounts depending on the industry (para 1). Furthermore, it states that in any case the amount of the minimum taxable proceeds cannot be lower than 19.000,00 euro<sup>405</sup>.

The last provision has been criticised within the doctrine<sup>406</sup> and in various judgments its rationality has been questioned<sup>407</sup>. In particular, it has been said that the amount of

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<sup>405</sup> In Com. I.R., 342/84 it is clarified that “*ce minimum constitue un forfait absolu qui ne peut être réduit proportionnellement au nombre de mois d’activité* ». See in this regard the judgment of the Constitutional Court No 93/2013, interim.

<sup>406</sup> See J.-P. Bours, *Vérité et preuve fiscale*, cited above, at p. 268, who, with reference to Article 182 A.R./CIR concludes: «*Ce texte est une indignité. (...) Dans le cas présent, et lorsque l’on est en présence d’une «entreprise» ou d’un «titulaire de profession libérale», l’administration est dispensée de toute preuve et peut faire application de forfaits totalement arbitraires. Pourquoi, en effet, un bénéfice imposable d’au minimum 19.000,00 EUR? Est-il réellement inimaginable qu’une entreprise réalise, une année, un bénéfice inférieur, voire même une perte? Ce texte constitue donc une violation flagrante des principes généraux applicables en matière de droit de la preuve. C’est à l’administration qu’incombe la charge de celle-ci, mais, si le contribuable est une entreprise ou un titulaire de profession libérale et qu’il se trouve dans la situation visée par l’article 342, § 3, C.I.R. (absence de déclaration ou remise tardive de celle-ci), l’administration n’a plus rien à prouver et peut lui appliquer un forfait, ce qui est un fait du prince. Le texte est par ailleurs discriminatoire, puisqu’il ne vise que les «entreprise» et «titulaires de profession libérale», à l’exclusion des titulaires d’un charge ou d’un office*». According to X. Thibéaut, *Le minimum des bénéfices ou des profits imposables des entreprises et des titulaires de professions libérales. La nouvel article 342, § 3, du C.I.R. 1992, inséré par la loi-programme du 11 juillet 2005*, R.G.C.F., 2005, 251 et seq., in particular at p. 255, Article 342, para 3, does not embody a new hypothesis of taxation by comparison, but rather «*une*

minimum taxable proceeds established in the royal decree, which applies when the taxpayer does not comply with the obligation of submitting the tax return on time, is arbitrary and does not reflect the concrete situation of the taxpayer concerned. For instance, there is not any distinction based on the period of time in which the activity has been carried out (the entire taxable year or just a few months) or on the type of activity.

#### **4.2.2.1 Minimum taxable proceeds and principle of equality. Constitutional Court No 93/2013**

Not surprisingly, the question of compatibility of Article 342, para 3, with the principle of equality is recently arrived before the Constitutional Court and a decision has been handed down<sup>408</sup>.

The referring court of Liège asked whether the provision was in conflict with Articles 10,11 and 172 of the Constitution. In particular, at issue was the minimum taxable proceeds established in Article 182, AR/CIR, in execution of para 2, Article 342, which applied to all the enterprises and self-employed persons irrespective of the period of time in which the activity was carried out during the taxable year and without allowing the taxpayer to prove the real taxable income<sup>409</sup>.

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*nouvelle sanction à l'absence ou au retard de déclaration, sanction aux effets redoutables, particulièrement pour les contribuables imposés au forfait », which among the other things raises doubts of compatibility with the principle of equality «en rompant l'équilibre existant entre taxation d'office et moyen de défense».*

<sup>407</sup> One of the most critical views is in Court of Liège 31 May 2012, where it was held that “(...) le contribuable est privé du droit de soulever l'arbitraire du mode de calcul retenu par le taxateur. Il apparaît disproportionné de sanctionner un contribuable, certes négligent dans ses obligations de rentrer sa déclaration fiscale, en lui fixant un minimum absolu de base imposable sans aucune autre considération et sans lui permettre de se défendre comme pourrait le faire tout contribuable taxé d'office. De surcroît, l'attribution automatique d'un bénéfice forfaitaire de 10.000 euros peut s'avérer sans relation avec l'activité concrète de la requérante; en cela, l'article 182 § 2 de l'AR CIR/92 confère à l'administration des pouvoirs exorbitants puisqu'elle présume que toute entreprise génère nécessairement un bénéfice imposable de 19.000 euros. Ce forfait ne repose sur aucune considération précise, et est fixé sans aucun rapport avec la nature de l'activité exercée, l'âge de l'exploitant, l'importance du personnel occupé, les difficultés pour rentabiliser une activité déficitaire etc. Ce n'est pas parce qu'un contribuable fait preuve, les cas échéant, de mauvaise volonté, que l'administration se trouve dispensée de recourir, pour l'imposer, aux modes de preuve connus». Given that «Le contribuable ne peut donc échapper à l'application d'un forfait, nécessairement approximatif et bien supérieur au montants des barèmes forfaitaire établie par secteur d'activités, s'ils existent et pour lesquels le contribuable pouvait opter» it concludes that « Etre taxé sur cette base minimale, sans rien d'autre à prouver, est nécessairement arbitraire et toute imposition qui est fondée sur un tel mécanisme doit être annulée».

<sup>408</sup> Const. Court 19 June 2013, No 93.

<sup>409</sup> The question was formulated as follows: «L'article 342, § 3, du C.I.R./92 viole-t-il les articles 10, 11 et 172 de la Constitution en ce que les minima imposables établis par le Roi en exécution du § 2 de cette disposition sont applicables à toute entreprise et titulaire de profession libérale quelle que soit la durée de l'activité exercée au cours de l'exercice d'imposition en cause? L'article 342, § 3, du C.I.R./92 viole-t-il les articles 10, 11 et 172 de la Constitution en ce que cette disposition instaure un minimum imposable et ne laisse pas au contribuable la possibilité d'établir le chiffre exact de ses revenus imposables?».



Thus, though in respect of the same constitutional parameter, the presumptive assessment was questioned under two main aspects. Firstly, it was deemed as treating in the same manner different situations, by disregarding any elements concerning the concrete situation of the taxpayer to which the minimum tax base applies. Secondly, it was deemed as jeopardizing the defence rights of the taxpayer, as long as the latter was not permitted to give the contrary proof, or more exactly to prove that the minimum does not apply to his case, as he has actually earned a lower amount.

With regard to the first question, which directly concerns the possible violation of the equality principle, the Court recalls that it falls within the competence of the tax legislator the provision of a certain tax treatment and the manner of levy. Where to this end criteria of distinction are introduced, these are legitimate as long as they are reasonably justified, meaning that they equally apply to all the persons who are in the same situation in respect of the measure concerned and its aim, save for the unavoidable simplification which is implied by the reference to categories instead of concrete situations.

Having clarified this, the Court, as usual, examines the norm by starting from the preparatory works. From them, it results that the measure has to be framed in the context of the *ex officio* assessment provided for by Articles 351 till 352-*bis* CIR, and it has been conceived in order to speed up such procedure and to alleviate the burden as to the statement of reasons lying upon the tax authority, by allowing a flat-rate estimation of the proceeds<sup>410</sup>. Such frame is completed by the legal presumption included in the first paragraph of the same Article 342, which is inextricably correlated to para 3 under discussion. In the view taken in the parliamentary documentation, indeed, the minimum taxable proceeds established in para 3 consist likewise in a legal presumption based on a comparison, albeit with an entire industry or group of taxpayers rather than three similar taxpayers. Ultimately, in the preparatory works reported in the decision of the Constitutional Court, the provision is justified with the aim of combating tax fraud, as unlike the first para of Article 342, the subsequent para 3 applies only to taxpayers who failed to submit the tax return or did it with delay.

In the light of the foregoing, the Court excludes the violation of the equality principle. In this view, the *ex officio* assessment applies without any distinctions to each enterprise and self-employed person envisaged in Article 182 of the royal decree whenever the tax return is not submitted on time. On the other hand, it is argued, the type of income concerned

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<sup>410</sup> Id., at No B.6.

originates from activities where the quality of the work is the essential element, rather than the timing<sup>411</sup>. The factors on which the amount of proceeds depends are so many that introducing a distinction based on the effective duration of the activity carried out could even create more inequalities.

With regard to the second question, the answer is included in the initial part of the decision, where the Court inserts the minimum taxable proceeds within the *ex officio* assessment. It follows from this that the taxpayer may rebut the legal presumption included in Article 342, para 3, by proving the effective amount of income earned, pursuant to Article 352, para 1, first indent. Precisely the contrary proof leads the Court to find the measure not only appropriate to the aim sought (tackling tax fraud), but also without any disproportionate effects<sup>412</sup>.

#### **4.2.3 Some considerations on the nature of the assessment based on comparison with similar taxpayers**

If the assessment based on indices recalls the Italian synthetic method, the assessment based on comparison with similar taxpayers shows some similarities with the Italian statistical studies ('studi di settore').

They all reflect the tendency of the national tax legislator towards assessments based on standardized taxable income or items of income. In this way, provisions which should concern the 'formal' tax law, meaning the powers of inquiry and assessment by tax authorities, have an impact on the definition of the tax obligation. From this perspective, indeed, the taxable proceeds tend to be identified with the average proceeds of the industry in which the taxpayer may be inserted, rather than the actual proceeds accrued upon him.

This is particularly evident with regard to the method of assessment set forth by Article 342, para 1, which consists of determining the taxable proceeds through the reference to

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<sup>411</sup> Id., at No B.8.2: «A la différence des salariés qui sont le plus souvent rémunérés à l'heure, les revenus générés par les professions telles que celles visées en l'espèce ne se mesurent pas tant à l'heure d'activité prestée qu'au regard de la prestation ou de la réalisation d'un contrat faisant appel à une qualité de services reposant sur un savoir dont le facteur temps n'est qu'un des paramètres pour définir le revenu. La diversité des activités considérées dans le chef d'entrepreneurs et de titulaires de professions libérales est telle qu'introduire un forfait tenant compte de la durée effective d'activité aurait pu être de nature à générer plus d'inégalités encore. Ainsi, un même revenu imposable pourra être produit en un nombre différent d'heures selon la qualité du professionnel, les moyens investis, l'environnement de sa profession libérale et les modalités du contrat qui le lie au bénéficiaire de ses services».

<sup>412</sup> See Id., B.10. It concluded as follows: "(...) Ainsi, la disposition en cause est un moyen pertinent pour atteindre l'objectif rappelé en B.6 de combattre la fraude fiscale. Elle n'a pas non plus d'effets disproportionnés dans la mesure où la présomption légale qui en résulte dans le chef de l'administration fiscale peut être renversée par le contribuable défaillant en apportant la preuve du montant exact des revenus générés par l'exercice de sa profession."

the normal proceeds accrued by three similar taxpayers. It is an instrument introduced by the tax legislator with the aim of facing the lack of information on the side of the tax authority, which in this way is relieved from the onus of proving the actual amount of taxable proceeds and may instead refer to the normal income attributable to the taxpayer, or to a forfait according to the second indent of para 1.

This is even more evident with regard to the minimum taxable proceeds established in Article 182 AR/CIR, in particular in the extent to which it fixes in 19.000,00 euro as the minimum taxable threshold, apparently without any concrete evaluation of the activity carried out by the taxpayer. One could object that this method is justified by the illegitimate position of the taxpayer who did not submit the tax return or did it with delay. In fact, due to the lack of information the tax administration would hardly be able to determine the taxable items. If such circumstance justifies the reversal of the burden of proof, it cannot however legitimate the provision of an amount which seems not to be correlated to indices revealing the existence of taxable income.

In the light of such considerations, the judgment of the Constitutional Court is regrettable in the extent to which it gets rid of the question of whether the minimum taxable proceeds was consistent with the equality principle where it disregarded the real conditions in which the activity was actually carried out. The referring court, similarly to other rulings handed down on the same matter, questioned the provision under the light of its reasonableness. In other words, the amount of 19.000,00 euro was found to be arbitrary. In the light of this, the need for simplification and tax fraud's encounter appears to be redundant and contributes to a reading of the provision as a fine envisaged for taxpayers who do not comply with their obligations.

The impression is that, despite these considerations, the possibility for the taxpayer to give proof to the contrary is what brings the Constitutional Court to 'save' the minimum taxable proceeds from a decision of inconsistency with the principle of equality. It has to be noted, however, that the concrete exercise of the defence right should have been taken into consideration. In fact, given that the minimum taxable proceeds implies the lack of a tax return (or a tax return submitted with delay), the taxpayer may have difficulties in proving his real taxable income, and as a result he might be subject to a fictitious taxation. The contrary proof here ends up being confined to exceptional events that justify the accrual of proceeds different from the amount fixed by the royal decree giving execution to Article 342, para 2 CIR.

## 5. Legal presumptions in the field of VAT

Having set the stage in the previous paragraphs, the focus is now on some legal presumptions included in the VAT Code (CTVA), under the headings concerning the collection of the tax due and the means of proof in the hands of the tax authorities<sup>413</sup>. To our purpose, they are particularly interesting, as VAT is regulated at EU level. The most relevant provisions are Articles 64, 65 and 68 CTVA, which are dealt with below.

It has to be noted that among the presumptions in the field of VAT, Article 51, para 1, CTVA is also normally referred to. It contains the list of the persons liable for payment of VAT. Besides those who supply goods or services, it refers to all persons who mention the VAT in an invoice or an equivalent document, irrespective of any supply<sup>414</sup>.

The *ratio* of the provision consists of avoiding that the person who issues the invoice, which gives right to a deduction upon the addressee, does not comply with the obligation to pay the VAT<sup>415</sup>. To this end, a formal fulfilment is assumed as an index of chargeability of the tax precisely upon the person issuing the invoice. In the light of this, the norm might be read as an irrebuttable presumption, a fiction, or more exactly a legal definition or assimilation. In fact, it identifies the persons liable for payment of VAT by assimilating those who realized the taxable operation and those who did not, as long as the latter have issued an invoice<sup>416</sup>. In this way, it encounters the phenomenon of issuing of invoices for inexistent transactions, aimed at circumventing the VAT system. This being the *ratio*, it does not apply where, for instance, the invoice reports a mistaken amount of tax, as long as the transactions concerned have actually taken place.

### 5.1 Presumptions of supply of goods and services

Article 64 CTVA, inserted under the heading “*moyens de preuve et mesures de controle*” contains five presumptions, which are aimed at ‘attracting’ in the scope of VAT transactions that have taken place without the obligation of payment being accomplished.

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<sup>413</sup> On legal presumptions in this field see H. Vandenberg, *De bewijsplicht van de fiscus inzake BTW en de omkering ervan door het instellen van wettelijke vermoedens*, T.F.R., 2001, 999 et seq.; D. Stas, *De wettelijke vermoedens van artikel 64, 65 en 68 W. BTW*, T.F. R., 2002, 3.

<sup>414</sup> It reads as follows: “§ 1er. La taxe est due: 1° par l’assujetti qui effectue une livraison de biens ou une prestation de services imposable qui a lieu en Belgique; 2° par la personne qui effectue une acquisition intracommunautaire de biens imposable qui a lieu en Belgique; 3° par toute personne qui, dans une facture ou un document en tenant lieu, mentionne la taxe sur la valeur ajoutée, encore qu’elle n’ait fourni aucun bien ni aucun service. Elle est redevable de la taxe au moment où elle émet la facture ou établit le document».

<sup>415</sup> Indeed, it has been introduced in accordance with Article 273 of the Directive 2006/112/EC, which allows Member States to impose other obligations which they deem necessary to secure the correct collection of VAT and the prevention of evasion.

<sup>416</sup> It is classified as a presumption by T. Afschrift, *Traité de la preuve en droit fiscal*, cited above, at p. 491.

To this end, the legislator has legally presumed the chargeability of the VAT if certain circumstances are met. In this way, once the tax authority has proved the latter, it is up to the taxpayer to prove that the tax is not due or it has been paid off<sup>417</sup>.

As we will see, some of these presumptions are to a certain extent similar to the presumption of supply included in the Italian VAT legislation. Likewise, they are intended to alleviate the probative position of the tax administration in the administrative procedure and tax trial. Besides that, they may have substantive effects, given that the taxpayer concerned may be called upon for the payment of VAT for supplies that might not have taken place, if for instance he is not able to give proof to the contrary. Or, said otherwise, the presumptions at hand are able to affect the definition of the tax obligation, by introducing *de facto* circumstances giving rise to the tax debt. Nonetheless, they are more correctly classifiable as procedural presumptions, because they imply the exercise of the tax administration's power of control and investigation in order to apply.

### **5.1.1 The presumption of taxable supplies**

The reflection developed at the end of the previous paragraph is evident when reading Article 64, para 1, according to which all persons who purchase or produce certain goods in view of the selling are presumed to have supplied them under the condition for the VAT chargeability, save for the counterproof<sup>418</sup>.

In the academic literature, this norm has not received much attention. Despite this, it is an extraordinary means of proof in the hands of the tax authority in order to detect tax evasion. In fact, it entitles the tax administration to presume that the merchandise which has been purchased or produced and does not result from the stock-inventory has been sold. In order to have recourse to such presumption, the tax administration has to prove that the purchase or the production of the goods concerned have taken place<sup>419</sup>, and that from a control it

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<sup>417</sup> As explained by J.-E. Krings, *Fictions et présomptions en droit fiscal*, in *Les présomptions et les fictions en droit*, Bruxelles, Bruylant, 1974, at 182, in these cases the presumption «*s'appuie sur des éléments de fait et facilite la charge de la preuve dans le chef de l'Administration fiscale. Il n'y a pas d'extension de la loi fiscale et celle-ci ne recourt à aucune fiction, aucune dénaturation des faits*».

<sup>418</sup> It provides: «*Toute personne qui achète ou produit pour vendre est présumée, jusqu'à preuve du contraire, avoir livré dans des conditions qui rendent la taxe exigible les biens qu'elle a achetés ou produits*».

<sup>419</sup> In some decisions, the provision is broadly interpreted, by letting the tax authority make use of the legal presumption on the basis of a merely documentary verification. Moreover, it is recognised the possibility for the tax administration to prove the purchase by means of presumptions *hominis*. See Appeal court of Bruxelles 8 December 2000, ([www.monkey.be](http://www.monkey.be)), maximized as follows: «*La comptabilité et les aveux d'un fournisseur permettent à l'administration d'établir qu'un assujetti a réalisé des achats en noir. La Cour estime que les éléments de la comptabilité du tiers ne sont certes pas opposables à l'assujetti, mais demeurent toutefois fiables et peuvent démontrer le mécanisme d'une fraude pratiquée. L'ensemble des éléments*

results that the same goods are not reported in the accounting records at the end of the taxable period to be verified<sup>420</sup>.

From the administrative practice and the case-law of the lower courts, a broad interpretation of the provision seems to prevail. In fact, it is applied on the basis of purchases that are not reported in the accountancy or for which the invoice has not been issued, thereby irrespective of a ‘material’ verification as to the presence of the goods in the storehouse. The norm is deemed preventing the phenomenon of the non-declared purchases – resulting, for instance, from the accounting records of the purchaser - and it is applied automatically once the known fact is ascertained.

A more reasonable interpretation of the norm, which however is not supported either by the administrative and judicial practice or by the letter of the provision, would request a ‘material’ verification as to the presence of the goods concerned in the storehouse. Similarly to what we have seen when dealing with the presumption of transfer included in the Italian tax system, the idea grounding the legal inference would be that, if at the beginning of a taxable period a certain quantity of goods were at the disposal of the taxpayer and at the end of the same period their absence is ascertained without him being able to provide a justification, then it is likely that he sold them without complying with the necessary VAT obligations.

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*présentés sont cohérents et confirmés par les déclarations du gérant du fournisseur et de ses préposés, de même que par la comptabilité de l'assujetti lui-même. Les mentions de la comptabilité du fournisseur sont des indices qui sont confirmés par d'autres éléments tels que les carnets de route du propre chauffeur de l'assujetti. L'assujetti est dès lors mal venu aussi de soutenir que l'administration ne tient pas compte de la nature des marchandises livrées au noir alors que les notes d'envoi après livraison ont été détruites. Elle ne peut invoquer sa propre turpitude. Le Code TVA prévoit une présomption légale selon laquelle les achats effectués en noir sont réputés vendus. Il appartient à l'assujetti de prouver de manière concrète les pertes résultant des casses, erreurs, commandes et autres éléments. A défaut d'apporter le moindre élément de preuve à cet égard, elle ne renverse pas la présomption prévue par l'article 64 § 1<sup>er</sup> du Code TVA». In this case, the turnover for the purpose of VAT of the taxpayer was re-determined on the increase, by presuming the selling of the the goods which had been purchased but not recorded in the accountancy. In turn, the purchase of those goods by the taxpayer was inferred on the basis of the documentation of the supplier. *Contra*, Court of first Instance of Bruges 17 May 2005, ([www.monkey.be](http://www.monkey.be)), according to which a presumption *hominis* is not certain enough for the purpose of being the basis of the legal presumption set forth in Article 64, para 1 CTVA. In this view, which contrasts with the view traditionally taken by the tax authorities, a chain of presumptions leads to an arbitrary demonstration.*

<sup>420</sup> T. Afschrift, *Traité de la preuve en droit fiscal*, cited above, at p. 493 observes that «C'est notamment sur la base de cette disposition légale que s'est développé le principe en vert duquel, lorsque l'assujetti prétend que les biens dont il ne peut établir l'affectation se trouvent encore en magasin, il doit prouver cette allégation par la production de l'inventaire de ses biens en stock au début de la période contrôlée. A défaut d'une telle preuve, l'administration, suivie par la jurisprudence considère que le stock existant à l'époque du contrôle est égal à celui qui existait au début de la période». Moreover, as noted by F. Baltus, *Procédure en matière de T.V.A.*, in *Manuel de procédure fiscale*, Limal, Anthemis, 2011, 696, «la jurisprudence va souvent jusqu'à considérer que la présomption permet à l'Administration de taxer l'opération en appliquant une marge bénéficiaire qu'elle estime raisonnable pour le secteur considéré». Cf. W. Defoor, *Note to Trib. Louvain 15 December 2006*, Cour. Fisc., 2007, 416.

Instead, it seems that the tax authority is merely required to prove that the taxpayer has purchased or produced certain goods in view of the selling and that the transactions concerned do not result from his accountancy.

It is then up to the taxpayer to prove, possibly, that they are in the storehouse. Indeed, the presumption is manifestly rebuttable. As a consequence, the taxpayer is allowed to prove, by producing the stock-inventory or any probative documents, that the merchandise was actually in the storehouse at the time of the verification made by the tax authority, or that the allocation assigned to the goods concerned does not give rise to the chargeability of VAT. For example, the taxpayer may allege that the goods concerned were lost, because of exceptional events or as they were perishable goods, and so on. It goes without saying that the pure allegation of a certain fact is not enough to escape the application of the presumption, being necessary to support it with probative elements (for example, reliable accounting records), which can be produced with any means of proof. More generally, he escapes the application of the presumption by giving evidence that the merchandise was not sold.

Paragraph 2 of Article 64, CTVA, provides the same presumption with regard to the supply of services. It stipulates, indeed, that each person who supplies a service is presumed to have done that under the conditions for VAT's chargeability, save for the contrary proof.

In the same article the legislator has dealt with the case where one of the hypotheses envisaged in para 1 or 2 occurs and various operations have been carried out to which different rates apply. If so, para 3 entitles the tax authority to presume that such operations are subject to the highest rate applicable, save for the counterproof.

Para 4 of Article 64 presumes the existence of supply of services concerning immovables behind the selling of a new building, thereby entitling the tax authority to ask for the payment of the VAT calculated on the basis of the normal value of those services<sup>421</sup>. As with the previous presumptions, this is rebuttable as well<sup>422</sup>. The owner of the new building

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<sup>421</sup> Pursuant to Article 36, para 1, let. b) CTVA.

<sup>422</sup> In this regard, para 4, Article 64 places on the owner the onus of keeping the invoices concerning the supplies for the construction of the building. It states: *“Tout bâtiment nouvellement construit est présumé jusqu'à preuve du contraire, avoir été livré par un assujetti en exécution d'une ou plusieurs prestations de services ayant pour objet des travaux immobiliers. Le propriétaire d'un bâtiment auquel cette disposition s'applique est tenu de conserver, pendant un délai de cinq ans à compter de la date de la signification du revenu cadastral, les factures relatives à la construction, ainsi que les plans et les cahiers des charges de l'immeuble. Il doit les communiquer à toute réquisition des agents chargés du contrôle de la taxe sur la valeur ajoutée. A défaut de communication, la taxe est, jusqu'à preuve du contraire, réputée ne pas avoir été acquittée du chef des services pour lesquels des factures n'ont pas été produites. Dans les trois mois de la date de la signification du revenu cadastral, le propriétaire est tenu, en outre, de remettre au fonctionnaire*

can prove that the presumed supply of services did not take place, that the transactions carried on are not subject to VAT, or that he realized the services himself<sup>423</sup>.

Ultimately, a further paragraph (para 5) has been introduced by Article 39 of the Law 17 December 2012 and has been in force since the 1<sup>st</sup> of January 2013. It states that the supply of a certain good is presumed to have occurred at the time when it is not in the store, in the atelier, in the warehouse or in any other place in the availability of the supplier in Belgium, any longer, save for the counterproof<sup>424</sup>.

The insertion of such norm in Article 64 confirms that para 1 does not imply a ‘material’ control for the purpose of verifying if the merchandise purchased is in the storehouse or it is not there anymore. Instead, this seems to be the sense of para 5. The latter appears to entitle the tax authority to presume that the goods which are not in the places where the business activity is carried on, have been sold under the conditions which render the VAT chargeable, and at the time when they have left such places. This interpretation is supported, on the one hand, from the circumstance that the norm is placed among those ones dealing with the means of proof in the hands of the tax administration, and on the other hand from the fact that the moment in which a certain transaction is considered to have taken place, is regulated in other articles of the same VAT Code.

### 5.1.2 The presumption of purchase

Whereas Article 64 CTVA sets forth a series of presumptions concerning the supplies of goods or services, Article 65 CTVA deals with the purchase and is based on the symmetrical inference that goods which are at the availability of the taxpayer are presumed to have been purchased.

In brief, it states that the goods which are delivered (‘envoyés à vue eou déposés en consignation’) are presumed to have been purchased by the addressee or consignee where

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*désigné par le Ministre des Finances, une déclaration comportant un relevé détaillé des factures relatives à la construction sur lesquelles la taxe sur la valeur ajoutée a été portée en compte.»*

<sup>423</sup> In this sense T. Afschrift, *Traité de la preuve en droit fiscal*, cited above, at p. 495. Cf. Circular letter 16/1973, No 17.

<sup>424</sup> It states as follows: “*Sauf preuve contraire, la livraison d'un bien est présumée être effectuée au moment où le bien cesse d'exister dans le magasin, l'atelier, le dépôt ou toute autre installation dont dispose le fournisseur en Belgique*». The Law 17 December 2012 has modified several articles of the Belgian VAT legislation in order to implement the Directive 2010/45/UE, which has amended the Directive 2006/112/EC as regards the formalities related to the invoices.



he is not able to demonstrate the availability of those goods or their delivery back to the sender<sup>425</sup>.

It seems that in the latter situation, the tax authority is entitled to presume that a purchase has taken place where a taxpayer who has received certain goods is not able to justify according to which title they are in his availability.

It must be observed that this provision – and the same holds true as regards Article 64 – is formulated in an extremely general and ambiguous way, so that it is difficult to interpret univocally the content of the norm. Given the role played in the context of the ascertainment made by tax authorities as regards circumstances having a relevance for the purpose of determining the turnover of the taxpayers involved, a more detailed description of the fact grounding the legal presumption, and above all on the content of the contrary proof are to be hoped for. This is especially so in view of the principle of legal certainty.

Besides that, the presumptions mentioned in the Articles 64 and 65 CTVA need to be tested in respect of the EU Law, in order to verify if they reflect the balance between the need to prevent VAT's evasion and fraud and the protection of the taxpayer's right as laid down in the VAT Directive.

### **5.1.3 The presumption of importation**

For the sake of completeness, the provision of Article 68 CTVA has to be recalled, though the little administrative practice and the case-law in the matter suggests that it has a scanty practical relevance.

Similarly to what is provided as regards the supply and purchase of goods in Articles 64 and 65, a given circumstance, in this case the presence of the goods in the customs radius, is assumed as grounding the presumption that they have been imported into Belgium, save for the contrary proof and in any case with the exception of the goods for private use<sup>426</sup>.

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<sup>425</sup> It reads as follows: «*Les biens envoyés à vue ou déposés en consignation sont présumés avoir été achetés par le destinataire ou le dépositaire si celui-ci ne peut justifier de la détention de ces biens ou de leur renvoi à l'expéditeur ou au déposant.*»

<sup>426</sup> Para 1, Article 68, CTVA stipulates that «*Tous biens se trouvant dans le rayon des douanes, tel qu'il est délimité par la réglementation douanière en la matière, sont présumés, jusqu'à preuve du contraire, avoir été importés en Belgique. Cette disposition n'est pas applicable aux biens qui, en raison de leur nature ou de leur quantité, ne doivent pas être considérés comme étant destinés à des fins professionnelles*» and at para 2 it provides the same for the means of transport: «*Tous moyens de transport à moteur, par terre ou par eau, à l'exception des bâtiments de mer ou de navigation intérieure visés aux articles 1er et 271 du Livre II du Code de commerce, ainsi que les remorques routières, sont réputés, lorsqu'ils se trouvent dans le pays, avoir été importés s'il n'est pas établi que ces véhicules sont en situation régulière au point de vue des droits d'entrée et des mesures de prohibition, de restriction ou de contrôle applicables à l'importation*».

The owner of the goods may, for instance, prove that the origin of the goods concerned is in Belgium or that they have been imported at an earlier time. If the counterproof is not given, then the tax authority is entitled to apply the VAT applicable for importations<sup>427</sup>.

## 6. Anti-abuse rules in the field of VAT

General measures combating abusive practices in the fields covered by EU law must be in line with the latter as interpreted by the EUCJ.

In this regard, it is significant that the general anti-abuse measure introduced by Article 128 of the Law 27 December 2005 in Article 59 CTVA, at para 3, was repealed precisely because it was not in line with the EUCJ case-law. Similarly to Articles 344 CIR, and Article 18 of the Code on registration duty, it entitled the tax administration to disregard the qualification given by the parties to the act(s) if the tax authority ascertained that such juridical qualification was justified solely in view of avoiding taxation. This, unless the taxpayer was able to prove that the qualification chosen responded to legitimate business reasons<sup>428</sup>.

Such provision has been almost immediately abrogated<sup>429</sup>, as it was not in line with the principles on abuse of law resulting from the EUCJ judgment handed down in the case of Halifax<sup>430</sup>.

Accordingly, a general definition of tax abuse has been inserted in Article 1, para 10, CTVA<sup>431</sup>, which is in line with the conditions requested by the EUCJ in order to detect

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<sup>427</sup> As clarified in para 3: «Lorsque la preuve contraire réservée par les §§ 1er et 2 n'est pas faite, la taxe est exigible selon les règles relatives aux importations. Elle est due, ainsi que l'amende prévue par l'article 70, § 1er, solidairement par l'importateur, le propriétaire, le détenteur et, en outre, s'il s'agit d'un véhicule, par le conducteur du véhicule. »

<sup>428</sup> It stated that «N'est pas opposable à l'administration, la qualification juridique donnée par les parties à un acte ainsi qu'à des actes distincts réalisant une même opération lorsque l'administration constate, par présomptions ou par d'autres moyens de preuve visés au § 1er, que cette qualification a pour but d'éviter la taxe, à moins que l'assujetti ne prouve que cette qualification répond à des besoins légitimes de caractère financier ou économique». See I. Massin, *Introduction of a General Anti-VAT Avoidance Measure in Belgium*, International Vat Monitor, 2006, 37 et seq., who foresaw the need to adapt the (at that time) recently introduced measure to the EUCJ decision in Halifax; I. Massin, *Introduction of Halifax in the Belgian VAT Legislation*, International VAT Monitor, 2006, 336.

<sup>429</sup> By Article 20, Law 20 July 2006.

<sup>430</sup> ECJ 21 February 2006, C-255/02, Halifax, where the Court held that "in the sphere of VAT, an abusive practice can be found to exist only if, first, the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages". Cf. also ECJ 20 February 2008, C-425/06, Part Service.

abusive practices. It refers to those transactions which entitle the taxpayer to obtain an advantage in contrast with the objective pursued by the Code or measures of enforcement of the Code and whose principal aim is the attainment of such advantage.

Besides that, several provisions included in the VAT Code are inspired by the need to encounter tax avoidance, but currently there is not a general anti-abuse clause. One could say, though, that on the basis of this definition and the principles stemming from the EUCJ rulings, tax authorities may deny a certain tax advantage, irrespective of a specific national provision establishing this<sup>432</sup>.

It has to be noted, that the legislator does provide explicitly the consequences of abusive practices when they concern the VAT input deduction. Indeed, Article 79, CTVA, which deals with adjustments of deduction, provides at para 2<sup>433</sup>, 2<sup>nd</sup> indent, that the person who has exercised the right of deduction with reference to the goods or services supplied or imported has to pay it back to the State, if at the time when the transaction has taken place he knew or he should have known that the tax due within the chain of transactions would have not been paid to the State with the intention to avoid taxation. The question arises as to whether the burden of proving the subjective state (knowledge of the abusive scheme) lies on the tax authority or if it is presumed, and in the latter hypothesis if this is in line with the EU law. As we will see later on, the more recent EUCJ judgments on the matter tend to recognize as legitimate the reversal of the burden of proof on the taxpayer in similar cases, while the absolute prohibition of the right of deduction based on the presumption of a participation of the purchaser in the abusive scheme is in principle against the VAT Directive.

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<sup>431</sup> Article 1, CTVA, is dedicated to the definition of several notions for VAT purposes. Pursuant to para 10 «*Pour l'application du présent Code, il y a pratique abusive lorsque les opérations effectuées ont pour résultat l'obtention d'un avantage fiscal dont l'octroi est contraire à l'objectif poursuivi par le présent Code et les arrêtés pris pour son exécution et que leur but essentiel est l'obtention de cet avantage*». For a comment by the tax authorities, Circular letter 24 August 2006, No AAF/2006, No 14/2006. For an in-depth analysis of the provision, see also T. Afschrift, *Les dispositions fiscales de lois du 20 juillet 2006 (deuxième partie). Les mesures destinées à combattre les «pratiques abusives» en matière de T.V.A.*, J.T., 2006, 756 et seq.; F. Baltus, *Les «pratiques abusives en matière de TVA»*, J.D.F., 2006, 57.

<sup>432</sup> See in this regard Circular letter 24 August 2006, No 14, where it is asserted «*les pratiques abusives condamnées qui tendent à l'obtention d'un avantage fiscal ne se limitent pas à celles qui ont pour but une déduction. Il peut s'agir également de la réduction d'une obligation*». As explained in the text, indeed, nowadays the VAT Code includes an explicit anti-abuse provision only as regards deduction of input VAT.

<sup>433</sup> Introduced by Article 51, Law 27 December 2006. It explicitly refers to abusive practices and provides that «*En cas de pratique abusive, la personne qui a opéré la déduction de la taxe sur les opérations en cause, doit reverser à l'Etat les sommes ainsi déduites à titre de T.V.A.. La personne qui a opéré la déduction de la taxe ayant grevé les biens et les services qui lui sont fournis, les biens qu'elle a importés et les acquisitions intracommunautaires qu'elle a effectuées, doit reverser à l'Etat les sommes ainsi déduites si au moment où elle a effectué cette opération, elle savait ou devait savoir que la taxe due, dans la chaîne des opérations, n'est pas versée ou ne sera pas versée à l'Etat dans l'intention d'éluder la taxe.*»

## 7. Anti-abuse rules in the field of income taxation

In the Belgian tax system a number of general anti-abuse measures have been introduced over the last few years in various areas of tax law (income tax, registration duty<sup>434</sup>, inheritance tax<sup>435</sup>) and have been recently amended by the Programme Law 29 March 2012 on the basis of the same pattern. Placed among the provisions on the means of proof, they entitle the tax administration, in the context of the administrative proceedings, to disregard the single or connected acts carried out without sound business reasons, when they are intended to circumvent one or more provisions of the tax legislation concerned in order to obtain undue tax savings or advantages.

In addition, a semi-general anti-abuse rule is included in Article 344, para 2, CIR, targeted at cross-border situations.

### 7.1 The general anti-abuse rule in Article 344, para 1, CIR

The scope of the general anti-abuse clauses is very much debated and the prevailing opinion within the doctrine is in the sense of their double nature. Particularly with reference to Article 344, para 1, CIR, it has been asserted that, on the one side, it has a probative character, as it defines the circumstances which the tax administration has to prove in order for the abuse to be presumed and also the circumstances which the taxpayer may rely on in order to prove that the abuse did not occur in the concrete case. On the other side, it is argued, Article 344, para 1, has a material character as well, in the extent to which it allows the tax administration to disregard the juridical acts (actually) realized by the taxpayer and to re-determine the levy on the basis of fictitious elements ('élément fictifs')<sup>436</sup>.

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<sup>434</sup> Article 18, para 2, of the Registration Duty Code.

<sup>435</sup> Article 106, para 2, of the Inheritance Tax Code, which refers to Article 18, para 2 of the Registration Duty Code.

<sup>436</sup> Critical to the attribution of a purely probative nature to Article 344, para 1, M. Bourgeois and A. Nollet, *L'introduction d'une notion générale d' "abus (de droit) fiscal" en matière d'impôt sur les revenus, de droits d'enregistrement et de droits de succession*, R.G.F., 2012, 14. They – rightfully – underline how this view is influenced by the issue of compatibility with the principle of legality and the criteria for the division of the competences among the various levels of political subdivisions in the field of registration duty and inheritance tax. “*Concernant la caractérisation de l’abus, la mesure comporte incontestablement une dimension probatoire, en venant définir, d’une part, les critères dont la rencontre doit être prouvée par le fisc pour présumer l’existence de l’abus, et d’autre part, les justifications qui’il possible au contribuable de rapporter pour établir l’absence d’abus en l’espèce. Mais dès lors qu’un abus a été caractérisé dans le chef d’un contribuable, les actes juridiques qu’il a accomplis et qui matérialisent cet abus sont rendus inopposables au fisc, et ce, nonobstant la réalité juridique de la conclusion de ces actes. À ce stade de son application, la mesure emporte alors un volet matériel, en permettant au fisc d’écarter des actes qui ont été réelemment conclus pour rétablir l’imposition du contribuable sur la base de ’élément fictifs. Certes, l’administration ne viendrait pas modifier la définition des élément essentiels de l’impôt par voie de mesures*”

Such interpretation reflects the main components forming the definition of tax abuse in Article 344, para 1. In fact, the first indent prescribes that the tax administration can disregard the single juridical act or the acts that are part of a single operation, where the tax office proves that they embody tax abuse. Whether there is tax abuse depends on the verification of one of the circumstances listed in the second indent of the same article. It requests alternatively that the operation realized by the taxpayer: a) is contrary to the objectives of a provision included in the CIR or its enforcement measures and places him outside the scope of such provision; b) entitles him to obtain a tax advantage provided in a provision of the CIR or its enforcement measures, contrary to the objectives of such provision and in the extent to which the grant of that advantage is the essential aim pursued by the operation.

In this way, tax abuse covers either those schemes planned by the taxpayer in order to avoid the application of a certain provision setting out a heavier tax treatment, or those operations plotted for the purpose of having granted a certain tax benefit for which otherwise he would not be entitled. Turning on the side of the taxpayer, the third indent of paragraph 1, Article 344, lets him prove that the choice of the single or more juridical acts

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*générale et abstraites; il n'empêche qu'elle viendrait bien toucher à la consistance concrète de ces éléments dans le cas individuel du contribuable concerné". Accordingly, they attribute a hybrid nature to Article 344, para 1, as it "présente en effet un volet probatoire majeur (présomption réfractable d'abus) doublé d'un volet matériel évident (fiction d'inopposabilité impactant sur l'établissement concret et individuel de la cotisation)". Even more drastic is the position recently expressed by T. Afschrift, *L'abus fiscal*, 1 éd., Larcier, at 199, who believes that the probative scope of Article 344, para 1, is 'accessoire' in respect to the substantive scope. He says: "De tel textes [Article 344, para 1, Article 18, para 2] ne peuvent être considérés, malgré l'intitulé de la section, du chapitre ou du titre au sein desquels ils ont été insérés, comme des mesures relatives à la preuve, Il s'agit de dispositions touchant au fond du droit, ayant pour objet et pour effet de modifier la base imposable, le taux de l'impôt ou les exonérations, et comportant accessoirement une règle de preuve destinée uniquement à assurer leur propre application." To support this theory, he refers particularly to the aim sought by the provision, which is not to alleviate the probative burden of the tax authorities, but rather to levy certain acts or income that would not be taxed otherwise. The same held true as regards the previous wording of the same provision, pursuant to which the tax administration could disregard the qualification given to the act(s) by the parties. In both of the cases, he argues, the tax authorities are entitled to extend the taxable base. The provision, therefore, lays down a way of determination for the taxable base. It does not contrast with the legality principle provided that the objective of the law which Article 344, para 1, refers to can be certainly determined through official documentation and the taxable income is re-determined by identifying the rule applicable to the concrete facts. In his view, the provision is in line with the legality principle if "il s'agit de "changer le droit", c'est-à-dire d'appliquer la règle légale, en cas d'abus fiscal, à des hypothèses entrant dans le champ d'application voulu de la norme en question, comme ci celle-ci avait effectivement un champ d'application conforme aux objectifs du législateur". By contrast, "s'il fallait devoir interpréter l'article 344, 1er, alinéa 4, du Code comme permettant de "changer les faits", c'est-à-dire d'appliquer la loi non pas aux actes qui ont été effectivement accomplis, mais à d'autres, à choisir par le contribuable, de telle manière qu'il permette une taxation "conforme aux objectifs du législateur", nous pensons que cela conduirait nécessairement à une indétermination du résultat. En effet, dans la quasi-totalité des cas, il existe plusieurs possibilités d'actes, conformes aux objectifs du législateur, qui pourraient se substituer à l'acte réellement accompli par les parties." Under this second interpretation, which entitles the tax authority to replace the act chosen by the parties with another (more 'normal') one, the provision would not be in line with the principle of legality, because of the lack of any objective criteria in the law.*

embodying an operation, which is abusive in the view taken by the tax authority, is justified in the light of reasons different from the essential aim of avoiding the payment of the income tax. If he does not produce such evidence, the tax authority is entitled (last indent) to re-determine the tax debt ('base imposable', 'calcul de l'impôt') as if the abuse did not take place, so as to apply a levy in line with the purpose of the relevant (circumvented) provision.

In fact, the provision governs the consequences of the ascertainment by the tax administration of an abusive conduct, which is defined by the law. In other words, the provision does concern the powers of investigation of the tax authorities, and in this sense it has a procedural (or probative) nature. It may have fictitious effects, though, in the extent to which the tax administration has the power to disregard the acts originally chosen by the parties involved and reckon the taxation on this new basis.

In this regard, in a very recent decision<sup>437</sup> the Constitutional Court has found Article 344, para 1 (new formula), to be in line with the principle of legality, and it has given further elements for interpreting such rule<sup>438</sup>. In particular, alike what had asserted as regards the old formula, the Court has excluded that such rule affects the tax obligation, being rather a means of proof in the hands of the tax administration<sup>439</sup>. In this view, it does not leave to

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<sup>437</sup> Const. Court 30 October 2013, No 141. In the decision, the Court has also examined the compatibility of Article 344, para 1, with the principle of equality and rejected the question.

<sup>438</sup> In particular, some uncertainties could raise as regards the asymmetry between the way in which the contrary proof is provided in the third indent and the hypotheses of abuse laid down in the second indent. The former states that "*Il appartient au contribuable de prouver que le choix de cet acte juridique ou de cet ensemble d'actes juridiques se justifie par d'autres motifs que la volonté d'éviter les impôts sur le revenu*". At first sight, it regards exclusively the subjective element of the abusive conduct, which in turn the tax authority is (literally) requested to prove only in the second hypothesis of abuse set out in the second indent. In fact, whereas the first hypothesis refers to an operation which places the taxpayer outside the scope of a CIR provision in contrast with the objective of the provision itself, the second covers an operation carried out with the essential purpose of obtaining a certain tax advantage and that entitles him to get such benefit pursuant to (albeit in contrast with the objective of) a CIR disposition. In brief, both the hypotheses of abuse contemplate the circumvention of a certain provision of the CIR (providing for a certain tax treatment or tax benefit), but only in the second one is the tax authority requested to prove the subjective element alongside the objective component. Consequently, one could infer that the evidence of the recurring of non-fiscal justifications may be given only when the abuse consists of availing of a certain tax benefit contrary to the objective pursued by the provision granting it. Even though in the literature there has been the attempt to refer the subjective component also to the first hypothesis listed in the second indent, para 1, Article 344, the actual wording of the provision does not fit such systematic interpretation

<sup>439</sup> The Court refers to the Parliamentary works and states that "*B.15.1. Les travaux préparatoires font apparaître que la nouvelle disposition anti-abus, comme l'ancienne, est un moyen de preuve de l'administration et qu'il s'agit d'un «système de preuve et de preuve contraire» (Doc. parl., Chambre, 2011-2012, DOC 53-2081/001, pp. 111-112). Dans une première phase, l'administration doit démontrer qu'il y a un abus fiscal (élément objectif). Cette preuve doit être apportée à l'aide de présomptions ou des autres moyens de preuve visés à l'article 340 du CIR 1992. Il s'agit des moyens de preuve du droit commun, à l'exception du serment (ibid., pp. 113-114). Ensuite, le contribuable peut prouver que d'autres motifs que l'évasion fiscale justifiaient ses actes juridiques (élément subjectif). S'il n'y parvient pas, le fisc peut imposer comme si l'abus n'avait pas été commis (Doc. parl., Chambre, 2011-2012, DOC 53-2081/016, p. 10).*"

the discretion of the administrative power<sup>440</sup> the determination of the tax event or taxable amount, but it is rather a procedural provision that alters (but do not reverse) the division of the burden of proof between tax administration and taxpayer. The former is requested to demonstrate the constituting elements of an abusive conduct, which is defined by the same provision in accordance with the rules set at EU law. In particular, it has to prove that the act or operation chosen by the taxpayer contradicts the objectives of a certain (income tax) provision with the aim of avoiding taxation. At this stage, the tax administration is not requested to prove also the possible other reasons justifying the act or operation. It is up to the taxpayer, indeed, to give evidence of such economic and financial (i.e. non-merely related to taxation) reasons.

Therefore, under Article 344, para 1, the tax authorities are not relieved from the burden of proving the abuse. At most, a presumptive rationale may be assigned to the provision at hand, as it assumes the behaviour of the taxpayer to be abusive (guided by the intention of avoiding taxation) where some circumstances are met, i.e. the circumvention of an income taxation provision with the essential aim of obtaining a tax advantage. As such, it does not appear to embody a legal presumption. It is rather a rule of assessment having a presumptive *ratio* and apparently formulated as a rebuttable presumption, with the attempt to meet the constitutional as well as the EU standards.

## **7.2 The (semi)-general anti-abuse rule in the field of income taxation for cross-border transactions**

Article 344, para 2, CIR, provides that the (income) tax administration may disregard the transfer of a number of listed assets to a non-resident taxpayer<sup>441</sup> who is not subject to

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(...)B.15.3. *La circonstance que par suite de l'application de la disposition anti-abus, une opération déterminée peut être soumise à l'impôt ne conduit pas à la conclusion que la mesure attaquée aurait réglé le taux d'imposition, la base imposable (« base d'imposition ») et les exonérations de certains impôts régionaux. En effet, comme l'ont souligné à plusieurs reprises les travaux préparatoires mentionnés en B.15.1, la disposition anti-abus est une règle de procédure relative à l'administration de la preuve qui permet l'établissement factuel de la base.*” To support such classification the Court refers also to the fact that Article 344, para 1, is placed under the heading ‘Moyens de preuve de l’administration’ in the CIR.

<sup>440</sup> At point B.21.1 it states that “*la mesure attaquée n'est pas une habilitation générale autorisant l'administration à fixer elle-même, par voie de mesure générale, la matière imposable, mais constitue un moyen de preuve destiné à apprécier, dans des cas concrets, sous le contrôle du juge, des situations particulières, de manière individuelle.*”

<sup>441</sup> More precisely, the provision refers to ‘a taxpayer mentioned in Article 227’ CIR, which identifies as follows the persons subject to non-resident income taxation: “*1° les non-habitants du Royaume, y compris les personnes visées à l'article 4; 2° les sociétés étrangères ainsi que les associations, établissements ou organismes quelconques sans personnalité juridique qui sont constitués sous une forme juridique analogue à celle d'une société de droit belge et qui n'ont pas en Belgique leur siège social, leur principal établissement ou leur siège de direction ou d'administration; 3° les Etats étrangers, leurs subdivisions politiques et*

income taxation or is subject to a remarkably more favourable taxation for the income generated by those assets in respect of the treatment provided by the Belgian legislation. As a result, the income generated by these assets are attributed to the transferring taxpayer, unless he proves alternatively that a) the operation is justified by legitimate financial and economic needs or b) he has received a consideration for the transfer which generates income that is subject to a normal tax burden in respect to that which would have been applied in the lack of the operation<sup>442</sup>.

Similarly to paragraph 1 of the same Article 344, the above provision entitles the tax administration to disregard the conveyance between the parties for income tax purposes only<sup>443</sup>, thereby applying the taxation as if did not take place. Unlike the general anti-abuse provision, however, it has a specific scope, in the sense that it covers only certain listed operations and it is targeted at countering the shifting of income towards tax havens. In other words, whereas the former aims at tackling all the possible ways in which abusive practices are carried out, the latter rather concerns only the transfer of certain assets producing income to a non-resident benefiting from a more favourable foreign tax regime. Besides the scope, they differ also under the perspective of the division of the burden of proof between tax authorities and taxpayer. As a matter of fact, under para 1, the tax authority is required to give full evidence of the abusive conduct, as defined in the same paragraph. It has to prove that the legal act grants to the party an undue (meaning contrary to the objective of the income tax legislation) tax advantage or lower taxation and the act is essentially justified by the aim of obtaining a tax advantage. Instead, when having recourse to paragraph 2, the tax authority is relieved from proving that the relevant transaction has been carried out for the purpose of avoiding the 'normal' taxation, as such the burden is shifted onto the taxpayer. In fact, once the tax administration has proven the circumstances

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*collectivités locales ainsi que toutes les personnes morales qui n'ont pas en Belgique leur siège social, leur principal établissement ou leur siège de direction ou d'administration et qui ne se livrent pas à une exploitation ou à des opérations à caractère lucratif ou se livrent, sans but lucratif, exclusivement à des opérations visées à l'article 182.»*

<sup>442</sup> It stipulates that: «N'est pas non plus opposable à l'Administration des contributions directes, la vente, le cession ou l'apport d'actions, d'obligations, de créances ou d'autres titres constitutifs d'emprunts, de brevets d'invention, de procédés de fabrication, de marques de fabrique ou de commerce, ou de tous autres droits analogues ou de sommes d'argent, à un contribuable visé à l'article 227, qui, en vertu des dispositions de la législation du pays où il est établi n'y est pas soumis à un impôt sur les revenus ou y est soumis, du chef des revenus produits par les biens et droits aliénés, à un régime de taxation notablement plus avantageux que celui auquel les revenus de l'espèce sont soumis en Belgique, à moins que le contribuable ne prouve soit que l'opération répond à des besoins légitimes de caractère financier ou économique, soit qu'il à reçu pour l'opération une contrevaieur réelle produisant un montant de revenus soumis effectivement en Belgique à une charge fiscale normale par rapport à celle qui aurait subsisté si cette opération n'avait pas eu lieu.»

<sup>443</sup> In the sense that the operation will normally have effects from the civil law point of view.



provided for by the law (assets transfer to non-resident established in a low tax jurisdiction), it lies on the taxpayer the evidence to the contrary. The resident taxpayer bears the burden of proving that there are concrete economic reasons behind the operation or that from the latter it does not follow the effect of transferring the income to a lower tax jurisdiction and eroding the taxable income subject to the Belgian legal order.

Precisely the reversal of the burden of proof and the content of the contrary proof indicate that Article 344, para 2, introduces a rebuttable (mixed) presumption of law, and in particular a presumption of cross-border tax avoidance. The carrying on of certain transfers of assets, which in the evaluation of the legislator show a higher risk of abusive manoeuvres, with persons resident in low tax jurisdictions, is assumed as the known fact from which the intention of avoiding tax by transferring assets abroad is inferred, save for the counterproof.

The 'secondary' effect of this presumption is that in respect to the tax authorities the transfer is deemed as if it never took place. In this way, the assets, though transferred under private law, are still part of the transferor's patrimony for income tax purposes, so that the income generated by those assets is taxed under the Belgian legal order. Such 'secondary' effect ensuing from the application of Article 344, para 2, has led tax authorities to classify the norm as a presumption of sham<sup>444</sup>. As it has been correctly observed, however, "*It follows from the evidence which the taxpayer is required to administer to ward off the application of Art. 344(2) BITC that Art. 344(2) BITC does not introduce a presumption of*

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<sup>444</sup> See Com. CIR 344/3: "*Pour combattre la fraude décrite ci-dessus, l'art. 344, CIR 92, présume que les actes ayant pour objet le transfert de droits ou de biens à des sociétés holdings, à des personnes ou à des entreprises établies dans des pays dénommés "pays-refuges" et y soumises à un régime fiscal exorbitant du droit commun, sont des actes simulés, accomplis dans une intention de fraude et d'évasion fiscales. Il dispose, en effet, que ces actes sont réputés non opposables à l'administration, c.-à-d. que le contribuable ne peut en tirer argument pour justifier qu'il n'est plus propriétaire des actions, obligations, créances, brevets d'invention, etc., et qu'il doit être imposé sur les revenus de ces valeurs comme si le transfert n'avait pas eu lieu*"; Com. CIR 344/4: "*Le texte de l'art. 344, CIR 92, vise, d'une manière générale, les différentes opérations par lesquelles un contribuable peut transférer à une société holding établie à l'étranger ou à une personne ou à une entreprise établie dans un "pays-refuge", la propriété de droits ou de biens normalement productifs de revenus passibles de l'IPP, de l'ISoc. ou de l'INR, tels que actions ou parts, obligations, fonds publics, créances et prêts à charge de sociétés ou de personnes physiques, dépôts d'argent, rentes et valeurs mobilières étrangères, créances sur l'étranger, brevets d'invention, procédés de fabrication, marques de fabrique ou de commerce et tous autres droits analogues*". Cf. also Com. CIR 344/5, where it is clarified that the sham may be claimed only as regards the person who carried out the transaction, and not also to the assignee. Indeed, "*En effet, l'art. 344, CIR 92, a pour objet de maintenir fictivement dans le patrimoine du contribuable, qui a effectué une opération visée par cette disposition, les éléments d'actif qu'il en a ainsi fait sortir, mais non d'introduire fictivement, même au décès de ce contribuable, dans le patrimoine de tiers, des éléments d'actif qui ne s'y trouvent point, eussent-ils même pu y entrer si l'opération n'avait pas été réalisée (Cass., 18.12.1962, Dauge Pierre et Dauge Elisabeth, Bull. 397, p. 1109)*".

*sham, but a (rebuttable) presumption of (international) tax avoidance*”<sup>445</sup>. In fact, if the provision presumed the sham, the taxpayer would be called upon to prove that the transfer of assets actually took place and that he accepted all of the legal consequences. On the other hand, the presumption under discussion is not targeted at abusive schemes wherein the legal act(s) which appear to have been conveyed were not actually carried out. By contrast, the phenomenon that the provision aims at tackling is the transfer of taxable base towards low tax jurisdictions, which may happen through acts which actually transfer the ownership (or other) rights.

From the foregoing it results that the construing of the provision as including a rebuttable presumption of law appears to be the more suitable. One could object that the subjective element is not presumed, but rather inherent to the situation envisaged in the norm, in the sense that the circumstances provided by the provision are deemed as implying *ex se* the avoidance intent, which thus is not presumed. Such theory, which ends up to label para 2 of Article 344 as a typification or at most a fiction, is not supported by the scheme drafted in the provision. In particular, it is significant that the contrary proof is admitted and even that it does not concern the known fact (i.e. the condition for Article 344, para 2, to apply), but rather the unknown (presumed) fact. The counterproof, which is provided for by the same provision, aims at proving the inexistence of the intention to fraud or reduce the tax base, either because the transaction carried out is justified by economic (other than tax) reasons or because there was not in fact a reduction of the taxation as the tax burden on the consideration received is ‘normal’; a circumstance which *per se* excludes the recurring of a tax avoidance scheme.

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<sup>445</sup> L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, IBDF Docotoral Series, Vol. 14, 2008, at p. 128. Otherwise, the contrary proof envisaged in the norm would be hard to give. Notably, the Author, while examining the possible interference of Article 344, para 2 with Article 26 CIR, observes that the former is listed amongst the provisions dealing with the methods of proof available to the tax administration, so that it embodies a specific method of proof. Accordingly, Supreme Court 18 December 1962, Pas., 1963, I, 489. Cf. A. Nollet, *L'article 344, §2, du C.I.R. 1992: essai de contrôle de "constitutionnalité" et de "conventionnalité" d'une disposition légale belge "anti-abus"*, R.G.C.F., 2011, 488 et seq. The Author observes how the provision “combine dans une seule disposition plusieurs techniques législatives qui sont symptomatiques du fonctionnement des mesures anti-abus rencontrées dans le C.I.R. 1992: présomption réfrangible d'évasion fiscale, fiction d'inopposabilité d'actes juridiques non simulés, stigmatisation de régimes fiscaux étrangers, réattribution de revenus entre différents contribuables”. In his opinion, “ces mesures [Articles 54 and 344, para 2 CIR] viennent présumer le mobile d' "évasion fiscale" dans le chef du contribuable à partir de caractéristiques objectives d'une opération qu'il accomplit, renversant alors sur ce contribuable la charge de prouver positivement certains éléments qui "contre-indiqueraient" que cette opération a pour finalité essentielle la diminution de son imposition”.

### **7.2.1 Article 344, para 2, CIR, and CFC rules**

Looking at the alternative forms of evidence that the taxpayer can give in order to ward off the application of Article 344, para 2, one may observe that they recall the contrary proof drafted by Article 167 TUIR governing the Italian CFC rule. Simplifying, in both of the cases, it rests upon the (resident) taxpayer the proof that a) the transfer of assets/activity carried on abroad is justified by sound business reasons or that b) from the transfer/activity carried on abroad does not ensue a remarkable lower taxation.

As a matter of fact, it has been observed in the academic literature that, albeit the Belgian tax system does not include a CFC legislation, some of the features of the latter may be recognized in the rule laid down in Article 344, para 2, CIR.

The main similarities concern the task sought by the legislator and the taxing mechanism. As to the former, they both aim at preventing a resident taxpayer from transferring taxable income to a low tax jurisdiction, possibly enjoying a tax deferral. As to the second, they are both based on a fiction, which consists of attributing the income produced by the non-resident taxpayer to another resident taxpayer. In the case of Article 344, para 2, the non-transfer of the assets is assumed, whereas in the case of a CFC rule the earning of the CFC's profit directly (i.e. irrespective of the distribution as a dividend) by the resident shareholder. Nonetheless, they differ under several aspects, besides their different nature. Among these, it has to be noted that Article 344, para 2, does not imply a control requirement, albeit it may in practice occur. Instead, the condition of the (qualified) control requirement or of a certain interest of the resident person in the foreign entity is peculiar to every CFC rule. If from this point of view the CFC regime might appear more restricted in scope, this is not the case when considering the type of income which is imputed to the resident taxpayer. In the case of Article 344, para 2, it is the income generated by the assets that have been transferred, which continue to be taxed under the Belgian law taking into account its character and source. Instead, the CFC regime (normally) entails that all the CFC profits are included in the taxable base of the shareholder (in proportion to his participation) irrespective of their distribution, as if the foreign entity was transparent.

#### **7.2.1.1 Conditions for application and proof to the contrary**

The conditions for the application of Article 344, para 2, are clear enough.

The rule applies to all transferors who are resident taxpayers in Belgium, either individuals or corporations<sup>446</sup>, with regard to the transactions carried on with non-resident persons who, pursuant to the legislation of the State where they are established, are not subject to income tax or, with respect to the income generated by the assets transferred, are subject to a considerably more favourable tax treatment in comparison to the one that would have been applicable in Belgium. With regard to the list of assets and rights covered by the provision, it is only apparently specific, as the inclusion of the transfer of cash significantly contributes to the extension of the (objective) scope. In practice, the legal acts envisaged (sale, transfer, contribution) have in common the effect of transferring the ownership right of the listed goods (financial instruments, patent or intellectual property rights, cash).

Having said this, it has to be noted that uncertainties arise as regards the method of determination of the income attributable to the transferor. In fact, from Article 344, para 2, we certainly infer that the income derived from the assets in the hands of the transferee are imputed on the transferor, because such assets are deemed as not having been transferred. But this puts on tax authorities a heavy administrative burden, as a certain difficulty in getting the necessary information and in tracking the assets can be foreseen. Furthermore, one could wonder what happens if the assets are reinvested or are sold by the transferee to a third party.

Moreover, uncertainties concern also the theme of the contrary proof, particularly the second one.

As said, Article 344, para 2, introduces a mixed presumption of law, that is a tax law presumption for which the law provides strictly the circumstances to be proved in order to rebut the presumption<sup>447</sup>. In other words, the contrary proof cannot be freely given, and this advocates for an evaluation of the concrete possibility to meet such burden.

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<sup>446</sup> Moreover, it “equally applies to non-residents that own income producing assets situated in Belgium which are susceptible to being transferred outside the Belgian tax jurisdiction (mainly assets belonging to a Belgian branch)” according to L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, at p. 128.

<sup>447</sup> In this regard, according to the tax authorities, Com. CIR No 344/6: “*La présomption légale de simulation que l'art. 344, CIR 92, attache à l'égard des actes en question, n'est pas irréfragable. Le même article dispose en effet que le contribuable peut renverser la présomption "juris tantum" en prouvant : soit que l'opération répond à des besoins légitimes de caractère financier ou économique; soit qu'il a reçu pour l'opération une contre-valeur réelle produisant un montant de revenus soumis effectivement en Belgique à une charge fiscale normale par rapport à celle qui aurait subsisté si cette opération n'avait pas eu lieu*». Thus, Com. CIR No 344/7 : «*En ce qui concerne la première manière de renverser la présomption "juris tantum", on se référera utilement aux règles énoncées aux commentaires de l'art. 49, CIR 92, qui sont relatifs au renversement de la présomption légale dont il est question à l'art. 54, CIR 92. En ce qui concerne la seconde manière de renverser la présomption "juris tantum", on notera qu'il appartient au contribuable d'établir non seulement qu'il a reçu une contre-valeur réelle (espèces, titres, etc.) en échange de ses actions,*

Under the first alternative counterproof, the taxpayer is requested to give evidence of ‘legitimate financial and economic needs’ justifying the assets transfer. This first escape does not give rise to any particular doubts. It is plainly interpreted as referring to the economic reasons other than tax saving which can explain the transfer of the assets. As such, it is a positive proof: the taxpayer is not required to prove that the transaction is not justified by the aim of alleviating the tax burden, but rather that there are financial and economic needs which the operation is called upon to satisfy. In this way, economic purposes may co-exist with income tax burden considerations, but the latter have to be separated from the former.

In this regard, a number of observations drawn with reference to one of the escapes to the Italian CFC rule may be extended to the counterproof at hand. It has to be noted, indeed, that the ascertainment of the existence of such economic needs entails a delicate balance between the prevention of business conduct guided by tax burden purposes and the freedom of economic private initiative. The latter implies the discretion of the taxpayer as regards the management of his business, which neither the administrative nor the judicial authorities enter<sup>448</sup>.

The second form of evidence implies a more complex burden of proof upon the taxpayer, as he is required not only to prove that he has received a consideration for the transfer, but also that such consideration generates income which is subject in Belgium to a tax burden that is ‘normal’ in comparison to the one that would have been imposed in the absence of the transfer. Thus, the evidence concerns first of all the remunerative character of the transaction, and secondly, a hypothetical (domestic) comparison between the current taxation upon the income produced from the consideration and the taxation that would have been applied on the income from the assets transferred. All this, in order to show that the effect of the transaction is not a lower tax burden in the home State, as the use of the vague term ‘normal’ for judging the comparison seems to suggest. Moreover, while the first escape (the existence of economic needs) is to be ascertained at the time when the transfer occurs, the second does not appear to be susceptible to a one-time ascertainment,

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*obligations, brevets d'invention, etc., mais encore que cette contre-valeur produit un montant de revenus soumis effectivement en Belgique à une charge fiscale normale par rapport à celle qui aurait subsisté si cette opération n'avait pas eu lieu».*

<sup>448</sup> Though, the use of the term ‘legitimate’ indicates that the statute requires a ‘reasonableness’ test, meaning that “*The tax authorities (and later the Courts) may therefore reject the needs put forward if a reasonable person who is guided by the alleged needs would not have chosen such a scheme*” according to L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, at p. 140.

as the tax burden might depend on several factors. It seems to follow, then, that the taxpayer should be allowed to prove the normality of the taxation borne on the income actually produced in comparison to the one that he would have produced in the absence of the transfer, even beyond the taxable year when the transfer occurs<sup>449</sup>.

### 7.2.2 Critical aspects and questions of Constitutional (in)consistency

Given the uncertainties related particularly to the assessment of the taxable income imputable upon the resident taxpayer, one cannot be surprised to see that Article 344, para 2, has not found a wide application in practice. In fact, it relieves tax authorities from the evidence of the tax avoiding scheme, but once this is deemed as being proved, they have to determine the taxable income by taking into account the assets which are in the hands of another person, according to the criteria provided for by the norm.

However, such criteria are not (at least explicitly) set forth by the same article, where it is simply stated that the transfer cannot be opposed to the tax authorities for income tax purposes. This raises questions of compatibility with the legality principle, as the taxable income is one of the essential elements that must be regulated by the law rather than left to the discretion of the tax administration<sup>450</sup>. In this regard, it cannot be ignored that the

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<sup>449</sup> In other words, if the taxpayer fails to prove the first escape, he must yearly administer the second escape. See L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, at p. 140. He illustrates this with the following example: “if assets have been contributed to the paid-up capital of the beneficiary and the beneficiary distributes sufficient dividend to meet the burden of proof in one year but not in another year, the tax authorities can disregard the contribution in the second year but not in the first year.”

<sup>450</sup> According to A. Nollet, *L'article 344, § 2, du C.I.R. 1992: essai de contrôle de “constitutionnalité” et de “conventionnalité” d'une disposition légale belge “anti-abus”*, cited above, 496, the compatibility with the legality principle has to be particularly checked with regard to the first form of evidence provided in the norm and the effects of the latter on the amount of income to be imputed upon the taxpayer. As to the former, the Author criticizes the choice of the terms (‘legitimate needs’, ‘economic and financial’), which are vague and undetermined, so that it is left to the tax administration the power of determining their concrete meaning in single cases. On the other hand, he recognizes that in order to be effective an anti-avoidance measure must be general so as to cover all the various ways of avoiding tax, though analogy and a retroactive application are to be excluded precisely by virtue of the legality principle. Thus, with regard to Article 344, para 2, he asserts as follows: “l’insertion de la clause ouverte des “besoins légitimes à caractère économique ou financier” est venue permettre au législateur d’appréhender sans complexe une catégorie complète et homogène d’actes juridiques suspectés d’évasion fiscale, tout en laissant “exfiltrer” les actes dont les circonstances singulières ne justifieraient pas l’application de redressement prévue”. Yet, the fact that the determination of the content of the escape at hand is left to the tax administration is not in line with the legal certainty (‘sécurité juridique’) on the side of the taxpayer, which the legality of the levy aims at safeguarding. As to the margin of manoeuvre of the tax authorities in determining the income imputable upon the taxpayer when Article 344, para 2 applies, the Author excludes the inconsistency with the legality principle on condition that the measure is strictly interpreted. Indeed, he argues: “Dans l’article 344, S2, le législateur a ciblé certains actes de transfert d’actifs mobiliers et s’est contenté de les rendre inopposables à l’égard de l’administration des contributions directes. Lors d’un redressement en application de cette mesure, le fisc n’a dès lors aucun autre choix que d’établir l’“impôt sur les revenus” du contribuable-cédant comme si le transfert en cause n’avait pas eu lieu, et partant, l’imposer dans le chef de ce contribuable les revenus des actifs mobiliers

approach of the Constitutional Court manifested on occasion of its judgments concerning Article 344, para 1, (prior to the amendments of 2012) is in the sense of ensuring the specificity of the legislative choice consisting of providing that the tax administration can disregard the relevant operation.

Furthermore, Article 344, para 2, might be questioned under the light of the principle of equality as well<sup>451</sup>, because – similarly to para 1 – it may give rise to economic double taxation. Unlike some CFC rules, like the Italian one, which provides that the income taxed upon the resident taxpayer before the distribution of profits is not taxed a second time at the time of the distribution, no provisions aiming at avoiding such effects are laid down in Article 344.

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*transférés comme si ces biens étaient restés dans son patrimoine. (...) En effet, la disposition légale ne prévoit que l'inopposabilité de l'acte de transfert et non la transparence de la personne du cessionnaire, en sorte que ce sont uniquement les revenus qui sont directement produits (après le transfert) par les biens transférés qui peuvent être ré-inclus dans la base imposable du cédant (et ce, dans leur catégorie normale d'imposition)."* In this view, the transferor cannot be taxed, for example, on the income generated by the assets that the transferee has obtained by selling the assets transferred. The possibility for the taxpayer to ask for an advance ruling by the tax authorities only partially alleviates the gap of legal certainty. As to the availability of such instrument, the tax authorities have recalled, in the Circular letter 4 May 2012, AAF. No 3/2012, AGFisc No 17/2012, AGDP No 4/2012, that the royal decree 17 January 2003 (enacted pursuant to Article 22, para 2, Law 24 December 2002) excludes the authorization to issue an advance ruling as regards "la déclaration, les investigations et le contrôle, l'utilisation des moyens de preuve, la procédure de taxation, les voies de recours, les droits et privilèges du Trésor, la base minimale d'imposition, les délais, la prescription, le secret professionnel, l'entrée en vigueur et les responsabilités et obligations de certains officiers et fonctionnaires publics, d'autres personnes ou de certaines institutions". Thus, "En soi, le service des décisions anticipées en matière fiscale (SDA) ne peut donc pas se prononcer sur le fait de savoir si l'administration appliquera ou non la mesure anti-abus (DOC 53 2081/001, p 112). En soi, la mesure anti-abus de droit est une règle de procédure qui ne peut s'appliquer qu'après la réalisation des opérations visées. Certes, ce service pourra prendre une décision relative au choix de l'acte juridique ou l'ensemble d'actes juridiques qui lui est présenté par le contribuable. Le service pourra donc se prononcer sur le fait de savoir si le choix du ou des acte(s) juridique(s), ou l'ensemble d'actes juridiques projetés et réalisant une même opération, est justifié par d'autres motifs que l'évitement des impôts. L'accord de ce service sur le choix du contribuable d'un acte ou d'un ensemble d'actes implique que celui-ci ne peut pas être remis en question dans le cadre de la présente disposition, pour autant que toutes les opérations aient été réalisées telles qu'elles sont reprises dans l'accord préalable (DOC 53 2081/001, p. 112)."

<sup>451</sup> A. Nollet, *L'article 344, §2, du C.I.R. 1992: essai de contrôle de "constitutionnalité" et de "conventionnalité" d'une disposition légale belge "anti-abus"*, cited above, at p. 504-505, holds that "la mesure étudiée apparaît bien compatible avec le principe d'égalité tant elle ne "discrimine" que sur la base de catégories pertinentes et qu'avec une intensité proportionnée par rapport à sa ratio legis de lutte contre une certaine forme d'évasion fiscale internationale". In fact, the Author finds the distinction resulting from the scope of the provision as being coherent with the aim sought. In this light, it can be reasonably justified the exclusion of legal acts which do not transfer the property rights, the inclusion of the transfer of cash but not of immovables. He also finds the effects of the mechanism in line with the proportionality principle, provided that the re-determination of the taxable base is interpreted strictly. It should be noted, however, that the same Author, dealing with the issue of the anti-abuse measures in respect of the equality principle, points out that "la mesure contrôlée implique, dans le chef des contribuables auxquels elle s'applique, un redressement fiscal qui n'excède pas ce qui est nécessaire pour neutraliser les conséquences fiscales favorables dont ces contribuables ont abusivement cherché à bénéficier". This statement is not completely coherent with the conclusion of consistency of Article 344, para 2 with the equality principle. As said in the text, the event of a double taxation is a concrete possibility.

Ultimately, given the fact that the provision is targeted exclusively at cross-border operations, which might involve EU Member States, where a taxation considerably lower than in Belgium is envisaged, it has to be tested against the EU fundamental freedoms, as we will see.

## **8. Transfer pricing adjustments**

The Belgian legal order includes several specific anti-avoidance rules aimed at combating international tax avoidance which *de facto* imply a relief for the tax administration from proving certain abusive practices and where the inference is drawn by the legislator.

Among these, there is a set of rules providing for transfer pricing adjustments, though in different forms. They embody very different mechanisms for restoring the taxable base, which may be made through the disregard of a certain assets transfer, the recapture of profits or the disallowance of deductions. Though, in the extent to which they concern cross-border situations, they have in common the aim of tackling the shifting of the taxable base towards foreign jurisdictions, as manifestly results from the circumstance that their application mostly implies the non-taxation or considerably lower taxation of the income concerned.

One of these mechanisms is represented by Article 344, para 2, dealt with above. It entitles tax authorities to disregard certain transfers of assets to a person established in a low tax jurisdiction, unless the taxpayer proves that the transaction is justified by legitimate economic needs or that he received a real consideration generating income which is subject in Belgium to a normal tax burden. Though the potential substantive effects of this provision cannot be denied, it is still a mechanism which assumes the exercise of assessment powers by the tax administration. In other words, the provision seems to be addressed to tax authorities before than to taxpayers potentially involved.

The other two forms of transfer pricing adjustment appear to set forth certain rules as to the determination of profits and expenditure, which seems to first address the taxpayers, as the different location in the system of the CIR reflects.

The reference is to Articles 26 and 54 CIR. The former recaptures, among the others, the abnormal or gratuitous advantages granted by a resident company to foreign-related persons or persons established in low tax jurisdictions, where the conditions agreed upon differ from those which would be made between independent enterprises in a free market. The second grounds the disallowing as deductible business expenses of certain expenditure



items (interest, royalties, fees) paid by a resident to a non-resident holding company or any other recipient located in a tax haven, except if the taxpayer proves that the transaction is actual and the payment does not exceed the limits.

Hereinafter the aforementioned provisions will be examined with a special view to their main features and effects on the distribution of the burden of proof<sup>452</sup>.

### **8.1 Profit adjustments for abnormal or gratuitous advantages under Article 26 CIR: main features and conditions of application**

Article 26 CIR, in its first indent, provides that when an enterprise established in Belgium grants abnormal or gratuitous advantages, these are added back to the enterprise's profits, unless such advantages are taken into consideration for determining the taxable income of the beneficiary thereof<sup>453</sup>.

For our purpose, more interesting is the second indent of the same article, where it states – without any exception – that such abnormal or gratuitous advantages are to be added back to the enterprise's taxable income where they are granted to a non-resident person or legal entity. More in detail, where the beneficiary alternatively is: 1) a taxpayer mentioned in Article 227 CIR, with which the enterprise located in Belgium is directly or indirectly related; 2) a taxpayer mentioned in Article 227 or a foreign establishment which, according to the laws of the country where they are located, are not subject to income tax or are subject to a tax regime that is considerably more favourable than the one to which the Belgian enterprise is subject; 3) a taxpayer mentioned in Article 227, which has a common interest with the taxpayer or the establishment mentioned in No 1 and 2 above<sup>454</sup>.

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<sup>452</sup> It goes without saying that in this dissertation the issue of the transfer pricing adjustments cannot be exhausted and it will be dealt with in the extent to which they lay down presumptive provisions which are relevant in the EU perspective.

<sup>453</sup> This escape implies, according to the tax authorities' interpretation, that the income concerned is taxable in Belgium. See COM. CIR 92, No 26/12.

<sup>454</sup> Article 26 CIR, 1st indent, reads: "*Sans préjudice de l'application de l'article 49 et sous réserve des dispositions de l'article 54, lorsqu'une entreprise établie en Belgique accorde des avantages anormaux ou bénévoles, ceux-ci sont ajoutés à ses bénéfices propres, sauf si les avantages interviennent pour déterminer les revenus imposables des bénéficiaires*". At the 2<sup>nd</sup> indent it continues as follows: "*Nonobstant la restriction prévue à l'alinéa 1er, sont ajoutés aux bénéfices propres les avantages anormaux ou bénévoles qu'elle accorde à: 1° un contribuable visé à l'article 227 à l'égard duquel l'entreprise établie en Belgique se trouve directement ou indirectement dans des liens quelconques d'interdépendance; 2° un contribuable visé à l'article 227 ou à un établissement étranger, qui, en vertu des dispositions de la législation du pays où ils sont établis, n'y sont pas soumis à un impôt sur les revenus ou y sont soumis à un régime fiscal notablement plus avantageux que celui auquel est soumise l'entreprise établie en Belgique; 3° un contribuable visé à l'article 227 qui a des intérêts communs avec le contribuable ou l'établissement visés au 1° ou au 2°*". Conversely, Article 207 CIR, second indent, looks at the abnormal and gratuitous advantages received by a Belgian taxpayer from an affiliated company and it precludes him to claim certain deductions (for losses,

The core of the provision - Article 26, second indent - is represented by the ‘abnormal or gratuitous advantages’ which are granted from a resident person to a foreign taxpayer.

The concept is not defined by the law, but from the case-law it results as referring to any kind of enrichment (‘advantage’) attributed to the transferee under unusual economic conditions (‘abnormal’) or in the absence of any consideration (‘gratuitous’)<sup>455</sup>. It has been observed how this notion is inspired by the arm’s length principle set forth by Article 9 of the OECD model convention, though the domestic case-law has manifested a more subjective approach, which aims at fitting the provision to the personal situation of the taxpayer involved<sup>456</sup>.

At any rate, the provision has a general (objective) scope, and it envisages either the situation in which the attribution of an advantage results from practising a lower price or fee for the goods and services supplied or the situation wherein a higher price, in comparison to the one that would be agreed upon under free market conditions, is conveyed between the parties. As a consequence, once applied such provision may determine a reintegration of the profit forfeited or a disallowance of the deduction of the excessive costs.

As to the *ratione personae* conditions of application on the side of the non-resident taxpayer, the provision at hand covers three situations, which render evident how it is not a typical transfer price measure purely aimed at avoiding the shifting of profits between related companies.

First, it applies to a non-resident company which has ‘any direct or indirect affiliation relationship’ with the Belgian transferor. The formula has been broadly interpreted both by

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investments, dividend qualifying for the participation exemption) in connection with profits resulting from such unusual advantages. It reads as follows: “*Aucune de ces déductions [those provided in Articles 199 to 206] ou compensation avec la perte de la période imposable ne peut être opérée sur la partie du résultat qui provient d’avantages anormaux ou bénévoles visés à l’article 79, ni sur les avantages financiers ou de toute nature reçus visés à l’article 53, 24°, ni sur l’assiette de la cotisation distincte spéciale établie sur les dépenses ou les avantages de toute nature, non justifiés conformément à l’article 219, ni sur la partie des bénéfices qui sont affectés aux dépenses visées à l’article 198, § 1er, 9° et 12°, ni sur la partie des bénéfices provenant du non-respect de l’article 194quater, § 2, alinéa 4 et de l’application de l’article 194quater, § 4.*”

<sup>455</sup> See Supreme Court, 10 April 2000, Pas., I, 240, where it is held that “*par avantages anormaux, la loi, sans exiger nécessairement que le transfert ait été réalisé dans l’intention de soustraire un bénéficiaire taxable à l’impôt, vise les avantages qui, eu égard aux circonstances économiques du moment, sont contraires à l’ordre habituel des choses, aux règles ou aux usages commerciaux établis*” and that “*le caractère anormal de l’avantage dans le chef de l’entreprise ou de la personne étrangère relève de l’appréciation en fait du juge du fond*”; see also Supreme Court, 31 October 1979, Pas., 1980, 280, where the gratuitous advantages are defined as “*les avantages accordés sans qu’ils constituent l’exécution d’une obligation ou sans qu’ils aient une contre-partie*”.

<sup>456</sup> L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, 81.

tax authorities and courts, given its quite general wording<sup>457</sup>. It is commonly believed to include not only legal forms of affiliation (like participation in the share capital, the power to influence the assembly or the management), but also economic forms of affiliation (contractual, for example) and indirect forms of relation (for instance, enterprises of the same group or controlled by the same company).

Second, it applies to non-resident persons or enterprises which are located in a low-tax jurisdiction irrespective of any form of affiliation with the Belgian transferor. More exactly, the norm does not refer to the regime generally applicable in the foreign country, but it seems to account for the concrete tax liability of the non-resident taxpayer therein. Indeed, it requests the latter not to be subject to taxation or to be subject to a tax treatment considerably lower than the one levied upon the transferor.

Third, it applies to non-resident taxpayers having a ‘common interest’ with the categories of non-residents mentioned in numbers 1 and 2. Such a hypothesis significantly enlarges the scope of the provision, not only because it is susceptible to covering any forms of relation, but also because it is targeted at triangular schemes. In this way, it seems to play the role of a ‘safety clause’, meaning that it is intended to impede the circumvention of the first two situations. The legislator assumes that the existence of a common interest between the interposed person, who is not related to the Belgian transferor and is subject to a normal tax burden, and the ultimate beneficiary, who is related to the Belgian transferor or subject to a preferential tax treatment, is a certain index of an abusive scheme aimed at passing on the advantages to the non-resident ultimate beneficiary<sup>458</sup>.

### **8.1.1 Some considerations on the nature of the provisions in Article 26 and interplay with Article 185, para 2, CIR ...**

Looking at the first indent of Article 26, one could say that the legislator has aimed at securing the taxation of profits where abnormal or gratuitous advantages are granted to another taxpayer (individual, association or company), at the same time providing for the case in which such advantages have been taken into account in the determination of the

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<sup>457</sup> See, COM. CIR 26/37; Supreme Court 9 April 1968, Pas., II, 1041.

<sup>458</sup> To support this reading of the norm, I quote L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, 92, who underlines that it is not decisive if the advantages are passed on to the ultimate beneficiary or they are rather retained by the interposed person. Thus, “*The statute provides for an irrebuttable presumption that the interposed person does or will do so because of the presence of a common interest between that person and the alleged ultimate beneficiary thereof.*”

transferee's taxable income, in order to avoid double taxation. The provision has a broad scope, as on the one side it does not request any affiliation between the parties involved and, on the other side, it does not impose transactions to be concluded at a normal value. In the light of this, it may be read as assuming that granting abnormal advantages is an index of a manoeuvre aimed at reducing the tax burden, save for the possibility for the transferor to prove that the profits are relevant in the forming of the transferee's taxable base.

The anti-avoidance rationale is more evident when examining the second indent of Article 26, which concerns the advantages granted by a resident to non-resident related persons or non-residents that are located in tax havens. Under this rule, however, the taxpayer is not allowed to escape the application of the provision by claiming that the advantage is taxable abroad in the hands of the transferee. He is presumably able to contest, nonetheless, the existence of such advantages or their unusual character, that is to say the conditions for the application of the norm. Moreover, from the SGI case decided by the EU CJ, which will be dealt with in the next chapter, it results that he is given the opportunity to demonstrate the commercial reasons justifying the transaction concerned.

As such, the provision may not be read as a rule imposing certain cross-border transactions to be agreed upon under free market conditions, but rather as presuming the aim of avoiding taxation. In this view, the tax authorities which claim an abnormal or gratuitous advantage bear the burden of proving the existence of such advantage and also that it has been attributed against the prevailing market conditions or without a consideration, whereas they are not requested to prove fraud or intention to fraud or to reduce the taxable base<sup>459</sup>.

Ultimately, that Article 26 does not fully match with the arm's length principle results also from Article 185, para 2, CIR, which was introduced in 2004 and lays down such principle, in part overlapping Article 26. It applies to two companies which are part of a multinational group of associated companies and carry on cross-border dealings. Two situations are envisaged, albeit apparently on condition that a request for a ruling to the Ruling Committee is filed or there is an international procedure aimed at eliminating double taxation<sup>460</sup>. First, it provides that where commercial relations have been agreed

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<sup>459</sup> In this sense, L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, 81.

<sup>460</sup> Indeed, Article 185, para 2, after having stipulated the scope of the provision in the first indent, continues in the second indent as follows: "*L'alinéa 1er s'applique par décision anticipée sans préjudice de l'application de la Convention relative à l'élimination des doubles impositions en cas de corrections des*

upon under conditions which differ from those which would have been made between independent companies, the profits that the Belgian company would have accrued if acting in arm's length terms with the foreign associated company, may be adjusted upon the former. Second and in parallel, it provides a corresponding adjustment of the Belgian company's profits where the tax authorities of the foreign-related company has adjusted the profits of the latter so as to reflect the arm's length principle<sup>461</sup>.

### **8.1.2 ... and Article 49 CIR**

Currently, the wording of Article 26 reads as follows: "*Sans préjudice de l'application de l'article 49 et sous réserve des dispositions de l'article 54*". This entails that the former does not prevail over Article 49, which is the general provision on the deductibility of business expenditure.

The issue of the interplay between Articles 26 and 49 CIR, has been very much debated. This, not only before Article 81, Programme-Law 27 April 2007, which has inserted in Article 26 a reference to Article 49, but even afterwards. The question is manifestly not merely theoretical. Under Article 26, para 1, the taxpayer is allowed to prove that the unusual advantages granted to another taxpayer have been taken into consideration when determining the taxable income of the latter, so as to escape the application of the profit

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*bénéfices des entreprises associées (90/436) du 23 juillet 1990 et des conventions internationales préventives de la double imposition."*

<sup>461</sup> Article 185, para 2, first indent reads as follows: "*§ 2. Sans préjudice de l'alinéa 2, pour deux sociétés faisant partie d'un groupe multinational de sociétés liées et en ce qui concerne leurs relations transfrontalières réciproques: a) lorsque les deux sociétés sont, dans leurs relations commerciales ou financières, liées par des conditions convenues ou imposées qui diffèrent de celles qui seraient convenues entre des sociétés indépendantes, les bénéfices qui, sans ces conditions, auraient été réalisés par l'une des sociétés, mais n'ont pu l'être à cause de ces conditions, peuvent être inclus dans les bénéfices de cette société; b) lorsque, dans les bénéfices d'une société sont repris des bénéfices qui sont également repris dans les bénéfices d'une autre société, et que les bénéfices ainsi inclus sont des bénéfices qui auraient été réalisés par cette autre société si les conditions convenues entre les deux sociétés avaient été celles qui auraient été convenues entre des sociétés indépendantes, les bénéfices de la première société sont ajustés d'une manière appropriée.*" Thus, Article 26 CIR will apply instead of Article 185, para 2, when a transaction between related companies of a multinational group is domestic, or one of the party is not an individual enterprise, or when parties are not associated. The scope of the provision is delimited into the Circular letter 4 July 2006, Ci.RH.421/569.019 AOIF 25/2006, where administrative guidelines on transfer pricing audits and documentation are provided. See P. Cauwenbergh, A. Gaublomme, L. Hinnekens, *Transfer pricing in Belgium – Rulings and Practice*, Bulletin for International taxation, 2008, 382 et seq., for further case-law and administrative references. With particular regard to Article 185, para 2, the Authors point out that it "*allows companies to report a taxable result in their annual tax return which deviates from the result demonstrated through financial reporting in the Belgian accounting books. Indeed, if it can be justified that the accounting result exceeds the arm's length result, the difference can be exempt from tax. (...) In other words, for a downward adjustment in Belgium, it is not a prerequisite that a profit adjustment was made in another country*". From this perspective, Article 185, para 2, has a broader scope than Article 9 OECD Convention, as the latter entails double taxation.

adjustment. By contrast, Article 49 does not provide for any measure aimed at avoiding double taxation. It lays down the conditions for the purpose of the expenses' deductibility. To this end, it rests with the taxpayer the burden of establishing that the expenses were made or borne during a certain taxable period with a view to obtain or retain taxable business income and to justify the genuineness and amount of them by means of written documents or, when not possible, of other (admissible) means of proof<sup>462</sup>.

In this regard, it has to be noted that the administrative practice shows a tendency to rely on Article 49 instead of Article 26 in order to disallow the deduction of excessive expenses<sup>463</sup>. In fact, whereas under Article 26 tax authorities must prove the unusual advantage, Article 49 rather concerns a circumstance (deduction of expenditure) which normally must be proved by the taxpayer. However, once the latter has complied with the duty of producing the documents or other means of proof from which the relation between such expenses and the exercise of his business activity, the authenticity and amount of expenditure result, it is likely that the burden of proving their abnormal character for the purpose of disallowing the deduction still lies upon the tax administration<sup>464</sup>.

Having clarified this, the case may be that Article 26 cannot apply because the unusual advantages granted to the beneficiary have been taken into consideration when forming the taxable income of the latter (pursuant to Article 26, 1<sup>st</sup> indent), and nonetheless the deduction of the corresponding expenses claimed by the taxpayer granting the advantage is denied if they are considered to be excessive pursuant to Article 49 CIR. Notwithstanding the risk of economic double taxation under this interpretation of the interplay between Articles 26 and 49 CIR, the Constitutional Court has rejected the question of compatibility of the former with the principle of equality. In particular, in the light of the risk of abusive practices, the Court has excluded that the same treatment for different situations (taxpayers granting abnormal advantages which are considered in the forming of the beneficiary's

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<sup>462</sup> Article 49, para 1 reads as follows: "A titre de frais professionnels sont déductibles les frais que le contribuable a faits ou supportés pendant la période imposable en vue d'acquérir ou de conserver les revenus imposables et dont il justifie la réalité et le montant au moyen de documents probants ou, quand cela n'est pas possible, par tous autres moyens de preuve admis par le droit commun, sauf le serment."

<sup>463</sup> See J.-P. Bours, *Vérité et preuve fiscale*, cited above, 6.

<sup>464</sup> In other words, the provision does not seem to request a heavier proof in respect of the normal burden that the taxpayer bears as regards those elements of the taxation that contribute to reducing it. In this sense, also L. DE BROE, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, 82, according to whom it is up to the tax authority to prove that an expense, albeit documentarily justified, does not meet the arm's length standard.

taxable income and taxpayers granting abnormal advantages which are not taxed upon the beneficiary) is unreasonable<sup>465</sup>.

## **9. Disallowance of certain payments to non-residents under Article 54 CIR**

Dealing with the EU law context, we will see in the next chapter how Articles 26 and 54 CIR have been ruled on by the EUCJ, as in the attempt to tackle (international) tax avoidance they give rise to distinctions among national and foreign taxpayers in respect of the possibility of escaping the recapture of profits or the disallowance of expenses' deduction.

Indeed, Article 54, CIR, disallows the deduction of interest, royalties, manufactured dividends and fees for services paid, either directly or indirectly, by a resident taxpayer to a taxpayer mentioned in Article 227 CIR or to a foreign establishment which, according to the laws of the country where they are located, are not subject to income tax or are subject, with respect to the above items of income, to a tax regime that is considerably more favourable than that applicable in Belgium. This, unless the taxpayer proves that the transaction is sincere and genuine and that the payment does not exceed the normal amount<sup>466</sup>.

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<sup>465</sup> Const. Court 6 November 2008, No 151, originated by a request for the annulment of Articles 81 and 82, Law 27 April 2007, which has introduced in Article 26, first indent, the wording “*Sans préjudice de l'application de l'article 49 et sous réserve*”, in force from the taxable year 2008. In the decision the opinion of the State Counsel is reported and the reply of the Minister of Finance. The former underlined the risk of double imposition, but the latter replied that the tax position of the parties involved in the transaction concerned should be taken aside. The Court recognised that double taxation might follow from the autonomous application of Articles 26 and 49 CIR (“*B.10.4. Il est vrai que la mesure contestée peut avoir pour conséquence que la déduction des indemnités octroyées sera rejetée dans le chef de celui qui les a concédées, même lorsqu'il s'agit d'avantages anormaux ou bénévoles qui sont également imposés dans le chef du bénéficiaire*”). Nonetheless, the interest represented by the contrast to abusive practices prevails in the balance with the interest to non-double economic taxation (“*En l'espèce, le législateur pouvait considérer, eu égard à la nature même des avantages anormaux ou bénévoles, qu'il existe un risque d'usage abusif du régime consacré à l'article 26, alinéa 1er, du CIR 1992. Dès lors que la mesure attaquée peut être de nature à prévenir ce risque, elle n'est pas dépourvue de justification raisonnable*”). Cf. Const. Court 22 December 2010, No 160, in particular at No B.8.; Const. Court 10 February 2011, No 27.

<sup>466</sup> More in detail, Article 54, CIR, reads as follows: “*Les intérêts, indemnités visées à l'article 90, 11°, qui sont payées en compensation de ces intérêts, redevances pour la concession de l'usage de brevets d'invention, procédés de fabrication et autres droits analogues ou les rémunérations de prestations ou de services, ne sont pas considérés comme des frais professionnels lorsqu'ils sont payés ou attribués directement ou indirectement à un contribuable visé à l'article 227 ou à un établissement étranger, qui, en vertu des dispositions de la législation du pays où ils sont établis, n'y sont pas soumis à un impôt sur les revenus ou y sont soumis, pour les revenus de l'espèce, à un régime de taxation notablement plus avantageux que celui auquel ces revenus sont soumis en Belgique, à moins que le contribuable ne justifie par toutes voies de droit qu'ils répondent à des opérations réelles et sincères et qu'ils ne dépassent pas les limites normales.*”

Similarly to Article 26 CIR, Article 54 aims at preventing the transfer of profits to low tax jurisdictions<sup>467</sup>, with special regard to certain costs met with non-resident companies or establishments therein, on the basis of fictitious transactions and abnormal payments. To this end, the provision seems to establish a rebuttable presumption that certain payments made to non-residents located in tax havens hide a tax-avoidance scheme<sup>468</sup>. Indeed, the taxpayer is requested not only to prove the existence, amount and authenticity of the expenditure incurred – as he would be pursuant to the general rule laid down in Article 49 CIR -, but from the content of the counterproof we infer that he is even expected to positively demonstrate that the operation is genuine and that such expense reflects the arm's length standard.

In other words, when relying upon Article 54 CIR, the tax authorities must only prove the conditions provided for by the norm, without being requested to prove that the operation has been carried on with the aim of reducing taxation or that the payment corresponds to an abnormal amount. Instead, under Article 49 CIR, the taxpayer is permitted to deduct the expenditure by complying with the ordinary burden of proof, though the wording of the provision suggests a reinforced duty. It rests on the tax administration to contest the abnormality of such expenses in order to reject the deduction.

### 9.1 The proof to the contrary under Article 54 CIR

The contrary proof that the Belgian taxpayer must give in order to rebut the presumption laid down in Article 54 CIR, so as to obtain the deductibility of the expenses incurred with

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<sup>467</sup> As the use of the same format in order to identify the beneficiary located in a low tax jurisdiction indicates. Both of the provisions refer to non-residents which, according to the law of the country where they are established, are not subject to income tax or are subject to a tax treatment there which is considerably more favourable than that applicable in Belgium, with regard respectively to the profits ex Article 26 and the expenses ex Article 54.

<sup>468</sup> This classification seems to be supported by L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, at 101-102, where he asserts that “*The provision establishes a presumption that the making of certain payments to tainted non-residents is inspired by tax avoidance motives. (...) [the provision] presumes that such payments relate to artificial or sham transactions and/or do not meet the “arm’s length test” with the purpose of dissuading taxpayers from making such payments*”. Accordingly, he concludes that under Article 54 the taxpayer “*is de iure precluded from deducting the payments and, if he wishes to deduct the payments, he must rebut to statutorily defined presumptions*”. He gives account of the debate among the scholars on whether Article 54 CIR introduces a presumption of sham or it merely strengthens the taxpayer’s ordinary burden of proof when claiming a deduction for the expenses envisaged in the norm. Not fully coherent with the wording reported above, he endorses the second thesis. Arguing from the content of the contrary proof envisaged, he assumes that the first presumption included in Article 54 is a presumption of sham of the transaction. However, he argues, the case-law does not request from the taxpayer the proof that the transaction is real, but rather that it is justified by business need. In this view, the provision simply puts a heavier burden on the taxpayer.



non-resident persons, is quite heavy. Unlike other anti-avoidance rules, it includes two circumstances which are not alternative.

First, the Belgian taxpayer has to prove that the transaction is genuine ('opérations réelles et sincères'). A literal interpretation of the normative wording would lead to a request for the evidence that the operation carried on with the non-resident is not artificial, but that it actually took place. However, the prevailing interpretation in the case-law<sup>469</sup>, which is in line with the escapes provided against other anti-avoidance rules in the Income tax Code, requests the taxpayer to demonstrate that such transaction is justified by economic, financial, industrial, commercial, etc., needs. In other words, to satisfy such burden he must prove that the operation concerned and the corresponding costs incurred are connected with the needs of the business activity.

Second and in addition, the taxpayer must prove that the payment does not exceed the normal limits. This entails bringing up the evidence that the amount of consideration agreed upon by the parties – which are not necessarily related – does not considerably differ from that which would have been conveyed between independent parties under free market conditions. In other words, the taxpayer has to prove that the payment is at arm's length, i.e. it is comparable to that which would be established for similar operations under prevailing market conditions.

From the content of such counterproof we infer that the legislator assumes the fictitious or the non-arm's length character of certain costs incurred by a resident taxpayer with non-resident companies or establishments located in low tax jurisdictions. The format of the provision is quite explicit in preventing the taxpayer from the exercise of the right to deduce such expenses, as it states that "*ne sont pas considérés comme des frais professionnels*". This, unless the resident taxpayer demonstrates that those expenses were met for business reasons and in accordance with the normal market value.

Notably, the provision has a wide scope, as it covers not only direct but also indirect payments, which presumably are those made to interposed persons located in jurisdictions with a normal tax burden in order to circumvent the non-deductibility of the enumerated expenses. A wide scope that however covers only cross-border situations. This inevitably embodies a different tax treatment amongst domestic companies concluding transactions

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<sup>469</sup> See Supreme Court 10 November 1964, Pas., 1965, I, 240, where the provision is nonetheless classified as a presumption of sham.

with resident persons and domestic companies which carry on operations with non-residents.

## 10. Limitations to business expenditure's deductibility

Concluding the brief overview of the main anti-avoidance presumptive measures included in the Belgian legal order, a number of provisions provided for by Article 198 CIR, recently amended, must be mentioned.

Article 198, para 1, CIR, provides a list of cost's items which are in principle not deemed as business expenses, so that their deduction is disallowed. Amongst these, the expenses dealt with in Numbers 10 and 11 are of particular interest, as they both are susceptible to involve cross-border transactions.

The former provision (No 10) concerns the payments made directly or indirectly towards those countries referred to in Article 307, para 1, indent 3, CIR, and that have not been declared. Moreover, the deductibility of the expenses is denied also in relation to those payments that have been declared, but for which the taxpayer is not able to prove that they correspond to genuine and actual operations carried on with persons other than fictitious establishments<sup>470</sup>. The provision has to be read in conjunction with Article 307, para 1, indent 3, which places on residents liable to income corporate tax and non-resident legal entities liable to income taxation for non-residents, the obligation of reporting in their tax return – rectius, in a proper form alleged to the tax return - the payments made directly or indirectly to States which are deemed as being tax havens either because they do not meet the OECD standards for the exchange of information or because they have a low tax regime.<sup>471</sup>

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<sup>470</sup> It provides: “10° sans préjudice de l'application de l'article 219, les paiements effectués directement ou indirectement vers des Etats visés à l'article 307, § 1er, alinéa 3, et qui n'ont pas été déclarés conformément audit article 307, § 1er, alinéa 3, ou, si les paiements ont été déclarés, pour lesquels le contribuable ne justifie pas par toutes voies de droit qu'ils sont effectués dans le cadre d'opérations réelles et sincères et avec des personnes autres que des constructions artificielles».

<sup>471</sup> More in detail, the provision reads as follows: “Les contribuables assujettis à l'impôt des sociétés ou à l'impôt des non-résidents conformément à l'article 227, 2°, sont tenus de déclarer tous les paiements effectués directement ou indirectement à des personnes établies dans un Etat qui: a) soit pour toute la période imposable au cours de laquelle le paiement a eu lieu, est considéré par le Forum mondial de l'OCDE sur la transparence et l'échange d'informations, au terme d'un examen approfondi de la mesure dans laquelle le standard de l'OCDE d'échange d'informations est appliqué par cet Etat, comme un Etat n'ayant pas mis substantiellement et effectivement en œuvre ce standard; b) soit figure sur la liste des Etats à fiscalité inexistante ou peu élevée”. In the subsequent indents it is added that “Pour l'application de l'alinéa 3, on entend par Etat à fiscalité inexistante ou peu élevée un Etat dont le taux nominal de l'impôt sur les sociétés est inférieur à 10 pct” and that “La liste des Etats à fiscalité inexistante ou peu élevée est fixée par arrêté royal délibéré en Conseil des Ministres. Cette liste est mise à jour par arrêté royal délibéré en Conseil des Ministres”. Ultimately, the obligation of declaration is delimited as follows: “La déclaration visée à l'alinéa

The provision – Article 198, para 1, No 10 - envisages two different situations.

First, it disallows the expenses related to payments made to tax havens when the taxpayer has not complied with the obligation to declare them in a proper form alleged to his tax return.

Second, it disallows such expenses even though they have been declared, unless the taxpayer can demonstrate a) that the payment is inserted in the context of a real and sincere operation and b) that the addressee located in the tax heaven is not an artificial establishment. In this case, a rebuttable presumption of tax avoidance is set forth, by shifting on the taxpayer the burden of proving that not only the operation but also the counterparty is real and genuine.

### **10.1 Thin capitalization**

Article 198, para 1, No 11, deals with the thin capitalization of Belgian companies by disallowing the deduction of interest if the debt/equity ratio exceeds 5:1 and the payment is made from certain persons or to certain beneficiaries. Such rule is the result of a recent amendment mainly justified in the light of rendering the regime more effective.

Indeed, under the rule previously in force, the disallowance of interest concerned the loans granted by resident lenders or lenders located in low-tax jurisdictions, which were not necessarily shareholders or members of the same group of the borrower. As such, the rule differed from the traditional regimes against the undercapitalization of companies, and showed the legislator's aim to combat the shifting of taxable base towards low tax jurisdictions. At the same time, the high ratio provided (7:1) was able to render the provision ineffective.

In the light of the foregoing, the new regulation<sup>472</sup> resulting from the Law 29 March 2012 – and from some amendments made by the subsequent Law 22 June 2012 – has a significantly broader scope and a reduced ratio (5:1).

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*3 doit être faite uniquement si la totalité des paiements effectués au cours de la période imposable atteint un montant minimum de 100.000 EUR. La déclaration est faite sur une formule dont le modèle est fixé par le Roi et est annexée à la déclaration visée à l'article 305, alinéa 1er.*" The list of the low or non-existent tax jurisdictions is in Article 179 AR/CIR, and it includes: Abu Dhabi, Ajman, Andorre, Anguilla, Bahamas, Bahreïn, Bermudes, Iles Vierges britanniques, Iles Cayman, Dubaï, Fujairah, Guernesey, Jersey, Jéthou, Maldives, Ile de Man, Micronésie (Fédération de), Moldavie, Monaco, Monténégro, Nauru, Palau, Ras al Khaimah, Saint-Barthélemy, Sercq, Sharjah, Iles Turks-et-Caicos, Umm al Quwain, Vanuatu, Wallis-et-Futuna.

<sup>472</sup> In force from the 1<sup>st</sup> July 2012.

As to the first aspect, the current rule concerns the interest on loans (i.e. any interest due in relation to financial arrangements<sup>473</sup>) which is granted to: a) a real beneficiary that is not subject to income tax or is, with respect to the interest, subject to a tax treatment that is considerably more favourable than the Belgian general tax regime; b) a real beneficiary that belongs to the same group<sup>474</sup> of the borrower. Thus, the provision applies either to cross-borders situations where the beneficiary is established in a low-tax State, or to domestic situations, where the lender and the borrower belong to the same group.

As to the second aspect, the legislator has fixed the debt/equity ratio at 5:1, which means that the disallowance of the interest deduction operates where, at any time during the taxable period, the amount of the debt as above delimited exceeds five times the equity. The latter includes the sum of the taxed reserves at the beginning of the taxable period plus the paid-up capital at the end of the same period<sup>475</sup>. The disallowance covers only the amount of interest which corresponds to the debt in excess of the ratio.

The provision includes a few exceptions, taking account of publicly issued financial securities, companies working in the financial sectors (but not for payments to tax havens), groups that centralize their infra-group financing activities in Belgium.

Notably, the thin capitalization rule seems to include a number of specific presumptive provisions.

For instance, when the previous provision was in force, it has been observed that the reference to the ‘real beneficiary’ in order to define the lender receiving the payment, might imply a presumption (of tax avoidance realized through conduit structures) where the interest is paid to a person or legal entity that is subject to a general tax regime on the interest received, and it passes on this income to a lender located in a low tax jurisdiction. This reading seems to force the literal data. It has to be observed, though, that the current

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<sup>473</sup> As to the concept of debt, the provision explicitly excludes, in No 11, bonds issued by public offering and similar securities. It reads as follows: “11° sans préjudice de l'application des articles 54 et 55, les intérêts d'emprunts payés ou attribués si, et dans la mesure de ce dépassement, le montant total desdits emprunts, autres que des obligations ou autres titres analogues émis par appel public à l'épargne et autres que les emprunts octroyés par des établissements visés à l'article 56, § 2, 2°, excède cinq fois la somme des réserves taxées au début de la période imposable et du capital libéré à la fin de cette période: - soit, lorsque les bénéficiaires effectifs de ceux-ci ne sont pas soumis à un impôt sur les revenus ou y sont soumis, pour ces revenus, à un régime de taxation notablement plus avantageux que celui résultant des dispositions du droit commun applicables en Belgique; - soit, lorsque les bénéficiaires effectifs de ceux-ci font partie d'un groupe auquel appartient le débiteur». Notably, the provision clarifies that it does not prevail over Articles 54 and 55 CIR, which deal respectively with the business expense's and interest's deductibility.

<sup>474</sup> Defined by reference to the notion of affiliated company included in Article 11, Belgian Company Code.

<sup>475</sup> It is also clarified that, for non-profit organisations subject to income tax, the paid-up capital is represented by the funds of the association as reported in the balance sheet.

format of Article 198, para 1, No 11, still refers to the ‘bénéficiaire effectif’, presumably with the intent of avoiding the circumvention of the regime.

Another presumptive measure is included in para 3, second indent, of Article 198, where it is stated that loans guaranteed or funded by a tainted third party, which in this way bears the risk, are deemed as being granted by this third party<sup>476</sup>.

### **10.1.1 Thin capitalization and principle of equality. Constitutional Court No 104/2013**

The anti-abuse presumptive rationale grounding the thin capitalization measures may be gathered by referring to a recent judgment of the Constitutional Court<sup>477</sup> where the consistency with the equality principle was questioned.

In particular, to be contended was the different treatment of the interest depending on whether the loan is granted to the company by an entity of the same group or an entity falling in the exceptions provided for by Article 198, para 1, No 11. In the former hypothesis, the interest deduction is disallowed, whereas in the second hypothesis, which includes publicly issued bonds and similar financial securities, the thin cap rule does not apply.

The Court rejects the question by arguing from the objective character of the criterion in the light of which a distinction is drawn between different lenders (to simplify, private companies rather than public bodies). Such distinction rests on the quality of the lender and its relationship with the borrower. When it comes to intra-group loans, then the risks of abusive practices related to the regime of interest’s deductibility are higher. In this regard, the Court incidentally observes: *“Puisque le législateur a entendu lutter contre les conséquences fiscales d’une sous-capitalisation destinée à réduire la base imposable de la société soumise à l’impôt sur les revenus, il n’est de surcroît pas sans justification raisonnable qu’il ait décidé d’exclure du calcul du ratio d’endettement certains emprunts qui, comme ceux obtenus via un appel public à l’épargne ou auprès d’institutions financières visées à l’article 56, § 2, du CIR 1992, peuvent être présumés, à la différence, notamment, de prêts «intra-groupe», avoir été conclus dans un objectif étranger à celui contre lequel le législateur entendait lutter. Pour le surplus, la partie requérante reste en*

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<sup>476</sup> Pursuant to which *“En cas d’emprunts garantis par un tiers ou d’emprunts pour lesquels un tiers a procuré les moyens au créancier en vue du financement des emprunts, et qu’il subit en tout ou partiellement les risques liés aux emprunts, ce tiers est considéré être le bénéficiaire réel des intérêts de cet emprunt, lorsque cette garantie ou cette procuration de moyens a comme objectif principal l’évasion fiscale.”*

<sup>477</sup> Const. Court 9 July 2013, No 104.

*défaut de démontrer quel autre type d'emprunts pourrait bénéficier d'une présomption analogue*"<sup>478</sup>. The measure is accordingly found non-unreasonable and non-disproportionate, given that the company is not prevented from being financed through intra-group loans, but it simply confines the interest's deductibility within the ratio 5.1.

In other words, the Court finds the thin capitalization measure, with particular regard to the distinction based on the quality of the lender, to be reasonable on the basis of the (reasonable) presumption that the existence of intra-group relationship between the borrower and the lender, together with the undercapitalization of the former, are indices of an abusive practice. In this context, the regime as drafted in Article 198, para 1, realizes a correct balance between the different interests in play: combating undercapitalization and abusive practices realized between related companies on the one side, and guaranteeing, though under certain limitations, the possibility of intra-groups loans on the other side.

## 11. Conclusion

The analysis of some of the most significant presumptive provisions in force in the Belgian tax system, with particular reference to VAT and income taxation, shows a symmetry with the Italian experience as to the use of legal presumptions. As a matter of fact, the scenario includes legal presumptions provided for in the context of the administrative proceedings, which are aimed at simplifying the assessment of the VAT, and to detect tax evasion or fraud. Though formulated in a quite general way, they do not limit the right of the taxpayer to give the proof to the contrary, so that he is able to avoid being taxed upon operations that are presumed to have been carried out but they did not (e.g. goods which were lost). There is, then, a number of general and specific anti-abuse rules aimed at combating the circumvention of national income tax legislation, facing both domestic situations and cross-border transactions. These provisions raise issues similar to those that have been presented when dealing with the Italian tax avoidance rules. Likewise, a classification of the presumptive provisions, which has to be done case by case, is essential in order to investigate who has to prove what. For instance, once classified Article 26 CIR, which, a.o., entitles the tax authorities to disregard the abnormal advantages granted to non-resident taxpayers located in low-tax States or foreign related taxpayers, as a rebuttable presumption of tax avoidance, then the taxpayer can prove the absence of any avoidance scheme. By contrast, if classified as an irrebuttable presumption of law, or even as a legal

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<sup>478</sup> Id., at No B.11.1.

definition of a situation that entitles the tax administration to the profits' adjustment upon the resident taxpayer, then the latter would only be able to prove that no advantages were granted. In other words, the scope of the contrary proof is narrower in the second case. In the latter hypothesis, on the other hand, it would not be technically a contrary proof, but rather a proof in exoneration. Notably, the former interpretation is the one which has been supported by the Belgian Government in the SGI case before the EUCJ, and it was essential in the judgment of compatibility with the freedom of establishment.

Thus a similar scenario exists in respect to the Italian tax system, but in part a different way of dealing with the concept of tax law presumptions. In fact, within the Belgian scholars there was not an in-depth discussion concerning the concept itself, meaning the role in the context of the administrative procedure, or the possible substantive effects on the definition of the tax obligation, or again the distinction with boundary concepts. It is significant, for instance, that Article 341 and 342 CIR are plainly deemed as being legal presumptions of law. Yet, as underlined above, at least some doubts should be raised on this classification, because the former lays down a very general inference and the latter entitles the tax authorities to assess the proceeds by means of mere statistical data.

More recently, however, some scholars have underlined the importance of distinguishing between procedural provisions (and presumptions), which concern the exercise of the powers of assessment and inquiry by the tax administration, and provisions (and presumptive measures) of material law, which end up determining the tax event or the taxable base. This issue has been discussed with particular regard to Article 344, para 1, both under the previous versions and the formula currently in force. Furthermore, in the recent and articulated decision on the new formula, the Constitutional Court has excluded that it affects the definition of the tax event or taxable amount, being rather confined to the means of proof in the hands of the tax administration.

Finally, the rulings of the Constitutional Court concerning legal presumptions are only a few. At any rate, from them we infer that the principal criterion of evaluation of legal presumptions is the principle of equality (and non-discrimination), which basically condenses the principle of reasonableness and the principle of proportionality. Again, it is under such principle that the possibility for the taxpayer to rebut the presumption is evaluated.

## CONCLUSION

The aim of this second chapter was to construe the national approach to tax law presumptions based on two national experiences. To this end, the legal orders of Italy and Belgium have been separately examined, taking into special consideration the constitutional context and the main presumptive provisions in force with a view to the subsequent analysis of the European Union context.

As disclosed at the beginning of the Section I, the comparison between the two national experiences shows how a more ‘theoretical’ approach in the Italian context has contributed to an in-depth debate about the category of legal presumptions in the field of taxation, particularly under the aspect of the nature (whether substantive or procedural) and the distinction with similar notions. The substantial Italian Constitutional Court’s case law on the matter has represented the fuel of the debate and it gives an insight into the role and parameters of compatibility of tax law presumptions in the national legal order.

Precisely by bearing such conceptual frame in mind, the Belgian experience has been examined. The approach shown by the doctrine to tax law presumptions has been defined to be more ‘pragmatic’. This observation does not concern the category of tax law presumptions *per se*, but it is rather based on the scantiness of an in-depth discussion about its role in relation to the contexts in which it is relevant<sup>479</sup> and the possible consequences in terms of nature, effects, and distinction with notions other than fictions. In this regard, however, it has to be observed that the more recent doctrine shows a serious reflection on the nature of the single presumptive measure concerned and on the consequences in terms of compatibility with the Constitution. On the other side, the scant Belgian Constitutional Court’s case-law on tax law presumptions has certainly not helped a mature discussion of the issues arising from the concept at hand. Although the presumptions taken into consideration so far by the Court did not embody evident examples of infringement of the equality principle, the Constitutional Court appears to be still entrenched in its position of safeguarding the ‘fiscal interest’, sometimes barely debating the upheld reasonableness of the provision under examination, and mostly referring to the preparatory works.

This having been said, and notwithstanding the differences that emerge from the reading of the sections dedicated to the two Member States, a few common points should be

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<sup>479</sup> More exactly, the following levels: a) definition of the tax obligation, b) administrative proceedings, c) tax trial.



underlined, which mark out the national approach to tax law presumptions in comparison to the EU approach which will be construed in the next chapter.

The argumentative scheme used by the Italian and Belgian Constitutional Courts has a number of similarities, which reflect the common approach to tax law presumptions within the national doctrine and the case-law of the Supreme Courts. Both of the Constitutional Courts start from the acknowledgement of the fact that tax law presumptions safeguard the ‘fiscal interest’, that is the interest of the State to the recovery of the tax due (in other words, the Treasury interest). This justifies different regulations of the limitations to the proof (legal presumptions included) when a *tax* obligation is at issue, in comparison to a civil law obligation<sup>480</sup>. Given the special character of the former (for the conditions of application and the aim sought), the principle of equality (or non-discrimination) cannot be deemed as being infringed when a stricter set of rules is provided, in comparison to the treatment reserved for situations falling within civil law. On the contrary, the collective interest to the recovery of the tax concerned must be balanced with the other interests in play. This has been held by the Italian and Belgian Constitutional Courts on several occasions, mostly dealing with measures concerning the assessment and collection of the tax due.

Notwithstanding this, the need to secure the tax recovery does not receive an absolute protection, but it rather finds a common limitation in the criterion of reasonableness. In the Italian legal order, such parameter is founded in the principles of equality and ability to pay, and it basically implies tax law presumptions to correspond to a rule of experience and be connected to indices concretely revealing the ability to pay. Similarly, in the Belgian tax system, such parameter stems from the principle of equality and non-discrimination, and entails tax law presumptions to be grounded on objective criteria and above all to be rational and proportional, in particular with a view to the aim pursued by the provisions including them.

At any rate, either in the Italian legal order or in the Belgian one, the core of the evaluation of compatibility with the Constitutional values is represented by an ‘internal’ parameter, meaning a parameter which concerns the scheme of the presumption itself. The latter is tested under the point of its rationality (is it arbitrary, does it correspond to the normal course of events?) and suitability (is the measure proportionate, does it provide the proof to the contrary?) with respect to the purpose that the legislator pursues by providing it.

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<sup>480</sup> I.e. an obligation regulated under the civil law.

Ultimately, it must be observed that from the examination of the constitutional case-law a very clear distinction of approaches depending on the context in which the tax law presumption is called to operate (within the assessment or recovery rather than at the substantive level) does not clearly emerge. Despite this, the excursus of the main presumptive provisions currently in force has been undertaken by noting when the provision under examination concerned the powers of inquiry and assessment of the tax authorities, on the one side, and when it directly affected the position of the taxpayer, on the other side. In fact, both the Member States have recourse to tax law presumptions either for the purpose of alleviating the burden of the tax administration in terms of motivation of the tax decision and proof before the court, or for the purpose of conditioning the fruition of tax advantages (deductions, for instance) or avoiding the disregarding of the latter through tax regimes directly affecting the juridical position of the taxpayer and including presumptions.

As said, the distinction is not much relevant under the perspective of the constitutional parameters of evaluation adopted, but rather under the possible ways in which the balance between the fiscal interest and the protection of the taxpayer should be developed.

Firstly, tax law presumptions governing the powers of inquiries of the tax authorities, which are often placed among the rules of the assessment or the recovery of the tax, embody legitimate means aimed at simplifying the tax assessment and the ascertainment of tax evasion or avoidance by the tax authorities. A number of these kind of presumptions examined above are included in the area of VAT, and they allow the tax administration to infer from a certain circumstance set by the law (e.g. the absence of the merchandise in the place where the activity is carried out) the existence of non-declared operations (i.e. tax evasion). The main issue raised by these presumptions, in relation to the principles of equality, ability to pay and right of defence, concern possibility to rebut the presumption and the limitation to such proof. In order to avoid the taxpayer being charged an amount of tax exceeding the amount concretely due, he should be enabled to give proof to rebut the presumption and the object of the contrary proof should be construed so as to secure the widest possibilities of defence for the taxpayer. Particularly when a harmonized tax like VAT is at issue, we will see how the defence rights broadly intended (thus, including the contrary proof and a judicial review) play a fundamental role in order to deem the national presumptive measure in line with the EU principles of proportionality and effectiveness. It is settled case-law of the EUCJ that “*the basis of assessment is the consideration actually*

*received and the corollary of which is that the tax authorities may not in any circumstances charge an amount of VAT exceeding the tax paid by the taxable person*<sup>481</sup>.

Finally, there are those presumptions or presumptive regimes that may directly and immediately affect the situation of the taxpayer. Many of them concern cross-border situations or transactions (e.g. limitation to the deduction of costs, transfer pricing), and in fact assume certain international elements as indices of tax avoidance or abusive practices. Such provisions and regimes need particularly to be checked under the point of view of the rationality of the discrimination that they create against situations or operations with an international component, as well as of the possible double-taxation effects. Moreover, given that they are commonly justified by the difficulties of inquiries by the tax administration facing cross-border situations and the (higher) risk of tax avoidance, evasion, or abuse, the taxpayer should be entitled to submit all the necessary documents required by tax authorities and to demonstrate that the presumed abusive practice does not occur in the concrete case.

In this regard, it must be observed that, as underlined when dealing with the single provisions, the national legislator and even tax authorities pay increasing attention to the indications resulting from EU law and more in particular from the case-law of the EUCJ as regards anti-avoidance measures. As we will see, in this sense, the possibility for the taxpayer to effectively escape the application of the anti-avoidance measure limiting the exercise of a Treaty freedom, and to a judicial review, are essential in order to overcome the last step of the rule of reason.

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<sup>481</sup> ECJ 3 July 1997, case c-330/95, *Goldsmiths*, at para 15, for which see *infra*, Chapter III. Cf. ECJ 23 November 1988, case C-230/87, *Naturally Yours Cosmetics*, at para 16; ECJ 24 October 1996, case C-317/94, *Gibbs*, at para 24.



## **Chapter III**

### **National Tax Law Presumptions and EU Law**

#### **Introduction**

The definition of the concept of tax law presumptions with all the related nuances and the outline of the national approach to the matter have been developed in view of the subsequent consideration of the European Union context.

In this regard, it has to be noted at the outset that the difficulties met in dealing with tax law presumptions from a national perspective increase when turning to the European Union experience, wherein the line between substantive and procedural rules and the operating of presumptions on different levels become even more uncertain and it is overruled by the predominant interest related to the primacy and effective application of EU law.

This first consideration encompasses also the key element in reading all the EUCJ jurisprudence on the matter and a steady point at the same time.

Due to their own features, tax law presumptions are essential means for simplifying the assessment and securing the recovery of the tax due, normally to the disadvantage of the taxpayer. As such, at EU level they are mostly looked at under the perspective of the limitation to the opportunity of giving (counter) proof, which may affect the exercise of a certain EU right or freedom. In the light of this, they need to be scrutinized in view of the EU rules, principles, or objectives that are relevant in the main proceedings, in order to verify if they may be accepted. Generally speaking, the consistency is basically measured through the satisfying of the principle of effectiveness alongside the proportionality test.

Obviously, these very general considerations need to be tested as regards different tax fields. Customs duties, VAT, the right of reimbursement of undue taxes levied in contravention of EU law and direct taxes represent micro-systems raising different issues and, to a certain extent, expressing their own standards. Hence, the divergent degree of harmonization reached in the tax fields covered by EU law hints at dealing with them separately before drawing any (more general) conclusions.

Prior to this examination, however, it is worthy to look briefly at the stage of minimum harmonization reached in the area of procedural law on the basis of settled case law.

This Chapter is divided as follows. Firstly, a general overview is offered of the EU law framework, in order to set the stage and give an insight in the rules, principles, and case law which are relevant for the purpose of discussing more in detail the issue of tax law presumptions in the single areas of EU law. The attention is addressed, in particular, to the principles of effectiveness and proportionality, and to the issue of the division of the burden of proof. Afterwards, two Sections follow, dealing respectively with Customs law and harmonized indirect taxes (Section I) and Direct taxation (Section II). Section I, after a brief introduction, is divided into three main parts. Part I deals with tax law presumptions in the field of Customs law, both provided by the Customs legislation, or included into national provisions. Part II concerns tax law presumptions, either substantive or procedural, provided in the area of VAT. Part III deals with the issue of the repayment of indirect taxes levied in breach of EU law and on the national presumption that they passed on to customers. Section II concentrates on tax law presumptions in Direct taxation, by examining the relevant case-law under the perspective of the possible justifications for the national restrictive measure. Finally, some general conclusions are drawn.

### **1. EU law and procedural matters**

So far there has not been an overall consideration of the consistency of national tax presumptions with EU law.

In fact, many commentators have focused on issues involving presumptions and resulting from single EUCJ decisions, such as distribution of the burden of proof or general presumptions of tax avoidance or abuse, without however the attempt to systematize the matter under a uniform perspective.

The initial goal of the economic integration, meaning an internal (earlier “common”) market with the “elimination of all obstacles to intra-Community trade”, has enshrined a major concern on substantive rules of law – basically, the fundamental freedoms - and principles - amongst which is the non-discrimination principle - whereas slightly less attention has been paid to purely procedural law subjects.

This is, however, only amongst scholars and national authorities, as is confirmed by the minor number of procedural questions referred to the EUCJ by national courts, especially of some Member States, in the past<sup>482</sup>.

On the contrary, the EUCJ jurisprudence shows to have immediately gathered the impact that procedural aspects may have on the enforcement of rights conferred to individuals and undertakings by Community law. It is needless to point out that the recognition of a certain right would be meaningless if each Member State – through its public institutions – could violate it, for instance by approving or retaining a provision in conflict or by hindering the access to the judicial system<sup>483</sup>. Hence, the availability of an EU right presupposes the primacy of EU law over national (even constitutional) and bilateral law and its unconditional enforcement into national legal orders, which among other things requires the taxpayer to be entitled to submit the possible violation before a national court on the same conditions as if it was a national right.

Since the *Rewe* and *Comet* rule<sup>484</sup>, the Court has affirmed thereof, in particular by developing the (procedural) principle of effectiveness of EU law. Such rule consists of a limitation to national procedural autonomy. As it is well known, due to the absence of EU procedural rules and the lack of harmonization, the enforcement of EU law is mostly left to each Member State, which autonomously has to designate the courts having jurisdiction and to lay down procedural rules regulating the protection of EC rights<sup>485</sup>. This, on condition that:

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<sup>482</sup> M. Lang e.a. (eds.), *Procedural rules in tax law in the context of European Union and Domestic law*, Alphen aan den Rijn, Kluwer, 2010, 30. The analysis of national reports shows that there is a direct link between the application of Community law principles by the domestic courts and the awareness thereof amongst scholars. As regards the Community requirements in the field of procedural law, in the general report it is asserted that they remain a ‘highly specialized subject’ and that “*So far, there has not been much debate or focus on the principles in the field of tax law and tax procedure, but there are indications in the field of tax procedure that theorists are becoming increasingly aware of the principles and their implications for tax procedure, and more research projects on the subject appear to be underway*”.

<sup>483</sup> See G. Maisto, *EU Law and Rules of Tax Procedure, Tackling Discrimination and Achieving Simplification*, in *The Influence of European Law on Direct Taxation, Recent and Future Developments*, (ed.) D. Weber, Alphen aan den Rijn, Kluwer Law International, 2007, 200 et seq.

<sup>484</sup> ECJ 16 Dec. 1976, Case C-33/76, *Rewe*; ECJ 16 Dec. 1976, Case C-45/76, *Comet*, where the ECJ held that (paras 12-15-16) “*(...) in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter. In default of such harmonization measures, the rights conferred by Community law must be exercised before the national courts in accordance with the rules of procedure laid down by national law. The position would be different only if those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect.*”. The judgments of the EUCJ can be found at [www.curia.eu](http://www.curia.eu).

<sup>485</sup> Cf. N. Trocker, *La formazione del diritto processuale europeo: studi*, Torino, Giappichelli, 2011, at p. 278 et seq.

- national procedural rules governing the exercise of rights derived from EU law are not less favourable than those regulating the exercise of similar domestic rights;
- national procedural rules governing the exercise of EU rights do not render practically impossible or excessively difficult the exercise of such rights.

The first condition is known under the formula of principle of equivalence. Member States are not imposed upon to create an autonomous procedure for the enforcement of rights that taxpayers derive from EU law. Nevertheless, they are required to secure the same legal remedies and procedural rules set up for the protection of similar domestic rights<sup>486</sup>. In this way, the principle of equivalence embodies a sort of procedural non-discrimination principle, by prohibiting a different treatment of claims/appeals/objections based on Community law in respect of those grounding on domestic law.

The second condition is aimed at securing EU rights to be effective in national legal orders, irrespective of the treatment of domestic comparable situations. It requests Member States to guarantee not only a formal protection to EU rights, but rather an actual protection so that the taxpayer is put in the condition to fully exercise the right he derives from EU law.

Alongside the above conditions, the EUCJ often refers to the principle of effective judicial protection.

It has been observed that it differs from the former consisting of limitations for being a positive standard<sup>487</sup>. From the EUCJ rulings its nature of general principle of Community law that derives from the common traditions of EU Member States results<sup>488</sup>. Thus,

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<sup>486</sup> A.o., ECJ 29 Oct. 2009, case C-63/08 Pontin. “*The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar (...). In order to establish whether the principle of equivalence has been complied with, it is for the national court, which alone has direct knowledge of the procedural rules governing actions in the field of domestic law, to determine whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under domestic law comply with that principle and to consider both the purpose and the essential characteristics of allegedly similar domestic actions*”.

<sup>487</sup> M. Lang, *Procedural rules in tax law in the context of European Union and Domestic law*, cited above, at p. 18.

<sup>488</sup> A.o., ECJ 15 April 2008, case C-268/2006, Impact. After having recalled that “*It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective*” (para 42), the Court defined the principle of effective judicial protection as a ‘general principle of Community law’ (par. 43) which is embodied by the requirements of equivalence and effectiveness (“*Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law*” at par. 47. See also ECJ 13 March 2007, case C-432/05, Unibet, where it was ruled that “*according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (...)* and which has been reaffirmed by Article 47 of



despite the letter that would lead the interpreter to narrow it to the trial, it appears to be a comprehensive principle including both the equivalence and effectiveness criteria. At any rate, the outcome of its application is still the full effect of EU law, especially when the access to the court or tribunal and the protection before the latter is at issue. So that it ends up to be no more than a variation of the principle of effectiveness, from which it mainly differs as it is positively enshrined in Article 19, para 2, 2<sup>nd</sup> indent, of the Treaty on European Union (hereafter TEU)<sup>489</sup>.

In summary, given the absence of EU procedural rules and the lack of harmonization as to procedural law, the EUCJ has developed a number of principles in its rulings mainly aimed at securing the enforcement of EU rights into the single legal orders. It is in this framework that the EU approach to national tax presumptions is to set in, as the latter may undermine the enjoyment of EU rights by the European taxpayer.

## **2. EU legal framework: the principle of sincere cooperation**

Some of the general principles developed by the EUCJ in order to secure the effective application of EU law in rulings where the enjoyment of EU rights was at issue or to fill in the gaps in matters where, albeit the competence rested on the Member States, a fundamental goal of the EU was to be jeopardized, find their basis in the principle of sincere cooperation.

Such principle is provided for by Article 4, para 3, TEU, which after having stipulated that both the Union and the Member States have to cooperate by means of a mutual respect and assistance in order to pursue the objectives resulting from the Treaties (1<sup>st</sup> indent), specifically puts on Member States a double obligation. They are indeed called upon to take any proper measure for the purpose of ensuring the fulfilment of the obligations deriving from primary EU law and in general from acts enacted by the EU institutions (2<sup>nd</sup> indent); moreover, the cooperation towards the achievement of the EU tasks has to be embodied also by avoiding any measure able to undermine such tasks (3<sup>rd</sup> indent)<sup>490</sup>.

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*the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1)*" (para 37). The case is also the occasion to clarify that such principle does not impose on Member States to foresee a free-standing action for the purpose of disputing the compatibility of national provisions with Community law as long as the principles of equivalence and effectiveness are observed within the national legal orders providing for legal remedies. The nature of general principle of Community law was affirmed by the Court already in ECJ 15 Oct. 1987, C-222/86 Heylens.

<sup>489</sup> By virtue of which "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*".

<sup>490</sup> See G. Tesaurò, *Diritto dell'Unione Europea*, Assago, Cedam, 2010, 115 et ss. The principle has been explicitly regulated by virtue of Article 10 TCE and afterwards by Article 4, para3, TUE, following the

Clearly, it is a very comprehensive and articulated principle, from which the general obligation of each Member State to contribute to the implementation of EU law into their own legal orders arises. A general obligation that has been in turn filled in with content by the EUCJ by reference to primary or secondary law, whose application or execution within a domestic system was at issue.

In fact, the principle of sincere cooperation together with Articles 2 and 19 TEU laying down the rule of law<sup>491</sup> embody the legal basis on which the EUCJ has often relied within several matters. As a way of exemplifications, it has been referred to in order to ground an interpretation of national law in accordance with EU law or able to grant the “*effet utile*” of EU provisions, yet the State’s liability for damages caused to individuals by serious breaches of EU law or the review of definitive decisions based on a wrong application/interpretation of EU law. One of its main applications concerns the scope and effectiveness of the Union’s legal order and thereby the full efficacy of rights conferred to individuals by Unions, provisions<sup>492</sup>. Since for the enforcement of EU law the Union is still dependent on the national procedural law, Member States are requested to adopt all the measures necessary to guarantee such efficacy and to refrain from measures that might undermine its application. Such an obligation lies on all the powers and institutions of the State’s organization, albeit the responsibility for infringement of EU law is always borne by the central State according to settled case law<sup>493</sup>. Among those bodies, national tax administration and tax courts are requested to observe the principle of sincere cooperation and accordingly to interpret and apply EU law in such a way that guarantees its full efficacy.

### 3. The principle of effectiveness (in the wide sense)

It has been observed that “*‘first generation’ general concepts of EU law, such as direct effect in the national legal order and primacy of EU law over national and bilateral law,*

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Treaty of Lisbon. Originally, due also to the absence of a normative rule, it did not have a clear autonomy in respect of the substantive provisions to which it was linked. Subsequently, it has vested in the practice the role of autonomous parameter of legitimacy. “*It mostly applies when the attainment of an objective fixed in the Treaty requests a coordinated exercise of competences both of Union’s institutions and national ones*”.

<sup>491</sup> Article 2 TUE lists the values on which the Union is founded including the rule of law. Article 19 dealing with the composition and tasks of the European Court of Justice states that “It shall ensure that in the interpretation and application of the Treaties the law is observed” (par. 1, 2<sup>nd</sup> indent).

<sup>492</sup> A.o. ECJ 11 July 2000, case C- 62/00, Marks & Spencer I.

<sup>493</sup> A.o. see ECJ 30 Sept. 2003, case C-224/01, Köbler; ECJ 13 June 2006, case C-173/2003, Traghetti del Mediterraneo.

*seem to have converged into an even more general 'second generation' and overarching concept of EU law: the principle of effectiveness of EU law*<sup>494</sup>.

Once having successfully affirmed that EU rules which are clear, precise and unconditional may be relied on by individuals and undertakings before national courts or public institutions and that they take priority over national (and bilateral as well) provisions contrary to them, the EUCJ has turned to deal with the effects of EU law within national legal orders and the hindrances to its full application.

If the issues of direct effect and primacy concern the relationship between legal sources enacted by institutions at different levels and are typical – though with peculiarities – of structured international organizations, the principle of effectiveness is an autonomous parameter peculiar to the EU experience. The scope of such principle extends to request the efficacy of EU law even when it is not unconditional - for instance, through the consistent interpretation -, to question national fundamental principles such as the *res judicata*, and in general to directly impact on a non-harmonized matter like procedural law. In fact, notwithstanding that in a number of decisions the EUCJ leaves the judge of the main proceedings to rule on the suitability of the national provision to secure the actual exercise of the EU right or principle relevant in the main case, it gives all the indications necessary to decide the pending dispute in such a way that its effectuation is safeguarded as fully as possible.

The principle of effectiveness is not confined to the procedural meaning but within the literature it is also referred to in order to cover several mechanisms aimed at guaranteeing the full efficacy of EU law. In this sense, which coincides with the '*effet utile* doctrine', it includes, apart from the procedural principle of effectiveness, the principles of primacy, direct effect, consistent interpretation, State liability<sup>495</sup>.

The EUCJ rulings show a frequent use of this principle under both of the meanings<sup>496</sup> when dealing with national tax presumptions, as will be explored further below.

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<sup>494</sup> B.G.M. Terra, B.J. Wattel, *European tax law*, 6 ed., Alphen aan den Rijn, Kluwer Law International, 2012, 113. "All public institutions of Member States must ensure, any which way but effectively, if necessary of their own motion, that EU law is applied and enforced in their national legal order as fully as possible".

<sup>495</sup> See B.G.M. Terra and B.J. Wattel, *European tax law*, cited above, 113-114.

<sup>496</sup> Though in the jargon of the ECJ no distinctions between a procedural and a substantive principle of effectiveness can be found.

### 3.1 Procedural principle of effectiveness and procedural rule of reason

From the *Rewe* and *Comet* doctrine, grounding the procedural principle of effectiveness, it also follows that national procedural provisions may, by way of exception to such principle, restrict the possibility to exercise rights conferred by EU law under certain conditions. Apparently, within the various decisions concerning the repayment of taxes levied in breach of EU law<sup>497</sup>, the EUCJ has put forward a procedural rule of reason under which are evaluated the possible justifications to procedural restrictive measures.

Similarly to the judgments where the substantive rule of reason applies, the reasoning is developed through three main steps, following the recognition of the conflict of the measure at issue with EU law:

- that measure is indiscriminately restrictive, meaning that it limits claims made either under national or EU law;
- there is a 'mandatory requirement of general interest' which is worthy of protection, such as legal certainty, the prevention of unjust enrichment or other principles of good administration;
- the restriction is reasonable, in the sense that it does not go beyond what is necessary in order to safeguard the relevant interest and embodies a balancing between the effectiveness of EU law and the general interest relevant in the pending case.

To illustrate its application, the decisions of the EUCJ on national time-limits in order to bring an action for repayment of undue VAT may be referred to. Among these, in *Marks and Spencer I* the Court was asked about the compatibility of a national legislation that retroactively curtailed the period of time within which the repayment of VAT collected in breach of the Sixth Directive could be claimed with the principles of effectiveness and protection of legitimate expectations. The Court held that such a legislation was not *per se* inconsistent with the principle of effectiveness on condition that the new limitation period be reasonable and that a transitional arrangement be provided for the taxpayer retroactively deprived – or given a too short period of time - of the right to repayment that was previously enjoyed. This was not the case, as the UK legislation under examination reduced from six to three the time-limit to lodge the claim and extended its application not only to subsequent claims, but also to claims made between the date of its enactment and

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<sup>497</sup> As regards case-law on presumptions that the indirect tax has passed on to customers, see *infra*.

the date of its entry into force and furthermore to those lodged before the date of entry into force and still pending.

Similarly to a number of other cases, the possible justification and the proportionality test enter the evaluation of the possible restrictive nature of the national measure. It was held, indeed, that “*Member States are required as a matter of principle to repay taxes collected in breach of Community law (...), and whilst the Court has acknowledged that, by way of exception to that principle, fixing a reasonable period for claiming repayment is compatible with Community law, that is in the interests of legal certainty (...). However, in order to serve their purpose of ensuring legal certainty limitation periods must be fixed in advance (...)*”.

Thus, a national provision restricting the procedural possibility to exercise a repayment right deriving from EU law may be held compatible with the latter only as long as the time-limit introduced is reasonable and it is justified in the light of the legal certainty. After having found the national legislation in contrast with the Sixth Directive and clarified to what extent the satisfying of interests other than the effectiveness may render the former compatible with EU law, the EUCJ considered the justification raised by the UK government. The arguments based on the attempt of striking a balance between the individual and the public interest and on the budget planning were rejected, as in the main proceedings they would have implied a full denial of the right conferred to individuals by Community law.

More in general, the EUCJ has on several occasions held that “*every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure (...)*”<sup>498</sup>. Hence, the Court requests an overall consideration of the procedural national provision, which has to be set in the context relevant to the main proceedings. The foregoing includes the consideration of national procedural principles which might justify the domestic provision whose consistency with EU law is called into question. Principles

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<sup>498</sup> ECJ 6 October 2009, case C-40/08, *Asturcom Telecomunicaciones*, paragraph 39. See also ECJ 1 July 2010, C-35/09, (*Paolo Speranza*), in particular paragraph 43; ECJ 14 December 1995, *Peterbroeck*, in particular paragraph 14.

that are not necessarily in opposition to the principle of effectiveness, as the reference made by the EUCJ to the right of defence shows.

### 3.1.1 Principle of effectiveness and administrative proceedings

The scope of the (procedural) principle of effectiveness not only concerns the judicial protection (in a narrow sense), but it is extended so as to cover the administrative proceedings, meaning the procedure conducted by the tax administration prior to the issuing of the tax decision affecting the position of the taxpayer. It is clear, indeed, that the duty to safeguard the effective application of EU law is borne by the tax administration as well.

In this regard, the ruling of the EUCJ in the *Sopropè* case is worthy of attention, as it concerns the effectiveness of the right of defence within an administrative procedure in the field of customs duty.

The EUCJ was questioned as to whether a period of eight days granted to a Portuguese company by the Customs authority to submit its observation prior to the recovery of import duty for incorrect clearing of goods imported from Cambodia was compatible with the requirements of Community law, and in particular with the general principle of respect for the right of defence. In the case of the proceedings, the opportunity for the importer to be heard by Customs authorities had followed an inspection whose findings had been rushed into a report and was prior to the decision on the recovery that was taken only five days after the submission of observations and expiration of that period.

After having asserted its jurisdiction on the referred preliminary ruling, given that the national rules at issue enter the scope of Community law and their compatibility with a fundamental right the observance of which the Court ensures is questioned<sup>499</sup>, the Court held that (paras 36 to 38):

*“Observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual.*

*In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their*

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<sup>499</sup> ECJ 18 December 2008, case C-349/07 (*Sopropè*). “*Since the questions referred for a preliminary ruling concern the procedures to be followed by national authorities when applying the Community Customs Code, the Court has jurisdiction to provide the national court with all the criteria of interpretation required by that court to determine whether the national rules at issue are compatible with the fundamental rights the observance of which the Court ensures*”.

*views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so (see, inter alia, Commission v Lisrestal and Others, paragraph 21, and Mediocurso v Commission, paragraph 36).*

*The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of Community law, even though the Community legislation applicable does not expressly provide for such a procedural requirement. As regards the implementation of that principle and, in particular, the periods within which the rights of the defence must be exercised, it must be stated that, where those periods are not, as in the main proceedings, fixed by Community law, they are governed by national law on condition, first, that they are the same as those to which individuals or undertakings in comparable situations under national law are entitled and, secondly, that they do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the Community legal order.”*

The Court recognized that Member States are permitted to introduce national legislation or regulations governing precise time-limits in the context of administrative procedures, which also safeguard the principle of equal treatment. When facing a matter that comes within the scope of Community law, it is up to them, as they are closer to the public and private interests worthy of consideration, to fix those periods of time. In particular, with reference to post-clearance recovery of customs import duties, the time range given to the taxpayer to exercise the right to a prior hearing (not less than 8 days and not greater than 15) does not per se make it impossible or excessively difficult to exercise the right of defence conferred by Community law. Accordingly, the decision on whether in the case of the main proceedings such time-limit to submit observations is enough in order to guarantee the effectiveness of its rights of defence is left to the national court, which for this purpose has to take into consideration all the circumstances specific to the case, such as the size of the undertakings and the fact that they are professionals having recourse to importation on a regular basis, the relations with the local authorities of the country from which the importation is carried out or the course of the inspection procedure that might weigh upon the actual possibility to produce observations on time.

From this ruling it follows that the Community law requirements – in *primis*, the principle of effectiveness – entail national tax administrations to be obliged to hear the taxpayer whenever it is to take a decision that comes within the scope of Community law and is able

to be prejudicial to the taxpayer's interests. The latter has to be put in the condition to fully exercise his right of defence by contesting the data on which the draft decision is grounded prior to being taken. As a consequence, the principle of effectiveness applied to time-limits given to exercise the right of defence implies not only the possibility for the taxpayer to appeal a decision issued by the customs authorities, but also to be heard prior to such decision and its observation to be considered in the final decision.

It has been observed that whether the foregoing can be extended so as to cover tax fields other than customs duty remains to be seen<sup>500</sup>. In other words, one could wonder if the 'decisions that come within the scope of Community law' are only those concerning Customs law<sup>501</sup>. In this regard, it cannot be disregarded that customs duties are regulated at EU level, whose legislation *inter alia* provides that undertakings must be able to furnish proof, for the

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<sup>500</sup> See B.G.M. Terra, B.J. Wattel, *European tax law*, cited above, 51: "It will be interesting to see which national decisions are covered by this judgment, i.e. which decisions 'come within the scope of Union law'. Cf. in the field of customs duties, ECJ 12 December 2002, C-395/2000, C-395/2000, Cipriani. At para 51 the Court held that "Respect for the rights of defence, as the Court has frequently held, is in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person and, in particular, in proceedings which may lead to the imposition of penalties, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (Case C-32/95 P *Commission v Listestai and Others* [1996] ECR I-5373, paragraph 21, and Case C-462/98 P *Mediocurso v Commission* [2000] ECR I-7183, paragraph 36)."

<sup>501</sup> In this regard, some indications in the field of direct taxation emerge from the very recent case EU CJ, 22 October 2013, case C-276/12, *Jiří Sabou*, where the appellant claimed his right to be heard in the context of a request for assistance from his Member State to another Member State. The Court confirmed that the Directive No 77/799 does not confer specific rights to the taxpayers. It held (para 36): "It is thus apparent from an examination of Directive 77/799, the purpose of which is to govern cooperation between the tax authorities of Member States, that it coordinates the transfer of information between competent authorities by imposing certain obligations on the Member States. The directive does not, however, confer specific rights on the taxpayer (see *Twoh International*, paragraph 31), and in particular it does not lay down any obligation for the competent authorities of the Member States to consult the taxpayer". Then, it echoed its ruling in the case *Sopropé*, where it held that "the rights of the defence is a general principle of European Union law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (see *Sopropé*, paragraph 36). In accordance with that principle, the addressees of decisions which significantly affect their interests must therefore be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (see, *inter alia*, C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21, and *Sopropé*, paragraph 37). The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of European Union law, even though the European Union legislation applicable does not expressly provide for such a procedural requirement (see *Sopropé*, paragraph 38, and Case C-383/13 PPU *G and R* [2013] ECR I-0000, paragraph 35)" (para 38). However, it concluded that the respect of the right to be heard, and in general the right of defence, "does not require that the taxpayer should take part in the request for information sent by the requesting Member State to the requested Member State. Nor does it require that the taxpayer should be heard at the point when inquiries, which may include the examination of witnesses, are carried out in the requested Member State or before that Member State sends the information to the requesting Member State" (para 44). It must be noted, though, that the tax decision at hand in this case was not directly detrimental to the taxpayer, as it concerned the request for information.



purposes of inspection, of the lawfulness of all the transactions that they have carried out<sup>502</sup>. Moreover, as recalled by the EUCJ in the decision under discussion, the interest of the European Community “*in recovering its own revenue as soon as possible mean that inspections must be capable of being carried out promptly and effectively*”<sup>503</sup>. As customs duties are part of the EU’s own resources, clearly the interest of the Union in the recovery of such amounts comes into play in the balance of interests relevant in the main proceedings.

#### **4. The Community Customs Code and the administrative cooperation between Member States in tax matters as a procedural law harmonization pattern: a brief outline**

The lack of harmonization in the field of procedural law undergoes two main exceptions. The first one is embodied by customs duties, as can be foreseen from the reflections laid down at the end of the previous paragraph. Except for merely implementing national measures, customs duties are currently regulated at EU level by a regulation laying down the Community Customs Code<sup>504</sup>. Such legislation covers not only all the events concerning the customs duty, meaning the origin, expiration, amendment, repayment, remission and so on, but also pure procedural matters. It regulates, on the one hand, the formalities to be accomplished by the taxpayer such as the customs declaration, and on the other hand, the controls, the decisions relating to the application of customs legislation, the appeals against those decisions. Though the controls of trade, the assessment, the recovery of customs duty and the treatment of possible tax litigations are decentralised, the procedures are envisaged and a minimum standard of common requirements are drawn at EU level. In fact, the formalities are performed at and the decisions are taken by national customs authorities as well as appeals are brought in front of national designated body, but

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<sup>502</sup> Pursuant to the recital N° 13 to the Regulation N° 450/08 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) “*In accordance with the Charter of Fundamental Rights of the European Union, it is necessary, in addition to the right of appeal against any decision taken by the customs authorities, to provide for the right of every person to be heard before any decision is taken which would adversely affect him*”.

<sup>503</sup> Para 41 of the judgment.

<sup>504</sup> Regulation (EEC) No 2913/1992 of the European Parliament and the Council. It has to be said that since the 30<sup>th</sup> of October 2013 the Regulation No 952/2013 is in force and it is a recast of the Regulation (EC) No 450/08, which was thought to replace the Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, in order to adapt customs legislation to the electronic environment for customs and trade and at the same time to re-organize the customs rules and processes so as to render them simpler. However, the new Regulation will apply entirely only from 2016.

in accordance with the procedures – including time-limits, for instance -, and rules laid down by the above Regulation and by the implementing regulation.

In the light of the foregoing, the overview of the EUCJ case law will be conducted in this chapter starting from the field of customs duties. It is indeed worthy of attention the way the Court deals with tax presumptions inserted in a field wherein the rules and procedures are of the Union, albeit embryonic for certain aspects and whose application is still under the competence of national administrations.

The second exception is represented by the administrative cooperation between Member States as to the assessment and recovery in their own territory of taxes involving cross-border situations, though the legislation concerned does not seek to harmonize national substantive tax law or procedural law.

The internationalization and the increasing mobility of taxpayers and productive factors have stressed the need for a wider cooperation between different administrative authorities in order to cope with tax fraud and avoidance, profits shifts through intra-group transfer price adjustments, fictitious establishment of the fiscal residence of (especially legal) persons or deduction of cross-border payments and similar irregularities. In other words, the development of the internal market wherein goods, services, persons and capital can freely move, has enlarged the risk of tax abuse and non-payment of taxes due (double non-taxation) which are likely to remain undetected when the transaction, the economic activity or in general the situation concerned is related to two or more Member States.

In fact, each State's sovereignty, which entails the power to gather and ask for information/documentation on the taxpayer assessed, to inspect the account and run investigations or on-the-spot inspection, to recover the tax due, to attach immovable property because of unpaid tax claims or as a precautionary/conservative measure and so on, is confined to the territory of the State itself and cannot be exercised outside the borders. On the other hand, as a rule Member States are prevented by the TFEU from introducing in their national legal orders tax measures that discriminate cross-border situations from merely domestic ones or restrict the fundamental freedoms without proportionate justification. Nor are the arguments based on the need to tackle tax evasion or to secure the effectiveness of fiscal supervision *per se* enough to justify a restrictive tax measure, especially when disproportionate<sup>505</sup>.

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<sup>505</sup> As regards the suitability of such arguments to justify national presumptive measures restrictive on fundamental freedoms, see *infra*.

Not surprisingly, alongside the EU initiatives on the matter of administrative cooperation – discussed below - several legal instruments can be counted at international level involving different States and promoting exchange of (tax) information, transparency and hindrance of distort conditions of competition. Inter alia, the OECD Model Convention includes Articles 26 and 27 respectively dealing with the exchange of information between the competent authorities of the contracting States and the assistance on the matter of the recovery of taxes, meaning every kind of tax due to a contracting State and including interest, administrative penalties and costs related to the collection. Article 27 was inserted in the model in 2003, so that the “new generation” tax treaties also cover cooperation in the recovery of tax claims. Article 26 has been amended several times, the latest in 2012 in order to broaden the possible use of information gathered and it currently excludes that a contracting State’s refusal of cooperation be based on bank secrecy.

Notwithstanding that the changes to the model convention have raised the standard of cooperation proposed, the drawback is the bilateral character of such legal instrument, the tax treaty being binding only for the contracting States<sup>506</sup>.

##### **5. Administrative cooperation at EU level ...**

International legal instruments on administrative cooperation are overruled – in the event of overlapping - by tools devised at EU level, which are the most far-reaching cooperation tools up to the present standard. This can be asserted especially after the very recent recast of the legislation of the Union on the matter, i.e. the EU Cooperation and Recovery Directives and the EU VAT, excises and customs duties information Regulations. The former Community framework for administrative cooperation was mainly embodied by the Directive 77/799/EEC regulating the mutual assistance in the area of direct taxation and covering also VAT and excise duties respectively from 1979 and 1992 until the Regulation No 1798/2003 EC in the field of VAT and Regulation No 2073/2004 EC in the area of excise duties were inserted, and lastly the Council Regulation No 515/97 in the field of customs and agricultural matters which is currently applicable<sup>507</sup>.

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<sup>506</sup> Actually, at international level there are other legal instruments having a multilateral character, though they do not involve all the EU Member States. Among these, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAATM Convention), drawn up in 1988 by the Committee of Experts of the Council of Europe (CoE) and the Committee on Fiscal Affairs of the OECD. See B.G.M. Terra and B.J. Wattel, *European tax law*, cited above, at 841-842.

<sup>507</sup> Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

The first instrument in particular, however, has shown, as far back as its introduction, several critical aspects, which have affected its effective application by the competent tax authorities of the Member States<sup>508</sup>. It had indeed a relatively limited scope, which was confined to the cooperation in view of the correct *assessment* of direct taxes. For this purpose, it provided for three main procedures, that is the exchange on request (Article 2), the automatic exchange of information (Article 3) and the spontaneous exchange of information (Art. 4) facing some delicate situations involving anomalies or tax base erosion and profit shifting. As to the first procedure, which is so far the one with the widest range of uses, the requested Member States were not obliged to deliver the information facing a series of circumstances laid down in Article 8. The assistance could indeed be alternatively refused when (a) the Member State requested was prevented from running the enquiries or collecting the data demanded for its own purposes under its law or administrative practices, (b) the forwarding of that information would have led to the disclosure of a commercial, industrial or professional secret, a commercial process, or of information whose divulcation would have been contrary to the public policy, or (c) finally when the requiring State would have been, if requested, unable to provide the same information. Moreover, in Article 2 it was clarified that the request of information could be complied with only if it appeared that the competent authorities of the requesting State had not exhausted its own sources and means to get the relevant information.

Not surprisingly, these restraints - above all, the ones set out in Article 8 - to an actual exchange of information have often been acknowledged by the EUCJ in its rulings, in accordance with the arguments put forward by the governments in order to strengthen the justification grounding on the need to secure the effectiveness of fiscal supervision and to confute the counter-justification embodied by the possibility for the national tax authorities to have recourse to the mechanism of the exchange of information.

In the light of this, with the purpose of rectifying the weaknesses emerging in the concrete application, the Assessment Assistance Directive has been amended several times, basically in a double direction. On the one side, its scope has been extended to taxes other than direct ones, like VAT, excise duties and taxation of insurance premiums, though after the introduction of dedicated Regulations for indirect taxes it has been conceived as focusing on the taxation of income, capital and insurance premiums only. On the other side,

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<sup>508</sup> Critical on the real efficacy of the rules concerning the mutual assistance in tax matters G. Marino, *La cooperazione internazionale in materia tributaria, tra mito e realtà*, Rass. Trib., 2010, 433 et seq.

particularly by virtue of Directive 2004/56/EC<sup>509</sup>, the procedure for gathering information has been speeded up and supplemented with provisions on notification to the addressee of a decision issued by the administrative authorities of the requesting Member State and on simultaneous controls when two or more Member States share the interest for the tax situation of a person liable to tax. Finally, in 2011 the Directive No 77/799 was replaced with a new directive on administrative cooperation (Directive 2011/16/EU) to be implemented before 1 January 2013, which, among the other things, covers all national taxes (except for VAT, customs and excise duties) and concerns “*information that is foreseeably relevant to the administration and enforcement of the domestic [tax] laws*”, removes the exception of the bank secrecy, broadens the possible use of the information gathered and the cases wherein the automatic exchange of information applies, simplifies and standardizes the other procedures like the simultaneous controls, introduces time limits for the execution of the request. Notably, the hypotheses when the refusal of cooperation is possible are reduced and rendered narrower; in fact, in Article 17 they are confined to the following: (a) the requiring State has not exhausted its own sources of information, (b) the requested State is prevented from its own statutory law (banking secrecy excluded), (c) the applying State would be legally unable to provide similar information if requested, (d) the forwarding of the information would cause the disclosure of a commercial, industrial, professional secret or a commercial process, or would be contrary to the public policy.

A similar evolution has concerned the administrative cooperation on tax recovery, wherein the Directive No 2010/24/EU, to be implemented before 1 January 2012, has replaced the former Directive No 76/308/EEC that, initially conceived for the assistance in the recovery of the Union’s own resources, had been gradually extended so as to cover VAT and excise duties (from 1979), and also direct taxes (from 2001)<sup>510</sup>. As with the new Administrative Cooperation Directive, the New Recovery Directive has a broader scope (all taxes and

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<sup>509</sup> Council Directive 2004/56/EC of 21 April 2004 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, certain excise duties and taxation of insurance premiums.

<sup>510</sup> On 18 November 2011 the Commission adopted a new Regulation laying down detailed provisions to implement the new Council Directive: Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. As said in the text, Council Directive 76/308 EEC originally covering agricultural levies and customs duties as sources of Community revenue, was later extended to VAT (Council Directive 79/1071/EEC), excise duties (Council Directive 92/108/EEC), taxes on income and capital and taxes on insurance premiums (Council Directive 2001/44/EC). Afterwards, a codified version of this legislation was adopted on 26 May 2008 (Council Directive 2008/55/EC on mutual assistance of claims relating to certain levies, duties, taxes and other measures) and detailed implementation arrangements were laid down in Commission Regulation (EC) 1179/2008.

duties levied by or on behalf of a Member State or of the Union)<sup>511</sup> and possible uses of the information gathered in comparison to the forerunner; it does not allow the requested Member State to base a refusal on the banking secrecy. More generally, it is intended to render the procedure of recovery assistance more efficient, also by providing for a single European enforcement instrument.

Again, with the purpose of rendering the administrative cooperation more effective in the domain of indirect taxation, the above-mentioned Regulation No 1798/2003/EC has been recasted into the Regulation No 904/2010/EU on administrative cooperation and combating fraud in the field of valued added tax, in force since 1 January 2012, which envisages common rules and procedures for administrative cooperation and information exchange between national competent authorities in order to correctly apply VAT and tackle fraud<sup>512</sup>. In the field of excise duties it is still to be adopted – in 2011 the Commission issued a proposal for a revised regulation - the new Regulation on administrative cooperation, being in particular necessary to coordinate the currently applicable Regulation No 2073/2004 cited above with the computerised Excise Movement and Control System (EMCS) introduced in 2010.

### **5.1 ... and the division of the burden of proof**

The brief excursus of the relevant legislation governing the administrative cooperation between competent authorities of Member States is not intended to be descriptive, as this would go further than the scope of this dissertation, but rather to highlight that purely procedural aspects are more and more catching the attention of the European Institutions (both Council and Commission, the latter responsible for the implementation of the measures) with the aim of improving and rendering effective a mechanism that so far has not worked very well in terms of concrete use by the tax administration and above all practical results. The informative isolation of the Member States as to the tax situation of taxpayers enjoying one of the fundamental freedoms or carrying out a trade involving two or more of them, coupled with the increasing tax avoidance, evasion or even fraud scheme, cannot be coped with other than at a higher level. Leaving the issues related to the lack of knowledge on the side of the tax authorities in the hands of the single legal orders would

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<sup>511</sup> Pursuant to Article 1.

<sup>512</sup> Cf. Commission Implementing Regulation (EU) of 31 January 2012, No 79, laying down detailed rules for implementing certain provisions of Council Regulation (EU) No 904/2010 concerning administrative cooperation and combating fraud in the field of valued added tax.

be likely to turn the recourse to measures into a disproportionate increase of the administrative (documentary, probative) burdens on the taxpayers exercising a certain EU right.

In other terms, the most recent amendments or recast of the administrative cooperation instruments evidently shows the concerns of the European institutions about their efficacy and are readable in the light of the need to modernize the mechanism of mutual assistance between tax administrations and strengthen those tools in order to live up to the growth of tax avoidance and tax fraud when cross-border situations are concerned.

In addition, it cannot be disregarded that much pressure has come as a way as to improve the chances of exchanging information or documents and assisted recovery, by the EUCJ rulings dealing with the distribution of the burden of proof between national tax authorities and taxpayer in not-merely-domestic situations. There is a link between the opportunities of the national tax administrations to gather information from the foreign Member State and the possible justifications to restrictions on the taxpayers' rights or freedoms<sup>513</sup>. Generally speaking, the more the former is enabled to directly obtain such information, the less a legislation restricting on a fundamental freedom – e.g through the setting out of an irrebuttable presumption – is likely to be considered a proportionate provision aimed at securing the effectiveness of fiscal supervision. In other words, if a Member State introduces or maintains a tax presumption that is restrictive on a fundamental freedom, the justification based on the need to secure the effectiveness of fiscal supervision is likely to be rejected if the mechanism of the mutual assistance works and the limits are reduced. This, even though, as we will see, from a number of cases it results that the EUCJ excludes the right of the taxpayer to ask the tax administration to make use of the administrative cooperation instruments and an obligation of the latter to use them. In addition, it often refers to the possibility of the tax authorities to request from taxpayer himself the necessary information, thereby showing to accept an alteration of the burden of proof.

In the previous chapter of this dissertation, it has been sufficiently stressed how legal presumptions live up to the deficit of knowledge on the side of the tax administration, the taxpayer being the most aware of the tax obligation's constitutive elements and the one closer to the relevant information. Therefore, whereas normally the burden of proof as to

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<sup>513</sup> Cf. F. Amatucci, *The enlargement duties to co-operate of taxpayers and the reversal of the burden of proof*, in *Mutual Assistance and Information Exchange*, (eds.) R. Seer and I. Gabert, EATLP International Tax Series, Vol. 8, 2009, at p. 91 et seq.

the tax debt lies on tax authorities, the mechanism of legal presumptions causes the shift on the taxpayer of such burden (in the event of rebuttable presumptions) or the substantive definition of the matter without any opportunity for the latter to give evidence to the contrary (in the event of irrebuttable presumptions).

Given the even greater lack of information that tax authorities cope with in situations involving one or more different Member States, the national legislator is led to make use of presumptive provisions and in general to shift the risk of the absence of enough information in order to, for instance, guarantee a tax relief, delay the recovery of an exit tax or to let the related companies fix the prices of intra-group transactions<sup>514</sup>.

### **5.1.1 EUCJ case-law on the use of administrative cooperation and division of the burden of proof**

The approach of the EUCJ as regards the interaction between administrative cooperation instruments and distribution of the burden of proof will be individualised with special regard to single presumptive provisions or regimes, but in order to set the stage it is useful to refer at the outset to some of the more interesting cases on the matter recently dealt with by the Court.

#### **5.1.1.1 The Elisa case**

In the *Elisa* case the question examined was whether the French legislation that exempted companies resident in France from the tax on the commercial value of immovable property owned in the same country by legal persons while for companies resident in another Member State conditioned that exemption to the existence of a convention on

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<sup>514</sup> See R. Seer and I. Gabert, *European and International Tax cooperation: Legal Basis, Practice, Burden of Proof, Legal Protection and Requirements*, Bulletin for International Taxation, 2011, at 95. The Authors point out that some States have extended a taxpayer's duties to cooperate with the national tax authorities with regard to cross border activities. As a result, a smaller number of information requests regarding direct taxes comes from these States, as they can get the information directly from the taxpayer under assessment. Such expanded duties can be embodied by the shift of the burden of proof. In this regard, it is noted that in the legal bases for the international exchange of information's instruments there are not provisions dealing with the burden of proof, which thus belong to the national procedural law. On the basis of a survey regarding the Member States, three ways to (generally) allocate the burden of proof between taxpayers and tax authorities are identified. Firstly, in some legislations (such as Belgium) the tax authority bears the burden of proof, but it is shifted onto the taxpayer if he does not deliver the requested information. Secondly, some other legislations follows the "theory of sphere", which puts the burden on the party who has the easiest access to the information required and possibility of giving evidence. Such rule is in part effected by provisions stating that the tax authorities must provide evidence with regard to facts giving rise to tax liability while it is up to the taxpayer to give evidence of the facts reducing his duties. Lastly, there are those legislations that put the burden of proof upon the party who invokes a fact or claims the enforcement of a law. Cf. X. Oberson, *Exchange of information and cross-border cooperation between tax authorities - General Report*, in Cahiers de droit fiscal international, Vol. 98b, 2013, 19.



administrative assistance among the two States involved or a treaty including a non-discrimination clause, was consistent with the free movement of capital. More in detail, Article 990E of the French General Tax Code requested legal persons having the effective centre of management in France to merely accomplish a formality, which consisted of a yearly communication regarding the immovable property owned, information as to the members' identity, the rights held and the evidence of their tax residence. This communication was not enough for a legal entity resident outside France. Besides that, indeed, the tax relief depended on a further condition; that is the signature of a convention on mutual assistance aimed at tackling tax evasion and avoidance or a treaty having a non-discrimination clause on the basis of nationality. In fact, there was a convention between France and Luxembourg, but it did not cover the appellant of the main proceedings, which was a holding company formed under the Luxembourg law, so that its request to benefit from the exemption was denied.

Since in this case the legislation was clearly restrictive on the free movement of capital as it rendered less attractive for non-residents the investment in immovable properties located in France, the Court immediately attempted to verify if it could be justified in the light of an overriding requirement of general interest. More precisely, it focused on the proportionality of the measure, which on the basis of the argumentation contended by the French government was intended to combat tax evasion (of the wealth tax by natural persons resident in France) through transparency as to the composition of the legal persons owning immovable property in France.

As recalled by the Court, the prevention of tax evasion represents, according to settled case law, an overriding requirement of general interest potentially justifying a restriction to one of the fundamental freedoms. However, the restriction has to overcome the last stage of the rule of reason, i.e. the proportionality test, here declined in two main steps, i.e. the appropriateness to achieve the aim pursued and the proportionality in a narrow sense or necessity. While it is plain that the measure is able to cope with the abusive practice consisting of the use of companies resident for tax purposes in States from which France cannot get the relevant information as screens by natural persons aiming at avoiding the payment of the tax on capital, it remains to see if less restrictive measures can be devised. In this regard, the French government argued the necessity of the restrictive approach to the measure in the light of the difficulties met by tax authorities in giving proof of the tax

evasion in the absence of reliable information usable to corroborate the data included in the tax return by the taxpayers.

The Court held that (paras 91 to 96):

*“In that regard it must be recalled that, in accordance with settled case-law, the prevention of tax evasion can be accepted as justification only if the legislations is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, which precludes any general presumption of tax evasion. Consequently, a general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaty (...).*

*It is also in accordance with settled case-law of the Court that Directive 77/799 may be relied on by a Member State for the purpose of obtaining from the competent authorities of another Member State any information which is necessary to enable it to effect a correct assessment of the taxes covered by the directive (...).*

*It is admittedly clear from the answer given to the third question that, in the context of the main proceedings, the restriction on the scope of the Convention of 1 April 1958 is subject to the limitation on the exchange of information under Article 8(1) of Directive 77/799, with the result that the French tax authorities may find it is impossible effectively to combat tax evasion in the case of holding companies incorporated under Luxembourg law. However, it is also apparent from the case-law that, although Article 8(1) of Directive 77/799 does not oblige the tax authorities of the Member States to cooperate when the competent authorities are prevented by their laws or administrative practices from conducting enquiries or from collecting or using information for those States' own purposes, the fact that it may be impossible to request that cooperation cannot justify refusal of a tax benefit.*

*There is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for it that evidence is not supplied (...).*

*Thus, the taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (...).”*

On the basis of the foregoing and of the circumstance that the French legislation did not allow the taxpayer to give the necessary evidence in order to prove the absence of tax evasions' objectives when cooperation with the other Member States was not practicable, the Court stated that "*the French Government could have adopted less restrictive measures in order to attain the objective of combating tax evasion*". Therefore, the restrictive provision was not proportionate and as such it could not be justified in the light of the need to tackle tax evasion. It was indeed found to be inconsistent with the free movement of capital.

The decision reveals the tendency of the EUCJ to broaden the scope of the Council Directive 77/799/EEC, so as to support a strained interpretation of Article 1, para 3, that is considered to be applicable to the disputed tax, albeit the latter can hardly be classified as a tax on the capital rather than on the asset. At first instance, the attempt is to force the use of the relevant assistance directive by the national tax authorities in order to get from the foreign country that information necessary in order to grant the taxpayer with the tax benefit. At any rate, even when not feasible, because, as in the case at issue, the foreign State is not obliged to exchange information, then it is up to the taxpayer to give evidence of the absence of avoidance/evasion purposes. The Court explicitly says that the "*difficulty [in checking information] cannot justify a categorical refusal to grant a tax benefit in respect of investments made by investors from the Member State*".

This ruling is in line with the jurisprudence of the EUCJ with regard to tax benefits that are denied to the taxpayer because of the transnational character of the situation encompassing lack of transparency and a higher risk of tax abuse in comparison to a domestic situation<sup>515</sup>. As a rule, the burden of proving that the conditions for granting a certain benefit are met lies on the taxpayer submitting the request. On the other hand, pursuant to settled case law,

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<sup>515</sup> *Ex multis*, see ECJ 28 January 1992, case C-204/90, Bachmann, where the Belgian provisions limiting the deduction of insurance premiums for tax purposes was found restrictive of the freedom of movement – though "*justified by the need to ensure the cohesion of the tax system of which they form part*". The Belgian government contested the difficulties or even impossibilities of checking certificates relating to the payment of contributions in other Member States, as a number of Member States have no legal basis for requiring insurers to provide the information needed to monitor payments made within their territories. In such a case, the Administrative cooperation directive No 77/799 may not be invoked. The Court recognised that under Article 8, para. 1 of the Directive the tax authorities of the requesting Member States have no obligation to collaborate when their laws or administrative practices prevent the competent authorities from carrying out enquiries or using information for those States' own purposes. However, the impossibility to have recourse to such collaboration cannot justify per se the non-deductibility of insurance contributions. Indeed, continued the Court, "*There is nothing to prevent the tax authorities concerned from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing to allow deduction where such proof is not forthcoming*". The issue will be discussed with special regard to tax law presumptions infra, when dealing with the field of direct taxation.

it is up to the tax authority to prove the existence of tax avoidance or evasion grounding the denial of the benefit.

The ruling at hand, however, goes a bit further by assuming that when the instruments for administrative cooperation apply, the national legislation cannot refuse the tax relief by arguing from the lack of information as to the cross-border situation, being empowered to request from the other Member State the necessary documentary evidence. This seems irrespective of the party on which the burden of proof lies according to the national law, though in another decision the Court has denied the existence of a taxpayer's right to ask for the use of the assistance instruments by the tax authorities<sup>516</sup>. In addition, the same tax authority may ask the taxpayer for the necessary information or documentation before denying the benefit. As underlined by the General Advocate in his Opinion to the case, especially in the more recent decisions, the Court has started to give primary relevance to the circumstance that in cases when a general presumption of tax avoidance or evasion applies, the non-resident taxpayer is "best placed for that purpose, to prove the reality of its activities which allow it to claim the benefit of the fundamental freedoms"<sup>517</sup>.

### 5.1.1.2 The Teleos and Twoh cases

A similar question relating to the distribution of the risk as to the lack of information/documentation has been dealt with by the EUCJ in the cases Twoh and Teleos<sup>518</sup> involving intra-Community supplies of goods within a fraudulent overall design. Such decisions are interesting in the extent to which the approach of the EUCJ to the

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<sup>516</sup> ECJ 27 Sept. 2007, Case C-184/05, Twoh. It follows an obligation on the tax administration to which it does not correspond a right of the taxpayer, but at the most only a legitimate expectation.

<sup>517</sup> Opinion of Advocate General Mazák delivered on 26 April 2007, at paras 102-103. He observed that "As far as the 102-burden of proof is concerned, the Court's case law provides that it is in principle for the tax authorities of the Member States concerned to prove a risk of tax avoidance or evasion in each case. It cannot be inferred from the fact that a taxpayer uses his fundamental freedoms to establish his residence in another Member State that such a taxpayer pursues a fraudulent objective. A general presumption of tax evasion or tax avoidance cannot justify a fiscal measure which compromises the objectives of the Treaty. The Court has gone as far as to consider that the laying down of a general rule automatically excluding certain categories of operations from a tax advantage, whether or not there is actually tax evasion or tax avoidance, cannot be considered as proportionate. More recently, the Court seems to have refined its approach to general presumptions of avoidance in the area of direct taxation. In *Cadbury Schweppes*, it held that such a presumptions could be acceptable, provided that it is designed, by the precise conditions it establishes, to apply only in very specific circumstances which correspond to cases in which the probability of the risk of tax avoidance is highest. In that case, the burden of proof will lie with the non-resident taxpayer, which is best placed for that purpose, to prove the reality of this activities which allow it to claim the benefit of fundamental freedoms."

<sup>518</sup> ECJ, 27 Sept. 2007, C-409/04 (Teleos); ECJ 27 Sept. 2007, C-184/05 (Twoh). Concerning the first judgment see M.G. De Flora, *Brevi riflessioni in tema di regime probatorio nelle operazioni intracomunitarie*, Note to EUCJ 27 September 2007, case C-409/04, Riv. Dir. Trib. 2009, 20.

allocation of the probative burden can be drawn at the outset, especially in the interaction with the administrative cooperation tools<sup>519</sup>.

Without indulging in the circumstances of the concrete cases, the main issue concerns the obligations and the recognition of the right of exemption on the supplier of an intra-Community supply when the purchaser resident in the other Member State has not (or there is the suspicion that he has not) fulfilled his obligations as to the outcome VAT. The question arises as to the means of proof requested in relation to the carrying out of a intra-Community operation, which is exempted in the State where the supplier is resident, and to the person (whether the supplier or the tax authority) bearing that burden.

In both the decisions the Court has recalled that after the abolitions of controls at the frontiers between Member States it is mostly on the basis of evidence (declarations, statements) produced by taxable persons that national tax authorities are to ascertain if an intra-Community transaction took place, for the purpose of which it is requested not only the transfer of ownerships on the goods, but also that the latter have physically left the territory of the Member State of dispatch. What kind of evidence is to be given to get the exemption of intra-Community supplies of goods is a matter left to the single Member States, within the limits imposed by Community law<sup>520</sup>, amongst which are the principles of legal certainty and proportionality. Such limits are not exceeded, in the Court's view,

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<sup>519</sup> The possible use of presumptions (not necessary legal) rather concerns the proof of the absence of *bona fide* on the taxpayer (supplier) who could not know about the fraud and thereby of its participation in the fraud organized by a third party. The inference developed by tax authorities – on which the burden lies - in order to prove the effective or potential knowledge should ground on 'objective elements' and comply with the criteria of rationality and proportionality in such a way not to render too difficult or impossible the possibility for the taxpayer to give the counterproof. In this sense A. Mondini, *Falso materiale e ideologico nelle frodi Iva e tutela dell'affidamento e della buona fede del contribuente nell'apparenza di situazioni fattuali e giuridiche prodotta da terzi, commento a Sent. CE causa C-409/04; Sent. CE causa C-271/06: Iva comunitaria*, Rass. Trib., 2008, 6, 1788. On the issue of the distribution of the burden of proof within the context of fraud carousel, see M. Miccinesi, *Le frodi carousel nell'Iva*, Riv. Dir. Trib., 2011, 1089 ss., in particular at p. 1099-1100. *Mutatis mutandis*, for intra-Community purchases similar questions arise in respect of intra-Community supplies. Whereas it seems to be plain that the purchaser has to prove his qualified diligence (he did not know and he could not know), is he requested to do so after the tax authority has proved, also by means of presumptions of fact, that he could not ignore the fraud or instead has the latter only prove the existence of the carousel fraud? In the Author's opinion, from the EUCJ case law on the matter (a.o., Optigen, Axel Kittel, Federation of Technological Industries), it can be inferred that the tax administration, in order to contest the violation of the obligation of diligence, has to prove that the taxpayer took part, also passively, in the fraudulent circuit. Such a proof can be based on objective circumstances, such as the gap between the price of purchase and the average price applied on the market or more in general all those circumstances that embody abnormal economic or commercial facts and are normally recognizable by the economic operators. Once the tax administration has fulfilled such a proof, than it's up to the taxpayer giving the counterproof; that is the evidence that he took every step necessary in order to verify the genuineness of the supplier-contracting party.

<sup>520</sup> ECJ, 27 Sept. 2007, C-409/04 (Teleos), par. 63-64.

when the burden of proof as to the entitlement to a tax derogation or exemption is put on the person who is interested in getting that.

In *Teleos* the Court held that (paras 58, 63-64-65):

*“Admittedly, the objective of preventing tax evasion sometimes justifies stringent requirements as regards supplier’s obligations. However, any sharing of the risk between the supplier and the tax authorities, following fraud committed by a third party, must be compatible with the principle of proportionality. Furthermore, rather than preventing tax evasion, a regime imposing the entire responsibility for the payment of VAT on suppliers, regardless of whether or not they were involved in the fraud, does not necessarily safeguard the harmonised VAT system from evasion and abuse by purchasers. The latter, were they exempted from all responsibility, could in effect, be encouraged not to dispatch or not to transport the goods out of the Member State of supply and not to declare the goods for VAT purposes in the envisaged Member States of destination”. (...)*

*Since it is no longer possible for taxable persons to rely on documents issued by the customs authorities, evidence of intra-Community supplies and acquisitions must be provided by other means. Whilst it is true that the regime governing intra-Community trade has become more open to fraud, the fact remains that the requirements for proof established by the Member States must comply with the fundamental freedoms established by the EC Treaty, such as, in particular, the free movement of goods.*

*In that regard, it is also important to point out that, under Article 22(8) of the Sixth Directive, the Member States may impose the obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.*

*Moreover, according to the Court’s settled case-law, which is applicable to the main proceedings by way of analogy, it would not be contrary to Community law to require supplier to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (...).”*

These considerations, together with the principles of fiscal neutrality and legal certainty led the Court to interpret Article 28(A)(a), of the Sixth Directive as precluding the tax authority from accounting for VAT a supplier who acted in good faith without taking part

in the evasion and submitted evidence establishing at first sight his right to the exemption of an intra-Community supply of goods.

Therefore, the EUCJ on the one side observes that obliging the taxable person to provide evidence that goods have physically left the Member State of supply does not secure the correct application of exemptions (para 51); on the other side it asserts that such obligations might be justified for the purpose of preventing tax evasion.

The balance between the different interests in play is embodied by the principle of proportionality, pursuant to which “*Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic law, cause the least possible detriment to the objectives and principles laid down by the relevant Community legislation*” (para 52). As asserted in *Elisa*, this entails that Member States cannot introduce tax measures restricting EU freedoms or principles in order to combat tax avoidance or fraud when they are empowered to make use of the administrative cooperation instruments for this purpose or to ask the taxpayer for the necessary information. In *Elisa* the Court also clarifies that the proportionality implies the latter be asked only those obligations necessary in order to grant him an exemption or in general a benefit. The same principle, however, does not entail the recognition of the taxable person’s right to demand the national tax authorities to avail themselves of the mutual assistance directive or the administrative cooperation regulation. In *Twoh* the Court held indeed (para 26-28):

*“(...) the principle that the burden of proving entitlement to a tax derogation or exemption rests upon the person seeking to benefit from such a right is to be viewed as being within the limits imposed by Community law. Thus, for the purpose of applying the first subparagraph of Article 28(A)(a) of the Sixth Directive, it is for the supplier of the goods to furnish the proof that the conditions for exemption referred to in paragraph 23 of this judgment are fulfilled.*

*(...) What is important in this case is the fact that Twoh, being unable to provide the necessary evidence to establish that the goods have in fact been dispatched to the destination Member State, has requested the Netherlands tax authorities to gather information capable of demonstrating the intra-Community nature of its supplies from the competent authority of that latter Member State, in application of the mutual assistance directive and the administrative cooperation regulation. The question that thus arises is whether those tax authorities were required to accede to such a request.”*

The Court answers the question arguing from the scope and content of the instruments concerned, which have been conceived for combating tax evasion/avoidance and improving the correct assessment of the tax due by regulating the cooperation between national tax authorities. As a consequence, they do not create any rights on individuals, also considering the use of “may” when regulating the possible actions. The same holds true in the domain of direct taxation, wherein the EUCJ transposes identical conclusions<sup>521</sup>.

### 5.1.1.3 The Persche case

What has been said at the end of the previous paragraph particularly results from the ruling given by the EUCJ in Persche<sup>522</sup>, which is interesting as the Court focuses again on the question of the division of the burden of proof among taxpayers asking for a tax benefit and tax authorities when administrative cooperation tools apply, and it confirms its previous findings without agreeing with the far-reaching opinion of the General Advocate Mengozzi. Indeed, one of the question referred by the national court is whether when facing a factual situation which occurred abroad the tax authorities of the Member State of residence of the taxpayer are obliged to have recourse to the mutual assistance mechanism or are instead entitled to let the burden of proof lie on the taxpayer pursuant to the national procedural law.

In common with the above VAT cases of Teleos and Twoh, there was the difficulty met by the taxpayer willing to obtain a certain tax advantage in proving a circumstance that involves different Member States, thereby outside his sphere of direct availability. As a matter of fact, in Persche at issue was the restriction on the free movement of capital caused by the German legislation that allowed the resident donor a deduction for tax purposes of the gifts made in favour of national recognized charities whereas such a benefit was denied if the gift was made to a charity body established abroad.

After having found the tax measure to be restrictive on the above fundamental freedom, the Court checked whether the lack of objective comparability of the situations concerned or

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<sup>521</sup> ECJ 27 Sept. 2007, case C-184/05 (Twoh), par. 35: That finding is also corroborated by the case-law of the Court of Justice on mutual assistance between the competent authorities in the area of direct taxation, which is transposable by analogy to a situation such as that in the main proceedings. According to that case-law, the mutual assistance directive may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of tax. There is, however, nothing to prevent the tax authorities concerned from requiring the taxpayer himself to provide such proof as they may consider necessary in order to determine whether or not the deduction requested should be granted (...).

<sup>522</sup> ECJ 27 Jan. 2009, case C-318/2007 (Persche). See C. Sanò, *Note to European Court of Justice, case C-318/07*, *Giurisprudenza delle Imposte*, 2009, ([www.giurisprudenzaimposte.it](http://www.giurisprudenzaimposte.it)).



the need to safeguard effective fiscal supervision occurred. Both of these arguments were rejected: the first one on the grounds that the foreign charitable entities that pursue the objectives advocated by the German law are in a comparable situation with domestic bodies, the second one in view of the disproportionate character of a measure absolutely preventing the taxpayer from proving the charitable status and the genuineness of the gift to a body established abroad.

The Court thus held (paras 53-54):

*“(...) the possibility cannot be excluded a priori that the taxpayer is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the expenditure incurred in other Member States (...).*

*Nothing would prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (...).”*

As already asserted in *Centro di Musicologia Walter Stauffer*<sup>523</sup>, disadvantages of a purely administrative nature, meaning difficulties in the ascertainment/monitoring of the conditions for the benefit that would impose a disproportionate burden on the tax administrations in the view taken by the intervening governments, cannot justify a refusal of that benefit facing cross-border situations. The EUCJ insisted, indeed, on the possibility for tax authorities to get the necessary evidence from the taxpayer submitting the request for the exemption, who normally is in the position to produce documentary evidence showing that the foreign entity meets all the conditions required by the national legislation for the granting of the tax advantages. In addition, the EUCJ recalled that the national tax administration may avail itself of the mechanism of the administrative cooperation, though it clarified that the latter does not impact on the power of assessment of the conditions requested and it does not compensate for the inability of the donor to give enough evidence, being rather at the discretion of the single Member State to have recourse or not to the mutual cooperation.

As in the case of *Twoh*, the EUCJ interprets the content of the mutual assistance directive as laying down the possibility (“may”) rather than an obligation of national tax authorities to request to the competent authorities of another Member State the “complementary

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<sup>523</sup> ECJ 14 Sept. 2006, case C-368/04, *Centro di Musicologia Walter Stauffer*.

information” necessary in order to check the documents produced by the taxpayer. Therefore, in the view of the Court, the burden of proving the conditions to obtain a certain tax advantage rests on the taxpayer (e.g. the donor), though tax authorities cannot deny such advantage – even by means of presumptions of fact, as the case may be - simply advancing doubts on the genuineness of the declarations or other evidence enclosed by the taxpayer without having controlled such information, even making use of the possibilities offered by the Directive 77/799<sup>524</sup>.

The Court thus shows a disregard of the circumstance that in the case of the main proceedings the proofs requested in order to benefit from the exemption for the purpose of the income taxation concerned a third person, that is the recipient of the gift established abroad; a circumstance that is done away with the consideration that *“it is usually possible, for a donor, to obtain from that body documents confirming the amount and nature of the gift made, identifying the objectives pursued by the body and certifying the propriety of the management of the gifts which were made to it during previous years.”*

On this point, the Court disagreed with the view expressed by the General Advocate Mengozzi, who asserted that national authorities cannot refuse a tax advantage without first taking into due consideration, on the one side the difficulties met by the taxpayer in collecting the proofs, and on the other side the possibility to make recourse to the Directive 77/799. In his Opinion submitted to the case, he seemed to support the existence of an *“onus”* upon Member States to have recourse to that Directive, where the taxpayer appears to be unable to produce the necessary documentation. This, for the purpose of securing the effective application of the free movement of capital. He acknowledged that the legal basis for the assessment of the conditions for granting the tax benefit fall within the residual competence of the Member States, which are empowered *“to establish, in accordance with their procedural rules, as part of an administrative procedure to determine the amount of*

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<sup>524</sup> Notably, in cases involving a third State, the Court has a more flexible approach. Cf. ECJ, 18 December 2007, C-101/05, A. The Court held (paras 61 and 63): *“In the first place, relations between the Member States take place against a common legal background, characterised by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even if, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which does not exist between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance. (...) It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country”*.

*tax payable, the rules of evidence applicable, including the allocation of the burden of proof between the taxpayer and the national tax authorities”.* However, he submitted that “*where the evidence requested for allowing a tax advantage does not directly concern the taxpayer who claims it, but a third party, in this instance the body which received the gift, and which is established in another Member State (...) the national authorities cannot systematically refuse to grant the tax advantage if the evidence requested from the taxpayer has not been adduced, without first taking into account the difficulties encountered by that taxpayer in collecting the evidence requested in spite of all the efforts he has already made, and without examining, in the light of those difficulties, whether it is actually possible to obtain that evidence with the assistance of the competent authorities of another Member State within the framework of Directive 77/799 or, where appropriate, in the context of the application of a bilateral convention. Of course, in that situation, it will be for the national court to ascertain, in each specific case, whether the refusal to allow the tax deduction claimed, without resorting to the cooperation between national authorities introduced by Directive 77/799, is based on a serious assessment of the abovementioned factors.*”<sup>525</sup>

If the EUCJ had followed this interpretation, then it would have been conceivable a sort of *onus* on the tax authority facing the described difficulties of proof on the side of the taxpayer.

It remains to be seen in the following if the EUCJ approaches differently the case-law where there are not only tax benefits at issue, but rather violations of tax legislation so that the burden of proof lies on the tax administration but it is shifted onto the taxpayer by means of legal presumptions.

## **6. The proportionality principle**

The degree of availability of the administrative cooperation instruments by the tax administration appears to be one of the criteria that enter the evaluation as to the proportionality of national restrictive measures carried out by the EUCJ. An evaluation that, as said, is composed of a three-fold step (or, more recently, two) aiming at the verification of the appropriateness of the measure to attain the goal, the necessity in terms of non-availability of less restrictive measures and the proportionality in a narrower sense. In turn, the proportionality test represents the last step of the rule of reason; that is the process

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<sup>525</sup> Opinion of Advocate General Mengozzi, delivered on 14 Oct. 2008, Case C-318/07, at para 110.

developed by the EUCJ in order to test the compatibility of national direct tax measures with fundamental freedoms.

If the application of the principle of proportionality is recurrent in direct tax cases (unless the rule of reason does not reach the last step) and among these, particularly in cases involving tax avoidance or evasion, nonetheless it is not confined to this domain of tax law, being used also in indirect tax cases brought before the Court.

As a matter of fact, the principle of proportionality is a general principle of EU law<sup>526</sup>. Though it stems from the constitutional traditions of Member States, being already known especially within administrative law, it has seen an increasing amount of attention by virtue of the application by the EUCJ.

Generally speaking, it implies the balancing between different interests and concerns the relation between the means and the aim attained. The first feature is peculiar to all general principles of law that are to be distinguished from rules as they do not fix a behaviour to be abided by, but they are rather used to weigh the (contrasting) values coming into play and also as criteria of interpretation of rules of law. The second feature gathers the essence of the proportionality parameter, as it entails the appraisal of the suitability and necessity to

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<sup>526</sup> A.o., ECJ 11 July 1989, Case C-265/87 Schröder, where proportionality concerned the validity of EC legislation on the common organization of the market in cereals. At par. 21 it was recalled that “*The Court has consistently held that the principles of proportionality is one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on economic operators are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous ones must be used and the charges imposed must not be disproportionate to the aims pursued.*” Notably, the Court carried out the verification as to the observance of the proportionality by assuming that “*with regard to judicial review of compliance with the above mentioned conditions [the ones laid down in par. 21], it must be stated that, in matters concerning the common agricultural policy, the Community legislator has a discretionary power which corresponds to the political responsibilities imposed by Articles 40 and 43. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution intends to pursue (...)*” (para 22). Cf. H. G. Schermers, *Judicial protection in the European communities*, Kluwer, Deventer, 1976, at 49. The Author referred to the Second Schlüter case (ECJ, 24 October 1973, C-9/73), where the Court held that “*In exercising their powers, the Institutions must ensure that the amounts which commercial operators are charged are no greater than is required to achieve the aim which the authorities are to accomplish; however, it does not necessarily follow that that obligation must be measured in relation to the individual situation of any one particular group of operators. Given the multiplicity and complexity of economic circumstances, such an evaluation would not only be impossible to achieve, but would also create perpetual uncertainty in the law. An overall assessment of the advantages and disadvantages of the measures contemplated was justified, in this case, by the exceptionally pressing need for practicability in economic measures which are designed to exert an immediate corrective influence; and this need had to be taken into account in balancing the opposite interests.*” He also recalled the importance of the principle in cases involving the imposition of penalties, such as the Fédéchar case (on which see the following footnote) and the Schmitz case (ECJ 19 March 1964, C-18/63) where the Court annulled the decision not to renew the contract of a member of the staff as it is “clearly exaggerated”. Two other decisions are cited (ECJ 23 Nov. 1971, C- 62/70, Chinese Mushroom; ECJ 13 Nov. 1973, C-63-69/72, Werhahn) that show the application of proportionality in ruling on the action of, respectively, the Commission and the Council.

have recourse to certain means in respect of the goal achieved and the taking into account of the interests possibly undermined, as well as the alternative measures (if available) which can enable the reaching of the same goal with a lower detriment to the losing interests.

The principle of proportionality, thus, touches on the exercise of (legislative or administrative) power in the extent to which such exercise implies the choice among different measures or actions. As such, its earlier applications dealt with the scope of the Community's action - for instance, consisting of the imposition of obligations, fines, or the accordance of derogations to single Member States - by requesting, in the context of the exercise of its competences (both exclusive and concurrent) the use of the instruments that most suit the objective attained<sup>527</sup>. Under this aspect, that is a parameter regulating the exercise of Community competences, it has been codified following the Treaty of Maastricht in Article 5, para 3 of the EC Treaty, and the Treaty of Lisbon which have not changed the substance<sup>528</sup>.

But the more "revolutionary" side of the principle of proportionality results from its application as a sort of reasonableness scrutiny with reference to national tax provisions<sup>529</sup> – thus, entailing the exercise of legislative or administrative power by a

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<sup>527</sup> See A. Zalasinski, *Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law*, Intertax, 2007, 310 et seq., who dated back the first appearance of the principle in an ECJ decision handed down in the Fédéchar case (ECJ 29 November 1956, C-8/55, Fédéchar). Accordingly, he observed that "At this early stage it was predominantly applied within the sphere of inter-institutional dealings, especially the Community law-making process. This aspect of the proportionality principle was subsequently codified in the EC Treaty as amended by the Maastricht Treaty". The role of the principle of proportionality, however, is not merely confined to the Community legal order's law making rules, as "Despite the fact that it is not codified as such, it is important in balancing the public and private sector's interests within the framework of application of Community law. It constitutes the most important part of the application of the rule of reason."

<sup>528</sup> Pursuant to Article 5, para 1 "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." At paragraph 4 it is then added that "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objective of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality." This, in accordance to what is set out in Article 3, laying down the Union's basic tasks, para 6: "The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties." See G. Tesaro, *Diritto dell'Unione Europea*, Assago, Cedam, 2010, 106, who identifies three criteria the exercise of a certain competence has to live up to in order to comply with the principle of proportionality. First, it (the exercise of the competence) has to be useful and pertaining to the attainment of the objective for which the competence has been arrogated. Secondly, it has to be indispensable, meaning that when various means are available for the same goal the competence is to be exercised so as to be the least detrimental possible to the other objective worthy of equal protection (replaceability criterion). Lastly, a link between the action and the objective is requested (causality criterion).

<sup>529</sup> Hence, the proportionality vests with a transversal function within the Community legal order. Firstly, it is "a means for checking the legitimacy of the Community Institution's actions and the validity of the EC acts, in this way operating at a superordinate level, as a limitation to the exercise of the normative power by the

Member State - within the context of a reference for a preliminary ruling or an infringement procedure. In this event, it offers the EUCJ (in the first instance) a tool for the balance between the interests in play, which depending on the tax field are the interest of the Union, the interest of the single Member State, and the private interest of the taxpayer that, not rarely, matches with the interest of the Union itself to the uniform and effective interpretation and application of EU Law. Such division is, however, not that definite, as the balance is inevitably affected by the degree of harmonization of the relevant tax field. As a way of exemplification, it is not the same thing dealing with the proportionality of a national measure in respect of one or more fundamental freedoms, which implies the investigation of the national aims that the Member State seeks to attain, or of a national measure with the VAT Directive and the principles therein laid down. In the second case, indeed, the model is designed at European level and the goals have been fixed uniformly by the EU legislator, who has defined a balance between the need for neutrality in respect of economic operators on the one hand, and the efficacy of the levy on the other hand. Hence, in the second case the objectives of the national measure are relevant and are taken into consideration by the Court, but they might find room only in the extent to which a derogation to the system of the VAT directive is explicitly permitted or is anyway in line with the principles governing the VAT field (like neutrality, right of deduction and so on).<sup>530</sup>

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Institutions, and characterized by a certain amount of discretion. Secondly, the proportionality is an instrument for the evaluation of the lawfulness of the Member States' behavior, both in the issuing of the measures implementing EC law and in the exercise of the derogations provided for by the Treaties in favor of them, by fixing the limits to the Member States' behavior." In this perspective, the proportionality principle recalls those national administrative principles among which is the 'power overkill', which is functional to the distinction between permitted and prohibited behaviors within certain norms. See in this way M.C. Ciciriello, *Il principio di proporzionalità nel diritto comunitario*, Napoli, *Editoriale scientifica*, 1999, 169.

<sup>530</sup> In this regard, it has been observed that in the area of negative integration the Court has more margin for a creative jurisprudence. In the absence of harmonization for direct taxation, the Court does not find rules of application of the proportionality principle in the EU (secondary) law. As a consequence, in a number of decisions – for instance, facing exit taxes - it goes so far as to suggest alternative models of taxation to the Member State involved that would pass muster under the above principle. Here the Court has the chance to develop the balance, which is inherent to the principle of proportionality, between the interests in play and to propose different models of levy. The rule of application in turn put forward by the Court, however, suffers the weakness due to the absence of harmonization and it is subjected to the flexibility of the proportionality principle in direct taxation, as it involves an open norm without a defined EU model. By contrast, in sectors of positive integration, like indirect taxation and VAT in particular, the Court is bound to the tasks defined at EU level, so that it is not allowed to suggest alternative models other than the ones laid down within the relevant EU regulation. In this perspective, it is often left in the hands of the judge referring for a preliminary ruling the ascertainment as to whether the national implementing measure embodies the due balance between the interests in play, in line with the secondary EU legislation. See A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, Pisa, Pacini editore, 2012, in particular at p. 115 et seq.

The foregoing confirms the opportunity to proceed to the analysis of the case law on national tax presumptions for sectors.

### **6.1 Proportionality principle and national tax law presumptions**

Coupled with the principle of effectiveness, the principle of proportionality represents the pivot of an analysis aiming at giving an overview of the main EUCJ case law on the matter in order to distil conclusions having a general character and enable the foreseeing of the future policy of the EUCJ when questioned on national tax law presumptions.

It goes without saying in which manner the proportionality inevitably happens to interact with national presumptive provisions. To simplify, looking at the taxation domain, the former – proportionality principle - consists of a weighing of the public (or fiscal) interest, that is the interest of the single Member State in achieving the objective chosen on the one hand, and the interest of the Union, which depending on the tax field may coincide with the recognition of an EU right or principle, or of the exercise of a fundamental freedom to the individual taxpayer. The second – tax law presumptions - are means the Member States have recourse to exactly for securing the(ir) ‘fiscal interest’, meaning the need to levy the budgetary resources for the purpose of providing services to the community. More precisely, they lighten the (*lato sensu*) procedural position of the tax administration by considering as proved a certain fact from which detrimental (conclusive) effects derive upon the taxpayer (in the event of irrebuttable presumptions) or (more often) by deeming as proved a certain circumstance unless the taxpayer gives the counterproof.

It follows that national tax presumptions embody one of the poles of the mechanism in which the proportionality test consists of. They are indeed the means through which, in turn, the national legislator aims at tackling tax avoidance, evasion or abuse in general (typically, in the field of income taxation but also in the VAT area) or to simplify the definition of the tax obligation or its assessment or recovery facing difficulties in conducting inquiries or documentary checks by the tax authorities (for instance, in the indirect taxation implementing provisions, but in direct taxation as well). Their scope and above all effects are scrutinized by the EUCJ with a view to the aims they have been conceived for and the EU objective relevant depending on the area. In fact, it is primarily with reference to the national intent that the suitability, necessity and possible existence of alternatives are to be checked, with a sort of process that investigates the ‘internal coherence’ of the presumptive provision concerned. This national aim, however, has to be

in line with the EU aims, laid down in the Treaties and/or in the secondary legal sources (pursuant to a sort of ‘external coherence’). When dealing with VAT, for example, the aims are defined in the Directive No 112/2006; in direct taxation, in the absence of an EU model, it has to be regarded the content of the fundamental principle coming into play on the one side, and the compelling reasons of public interests accepted by the Court at the second step of the rule of reason in the concrete case on the other side, as this supposes that the provision is (at least) not in contrast with the interests worthy of protection at EU level.

In this regard, it has to be further observed that though one may think that the fiscal interest is naturally recessive in respect of the EU interest in securing the freedom of movement or the exercise of the EU right, national tax presumptions involve values and tasks that the Union shares with the single Member States. This is clear, for instance, in the case of anti-avoidance measures, which very often boil down to presumptive criteria, and that may also live up to the EU’s interest in combating the abuse of EU rights and freedoms if certain conditions drawn by the EUCJ in its case law are met. Such conditions concern exactly the scope of the measure – not too general - in view of the purpose attained and the potential effects.

In conclusion, generally speaking, one should remember that the application of national tax law presumptions may determine a limit to the enforcement of a certain EU law rule or the enjoyment of a certain EU right or freedom, which thus must be checked precisely in the light of EU law and principles. Whether they are construed as anti-avoidance provisions, a quantitative limitation as to the deductibility of input VAT, a definition (e.g. of commercial imports) introduced implementing the customs legislation, or a limitation to the refund of taxes levied in contravention of EU Law, they are enabled to jeopardize the effectiveness of EU law. On the other hand, as indirectly recognized by the EU institutions, they are important tools, among other things, for combating abuse. Therefore Member States may not be asked to remove them. Given also their procedural autonomy and the possibility to choose the means when implementing secondary EU legislation fixing the aims, they are free to introduce presumptive criteria, as long as they are in line with the principles of proportionality and effectiveness.



## 6.2 The application of the principle of proportionality in non-taxation cases...

Before starting the examination of cases involving tax law presumptions, it is useful to refer to a number of older cases on anti-avoidance provisions in areas other than taxation. This is done in order to get into the line of reasoning followed by the EUCJ. In other words, to set the stage of the mental scheme adopted by the European Court when facing measures restrictive on Treaty freedoms or rights conferred under secondary EU law which are aimed at tackling abuse and suspected of being non-proportional.

Firstly, from a number of cases involving the infringement of the EU law on freedom of services and television broadcasting activities by the Belgian and the Netherlands' Media Law aiming at avoiding the circumvention of their national law, it results that the exercise of a right inherent to EC law cannot generally be viewed as avoidance. This represents the second part of the puzzle when dealing with, generally speaking and irrespective of the area, anti-abuse legislation. The first part is embodied by the Court's recognition that Member States are permitted to introduce measures with the aim of preventing the circumvention of their own legislation protecting public interests. Such measures, however, cannot be too general, because when the link between the means used and the aim sought is vague they turn out to be an altogether limitation of the EU right concerned.

In the Van Binsbergen case, the Court held that "*a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within the State*"<sup>531</sup>. In *Commission v. Belgium* it went further saying that "*those cases [when "the Member State is entitled to prevent a person providing services whose activity is entirely or principally directed towards its territory from exercising the freedoms guaranteed by the Treaty for the purpose of avoiding the rules which would be applicable to him if he were established within that State", as held in Van Binsbergen, Commission v. Belgium and TV 10], "do not in any event authorize a Member State generally to exclude provision of certain services by*

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<sup>531</sup> ECJ 3 December 2004, case Case C-33/74, Van Binsbergen, at para 13. Notably, the focus of the Court is on the effects of the national provision on the Treaty freedom, as in para 11 it said that "*a requirement that the person providing the service must be habitually resident within the territory of the State where the service is to be provided may, according to the circumstances, have the result of depriving Article 59 of all useful effect, in view of the fact that the precise object of that Article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the State where the service is provided.*"

*operators established in other Member States, since that would entail abolition of the freedom to provide services.*<sup>532</sup>

The foregoing has been asserted not only with reference to the freedom of services, but in respect of all the fundamental freedoms and secondary EU law as well<sup>533</sup>.

The question then arises as to requisites that a national measure must have in order to be 'accepted' by the Court. In this sense, an indication results from the Veronica case where, unlike the Belgian legislation imposing language constraints or prior authorizations in Commission v. Belgium, the Netherland's legislation prohibiting national broadcasting organizations from helping to set up commercial radio and television companies abroad (in the main proceedings, in Luxembourg) for the purpose of providing services there towards

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<sup>532</sup> ECJ 1 September 1996, case Case C-11/95, Commission v. Belgium, para 63. At issue was the Belgian regulation asking for a prior (administrative) authorization for the distribution of foreign programmes, thereby overlapping the Directive No 89/552 relevant in the case, equally pursuing cultural objectives. Among the provisions involved, there were Articles 26 and 26b of the 1987 decree that, according to the Commission, conditioned the issue of the authorization for the broadcasting by foreign broadcasters of commercial advertisements and teleshopping programmes for viewers in the French Community to their involvement in supporting the French Community television channels and press. In the Belgian government's view, such rules were intended to avoid the circumvention of the legislation of the receiving State, so that Article 2, para 2, of the Directive prohibiting Member States from restricting the retransmission in their territory of television broadcasts from other Member State did not apply. Similarly, ECJ 16 December 1992, Case C-211/91, Commission v. Belgium, where in fact the Court found the regulation at issue to be a barrier to the freedom to provide services in the extent to which it prevented broadcasters established in other Member States from having programmes transmitted in a language different from the one of the country where they were established relayed by the cable networks of the Flemish Community. A barrier that was discriminatory, as it did not apply to domestic broadcasters and impeded broadcasters established in countries other than the Netherlands the offer of programmes in Dutch towards the Flemish Community's audience. Unlike in the Veronica case (see the following note), the cultural-policy objectives put forward by the Belgian government have been rejected as they in fact reveal the intention of protecting national broadcasters by restricting genuine competition with them. Accordingly, the Court concluded that "*While it is true that, according to paragraph 13 of that judgment [Van Binsbergen], the State in which the service is provided may take measures to prevent a provider of services whose activity is entirely or principally directed towards its territory from exercising the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules which would be applicable to him if he were established within that State, it does not follow that it is permissible for a Member State to prohibit altogether the provision of certain services by operators established in other Member States, as that would be tantamount to abolishing the freedom to provide services.*" Cf. also ECJ 6 June 1996, Case C-101/94, Commission v. Italy, regarding the Italian legislation that confined the activity of dealing in transferable securities to companies or firms having their registered office in Italy, which the Italian government justified in the light of the need for effective supervision and sanctions. The Court found such legislation to be inconsistent with the right of establishment and with the freedom to provide services, as the obligation to establish the registered office in Italy does not constitute the only means to secure the effectiveness of controls and sanctions imposed. The Court went further and in accordance with the jurisprudence on the distribution of the burden of proof, agreed with the Commission in underlying that the Member State may always require the dealers who are willing to operate in the Italian market to agree to be subject to checks or to produce all the necessary documents and information certifying that they comply with the conditions fixed by the domestic legislation. Particularly with reference to the freedom to provide services, the Court observed that "*The obligation for operators from other Member States to set up their principal establishment in Italy is the very negation of the freedom to provide services and, as can be seen from paragraphs 20 to 24 above, does not constitute a condition which is indispensable for attaining the aim pursued. It therefore infringes Article 59 of the Treaty.*"

<sup>533</sup> See in ECJ 9 March 1999, case Case C-212/97, Centros, at para. 24 for the reference to further judgments.

their territory, has not been deemed inconsistent with the freedom to provide services and with the free movement of capital. According to the Court, “*the Netherlands legislation at issue has the specific effect, with a view to safeguarding the exercise of the freedoms guaranteed by the Treaty, of ensuring that those organizations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of the programmes*”<sup>534</sup>. The difference thus appears to rest in the aim of the national legislation, which is worthy of legitimate protection and quite specific; the same holds for the effects. Both of them are in line with the (also) Community interest in avoiding the circumvention of national law by means of the abuse of EC fundamental freedoms.

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<sup>534</sup> ECJ 3 February 1993, case C-148/91, *Veronica*, para 13. Veronica was a non-commercial broadcasting organization established in the Netherlands, which in the view taken by Commissariaat voor de Media (the Dutch body responsible for overseeing broadcasting) contributed to the setting up of and provided material support to a commercial station in Luxembourg broadcasting to the Netherlands, thus infringing Article 57, para 1, of Mediawet pursuant to which “*Apart from producing their programmes the organizations which have obtained broadcasting time may not pursue any activities other than those provided for or authorized by the Commissariaat voor de Media.*” By referring to its previous judgments involving the Mediawet (the Dutch law of 21 April 1987 on the broadcasting of radio and television programmes), the Court recalled that such legislation “*is designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious and philosophical) components existing in the Netherlands*”, objectives that relate to the public interest legitimately pursued by a Member State with the regulation of the statutes of its own broadcasting organizations. The provision relevant in the main proceedings is deemed suitable to the attainment of these objectives, as “*It seeks to prohibit national broadcasting organizations from engaging in activities which are alien to the tasks assigned to them by the Law or undermine the aims thereof, in the view of the Commissariaat voor de Media. Thus, in particular, it [Article 57, para. 1] provides that the financial resources available to the national broadcasting organizations to enable them to ensure pluralism in the audio-visual sector must not be diverted from that purpose and used for purely commercial ends.*” See also ECJ 5 October 1994, Case C-23/93, *TV10 SA*, where the same premises led the Court to state that “*a Member State may regard as a domestic broadcaster a radio and television organization which establishes itself in another Member State in order to provide services there which are intended for the first State’s territory, since the aim of that measure is to prevent organizations which establish themselves in another Member State from being able, by exercising the freedoms guaranteed by the Treaty, wrongfully to avoid obligations under national law, in this case those designed to ensure the pluralist and non-commercial content of programmes.*” As noted by D. Weber, *Tax avoidance and the EC Treaty freedoms: a study of the limitations under European law to the prevention of tax avoidance*, The Hague, Kluwer Law International, 2005, 222, this decision is different from the others rendered on similar matters as here the Court skips the proportionality test. The case concerns the qualification as domestic broadcaster, by the Dutch Commissioners for the Media, of TV10 that was established in Luxembourg. In the reconstruction of the Commissioners, the commercial broadcasting undertaking had established itself abroad for escaping the Netherlands legislation applicable to domestic associations. As a consequence, it concluded that TV10 had to be deemed a domestic broadcaster and subject to the corresponding regulation (stricter than the one applicable to foreign broadcasters), thereby denying the transmissions of its programmes by cable in the Netherlands. The Court did not go further into the existence of less restrictive measures than the re-qualification as domestic organizations. Moreover, the Author put the attention on two further issues that the Court made very short shrift of: it did not explicitly say if the national regulation is restrictive on the freedom to provide services; above all, it was silent and seemed to uphold the national court’s view that established the avoidance on the basis of objective circumstances *per se* revealing a subjective intention of circumventing the national rules.

The main concern shown by the EUCJ for the aim and effect of the national measure as well as for its coherence with respect to the national aim pursued, emerges also from the Centros case<sup>535</sup>, which concerned the refusal by the competent Danish authorities to register a branch of a private limited liability company formed by Danish nationals in the UK where it did not carry out any activity, on the grounds that the overall arrangement was intended to circumvent the national legislation requiring the paying-up of a minimum amount of share capital. Centros is one of the first cases dealing with the issue of abuse of EU rights and the boundary with the legitimate use of the possibilities offered by the Treaty. In the decision, the Court recognized that a Member State may deny a national to rely on Community law when such claim hinders the circumvention of national legislation. Nevertheless, it requested the conduct suspected of embodying avoidance be judged on the basis of objective evidence and in the light of the objectives pursued by the provisions concerned<sup>536</sup>. In this regard, notably the Court underlined the contradiction in which the Danish authorities fall when they asserted, on the one side, that the branch would have been registered in Denmark if the company had carried out an activity in the UK, while on the other side they identified the purpose of the national practice at issue in the protection of creditors. In fact, if the company formed under the UK law had conducted business there, its branch would have been registered in Denmark, albeit the risk the creditors might have been exposed to remained. As a consequence, the measure concerned was found to be neither appropriate nor necessary to attain the purpose, and measures that interfere less with the fundamental freedoms were conceivable. Under a similar perspective, it can be said that the national measure misses a sort of ‘internal coherence’, meaning that there is not full correspondence between the aim pursued and the means chosen in the national context. Moreover, in the decision a certain lack of ‘external coherence’ is pointed out, as the national provisions that would be circumvented in the view taken by national authorities concern the formation of companies (which at that stage of European integration were not fully harmonized), while the provisions of the Treaty relevant in the

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<sup>535</sup> ECJ 9 March 1999, case Case C-212/97, Centros.

<sup>536</sup> ECJ 9 March 1999, Case C-212/97, Centros. The Court recalled that “*according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law*” (para 24), but then added that “*although, in such circumstances the national courts may, case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (Paletta II, paragraph 25)*”(para 25).

main proceedings (on the freedom of establishment) rather relate to the carrying on of businesses<sup>537</sup>.

### **6.2.1 ... and the interaction with the division of the burden of proof under primary and secondary EU law**

From *Centros*, some indications may be inferred as to the distribution of the burden of proof and the standard of proof under primary Union law, which constitute a point of departure in the examination of the EUCJ's rulings on tax law presumptions to be discussed below. Member States cannot generally refuse the exercise of a fundamental freedom<sup>538</sup> by adducing the suspicion of avoidance purposes<sup>539</sup>. They are permitted to take measures for preventing or penalizing abusive conduct, towards the company (also having recourse to the cooperation with the State where the company is established) or its members, but only as long as "*it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned*"<sup>540</sup>. Thus, the Court would seem to request an ascertainment, in the concrete case, that in fact – and not presumably - the abuse has been carried out, the proof that the company is not conducting any business abroad not being sufficient in this regard.

Similar considerations led the Court in the *Paletta II*<sup>541</sup> case to reject a national interpretation whose effect, i.e. the reversal of the burden of proof, contrasted with the aim pursued by the Regulation applicable. The facts of the main proceedings concerned the refusal by a German employer (Mr Brennet) to pay wages over the six weeks following the sickness notification by his Italian employee (Mr Paletta) on vacation with his family in Italy, on the grounds that he did not consider himself bound by the medical statement supplied in Italy whose truthfulness he doubted. For our purpose, here the question of the

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<sup>537</sup> See para 26 of the judgment. As a result, the fact that a national of a Member State sets up a company in another Member State where the legislation is less restrictive, and then takes steps to register a branch in the former, does not in itself embody abuse of the right of establishment, not even when the parent company does not conduct any business. By contrast, the latter circumstance, in the view taken by the Court, does not suffice in order to prove the abuse.

<sup>538</sup> In *Centros*, as said, to be denied was the registration of the branch.

<sup>539</sup> In para 29 it is held that, according to para. 16 in the *Segers* decision, "*the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment*". Cf. also para 38.

<sup>540</sup> "*In any event*" concluded the Court, "*combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.*"

<sup>541</sup> ECJ 2 May 1996, case C-206/94, *Paletta II*.

distribution of the burden of proof between employer and employee is noteworthy, notably as it involves a matter regulated by secondary EU law. On the one hand, indeed, there was the Council Regulation No 574/72/EEC, fixing the procedure for implementing Regulation No 1408/71/EEC on the application of social security schemes to employed persons and their families moving within the Community<sup>542</sup>, while on the other hand there was the case-law referred to by the German referring court according to which, despite the Community regulation on the validity of the medical statement issued abroad, the employee was required to adduce additional evidence that the incapacity for work resulting from that statement was genuine in cases where his employer gave adequate evidence supporting serious grounds for doubting the existence of the adduced sickness.

Similarly to *Centros*, the EUCJ recognized that national courts are entitled to deny the worker the benefit of the Community provision he abusively or fraudulently relies on, but they have to assess such a conduct on the basis of objective evidence and above all in the light of the objectives pursued by the relevant provisions. In this regard, Article 18 of the Regulation No 574/72 exactly aims at eliminating the difficulties in collecting evidence that a worker becoming sick in a Member State different from the one competent for the social security leave would meet<sup>543</sup>. Accordingly, a reversal of the burden of proof on the worker would jeopardize the system of the Community regulation on the mutual recognition of the certificates concerned. As a consequence, the Court states its inconsistency with the objectives laid down by Article 18<sup>544</sup>. This does not imply, however,

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<sup>542</sup> In particular, Article 18, paras from 1 to 5.

<sup>543</sup> In the words of the Court, “A worker whose incapacity for work arises in a Member State other than the competent Member State would, as a result, be confronted with difficulties involved in obtaining evidence which the Community rules in fact seek to eliminate”.

<sup>544</sup> Cf. ECJ 4 December 1997, Joined Cases C-253/96 to C-258/96, *Kampelmann and others*, where at issue was the interpretation of Article 2, para 2, c, of the Council Directive 91/533/EEC of 14 October 1991 on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship. Article 2, para 1, of the Directive requires employers to notify the employee of the essential aspects of the contract or employment relationship as set out in Article 2(2), while Article 6 of the same Directive reserves to national law and practice the regulation of the form and proof of the existence of a contract or employment relationship and of the relevant procedural rules. Despite national rules on the burden of proof falling outside the scope of the Directive, when questioned about the evidentiary efficacy of the notification ex Article 2, para 1, i.e. whether it is binding on the employer until he proves its incorrectness, the EUCJ did not refrain from stating that “national courts must apply and interpret their national rules on the burden of proof in the light of the purpose of the Directive, giving the notification referred to in Article 2, para 1, such evidential weight as to allow it to serve as factual proof of the essential aspects of the contract of employment or employment relationship, enjoying such presumption as to its correctness as would attach, in domestic law, to any similar document drawn up by the employer and communicated to the employee.” As a matter of fact, the Court observed that the objective pursued would be failed if the employee could not rely on the information contained into such notification as evidence before national courts. On the other hand, in the absence of a set of rules of evidence in the Directive, the employer is not prevented from bringing any

that the employer is prevented from contesting the validity of the medical statement and thereby avoiding the application of Article 18. On the contrary, he may prove that, despite the certificate issued pursuant to Article 18, the worker was actually not sick and that his conduct embodies an abuse. But, and this is the point, a direct proof is requested in order to get the non-application of the Community Regulation, national courts being prevented from presuming the abuse on the basis of mere clues<sup>545</sup>. Where the employer meets this proof, then it would be up to the worker to prove his real incapacity to work, according to the general rule on the distribution of the burden of proof.

From *Centros* and *Paletta*, one could infer that Member States are not allowed to introduce general presumptions of abuse, as the fraudulent conduct needs to be directly proved in the concrete pending case. At first sight, the Court would even seem to reject the use of presumptions of fact by national courts as well. Under this perspective, it would be possible to see an evolution in the approach of the Court, as in decisions handed down thereafter, the role of the contrary proof (when legal presumptions are at issue) emerges as a guarantee of a case-by-case evaluation and of a balance between the effectiveness of EU law and the need to combat tax avoidance.

However, the above decisions need to be contextualized. Both in *Centros* and *Paletta* we do not face a national legal presumption or even a legal provision, but rather the non-application by administrative or jurisdictional authorities of the legislation normally applicable (on the registration of the branch of a foreign company, on the recognition of security benefits in relation to a certificate issued abroad) in relation to a conduct which is deemed as abusing Community law. Hence, under a more immediate perspective, the decisions are readable as prohibiting Member States' practices from disproportionately

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evidence to the contrary, by proving that the information reported in the notification are incorrect or they do not correspond to the facts. National procedural law, therefore, serves the objectives of the Directive.

<sup>545</sup> D. Weber, *Tax avoidance and the EC Treaty Freedoms: a study of the limitations under European law to the prevention of tax avoidance*, cited above, at p. 224. The Author classified this decision among the case-law under secondary Community law whereby the proportionality test has been applied to legal presumptions of avoidance. Apart from the questionable classification, he correctly observed that from *Paletta II*, read in conjunction with cases like *Van de Bijl* (C-130/88) and *Fitzwilliam* (C-202/97) it results that if the Community introduces directly or indirectly an evidentiary rule, then the Member State is bound to that proof. This is an implication of the principle of mutual recognition of norms, statements, documentary evidence etc., which would be undermined if national authorities (meaning the legislator, the administration, the courts) were entitled to reverse the burden of proof. He continued as follows: "Given the objective of the Community provision, the Court, in this case, did not permit a reversal of the burden of proof if the employer's evidence led only to doubt. Community law may, however, be restricted if the proof is such that there can certainly be said to be avoidance. In this case Community law entails that the main rule of Community law may not be set aside on the grounds of presumptions but only on the basis of proof of actual avoidance." It has to be noted that, as said in the text, here the Court appears to face two issues: the type of proof requested and the standard of proof. It seems to exclude an indirect proof, irrespective of the standard of proof, and to require a direct proof about the avoidance.

undermining the objectives fixed at EU level. In *Centros*, the competent authority denied the registration of a branch of a foreign company on the basis of its evaluation of the facts, according to which *Centros* was seeking to have in Denmark a principal establishment rather than a branch, thereby circumventing the national rules on the paying of a minimum share capital. In *Paletta*, at issue was a judicial trend (it is not clear from the decision how much settled) which contravened the rules under secondary Community law on formalities when incapacity to work arises abroad, and in this way arrogated to itself the balancing of the interests in play that had already been developed at EU level.

In the light of this, such decisions might be read as requesting the effective proof of the abuse – meaning based on objective circumstances - in the administrative and judicial seat, thereupon suggesting that the balancing of interests should happen at the legislative level, albeit within the limits fixed by the EUCJ as to the case-by-case evaluation and the prohibition of too general anti-avoidance provisions having the effect of altogether preventing the exercise of the Treaty rights. This, unless the balancing has not already been drawn by the EU legislator, as in this case Member States are bound to the objectives established and their implementing measures, whether provided, cannot overlap or overcome the EU model so as to jeopardize it.

Perhaps the above reflections go far beyond what the Court has in fact asserted or meant to assert. In any event, from the decisions under discussion it follows that the burden of proof as to the existence of an abusive conduct lies in principle on the Member State's authorities rather than on individuals or companies relying on Community law. Though it is not certain that this statement may be analogously transposed to the area of tax law, it nevertheless represents a point of departure for the examination of the policy of the EUCJ on the matter to be discussed thereafter.

### **6.2.2 Proportionality and national quantitative restrictions**

In accordance with the great attention reserved by the EUCJ to the aim pursued by the national provision concerned, from the overview of other judgments outside taxation it further stems a (not always explicit) distinction between those provisions aiming at tackling avoidance and those ones seeking to bring simplification. The question notably arises under secondary EU law of which the abstract model of levy is drawn by the EU legislator while it rests on the single Member States the introduction of the concrete model or the necessary implementing measures (mostly depending on whether a Directive or a



Regulation is at issue). In the field of taxation, this can be verified dealing with presumptions in the area of indirect taxation. In some cases, the Court is prone to permit national measures that simplify the application of the relevant EU provisions, while it appears to be more reluctant facing general rules aiming exclusively at avoiding abuse.

Among these types of national measures there are those fixing quantitative constraints that are not laid down by the secondary EU law applicable, so that their application is potentially able to undermine the uniform application of the EU model. Such constraints are as a rule rejected by the EUCJ, on the grounds that they threaten the effective and homogeneous enforcement of EU law. However, as it will be shown later on, in the area of taxation, where needs of simplification linked especially to the determination of the taxable base arise, the Court follows more permissible positions.

To illustrate the question, the *Lair* case<sup>546</sup> can be mentioned. It concerned a French national (*Lair*) who was refused by the University of Hanover a maintenance and training grant for her University studies (which would lead to a professional qualification), on the grounds that she had not been engaged in an occupational activity in Germany for at least five years. Indeed, the German law applicable provided that such grants could be awarded not only to German nationals, but also to certain categories of foreigners on condition that they had resided and had been engaged in regular occupational activity in Germany for five years prior to the commencement of the educational or training course. Here the Court, after having clarified that a national of a Member State who has undertaken university studies in the host Member State where he has been previously engaged in occupational activity linked to the subsequent studies keeps the status of worker under the freedom of movement, so that he is entitled to the benefit of Article 7, para 2, of Regulation No 1612/68, faced the question of the minimum period of prior occupation activity on which German law conditioned the granting of such social advantages. The Court rejected the arguments submitted by the intervening Member States, which adduced the risk of abuses existing when entering a Member State as a worker with the purpose of enjoying the student assistance system after having worked for a short period of time. Indeed, noted the Court, when ascertained on the basis of objective evidence, these (abusive) conducts are not covered by Community law. Above all, the unilateral introduction of a minimum time-period of occupational activity as a necessary condition for the purpose of enjoying the social benefits provided for by Article 7, para 2, of the Regulation is enabled to directly

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<sup>546</sup> ECJ 21 June 1988, case Case C-39/86, *Lair*.

affect the regulation established at EU level, with the result that a Community right can be relied on under different conditions depending on the host Member State. In this view, the Court observed that a student who is a national of a Member State may claim the grant at hand for university training only in his capacity as a worker under Article 48 of the EEC Treaty and Regulation No 1612/68. The concept of worker “*has a specific Community meaning and may not be defined on the basis of criteria laid down in national legislation*”<sup>547</sup>. In other words, when the definition of a certain right is to be found at EU level, then the national legislator is prohibited from interfering with the insertion of further quantitative requirements that jeopardize the uniform application.

This holds true until another interest worthy of protection according to the EU standards comes into play, as it will be clear later on when dealing with presumptive provisions in tax law.

### **6.3 Conclusion. Is the legal concept of “general presumptions of avoidance” a misleading concept?**

The case-law briefly recalled so far in sectors other than taxation imposes to draw some conclusions with special regard to the line of reasoning of the EUCJ that can be inferred.

First of all, it goes without saying that the EUCJ in principle rejects every national statutory provision or practice (either administrative or judicial) that deems the exercise of an EU fundamental freedom or right as embodying per se abuse. More precisely, Member States are permitted to introduce measures aiming at avoiding the circumvention of their own law, but such measures cannot be too general, meaning that they are required to be limited both as to the scope and the effects.

Besides the cases referred to in the previous paragraph, *Alpine Investments*<sup>548</sup> can be ultimately mentioned, as it confirms that the Court does not refrain from accepting national measures that, albeit limiting a Treaty right, are justified in view of a compelling public interest and are proportionate. The case concerned the general prohibition issued by the Dutch Ministry of Finance on financial intermediaries who offered investments in off-market commodities futures from cold-calling potential clients resident in other Member

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<sup>547</sup> *Id.*, para 41.

<sup>548</sup> ECJ 10 May 1995, Case C-384/93, *Alpine Investments*. According to D. Weber, *Tax avoidance and the EC Treaty Freedoms: a study of the limitations under European law to the prevention of tax avoidance*, cited above, at p. 218, who with reference, for instance, to *Alpine Investments* described in the text says: “*It would appear from Alpine Investments that the Court permits measures that, given the avoidance being prevented, contain sufficient specific presumptions of avoidance even though they do not take a party’s subjective intention into account.*”

States. As foreseeable, such a measure was found to be restrictive on the freedom to provide services, but the argument put forward by the Dutch government, that is the protection of the investor confidence in Netherlands financial markets, was accepted as an imperative reason of general public interest capable of justifying such restriction. The Court observed, on the one hand, that the measure “*cannot be considered to be inappropriate to achieve the objective*”, thereby rejecting the argument of Alpine Investments who contended the controls of the Member State of the recipient to suffice. In fact, in the view taken by the Court the Member State of the provider of services is best placed to regulate the cold-calling. On the other hand, such measure does not go beyond what is necessary in order to achieve that objective, as “*the rules at issue are limited in scope. First, they prohibit only the contracting of potential clients by telephone or in person without their prior agreement in writing, while other techniques for making contact are still permitted. Next, the measure affects relations with potential clients but not with existing clients who may still give their written agreement to further calls. Finally, the prohibition of unsolicited telephone calls is limited to the sector in which abuses have been found, namely the commodities futures market.*”<sup>549</sup>

The foregoing can be considered a first line in the following examination of the EUCJ rulings dealing with national tax presumptions, notably those aiming at preventing avoidance, fraud, or abuse in general.

In this regard, a further consideration needs to be made. Not every national restrictive provision aiming at combating abuse is a presumption. Though this might be an obvious point of departure, it has to be pointed out that within the case-law of the EUCJ there is a certain trend to classify provisions like the ones (outside taxation) just dealt with as general presumptions of avoidance or abuse.

The overview of the general theory on presumptions carried out in the first and second chapter of this dissertation imposes, however, to distinguish those provisions where the known fact is not demonstrative in respect of the unknown fact and they are not linked by a rule of experience or at least by a rational basis. It cannot be denied that a presumptive *ratio* belongs to most provisions aiming at avoiding abuse in cross-border situations, in the sense that the legislator seems to presume the existence of a purpose of avoidance basically on the grounds of the transnational character of the situation. But this perspective would

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<sup>549</sup> Id., para 54.

lead to excessively stretching the category of presumptions by covering all the general anti-avoidance provisions.

It is true that when dealing with tax law presumptions in the EU context in respect of national contexts a certain amount of leeway has to be given. Nonetheless, this cannot result in a distortion of the concept, at least in its fundamental characters as identified so far.

Generally speaking, in the EUCJ case-law and within the tax literature as well, the concept of ‘general presumption of avoidance or abuse’ refers to measures, not necessarily legal, which discriminate against cross-border situations so as that the exercise of a Treaty freedom or a right conferred by a Directive ends up to be considered per se an index of abuse. Such trend reflects the approach of the EUCJ to tax law presumptions, which, as it will be explained later on, is so much focused on the ‘effects of presumption’ and on the need to secure the effectiveness of the EU law relevant in the case concerned that it often disregards the structure of the national presumptive measure and the body issuing the latter.

## Chapter III - Section I

### Customs Law and Harmonized Indirect Taxes

#### Introduction

After having framed the issue of tax law presumptions in the context of EU law and in line with the choice of paying separate attention to the main domains of tax law before drawing more general conclusions, the focus is on indirect taxation, including customs duties and VAT, while excise duties will be only briefly referred to.

To this end, the exploration of the single ambits should be introduced by making reference to the legal bases of the ‘positive’ integration, which those taxes reflect, albeit to a different degree.

As is well known, unlike direct taxes where the integration of national legislations mainly takes place through the EUCJ decisions declaring national tax measures inconsistent with EU law (‘negative integration’), indirect taxes have been increasingly harmonized over time by way of regulations and/or directives (‘positive integration’). It is significant that as from 1957 the EEC Treaty included in Chapter II on Tax provisions Article 99, para 1 (now Article 113 TFEU), which directed the Commission to examine “*how the legislation*

*of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation, including countervailing measures applicable to trade between Member States can be harmonized in the interest of the common market*". Indirect taxes are – more than taxes on income - perceived as visible obstacles to the proper functioning of the common (lately internal) market. Precisely the circumstance that they are levied on trades, rather than on personal income, has made it feasible to either repeal or uniformise them. Furthermore, the Council Decision No 70/243 might have had a role in the harmonization of the divergent system and bases, especially for turnover taxes, as it introduced the 'own resources' of the Community, which include the customs duties and a percentage of the VAT base. Uniform criteria for determining the taxable base were thus necessary in order to secure the equity between Member States.

Leaving aside any further consideration on the developments in the process of European tax harmonization that are of historical interest only, the legal basis of such harmonization and the different level of integration achieved as regards the indirect taxes mentioned above are worthy of attention, as they impact on the (very little) sovereignty of Member States left and on the EUCJ's case law.

As to the legal basis for the harmonization of indirect taxes in the Union, Articles 28 TFEU et seq. for customs duties, and Articles 110 to 113 TFEU for (other) indirect taxes are specifically relevant.

Article 28, in view of the abolition of the barriers to free movement of goods, provides that "*The Union shall comprise a customs union which shall cover all trades in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries*". On the grounds of this provision, steps are to be taken in a twofold direction: on the one side, the altogether prohibition of customs duties on intra-EU imports and exports and charges having equivalent effect (see Article 30 TFEU) as well as of intra-EU quantitative restrictions on imports or exports and measures having equivalent effect (see Articles 34 and 35 TFEU); on the other side, the establishment of a common customs tariff by the Council on a proposal from the Commission for the trades with third countries (see Article 31 TFEU). Notably, the concept of 'charge having equivalent effect' to customs duties has been broadly interpreted in several judgments of the EUCJ, by encompassing not only any pecuniary charge that is levied by a Member State on the occasion of the border-crossing of products, but also

merely internal levies that, albeit charged indiscriminately on domestic and imported products, are used so as to compensate domestic producers for the charge<sup>550</sup>.

In similar cases, for instance where there is not full compensation for domestic goods so that the charge is not 'equivalent' to a customs duty, Article 110 may be considered applicable, as it prohibits discriminatory (para 1) and protective (para 2) internal taxes<sup>551</sup>. It has been observed that this provision has played an important role in the process of harmonization of excise duties (of certain products)<sup>552</sup>, since it permits the taxation on imported products provided that they are charged in exactly the same way as domestic products.

More in general, the legal basis for the harmonization of indirect taxes, like excise duties and VAT, is represented by Article 113 TFEU, by virtue of which "*The Council shall, acting unanimously in accordance with a special legislative procedure 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 and to avoid distortion of competition*".

From this provision it results, firstly, that the integration of national indirect taxes is to be merely functional for the repealing of the obstacles that hinder cross-border trades and competition. Secondly, that the decision-making procedure requires unanimity, which means that each Member State has the power to veto EU proposals in the matter of indirect taxation.

In this regard, it should be observed that the unanimity is requested for all tax matters, included customs duties and all the more direct taxation. Indeed, Article 114, para 2, TFEU, excludes the fiscal provisions from the application of the ordinary legislative procedure for the approximation of national rules on matters concerning the establishment and

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<sup>550</sup> See ex multis, EUCJ 2 August 1993, case C-266/91, Fazenda Pública.

<sup>551</sup> It states that "*No Member State shall impose, directly or indirectly, on the products of other Member State any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member States shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products*". Member States are also prevented from introducing protective internal taxes on domestic exported goods pursuant to Article 111 TFEU: "*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.*"

<sup>552</sup> B.G.M. Terra, B.J. Wattel, *European tax law*, cited above, at p. 463-464.

functioning of the internal market. Moreover, Article 115 TFEU, which usually constitutes the legal basis for harmonization of direct taxation, requires the unanimity<sup>553</sup>.

There may be identified though, few tax-related matters where initiatives may be adopted with the ordinary legislative procedure, thereby with the qualified majority. Among these, Article 33 TFEU empowers the European Parliament and the Council to take measures in order to strengthen customs cooperation between the Member States and also between the latter and the Commission<sup>554</sup>. Secondly, Article 325 TFEU gives incentives for the European Parliament and the Council to adopt the necessary measures for preventing and tackling fraud and any other illegal activities affecting the financial interests of the Union. Given that customs duties and (in a certain percentage) VAT bolster the own resources of the Union, that article may represent a legal basis for measures combating tax fraud under the ordinary legislative procedure<sup>555</sup>.

Save for exceptions, the unanimity represents the rule for decision-making on tax matters, also in the domain of indirect taxes. Within such domain, however, a further distinction should be made between customs duties on the one side, and the other indirect taxes on the other side, under the aspect of the distribution of competences between the Union and the Member States. As a matter of fact, only the customs union is an exclusive competence of the Union (Article 3, para 1, let. a, TFEU), meaning that Member States have lost their sovereignty therein. By contrast, the other indirect (as well as direct) taxes are deemed to fall within the heading ‘internal market’ in Article 4, para 2, let. a, TFEU), in the extent to which they are able to affect cross-border transactions within the Union’s territory. Article

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<sup>553</sup> It states that “*Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure 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 the functioning of the internal market*”. Furthermore, a unanimous consensus has also to be reached on matters of environmental and energy taxation (see Article 19, para 2, let. a), 194, para 3, both requiring a special legislative procedure and unanimity when measures to be taken are “primarily of a fiscal nature”).

<sup>554</sup> This, “*Within the scope of application of the Treaties (...) [and] acting in accordance with the ordinary legislative procedure*”.

<sup>555</sup> Article 325, para 4 TFEU: “*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies.*” The same Article calls Member States to take against fraud affecting the financial interests of the Union the same measures adopted for protecting their own financial interests (para 1 and 2) and to coordinate their action with the Commission as well (para 3). For completeness sake, it has to be said that further exceptions to the unanimity requirement may be represented by the provisions of the Treaty in the area of State aid (see Articles 107 and 108) and by Article 116. According to the latter, where the Commission finds that a divergence between national legislative or regulatory provisions or even administrative practices is distorting the market competition and the consultation with the Member States involved does not flow into an agreement for the elimination of such distortion, then the European Parliament and the Council shall adopt the necessary directives or any other appropriate measures provided in the Treaty.

4 lists the matters where the Union shares the competence with Member States, so that both of them are competent, but once the Union has exercised its competence on a certain issue, then they lose their power to regulate it<sup>556</sup>.

The current regulation of customs duties, on the one side, and other indirect taxes, like excise duties and VAT, on the other side, reflects such different allocation of competence set forth in the Treaty. The former are governed almost completely at EU level through a Regulation<sup>557</sup>: a customs union necessarily entails a free trade area within the customs territory and a uniform customs tariff at the outside cross-borders. The latter (i.e. VAT, excise duties), instead, have been regulated by means of directives, thereby leaving to the Member States room as to the means to adopt in order to pursue the objectives chosen at EU level. This is evident when confronting the VAT Directive<sup>558</sup>. It lays down a ‘model’ of regulation of valued added tax which Member States are requested to comply with and to implement in their own legal orders, so that 28 VATs can still be counted in the European Union.

This also influences to a certain extent the EUCJ case-law, as whereas in one case the Court is confronted with a national measure in respect of a Regulation directly applicable in each Member State, in the other case it checks the conformity of a national provision with a model that *in abstracto* is to be implemented in 28 different ways.

Below, customs law will be dealt with first (Part I), afterwards the focus will turn to VAT (Part II), and ultimately on the issue of the repayment of indirect taxes levied in breach of EU law. As to the excise duties, they will be briefly referred to. Notwithstanding they represent a conspicuous financial resource for Member States, their harmonization is not as advanced as the one of customs duties and VAT and has concerned only some products (alcohol, tobacco, energy)<sup>559</sup>.

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<sup>556</sup> This category of competence conferred upon the Union is defined as ‘shared competence with preemption’ and distinguished either from the exclusive competence in Article 3 or from the ‘shared competence without preemption’ in Article 6. The latter lists a series of matters when the Union has “*competence to carry out actions to support, coordinate or supplement the actions of Member States*”. See B.G.M. Terra, B.J. Wattel, *European tax law*, cited above, 2012, at p. 9. Similarly, P. Craig and G. De Búrca, *EU law: text, cases, and materials*, 5 ed., Oxford, Oxford University Press, 2011, 84.

<sup>557</sup> Regulation 2008/450/EC.

<sup>558</sup> Directive 2006/112/EC.

<sup>559</sup> As is well known, excise duties are indirect taxes on the consumption or use of certain products. Unlike VAT, they are specific taxes, meaning that they are usually expressed as a monetary amount per quantity of the product. Another important difference with VAT, and customs duties as well, is that the revenue from excise duties flows entirely into the States’ Treasury. As it will be explained *infra*, excise duties are regulated by Directive 2008/116/EC, laying down the general rules, and by further Directives concerning single products categories.



## 1. A brief outline on excise duties

As said, the focus is mainly on customs duties and VAT. These domains are interesting for several reasons. They embody two different, though similar to a certain extent, ways of regulating the tax matter at EU level: the former is governed by a Regulation which is directly applicable in all the Member States, whereas the latter is regulated by a directive which is binding only as regards the aim to be pursued by Member States. Both of them, though under very different quotas, fuel the own resources of the Union. Ultimately, they have given rise, over the last years, to a number of issues and case-law dealing with tax law presumptions.

In this context, the choice of merely mentioning the domain of excise duties is guided by the absence, to my knowledge, of particular questions or relevant case-law on the compatibility of national presumptive measures with the relevant EU law. Before dealing with the case-law in those areas, however, a brief mention to excise duties should be done. In this regard, as recalled above, the regulation of the matter is mainly articulated into the Directive 2008/118/EC, which has replaced the previous Directive 92/12/EEC and contains the general arrangements for all the excise duties, and three further directives, which harmonize the structures, the possible exemption and the minimum rate of duty of the excise duties covered by the former directive. While the latter are quite technical and concern specific excise duties, a few considerations can be developed by making reference to the general rules.

First, excise duties embody taxes which are levied directly or indirectly on the consumption of certain goods (energy products, alcohol and alcoholic beverages, manufactured tobacco) and are due at the time of their production within, or their importation into, the territory of the Community<sup>560</sup>. This field is not completely harmonized, as Member States are permitted to levy other indirect taxes on excise goods for specific purposes, provided that they comply with certain rules governing excise duties and valued added tax<sup>561</sup>. Likewise, they may introduce (and maintain) taxes levied on products other than excise goods and on supply of services, as long as they do not give rise to formalities at frontiers in trades between Member States<sup>562</sup>.

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<sup>560</sup> See Article 1, para 1, and Article 2, Directive 2008/118/EC.

<sup>561</sup> Article 1, para 2, Directive 2008/118/EC: “Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.”

<sup>562</sup> Article 1, para 3, Directive 2008/118/EC: “3. Member States may levy taxes on:(a) products other than excise goods; (b) the supply of services, including those relating to excise goods, which cannot be

Second, Article 9 of the Directive explicitly refers to each Member State the regulation of the procedure concerning the levy, the collection, and, where appropriate, the reimbursement and the remission of the duty, on condition that it does not discriminate goods from other Member States in respect of national goods<sup>563</sup>. As a result, Member States have room for regulating these procedural aspects of the excise duties, though they must comply with the non-discrimination principle.

Besides this explicit limitation, further criteria may be inferred from other articles of the Directive or from the preamble, which reflect general principles inspiring the excise duties' rules. For instance, given the importance of defining uniformly the concept and conditions of chargeability of excise duties for the proper functioning of the internal market, the directive deals in detail – also by means of presumptions or legal definitions in Article 8<sup>564</sup> – with the moment when goods are released for consumption and who the person liable to pay the duty is (unlike the previous directive which was vague in this regard)<sup>565</sup>.

Such provisions therefore give the measure of the extent to which the national legislator may introduce presumptions affecting these profiles (person liable to tax, moment of chargeability) of the tax obligation. Similar considerations hold true with regard to certain

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*characterised as turnover taxes. However, the levying of such taxes may not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.”*

<sup>563</sup> See point (10) Preamble to the Directive 2008/118/EC. Cf. ECJ 5 April 2001, case C-325/99, Van de Water. At paras 40 and 41 it is held: “*However, by ensuring, in Article 6(1) [now, Article 9(1)] of the Directive, that the rules governing the chargeability of excise duty are the same in all the Member States, the Community legislature was clearly not seeking to harmonise the procedures for the levying and collection of duty by those States. On the contrary, in Article 6(2) [now, Article 9(2)], it expressly left it to the Member States to determine those procedures, subject to the non-discrimination requirement referred to in paragraph 38 of this judgment. Lastly, it should be noted that, whilst Article 6 [now, Article 9] of the Directive does not specify the person liable to pay the duty chargeable, it follows from the scheme of the Directive, and from the ninth recital in its preamble, that the national authorities must in any event ensure that the tax debt is in fact collected.*”

<sup>564</sup> The person liable to pay the excise duty is broadly identified, by explicitly including any other person involved in irregularities and providing for their joint and separate liability: “(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a): (i) the authorised warehouse keeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure; (ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehouse keeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure; (b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods; (c) in relation to the production of excise goods as referred to in Article 7(2)(c): the person producing the excise goods and, in the case of irregular production, any other person involved in their production; (d) in relation to the importation of excise goods as referred to in Article 7(2)(d): the person who declares the excise goods or on whose behalf they are declared upon importation and, in the case of irregular importation, any other person involved in the importation.”

<sup>565</sup> Point (8), Preamble to the Directive 2008/118/EC.

circumstances, like the destruction or the irretrievable loss of the excise goods, which in accordance with the taxable event of the excise duty (consumption of certain goods), should not give rise to taxation<sup>566</sup>. Again, for the purpose of securing the collection of the tax and above all of avoiding disputes among two or more Member States, the Directive deals with the hypothesis in which an irregularity was committed and the place where it occurred cannot be established. Similarly to what is provided in the Regulation on customs duties, the irregularity is presumed – or is established – to have been committed in the State where the irregularity was detected, or, when goods do not arrive at their destination, where the dispatch took place<sup>567</sup>.

Therefore, the EU legislator deals with the constituting elements of the tax obligation. It does not lay down detailed procedural rules, which thus fall in the competence of Member States. However, they are limited by the observance of the substantive criteria resulting from the EU directives on the matter, by the principle of non-discrimination, and not least by the principle of effectiveness. The latter, in particular, is likely to entail that the rights conferred to individuals by the directives on excise duties which are to be implemented into national legal orders, cannot be jeopardized by irrebuttable presumptions in contrast with the provisions of such directives. By contrast, it can be foreseen that rebuttable presumptions, on condition that they are in line with the criteria inspiring the directives and permit the taxpayer to give the counterproof, may be admitted.

Later on in the dissertation, national tax law presumptions in the field of excise duties will be dealt with under a particular perspective, which is the right of the taxpayer to obtain the refund of the excise duties – and more in general indirect taxes – levied by a Member State in contravention of EU law.

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<sup>566</sup> Point (9), Preamble to the Directive 2008/118/EC. See Article 7, para 4, Directive 2008/118/EC, pursuant to which “*The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption. For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods. The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.*” Next paragraph of the same article provides then that “*Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined*”.

<sup>567</sup> See Article 10, Directive 2008/118/EC.

## Chapter III - Section I - Part I

### Customs Law

#### 1. The reasons for dealing with tax presumptions in the domain of Customs law

Customs law constitutes a peculiar field in the domain of taxation, as the core of the discipline is covered by a Council Regulation<sup>568</sup> (complemented by its implementing provisions) which is directly applicable and enforceable within the single legal orders by virtue of Article 288, para. 2, TFEU.

It has been observed, at the beginning of this chapter, that alongside the tools on administrative cooperation, customs law represents a derogation from the common lack of EU provisions dealing with procedural law. Now is the moment to clarify that they – customs law and administrative cooperation - reflect two very different mechanisms of regulation the EU legislator avails itself of. In fact, the administrative cooperation instruments embody horizontal coordination between national (also customs) authorities with the aim of tackling tax avoidance and fraud. As such, they mainly turn out to be obligations put on national competent authorities without any harmonization of the main procedure, which remains regulated on a national level. By contrast, Customs legislation is based on the task of creating a customs union where the free movement of goods in the internal market is secured. It covers procedural aspects as well, which are only to be applied as such by national customs authorities; in summary, coordination of national procedural rules versus harmonization of national rules.

The Customs Union, which entails the free movement of goods within the EU territorial space without any barriers and the application of one single customs tariff for trade with third countries, is the pivot for the functioning of the internal market. Accordingly, it belongs to the range of matters wherein the Union has exclusive competence pursuant to Article 3, para 1, let. a), TFEU, meaning that “*only the Union may legislate and adopt*

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<sup>568</sup> Regulation 2913/92/EC. In this dissertation, references are made to the latter, i.e. to the Community Customs Code. It has to be said, however, that on the 30th of October 2013 the Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) entered into force, though not every provision of the latter is immediately applicable. See point 56 of the Preamble: “*The provisions of this Regulation setting out the delegation of power and the conferral of implementing powers and the provisions on charges and costs should apply from the date of entry into force of this Regulation. The other provisions should apply from 1 June 2016.*”

*legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.*”<sup>569</sup>

However, the EU regulation – i.e. not only the Community Customs Code (hereinafter also CCC), but also the implementing provisions<sup>570</sup> - does not exhaust all the aspects, especially the procedural ones, of the customs matter. On the one hand, it leaves to Member States – either explicitly or implicitly – to lay down the rules on certain issues. On the other hand and all the more so, the daily execution of customs legislation remains in the hands of national administrative and judicial authorities, though the essence of the procedures is (at least at minimum) harmonized. Though, such execution is placed under the supervision of the European Commission and the European Court of Justice, which has the last word on the interpretation of Community legislation and national rules that come within the scope of customs law.

Article 1 of the CCC presupposes this relation between Community and national (procedural) law where it states that “*Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them*”, and similarly does Article 4, para 23 of the CCC, which establishes that, for the purposes of the Code, ‘Provisions in force’ means Community or national provisions.

In practice, while the Community Customs Code covers the substantive discipline of customs duties, the procedural aspects are mostly circumscribed in a cursory way, meaning that only the essential features are regulated, leaving to Member States the discipline of the aspects related to the practical or daily application<sup>571</sup>. Customs duties are a kind of indirect tax levied on individual transactions on occasion and at the moment when the goods pass the customs frontiers. In the absence of a Union’s administrative body, the rules set out in the CCC are inevitably to be applied by national tax administration; more precisely by national customs authorities. In fact, the Customs code assumes the existence of an

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<sup>569</sup> Article 2, para. 1, TFEU.

<sup>570</sup> Amongst these, Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

<sup>571</sup> By way of exemplification, the legal form of decisions issued by customs authorities of a Member State, which among the other things fixes the amount of customs duty or may express its repayment, remission or reduction (see Article 4, para 23, CCC) and have the same legal effects in all other Member States (see Article 250 CCC), is determined according to the national procedural law, so that in many Member States it corresponds to that of the legal form used in other tax matters. Again, against such decisions Member States are requested by Article 243 et seq. CCC, to introduce appeals procedures, though respecting the (rudimentary) provisions laid down in the Code in that regard.

administrative organization entitled to take care of procedural aspects like the levying, the assessing, the controlling, the collecting and the enforcing of the duty<sup>572</sup>.

The foregoing implies, at the outset, two corollaries, which must be borne in mind in the following.

Firstly, most litigations brought before the EUCJ concern not only the content of a certain provision of the CCC, but they presuppose solving the question of what the relation between Community and national law is<sup>573</sup>. More in detail, the main problems of national measures' inconsistency with the EU regulation barely concern legislative provisions, but rather (more often) administrative practices or (settled) judicial interpretations.

Secondly, here, more than in other areas, the Court is oriented to secure the primacy of EU law and the uniformity of the rules on which the Customs Union is based, since customs duties, among the other things, embody one of the own resources of the Union's budget. On the other hand, the fact that a certain percentage (the collection costs) remains in the hands of the Member States entails that they retain a certain interest in affirming their jurisdiction to charge a certain transaction. In this regard, it has been observed that the EUCJ, which is entitled to strike a balance between several interests, that is jurisdiction,

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<sup>572</sup> See A. van Eijdsden, B.-R. Killmann, G. T.K. Meussen (final editor) with assistance of J. van Dam and D. Smit, *Procedural Rules in Tax Law in the Context of European Union and Domestic Law - General Part*, (eds.) M. Lang, P. Pistone, J. Schuch and C. Staringer, Alphen aan den Rijn, Kluwer, 2010, 35. On the grounds of a comparison between Member States' legal orders, the Authors underline that most of them have adopted a multi-layer legislative approach consisting of setting out specific national procedural rules. Their systems have foreseen a domestic Act for procedural rules in tax matters, which embodies a complementary set of rules to Community law. Where such Act, read together with the CCC, does not address a certain situation, then they normally refer to the application of the general procedural rules provided for other taxes.

<sup>573</sup> B.R. Killmann, *Community Customs Law: An Example of Balancing Harmonization and Procedural Autonomy of Member States*, in *Procedural Rules in Tax Law in the Context of European Union and Domestic Law*, (eds) M. Lang, P. Pistone, J. Schuch and C. Staringer, Alphen aan den Rijn, Kluwer, 2010, 49 et seq. The Author observes that though one would expect that uniform implementation would not mean tolerance from the central power towards deviating de-centralized legislation, this is not the case. "Although the CCC provides uniform customs procedures for the whole European Community in a wide range of fields, it deliberately falls short of completely removing any impact of domestic procedural law". After having underlined the peculiarities of the customs union, he individualises three main patterns of relation between national (procedural) law and Community law in the context of the Community Customs Code. First, the CCC includes provisions that 'fully harmonize' certain aspects of customs procedures, so that "they prevail over and remove contradictory or even only complementary national law." Some other articles reflect a sort of 'minimum harmonization', so that they leave in force complementary national law as long as "it does not contradict or undercut the aims of the CCC". Second, in the CCC there are provisions that presuppose already existent procedures, thereby they merely coordinate administrative activities either between the national authorities of the Member States ('horizontal coordination') or between one single national customs authority and the Commission ('vertical coordination') which has wide inspection powers towards Member State. Lastly, some articles of the CCC include 'specific references' to applicable national law (typically, for the appeal against a decision). Further, some provisions are considered to contain 'general or implicit references' to applicable national law, thereby permitting the latter to co-exist with the Community customs law. On methodological approaches cf. the reference to the legal literature in Opinion of the Advocate General Trstenjak 3 May 2007, C-62/06, Fazenda Pública, fns 14 and 17.

legal protection and effectiveness of Community law, is inclined to leave room for “regulatory competition in procedural matter” between Member States as long as it does not affect essential features of Community law<sup>574</sup>.

We will see below what that means in practice. For the purpose of this dissertation, such interaction between the Union legislation and the national implementing measures is interesting from a double angle. On the one side, it offers the possibility to test the (possible) use of presumptions by the EU legislator and to see how the EUCJ interprets them. On the other side, it raises the question as to the way the EUCJ reacts to national presumptive measures which overlap EU law provisions in a sector that represents a model of unified Union fiscal system.

Accordingly, below, after having set the stage by referring to the principles inspiring Customs regulation, some of the most significant EUCJ judgments concerning presumptive measures are examined. First, the EUCJ case-law on some presumptions included in the Customs legislation is at issue, and afterwards a number of decisions on national presumptions which, by departing from the Customs legislation, ended up affecting the uniform application of the latter.

## **2. Uniformity, Legal Certainty, Effectiveness: principles founding the EUCJ case-law in the field of customs duties**

Looking at the decisions of the EUCJ in this sector, one has to have in mind that either when ruling on presumptions included in Community law itself or in national implementing measures, the Court refers to some of the fundamental principles of Community law, which are inextricably related to the peculiarities of customs law.

Amongst these, the most relevant is the criterion of the uniform application, which is intended to secure the equal treatment of traders within the customs territory. It is precisely in the light of such principle that several provisions of the CCC can be read, one for all the legal effects *erga omnes* (meaning for all Member States) recognized to decisions issued by a national customs authority (see Article 250 CCC).

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<sup>574</sup> A. van Eijdsden, B.-R. Killmann, G. T.K. Meussen (final editor) with assistance of J. van Dam and D. Smit, *Procedural Rules in Tax Law in the Context of European Union and Domestic Law - General Part*, cited above, 34 et seq., in particular at 42-43. The Authors take into special consideration customs law as it is “*the one field of Community policy that has advanced the most in integrating the procedural treatment by national authorities.*” From the analysis of the interaction of Community customs law with national law, they conclude that both the Community legislator and the EUCJ appear to interpret the Community provisions on the matter in such a way as to respect procedural autonomy and keep regulatory competition (between the different national jurisdictions) going. Nonetheless, they do not refrain from setting strict parameters with a view to avoiding distortion and securing overall coherence.

The principle of the uniform application grounds the interpretation of single Customs provisions made by the EUCJ, which in this case might be compared to a national Supreme Court, since it is the body entitled to guarantee the homogeneous application of the regulation at issue. Above all, the need to secure such uniformity arises with reference to national implementing measures, which the Court rules on with the aim of ensuring equal customs treatment. We will see that the uniform application (and the related need to avoid the customs union being jeopardized) embodies the main substantive criterion the EUCJ avails itself of when dealing with national presumptive measures.

The uniform application presupposes another basic principle in customs law, which is legal certainty. Customs legislation and implementing provisions have to be as clear as possible, so as to speed up trades and guarantee the Community with the rapid availability of customs duties resources for its policies. This also implies the necessary protection of legitimate expectations claimed by traders, which national administrative and judicial authorities are requested to comply with.

When speaking of traders' protection, the principle of uniform application, which entails the equal treatment of economic operators, can also be discussed as it is also interrelated with their right of defence, which the EUCJ has had occasions to recognize, for instance in the already cited *Sopropé* case<sup>575</sup>. It basically consists of the trader's right to be heard before national customs authorities, before a decision adverse to him can be issued. In turn, this criterion is strictly related to the principle of equivalence and effectiveness, which the Court refers to for the purpose of guaranteeing the protection of traders' rights enshrined in the Community customs code.

Not surprisingly, however, the principle of equivalence and effectiveness is further referred to by the EUCJ in order to promote Community obligations towards traders. As in other areas of taxation, the EUCJ holds that, in the absence of Community law on the matter, it is for the Member States to lay down the detailed rules and conditions for the collection of Community revenues. In this regard, it requests that "*procedural rules may not render the system for collecting Community charges less effective than that for collecting national charges or render virtually impossible or excessively difficult the implementation of Community legislation*"<sup>576</sup>. Precisely the intention of securing the rapid flow of its own

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<sup>575</sup> Cf. also ECJ 4 March 2004, C-290/01, *Derudder*.

<sup>576</sup> See B.R. Killmann, *Community Customs Law: An Example of Balancing Harmonization and Procedural Autonomy of Member States*, cited above, 51, where also further references as to the EUCJ case law (fn. 8). The Author, with reference to the relation between national law and Community law, observes that the



resources and simplification leads the EUCJ to apply the principle of effectiveness in a more feasible way<sup>577</sup>, in the sense that national law, albeit interfering with the Community regulation, may be accepted in the extent to which it is deemed to be more *effective* in terms of recovery of the customs debt and provided that it complies with another general principle of EU law applicable in customs law, namely the proportionality<sup>578</sup>.

### 3. Tax law presumptions and Customs law

Before examining some of the most significant EUCJ decisions in the attempt to infer the approach to legal presumptions, a few considerations need to be made.

Looking at Customs law, some presumptive provisions may be identified, mostly dealing with the definition of the taxable person, event and place of incurring a customs debt. Without indulging now on the question as to whether such provisions are technically presumptions or would be better qualified as legal definitions, typifications, predeterminations, it has to be observed that they respond to interests similar to the ones grounding national presumptions. They indeed respond to the need of securing the collection of the customs duties due and to simplify the elements giving rise to the tax debt (or obligation) as well.

Such interests appear to permeate the overall jurisprudence of the EUCJ, which shows in its rulings on customs duties a more pragmatic approach in respect of the one followed facing national presumptions in customs law and all the more so in other areas of taxation. Notably, many of the presumptive criteria included in the CCC vest in a substantive nature, as they concern the design of the customs debt. On the other hand, as it has been

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former “has to withstand a ‘double check’ on its performance with regard to implement Community law, balancing rights and obligations with the same fervour.” In this view, “In customs matter effectiveness seems to reach beyond the mere assessment of national law compliance with Community law. The customs union must work well with the outside world so as to fulfil its prime purpose: promoting free circulation of goods within the Community. One should bear in mind that, in organizing its customs union, the European Community also has to make it function in a way that is in conformity with the requirements of the General Agreement of Tariffs and Trade (GATT), which requires *inter alia* transparency and predictability, non-discrimination and judicial review.” (p. 54).

<sup>577</sup> More exactly, in view of the pursuing of Community customs code’s purposes, the Court balances supremacy of the EC law with effectiveness by putting the latter first when it comes to the collection of customs duties. It takes a more ‘pragmatic approach’, according to the formula used by B.R. Killmann, *Community Customs Law: An Example of Balancing Harmonization and Procedural Autonomy of Member States*, cited above, 57, where there are also references to the case-law that shows such trend.

<sup>578</sup> A.o., ECJ 7 December 2000, case C-213/99, De Andrade, in particular at paras 14 et seq., as regards an administrative penalty applied ad valorem by the Portuguese law for failure to meet the time-limits prescribed for declaring goods for release for free circulation or for requesting another customs-approved treatment or use; ECJ 16 October 2003, case C-91/02, Hannl + Hofstetter, on Austrian legislation providing for an increase in duty as interest on arrears, which were not conceived in the CCC provisions on incurring a customs debt and its subsequent recovering in cases when the Community customs law is infringed.

underlined, the detailed regulation of the procedural aspects (inquiries included) are left in the hands of the single Member States' legal orders. Among these procedural aspects, there are the issues related to evidence. In this regard, the EUCJ has held two basic statements.

Firstly, given the lack of Community rules on the concept of proof, the question of admissibility of proof (for customs law purposes) falls under the procedural law of the Member States, which nonetheless have to comply with the principle of equivalence<sup>579</sup>.

Secondly, in a case where the customs authority contested the regularity of the fulfilments by the trader, the Court held that, according to the traditional general rule of the Member States, that authority bears the burden of proving such irregularity, and only after that it is for the trader to give evidence to the contrary<sup>580</sup>.

It has to be borne in mind, ultimately, that in this dissertation the aim is not to make a list of the presumptions included in the Customs legislation. Instead, the intention is to recall a few presumptive provisions, or deemed as being such by the EUCJ, on which the latter has

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<sup>579</sup> ECJ 23 March 2000, C-310/98 and C-406/98, Sagpol.

<sup>580</sup> ECJ 9 March 2006, C-293/04, Beemsterboer. Among the several questions, the Court was asked about the division of the burden of proof on the circumstance provided for in Article 220(2) (b), 3<sup>rd</sup> subparagraph as amended by Regulation No 2700/2000 (“*The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where, in particular, it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.*”). The Court held that, in accordance with generally accepted rules on the allocation of the burden of proof, “*the person who relies on the third subparagraph of Article 220, para 2, let. b) of the Customs Code, as amended by Regulation No 2700/2000, must adduce the evidence necessary for claim to succeed. It is therefore in principle for the customs authorities which wish to rely on the beginning of the third subparagraph of that Article 220, para 2, let. b) in order to carry out post-clearance recovery to adduce evidence that the incorrect certificates were issued because of the inaccurate account of the facts provided by the exporter. Where, however, as a result of negligence wholly attributable to the exporter, it is impossible from the customs authorities to adduce the necessary evidence the EUR.1 certificate was based on the accurate or inaccurate account of the facts provided by the exporter, the burden of proving that the certificate issued by the authorities of the non-member country was based on an accurate account of the facts lies with the person liable for the duty.*” Similarly, it is up on the person who relies on the exception set out at the end of the third subparagraph of Article 220, para 2, let. b) of the Customs code to bear the burden of proving that it is evident that the authorities which issued that certificate were or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment. Cf. ECJ 14 May 1996, Joined Cases C-153/94 and C-204/94, at par. 60 where it is stated that “*Rules as to the burden and means of proof of the originating status of goods are governed by national law only in so far as they are not covered by Community law*” and para 61 “*It is necessary, therefore, to examine whether such rules may be deduced from the Community rules which apply in this area. In this respect, Article 9 of Regulation No 3184/74 provides that an EUR.1 certificate is to be issued on application in writing by the exporter, who is required by Article 21, para 2) of the same regulation to submit any appropriate supporting document proving that the goods to be exported qualify for the issue of a certificate.*” Hence, the division of the burden of proof in customs matters are governed by national law, unless their regulation is fixed at Community level. To this end, the (also substantive) regulation of the matter under examination needs to be considered, as it might include indications in that regard. Cf. ECJ 17 July 1997, Case C-97/95, Pascoal & Filhos, (particularly at paras 39-41). See B.R. Killmann, *Community Customs Law: An Example of Balancing Harmonization and Procedural Autonomy of Member States*, cited above, 64.

ruled, for the purpose of testing the coherence of the Court's line of reasoning with the cases wherein the presumption is introduced by the national legislator.

Turning to national tax presumptions in the field of customs duties put under the length of the EUCJ, given the ambiguous nature of legal presumptions the focus cannot be confined to procedural rules only, but on national measures affecting the customs debt as well. Precisely on the grounds of the substantive nature surely attributable to irrebuttable presumptions of law, one would expect that the Court rejects them when they diverge from one or more provisions of the Regulation. More uncertainties arise as regards rebuttable presumptions of law. In this case, the possibility for the trader to give proof to the contrary might render them 'acceptable' as in this way they represent a non-conclusive arrangement of a certain matter. This, of course, when there is a public interest worthy of protection in play, like for instance the need for simplification or the efficacy of the customs' collection. It cannot be disregarded, however, that unlike other areas where the model is drawn by the EU legislator (VAT, excise duties) with directives so that the 'means' for attaining the aim set up are left in the hands of the Member States, here the matter finds its regulation in an EU autonomous legal source. As a consequence, a national measure intervening on an issue already dealt with in the Regulation and diverging from the latter might be, *per se*, in contrast with EU law.

At issue is not only the effectiveness of EU law, but also and primarily the supremacy of EU law, and the correct exercise of the competences as distributed by the Treaty. The judgments of the EUCJ on national legal presumptions are normally the result of a balance between these two principles of the scale.

Lastly, it has to be warned that the confirmation of such hypothesis may be found only in the extent to which the Court has ruled on the above matters. To put it differently, the conclusion as to the approach to national legal presumptions are inevitably affected by the circumstance that not many preliminary questions on national presumptive measures have been brought in front of the Court (or infringement procedures have been run). This is not so frequent in respect of other areas of taxation, as customs duties are governed on an EU level.

## 4. Presumptions in the context of Customs legislation

### 4.1 The presumption of competence

That presumptions set up by the EU legislator live up to interests similar to those grounding national legal presumptions results clearly from some provisions included in the Commission Regulation No 2454/93 implementing the Community Customs Code, which established the so-called presumption of competence<sup>581</sup>. In fact, pursuant to Articles 378<sup>582</sup> and 454<sup>583</sup>, when the goods have not been consigned or presented at the place of destination in the context of the external Community transit procedure and it is not possible to identify where the offence or irregularity was committed, such offence or irregularity is deemed to have been committed respectively in the Member State of departure and where it was detected, unless proof of the regularity of the operation or of the place where the offence or irregularity actually occurred is furnished (and it is deemed to be satisfactory by the customs authority).

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<sup>581</sup> Commission Regulation (EEC) No 2454/93 of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

<sup>582</sup> Article 378 of the Commission Regulation (EEC) No 2454/93 stipulates that “1. Without prejudice to Article 215 of the Code, where the consignment has not been presented at the office of destination and the place of the offence or irregularity cannot be established, such offence or irregularity shall be deemed to have been committed: - in the Member State to which the office of departure belongs or – in the Member State to which the office of transit at the point of entry into the Community belongs, to which a transit advice note has been given, unless within the period laid down in Article 379 (2), to be determined, proof of the regularity of the transit operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities. 2. Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State of departure or in the Member State of entry as referred to in the first paragraph, second indent, the duties and other charges relating to the goods concerned shall be levied by the Member State in accordance with Community or national provisions.( ...)”.

<sup>583</sup> More in detail, it states that “2. Where it is found that, in the course of or in connection with a transport operation carried out under cover of a TIR carnet or a transit operation carried out under cover of an ATA carnet, an offence or irregularity has been committed in a particular Member State, the recovery of duties and other charges which may be payable shall be effected by that Member State in accordance with Community or national provisions, without prejudice to the institution of criminal proceedings. 3. Where it is not possible to determine in which territory the offence or irregularity was committed, such offence or irregularity shall be deemed to have been committed in the Member State where it was detected unless, within the period laid down in Article 455 (1), proof of the regularity of the operation or of the place where the offence or irregularity was actually committed is furnished to the satisfaction of the customs authorities. Where no such proof is furnished and the said offence or irregularity is thus deemed to have been committed in the Member State in which it was detected, the duties and other charges relating to the goods concerned shall be levied by that Member State in accordance with Community or national provisions. If the Member State where the said offence or irregularity was actually committed is subsequently determined, the duties and other charges (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) to which the goods are liable in the Member State shall be returned to it by the Member State which had originally recovered them. In that case, any overpayment shall be repaid to the person who had originally paid the charges. (...)”.

The Court has had more than one occasion to judge on this rule. Indeed, its interpretation has raised questions related to the jurisdiction entitled to apply customs duties and charges related to the irregularity committed, as well as to the proof to be given by the economic operator.

Before examining the view taken by the EUCJ in this regard, it is worthy to point out that such a provision embodies a typical rebuttable presumption introduced with the aim of simplifying the ascertainment of a certain fact; that is the place where a certain irregularity in the context of an operation falling within the Community external transit regime has taken place. This would be a (unknown) fact from which very important legal consequences derive, more specifically the individualization of the Member State competent to charge the person liable for the irregularity. The place where the irregularity occurred is identified in the State of departure or in the one where the irregularity is detected, according to a presumption that can be rebutted by the economic operator by proving, within a fixed time-limit, the regularity of the operation or the place where the irregularity happened if different from the place of departure or where it was detected.

At the end of the day, the rationale of the provision is to release customs authorities, issuing a recovery notice of import customs duties, from a proof – and earlier, a motivation of the tax decision – that would be hard, if not impossible, to furnish, because it would imply an investigation on a large scale. In this way, when a certain irregularity is detected, it is already determined by the law what the Member State is entitled to charge the trader liable for customs duties so as to avoid a delay of the customs' collection. As regards the contrary proof, it appears to have been provided not only for the protection of the trader's position, but primarily in view of a correct distribution of competences between Member States in collecting the customs duties (as well as the charges related to the irregularity) and for the protection of the Community's financial interests.

#### **4.1.1 The Militzer and Münch case**

The question of which Member State had jurisdiction to recover customs duties has been dealt with by the EUCJ in the Militzer and Münch case<sup>584</sup>.

Here, the Italian customs authority, after having ascertained that the goods originating in the Czech Republic and transported from Germany had not arrived at their destination due to a forgery of the transit documents, ordered the customs forwarding agent (M&M,

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<sup>584</sup> ECJ 3 April 2008, case C-230/06, Militzer & Münch.

established in Germany) to pay the customs duties on the goods dispatched. M&M, which was not implicated in the forgery, asked for the remission of the duties, but the request was rejected by the courts of first and second instance. Thus, the dispute arrived before the Supreme Court, which decided to stay the proceedings and to refer to the EUCJ, among other issues, the question of the interpretation of the Customs provisions on the determination of the Member State having jurisdiction in the case at hand.

At issue, in particular, was the relation between Article 215 CCC<sup>585</sup>, which referred to the place where the customs debt incurred (or it is deemed to have incurred according to customs authorities) and if not possible to determine, to the place where the goods entered the Community under a certain procedure that has not been discharged, and Article 378 of the Commission Regulation No 2454/93 laying down the abovementioned presumption of competence. In this regard, M&M and the Commission contested the jurisdiction claimed by the Italian customs authority, as in their view, Article 378, para 1, applied, in the quality of *lex specialis* in respect of Article 215 CCC, for assigning the jurisdiction on the recovery of customs duties under the external Community transit procedure. By contrast, the Italian government grounded its jurisdiction on Article 215, para 2, as the irregularity was committed, or at least emerged, in Italy.

The view taken by the Court results from the conjunct reading of Articles 203, para 2, and 215, para 2 CCC, and Articles 378 and 379 of the implementing Regulation. From the first two articles it can be inferred that in case of forgery the customs debt arises where the goods were unlawfully removed from customs supervision<sup>586</sup>. Where, however, the place of the forgery cannot be determined by the customs authority, the procedure set up by Article 379 applies, and in accordance with Article 378, a presumption of competence operates in favour of the Member State to which the office of departure belongs, thereby

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<sup>585</sup> To be more precise, pursuant to Article 215 of the CCC, in the version applicable at the time of the proceedings (which is in practice the same as the version currently applicable), “1. A customs debt shall be incurred at the place where the events from which it arises occur. 2. Where it is not possible to determine the place referred to in paragraph 1, the customs debt shall be deemed to have been incurred at the place where the customs authorities conclude that the goods are in a situation in which a customs debt is incurred. 3. Where a customs procedure is not discharged for goods, the customs debts shall be deemed to have been incurred at the place where the goods: - were placed under that procedure, or – enter the Community under that procedure. 4. Where the information available to the customs authorities enables them to establish that the customs debt was already incurred when the goods were in another place at an earlier date, the customs debt shall be deemed to have been incurred at the place which may be established as the location of the goods at the earliest time when existence of the customs debt may be established. (...)”

<sup>586</sup> For definition of the concept of “unlawful removal from customs supervision see, a.o. ECJ 15 September 2005, Case C-140/04, Unamar and Seaport Terminals. It basically refers to “any act or omission the result of which is to prevent, if only for a short time, the competent customs authority from gaining access to goods under customs supervision and from carrying out the monitoring required by Article 37(1) of the Customs Code” (para. 28).

entitling them to recover the customs duties<sup>587</sup>. The Court went further to clarify that such presumption “*can be rebutted in favour of the jurisdiction of another Member State only if it is established that the first offence or irregularity was actually committed in the territory of that State. Nevertheless, proof to that effect must be furnished to the satisfaction of the authorities of the Member State to which the office of departure belongs, in accordance with the procedure laid down in Article 379 of the implementing regulation, which entails, inter alia, compliance with the time-limits laid down in that provision*”. Precisely with reference to these time-limits (11-month for notifying the principal of the irregularity and 3-month for the contrary proof)<sup>588</sup> the Court notably observed that they are intended to “*ensure diligent and uniform application, by the administrative authorities, of the provisions relating to the recovery of customs debts in order to secure rapid availability of the Community’s own resources(...). Moreover, the three month time-limits is also intended to protect the interests of the principal by allowing him sufficient time in which to furnish, where appropriate, proof of the regularity of the transit operation or the place where the offence or the irregularity was actually committed (...). Finally, the three-month time-limit is intended to encourage the principal to produce the evidence available to him within a mandatory time-limit, with a view to determining without delay the State with jurisdiction to recover duty (...).*”

Besides what has been said at the beginning of this paragraph, from the foregoing one can also infer that the Court finds in the counterproof the core of the balancing between the interest to a rapid customs recovery and the protection of the traders’ rights. Accordingly,

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<sup>587</sup> Notably, according to a tendency that will be pointed out in the dissertation, the Court put the attention exclusively on the effect of the presumption. In par. 34 it concludes: “*In order to determine whether, in the case in the main proceedings, the Italian authorities had jurisdiction to recover the duties in question, it is for the referring court to verify whether, having regard to all the relevant information available at the time when it came to light that the consignments had not been presented at the office of destination, it was possible to establish the place in which the first offence or irregularity capable of being classified as a removal from customs surveillance was committed. If that is not the case, the effect [italic of the Author] of the presumption of competence in favour of the Member State to which the office of departure belongs, established by Article 378(1) of the implementing regulation, is that the Federal Republic of Germany is the Member State with jurisdiction to recover the customs duties.*”

<sup>588</sup> Provided for by Article 379 of the implementing regulation, by virtue of which “*1. Where a consignment has not been presented at the office of destination and the place where the offence or irregularity occurred cannot be established, the office of departure shall notify the principal of this fact as soon as possible and in any case before the end of the 11<sup>th</sup> month following the date of registration of the Community transit declaration. 2. The notification referred to in paragraph 1 shall indicate, in particular, the time-limit by which proof of the regularity of the transit operation or the place where the offence or irregularity was actually committed must be furnished to the office of departure to the satisfaction of the customs authorities. That time-limit shall be three months from the date of the notification referred to in paragraph 1. If the said proof has not been produced by the end of that period, the competent Member State shall take steps to recover the duties and other charges involved. In cases where that Member State is not the one in which the office of departure is located the latter shall immediately inform the said Member State.*”

an appropriate time-limit for giving evidence so as to rebut the presumption of competence appears to be considered favourably, because it conciliates the legal certainty and the uniformity of the procedure in the Community territory on the one side, and the possibility for the trader to avoid the effect of the (procedural) presumption on the other side.

#### 4.1.2 The Met-Trans and Sagpol case

Further indications on the approach of the EUCJ as regards presumptions having EU origin may be inferred from the Met-Trans and Sagpol case<sup>589</sup>, where several probative aspects were at issue.

The dispute originated from the recovery notice addressed towards Met-Trans, a TIR carnet holder that placed a consignment of goods from Poland to Portugal under the Community external transit regime at a German customs office. The German authorities found the TIR carnet to have been forged, and therefore informed Met-Trans that the goods had not been produced at the office of destination. They added that, being unable to determine the place where the offence had been committed, such offence would have been presumed, by virtue of Article 454, para 2 and 3 of the implementing Regulation, to be committed in the State where it was detected (i.e. Germany), save the proof of the regularity of the transit operation or of the place where it was actually committed. The proof alleged by the trader, however, consisting in a statement of the driver about the consignment in the free area of the commercial port of Porto, was considered not to be sufficient by the German authority to prove to its satisfaction that the offence had occurred in Portugal and to rebut the presumption that it was committed in Germany. Similar circumstances concerned another TIR carnet holder, Sagpol, which also produced before the German customs authority the consignment note bearing an acknowledgment of receipt by a Spanish company. The Court was then questioned about the type of (contrary) proof which the trader is requested to furnish for the purpose of rebutting the presumption. More specifically, whether the admissible evidence be limited to documents issued by the customs authorities only.

In answering the question, the EUCJ delineates the relation between Community law and national law on the matter of evidence. It correctly interpreted the Community legislative data as not laying down any limit on the types of evidence admissible to prove where the offence was committed. Consequently, “*given that there is no legislation at Community*

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<sup>589</sup> ECJ 23 March 2000, Joined cases C-310/98 and C-406/98, Met-Trans and Sagpol.



level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible.”<sup>590</sup> Hence, “it is for the national authorities to determine, according to the principles of their national law of evidence, whether, in the specific case before them, and in the light of all the circumstances, the place where the offence or irregularity was committed has been proved to their satisfaction; for example, it is for them to determine whether, for instance, particular testimony is to be admitted or not, and whether it should be considered to have probative force. In particular, it is for the national authorities to assess the reliability of a witness who participated in the transportation operation affected by the irregularity at issue.”

As long as a certain procedural issue, here the possible limitation to and probative force of the contrary proof, is not regulated at Community level, then it is up to the national legislator to fill the gap. In the case of the main proceedings, Article 455, para 3, of the implementing Regulation, in the formula applicable *ratione temporis*, provided for a list of documents which “*inter alia*” may be furnished to the satisfaction of the customs authorities. Precisely the use of the words “*inter alia*” led to them being interpreted as being merely exemplifications. Such words have been removed by an amendment in Commission Regulation (EC) No 12/97 of 18 December 1996. Notwithstanding this, from the decision we can infer that the Court is oriented to interpret the provision strictly, by confining it to the proof of the regularity of the operation, and not even of the place where the offence was committed<sup>591</sup>.

From the foregoing one could even infer that rebuttable presumptions with a limited proof to the contrary are not censured by the EUCJ, though they are interpreted strictly. On the

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<sup>590</sup> Indeed, Article 455 provided that “2. Proof of the regularity of the operation carried out under cover of a TIR carnet or an ATA carnet within the meaning of the first subparagraph Article 454(3) shall be furnished within the period prescribed in Article 11(2) of the TIR Convention on Article 7(1) and (2) of the ATA Convention, as the case may be. 3. Such proof may be furnished to the satisfaction of the customs authorities *inter alia*: a) by production of a document certified by the customs authorities establishing that the goods in question have been presented at the office of destination. This document must include information enabling the goods to be identified; or b) by the production of a customs document issued in a third country showing release for home use, or a copy or photocopy thereof; such copy or photocopy must be certified as a true copy either by the body which endorsed the original document, or by the authorities of the third country concerned, or by the authorities of one of the Member States. This document must include information enabling the goods in question to be identified; or c) for the purpose of the ATA Convention, by the evidence referred to in Article 8 of that Convention.”

<sup>591</sup> In fact, Article 455, para. 3, Regulation 2454/93 mentions only the proof of the regularity of the operation. Accordingly, the Court held that “As the Advocate General has pointed out at points 96 to 101 of his opinion, Article 455(3) relates to a different matter, namely proof of the offence or irregularity as such. It cannot be assumed that because, as from 1997, the Community legislature limited the type of admissible evidence for establishing the regularity of transit operations, it intended, by implications, to do the same in relation to the question of establishing where an offence or irregularity was committed.”

other hand, the Court notes that irrespective of the interest in requesting an objective proof of the place of the irregularity put forward by the national government and agreed by the Commission, the Court itself cannot replace the Community legislature and interpret the provision differently to what results from its wording, as it is up to the Commission the initiative for proposals to that end. It appears that the Court does not disregard the need for objectivity of the proof to be adduced, which comes with legal certainty. Notably, instead, in this decision it does not consider the limit to the type of proof in the perspective of the difficulties that the person liable to pay customs duties might meet in furnishing it.

In any event, the EUCJ gathers the rationale of the presumption at hand read in conjunction with the compensation regime provided for by the same provision (Article 454 of the implementing Regulation). Such regime consists of the restitution of the duties originally recovered, according to the presumption, by the Member State where the offence was detected to the Member State where the offence actually took place, if subsequently determined<sup>592</sup>. It is indeed held that such compensation system “*institutes a mechanism for simplifying the administrative aspect and recovering duties and other charges in cases where uncertainty as to the place where the offences or irregularities vis-à-vis the customs provisions were committed might result in the sums owed being lost altogether. With that situation in mind, it is provided that, where the Member State in which the offence was committed cannot be determined with certainty, a provisional presumption arises that the Member State in which the offence or irregularity was detected has competence. Where it is subsequently established that the first State did have competence, the presumption in favour of the second State is rebutted and a compensation mechanism comes into operation between the two Member States, thus preventing the first State from being barred through lapse of time from recovering the duties and other charges*”<sup>593</sup>.

Once again emerges the priority assigned to the safeguard of the customs’ collection and to the legal certainty facing a situation where the unknown fact would hardly be ascertained by the tax administration.

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<sup>592</sup> Pursuant to Article 454, para. 3, 3rd and 4th subparagraph “*If the Member State where the said offence or irregularity was actually committed is subsequently determined, the duties and other charges (apart from those levied, pursuant to the second subparagraph, as own resources of the Community) to which the goods are liable in that Member State shall be returned to it by the Member State which had originally recovered them. In that case, any overpayment shall be repaid to the person who had originally paid the charges. Where the amount of the duties and other charges originally levied and returned by the Member State which had recovered them is smaller than that of the duties and other charges due in the Member State where the offence or irregularity was actually committed, that Member State shall levy the difference in accordance with Community or national provisions.*”

<sup>593</sup> ECJ 23 March 2000, Joined Cases C-310/98 and C-406/98, Met-Trans and Sagpol, at para 37.

#### 4.2 The presumption as to the representativeness of samples

In a number of decisions, the EUCJ has reasoned on the possibility for traders to challenge the representativeness of the samples of goods taken by customs authorities on occasion of exportations or importations, which is presumed by the Community Customs Code.

The issue of the representativeness of samples is a very good example of how the EUCJ struggles to find a balance between rapidity of the recovery and legal certainty on the one side, and effectiveness of Customs law, which in these kind of cases coincides with the safeguard of the taxpayers' right of defence, on the other side, when dealing with presumptions of law or legal fictions. The EUCJ has been asked for a preliminary ruling on this issue several times, as the provision which lays down the presumption of representativeness leaves the question open as to what extent (in terms of formalities, time-limits and size of the sample, for instance) the trader is permitted to contest such representativeness.

As is well known, it belongs to the power of control at the disposal of customs authorities the examination of all or part of the goods entering the Community territory and on this occasion also to take samples for analysis or for more detailed examinations<sup>594</sup>. The result of the verification of the declaration and possibly of the goods is particularly relevant, as it determines the amount of customs duties payable and in general the provisions governing the customs procedure under which the goods will be placed. As a matter of fact, the classification of a certain good under one or another nomenclature impacts on the applicable customs regime<sup>595</sup>. In this context, Article 70, para 1, CCC, states that “*Where only part of the goods covered by a declaration are examined, the results of the partial examination shall be taken to apply to all the goods covered by that declaration. However, the declarant may request a further examination of the goods if he considers that the results of the partial examination are not valid as regards the remainder of the goods declared.*”

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<sup>594</sup> Indeed, Article 68, CCC, provides that “*For the verification of declarations which they have accepted, the customs authorities may: (a) examine the documents covering the declaration and the documents accompanying it. (...) (b) examine the goods and take examples for analysis or for detailed examination*”. Moreover, Article 78, CCC, stipulates that “*1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods. (...) 3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.*”

<sup>595</sup> Pursuant to Article 71 CCC “*The results of verifying the declaration shall be used for the purposes of applying the provisions governing the customs procedure under which the goods are places.*”

Hence, Article 70 presumes the samples taken by customs authorities to be representative of all the goods reported in the declaration, according to a rule of experience that is based on statistical data. However, if the declarant contends that the samples taken are not representative of the whole (for instance, because of the methodology used), then he may require the customs authority to proceed to a further examination. From this we infer that the presumption of representativeness of the samples is not conclusive, meaning that it can be contested before the competent customs authority first, and presumably also in the course of legal proceedings. In fact, the wording of Article 70, para. 1, second subparagraph, does not delineate a real counterproof, as it confines the defence of the trader to the request of a further verification of the goods concerned. Nonetheless, as it will be said below, the Court clearly refers to the possibility for the trader to raise objections, from which it follows that in practice the foundation of the complaint is vested in a sort of counterproof aimed at confuting the representativeness of the samples taken.

More in general, looking at the theory on the concept of (legal) presumptions drawn in the first chapter of this dissertation, the ambiguous nature of the provision at hand may be gathered. Here, the unknown fact ends up coinciding with a rule of experience. In this way, it in fact appears as the crystallization of a certain rule of experience. To a certain extent it resembles the ‘improper presumptions, one for all the presumptions of *bona fide*, meaning that a certain circumstance is presumed provided (and as long as) the contrary is not proven. On the other hand, precisely the possibility to contest the representativeness of the sample seems to exclude it belonging to the category of legal fictions, though in one of the judgments discussed below the EUCJ appears inclined to adopt such classification as suggested by the referring national Court.

#### 4.2.1 The Derudder case

The question concerning to what extent the declarant is allowed to dispute the representativeness of the samples taken by the customs authorities - under the profile of time-limits and possible lapse - has been dealt with by the EUCJ in the case Derudder<sup>596</sup>.

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<sup>596</sup> ECJ 4 March 2004, case C-290/01, Derudder. The question was raised in the context of a dispute between the customs declarant (Derudder & Cie SA) and the Receveur Principal des douanes of Villepinte (France), with regard to the demand issued by the latter for payment of duty on the import of rice on the basis of analysis of samples. By a declaration registered on 8 November 1989 (thus, before the entry into force of the CCC) at the customs office of Villepinte, Derudder released for free circulation, on behalf of Tang Frères, a consignment of goods originating from Thailand that were declared as ‘broken rice’. On this occasion, the officials took samples of the merchandise, which were sent to a laboratory for analysis. At the time when the goods were checked, a representative of Derudder was present, and neither the representativeness of the

In more detail, the referring court asked if the applicable Community rules permitted to a customs declarant (or his representative) who was present at the time when the sample of imported goods was taken by the customs authorities and he did not dispute its representativeness, to contest such representativeness when requested to pay additional import duties on the basis of the analysis of the sample.

At the time when the facts of the main proceedings took place, the Community Customs Code was not yet in force, while Articles 9 and 10 of the Directive No 79/695 and Article 11 of the Directive No 82/57<sup>597</sup> applied. However, these provisions basically were in line

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samples were challenged, nor they asked to take additional samples. Immediately after that date, the goods were released, as the declarant wished to sell them quickly. However, from the analysis of the samples taken it resulted that the consignment did not contain at least 90% broken rice (as defined in point 3 of Annex A to Regulation No 1418/76), so that the import duty corresponding to that Combined Nomenclature subheading originally applied was found to be incorrect. Pursuant to Article 2, para 2, 2<sup>nd</sup> indent, of Regulation (EEC) No 2729/75 on the import levies on mixture of cereals, rice and broken rice (*“The import levy applicable to mixtures composed either of rice classifiable under several different processing groups or stages or of rice classifiable under one or more different processing groups or stages and of broken rice shall be that applicable: (...) – to the component liable to the higher or highest import levy, when no component represents at least 90% of the weight of the mixture”*), the customs authorities applied the higher duty applicable to imports of whole-grain rice and issued the collection notice. Against this decision, Derudder brought an action before the Tribunal d’instance of Bobigny seeking its annulment by contesting the method used by the customs authorities to analyse the samples and their representativeness. Such Court upheld Derudder’s claim and annulled the demand for payment on the basis of the report of an expert who, albeit arriving at the same conclusions submitted by the customs authorities as to the average length of the whole grains present in the samples and the proportion of broken rice contained in them, expressed reservations on the method of analysis used and the representativeness of the samples. As to the latter, he observed that the samples had been taken *“without reference to any statistical sampling plan and that the results of the analysis of those samples, although they appeared to be correct, could not be extrapolated to cover the entirety of the imported goods.”* The judgment was confirmed by the Cour d’Appel de Paris, thereby the dispute arrived before the Supreme Court, where the Principal Collector of Excise Duties of Villepinte contended the breach of Article 70 CCC in that the judgment of second instance had held that the result of the examination of the samples taken of the imported goods could not be considered as valid for the entirety of the goods despite the fact that the party was present and did not raise any request. The Supreme Court decided to stay the proceedings and refer the question of the interpretation of Article 70 (1) CCC to the ECJ for a preliminary ruling. As said in the text, the Supreme Court presented the question under the profile of the time-limits to challenge the representativeness of the sample taken, i.e. whether it is possible to do it before the court hearing the application for additional import levies albeit the importer was present on the date of the checks and he did not raise any objections.

<sup>597</sup> Afterwards replaced by the Community Customs Code and the implementing Regulation No 2454/93. Article 9 of Council Directive 79/695/EEC of 24 July 1979 on the harmonisation of procedures for the release of goods for free circulation (OJ 1979 L 205, p. 19), provided that *“1. Without prejudice to any other means of control at its disposal, the customs authority may examine all or part of the goods entered. (...) 4. The declarant shall be entitled to be present at the examination of the goods or to be represented at it. (...) 5. When examining the goods, the customs authority may take samples for analysis of fro more detailed examination. (...)”* Pursuant to Article 10, *“1. The results of the examination of the entry and the documents attached to it, whether or not combined with examination of the goods, shall be used for calculating the import duties and for applying any other provisions governing the release of goods for free circulation (...)”* Article 11 of the Commission Directive No 82/57/EEC corresponds to Article 70 of the CCC. It stated that *“Where it decides to examine a part of the goods only, the customs authority shall inform the declarant or his representative which items it wishes to examine. The authority’s choice will be final. The findings of such partial examination shall apply to all goods covered by the entry in question. However, the declarant may request a further examination should he consider that the findings of the partial examination are not valid for the remainder of the goods declared.”*

with the wording of the Community customs code on the matter, so that the ruling of the Court holds true even in the current legal context, as confirmed by the circumstance that the Court itself refers to both.

The interpretation of this legal framework given by the EUCJ embodies a compromise between the different interests in play. Indeed, it did not find in the wording of the relevant provisions any limitation to the right of the party to contest the legal presumption as to the representativeness of the samples at a later stage, but at the same time it identified, on the basis of those provisions, a lapse (of the exercise) of that right. Accordingly, the line of thought of the EUCJ can be divided into two main parts.

First, it observed that from the customs legislation it can be inferred that though the declarant must be informed about the taking of samples by customs authorities, he is not required to be present when they are taken, so that in this situation he could not raise any objection. But even when present, his freedom of action is restricted, as the taking of samples rests upon those authorities. As a consequence, the Court concluded that (para 42): *“(...) the right to challenge the representativeness of a sample of the imported goods taken by the customs authorities cannot a priori be denied to the declarant or his representative, even if he made no objection in this regard at the time the samples were taken. In addition to the fact that such an interpretation is in no way precluded by the wording of the abovementioned provisions, it also coincides fully with the actual aim of the Community customs rules, as stated in particular in the ninth recital in the preamble to Directive 79/695 and the fifth recital in the preamble to the Community Customs Code, that is to say to ensure the correct application of duties, charges and levies laid down by that legislation. Whilst to that end the customs authorities must be regarded as having wide powers of inspection, traders must also have the right to contest decisions taken by those authorities, in particular where, as in the main proceedings, they consider that the samples taken for analysis by those authorities are not representative of the whole of the goods imported and because of that have led to incorrect assessment of import duties.”*

However, the individual right recognized by the Court, which in practice consists of the possibility to rebut the presumption of representativeness of the sample taken from imported goods, does not receive an unlimited protection, at least in terms of time-limits for its exercise. There are, indeed, further interests receiving safeguard under the umbrella of the Community Customs Code and that are to be put on the scale. The Court held, indeed (para 43):

*“(...) both the principle of legal certainty and the need to give practical effect to Directives 79/695 and 82/57 and the Community Customs Code require that the possibility of raising the objection be restricted in time. It must lapse when the customs authority releases the goods concerned, except where it can be shown that the condition of those goods was not altered in any way whatsoever after the release, so that the possibility remains of conducting inspections and, if necessary, of taking additional samples.”*

In the view taken by the Court, such an interpretation not only results from the legislative data and is coherent with the overall discipline<sup>598</sup>, but it is also in line with the interest both of the trader and the customs system. Under the second profile, with regard to the position of the importer, that interpretation “*serves primarily to meet obvious practical needs*”, as generally he is not in the condition to challenge the representativeness of a sample once the merchandise has been released and sold. With particular regard to the system of the customs duty, the Court pointed out that (para 45):

*“Restricting in time the possibility of challenging the representativeness of a sample taken from those goods also satisfies the actual aim of Directives 79/695 and 82/57 and of the Community Customs Code, which are intended to guarantee rapid and efficient procedures for the release for free circulation since, if the declarant could challenge that representativeness for an unlimited period, the customs authorities would be forced, in order to guard against such a risk, to make a detailed inspection of all goods declared to customs as a matter of course, which would serve neither the interests of traders, who are in general concerned to obtain the release, as was the case in the main proceedings, in order to be able rapidly to sell the goods declared by them, nor the interests of those authorities, for whom a systematic examination of declared goods would mean a considerable amount of extra work.”*

Especially from the last wording of the judgment, the role played by the presumption under discussion in the context of the verification carried out by the customs authorities on import duties clearly emerges. The presumption of representativeness responds to the need of securing the rapidity of trades, by avoiding the customs authorities from having to check all the goods declared. In this perspective, the establishment of a period of time within

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<sup>598</sup> In the sense that the challenging of the representativeness of samples presupposes that the merchandise is still available (i.e. that it has not been released or, if so, it has not been altered in any way whatsoever, which is for the declarant to prove) leads, in particular, Article 78, para 2 CCC, pursuant to which “*The customs authorities may, after releasing of the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned*” and “*examine the goods where it is still possible for them to be produced*”. See also Article 13(3) of Directive 79/695.

which the right to contest such representativeness may be contested conciliates the recognition of the individual right to a correct taxation with the efficiency of the trades that is the main task of the customs regulation. One could even infer from this that the Court positively considers those presumptive mechanisms which have primarily a simplification rationale. This, save for the possibility offered to the trader to contend the correspondence of the presumption's effect with the reality (in view of a correct and effective levy).

#### 4.2.2 The Nowaco case

In the Nowaco case, in addition to the provisions of the Community Customs Code on the taking of samples, further Community provisions on the same matter were at issue, which contributed to give content to the presumption as laid down in Article 70 CCC.

In brief, the case concerned the export of goods which, on the basis of the samples taken, had been considered by the customs authorities as being defective, thereby not qualified for export refund according to the applicable Community regulation<sup>599</sup>. Given that the taking of samples in the case of export declaration relating to (agricultural) products qualifying for export refunds was also regulated by Regulation No 386/90 (under the point of view of the monitoring)<sup>600</sup> and Regulation No 1538/91 (under the aspect of minimum quality requirements and tolerance margin) the Court was first asked by the German referring court to clarify the interrelation between the different Community legal sources, and after that to answer “*whether the legal fiction relating to uniform quality in the first subparagraph of Article 70(1) of the Customs Code also applies if the size of the sample*

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<sup>599</sup> The case of the main proceedings originated from the denial of the export refund for two consignments of frozen chicken declared for export by Nowaco respectively in 1997 and 1998. The German customs authority, which had examined the goods and taken a sample and a reserve sample, found that some of the chicken in the two samples taken in 1997 had protruding broken thigh bones, while only the first sample taken in 1998 contained defects. The Finance Court, before which Nowaco brought an action against that decision, ordered the customs authority to pay Nowaco half of the export refund due for the consignment of 1998, while it dismissed the remainder of the action on the grounds that the goods did not meet the standards laid down by Regulation No 1538/91. Both the parties to the main proceedings brought an appeal before the Federal Finance Court, which decided to question the ECJ.

<sup>600</sup> Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts (OJ 1990 L 42, p. 2). In particular, pursuant to Articles 2 and 3, Member States are to carry out physical checks on goods at the time when export formalities are completed and before authorisation for the export is given. Such physical checks must take the form of spot checks conducted frequently and without prior warning. Moreover, they must relate to a representative choice of not less than 5% of the export declarations in respect of which applications are submitted for export refunds. Cf. Commission Regulation (EC) No 2221/95 of 20 September 1995 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 (OJ 1995 L 224, p. 13), in particular Article 7 (1) and (2).



taken is insufficient having regard to Article 7 of Regulation No 1538/91<sup>601</sup> and, consequently, it is not possible to establish whether the tolerance margin laid down therein have been exceeded or not”.

The Court clarified that Article 70 CCC is one of the general customs provisions which apply to export declarations relating to goods qualifying for Community aid without prejudice to special rules<sup>602</sup>. This entails that where the *lex specialis* provides for further requirements on occasion of the taking of samples, then such requisites must be respected for the purpose of the presumption of representativeness set out by the first subparagraph of Article 70, para 1, to apply.

In saying this, the Court notably refers to Article 70, para 1, with the term of “legal fiction”<sup>603</sup>. While it is noteworthy that the Court classifies the Community provision at hand by using the (national) concept of legal fiction, one has to be cautious in generalizing and assuming that it reflects the awareness of the distinction with legal presumptions. In fact, the EUCJ makes use of the label adopted by the German court in the order of reference for a preliminary ruling. As always, its attention is rather upon the effects and more in general on the effectiveness of the Community provisions on export financial subsidy.

The foregoing is corroborated by the further statements laid down by the Court on the division of the probative burden.

Indeed, in the decision it went beyond the questions asked by the referring court and found appropriate to clarify the rights, obligations and responsibility lying upon the exporter and customs authorities with regard to the verification of the exports qualifying for refund. In the frame of a relation based on cooperation, the EUCJ thus recalled that, on the one hand,

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<sup>601</sup> Article 7 of the Regulation No 1538/91 states that decisions arising from failure to comply with Article 6 of the same Regulation (listing the minimum requirements that poultry carcasses and cuts have to meet in order to be graded into classes A and b) may only be taken for the whole of the batch which has been checked in accordance with Article 7. It also stipulates that a sample is to be drawn at random from each batch (see table set out in para. 3) and fixes the tolerable number of defective units.

<sup>602</sup> This results from the conjunct wording of Article 1 of the CCC “*Customs rule shall consist of this Code and the provisions adopted at Community level or nationally to implement them. The Code shall apply, without prejudice to special rules laid down in other fields – to trade between the Community and third countries (...)*” and Article 4, para. 16, let. h, which includes ‘exportation’ among the ‘Customs procedure’.

<sup>603</sup> It held that (para 56): “*That legal fiction relating to uniform quality does not apply only to examinations carried out on the basis of the customs legislation, but is relevant (...) as regards checks carried out pursuant to the legislation concerning the system of export refunds on agricultural products and that concerning marketing standards for poultry meat*”. For the legal fiction relating to uniform quality to be applied, it is necessary that the conditions and operation of the examination satisfy the criteria laid down by the said legislation. As a result, it concluded that when the size of samples taken by the customs authorities is insufficient having regard to Article 7 of the Regulation No 1538/91 that sets out the tolerable number of defective units in relation to the size of the batch and of the sample, Article 70(1) does not apply, as it is impossible to check compliance with that tolerance margin.

national authorities are requested to comply with the Community requirements, among which are the ones on the taking of samples. On the other hand, according to the national rules of evidence, it lies on the exporter who lodges an application for a refund by asserting the fair marketable quality of the products (thereby, their eligibility for refund) the proof of such circumstance, if his declaration is questioned by national authorities<sup>604</sup>.

Having specified this, the Court left in the hands of the national administrative and judicial authorities the evaluation of the evidence. Such evaluation is governed by national (procedural) law, nonetheless the Court appears to suggest an overall consideration of the evidence, including the available samples, and also other information, such as the examination account produced by the customs officer who carried out the physical checks<sup>605</sup>. Thus, the Court appears to indicate that once the exporter contests the denial of the export refund based on the legal fiction as to the uniform quality, the widest probative allegation should be secured and the probative items should be freely evaluated by the judge. If the samples have not been taken in accordance with the fulfillments set out in the relevant Community provisions, then the presumption (or the fiction, as defined in the judgment) cannot operate and they degrade from elements of a legal proof binding for the judge to pure clues freely evaluable by the judge. This is so evidently true that when the facts cannot be conclusively established the EUCJ indicates to the national court to rule on the refund by considering the conduct (in terms of rights exercised and obligations fulfilled) of the exporter and customs authorities, which in national legal orders normally embody arguments of proof freely evaluable by the judge<sup>606</sup>.

One could lastly infer from the foregoing that the counterproof which the trader is permitted to give against the presumption of representativeness of sample may not

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<sup>604</sup> See para. 65 of the judgment, where the Court continues: “*In the case in the main proceedings, even if the size of the samples taken was insufficient, the result of the customs checks and the decisions of the Hauptzollamt show that the national customs authorities did question the exporter’s declaration.*”

<sup>605</sup> See para. 68 of the judgment. Pursuant to Article 7, para 2, Commission Regulation (EC) No 2221/95, “*The competent customs officer must produce a detailed examination account on each physical check carried out. (...)*” In this regard, see also Article 247 of Commission Regulation 2454/93 of 2 July 1993 provides that “*1. When the customs authorities verify the declaration and accompanying documents or examine the goods, they shall indicate, at least in the copy of the declaration retained by the said authorities or in a document attached thereto, the basis and results of any such verification or examination. In the case of partial examination of the goods, particulars of the consignment examined shall also be given. (...) 2. Should the result of the verification of the declaration and accompanying documents or examination of the goods not be in accordance with the particulars given in the declaration, the customs authorities shall specify, at least in the copy of the declaration retained by the said authorities, or in a document attached thereto, the particulars to be taken into account for the purposes of the application of charges on the goods in question and, where appropriate, calculating any refunds or other amounts payable on exportation, and for applying the other provisions governing the customs procedure for which the goods are entered. (...)*”

<sup>606</sup> See paras 62 et seq. of the judgment under discussion.

encounter any limitation. It has to be noted, however, that in the case of the main proceedings the dispute concerned the right to the export refund, which might explain the extensive interference of the Court in the field of the evaluation of the evidence that belongs to the competence of national legal orders. On the other hand, the presumption of representativeness of the samples constitutes a very general inference, as it does not include any indication on the methodology with which samples are to be taken. It is mainly thought of in order to speed up the monitoring and verification at the frontiers, but such generality might give rise to arbitrary acts by customs authorities. This is why it is essential that the possibility to challenge such presumption be widely recognized to the trader.

#### **4.3 The case-law on the theft of goods as a further example of the EUCJ's effectiveness-oriented interpretation of Customs law**

The judgments in the field of customs law illustrated so far concerned presumptions laid down in the Customs legislation, with regard to the territorial competence to collect the tax debt in case of irregularities and the representativeness of samples. These are ancillary aspects in respect of the definition of the tax obligation, but may nonetheless affect the position of the trader and the amount of the tax obligation.

It is now worth mentioning, incidentally, a further decision wherein at issue was the definition of the event giving rise to taxation as the effect of a presumptive rationale attributed by the EUCJ to the relevant legislation. It confirms that the jurisprudence of the EUCJ is mostly oriented in striking a balance between the interests in play so as to endorse the interpretation that guarantees the most effective application of Customs legislation. This is the case even when this entails a *fictio iuris* to the detriment of the traders themselves.

The first approach seems to emerge from the very recent case *Harry Winston*<sup>607</sup>, wherein the Court has ruled on the suitability of the theft of goods to determine the extinction of the customs debt, or, which is the same, on whether it can be deemed as a chargeable event giving rise to the customs obligation.

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<sup>607</sup> ECJ 11 July 2013, Case C-273/12, *Harry Winston*. The case in the main proceedings originated from a collection notice issued by the French customs administration, in which *Harry Winston* were asked payment of the customs duties and VAT applicable to items of jewellery placed under customs warehousing arrangement that were stolen through an armed robbery with hostage-taking.

The Court follows its own precedent handed down in *Esercizio Magazzini Generali and Melline Agosta*<sup>608</sup>, which diverges from the ruling in *British American Tobacco on VAT*<sup>609</sup>. The decision is interesting as it shows how the Court does not refrain from giving a broad interpretation of the event giving rise to the customs debt on the basis of a presumption extrapolated from the relevant provisions. The concept of chargeable event for the purpose of customs duties is extended so as to include even the theft on the grounds that the goods (liable from import duties and unlawfully removed from customs supervision) enter the economic circuit after the theft. In the view taken by the Court, the same presumptive rationale, *mutatis mutandis*, grounds Article 206 of the Community Customs Code, where it makes the extinction of the customs debt conditional to the proof that the non-fulfilment of the customs obligations<sup>610</sup> is due “to the total destruction or irretrievable loss of the said goods as a result of the actual nature of the goods or unforeseeable circumstances of *force majeure*, or as a consequence of authorisation by the customs authorities”.

The French legislation at issue in the main proceedings implementing such provisions provided that duties were payable on the quantity of goods which had disappeared, unless the trader proved that it was a case of unforeseeable circumstances of *force majeure*. The

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<sup>608</sup> ECJ 5 October 1993, Joined Cases C-186/82 and C-187/82, *Esercizio Magazzini Generali and Melina Agosta*. The case of the main proceedings originated from the collection notice issued by the customs authorities of Catania for customs duty and valued added tax on the goods belonging to Mellina Agosta that were stolen from the customs warehouse managed by *Esercizio Magazzini Generali*. On the grounds that a presumption of the definitive release for consumption of the stolen goods had been raised, the Italian customs authorities thus proceeded to issue the tax claim towards the undertakings. In fact, under the Italian Legislation (Consolidated Customs Laws, approved by Decree No 43 of the President of the Republic of 23 January 1973), in the case of goods on which customs duty was payable, the event giving rise to the fiscal obligation was constituted by their release for consumption in the customs territory; goods were regarded as being definitively released for consumption if they had been unlawfully removed without compliance with the customs obligations. The event giving rise to the obligation was considered not to have occurred – according, it would seem, to a fiction – when the taxable person proved that the failure to fulfil his customs obligation was due to the loss or destruction of the goods because of unforeseeable circumstances or *force majeure* or as the result of events attributable to the minor negligence of a third party or the taxable person himself, or from natural or technical causes. Such provisions, and in particular the word ‘loss’, were interpreted by the Italian Court as including the theft among the unforeseeable circumstances or *force majeure*. In response to this, Law No 891/1990 gave an authoritative interpretation of the term, by confining it to the ‘dispersion’ and not to the ‘removal’ of the products. The question referred to by the Italian Court of Appeal then, concerned the interpretation of the concept of ‘*force majeure*’ for the purpose of the Community Customs Law. After having recalled the Community provisions on the event giving rise to the fiscal obligation and to its extinction, the ECJ held that “*It appears from the above-mentioned articles together with the ninth recital of the preamble to the directive that the reasons for the extinction must be based on the fact that the goods have not been used for the economic purpose which justified the application of import duties. In the case of theft, it may be assumed that the goods pass into the Community commercial circuit. It follows that “loss” of the goods for the purposes of the directive does not embrace the concept of theft, regardless of the circumstances in which it has been committed.*”

<sup>609</sup> ECJ 14 July 2005, case C-435/03, *British American Tobacco International*.

<sup>610</sup> Meaning the obligations which arise from various customs provisions which have the effect of delaying the release for consumption of the goods.

question then concerned the possibility to subsume the theft within the circumstances of *force majeure* to which the legislation conditioned the extinction of the customs debt on the basis of the assumption that lost goods are not marketed. In particular, the referring Supreme Court underlined that the Customs code did not include a provision similar to the ninth recital in the preamble to Directive No 79/623 referred to in the decision *Esercizio Magazzini Generali and Mellina Agosta*, which in its view made the extinction of the customs debt depend on the fact, “*whether actual or presumed, that the goods did not find their way back to the economic circuit after the theft*”.

The EUCJ did not find such amended legal framework as relevant for a different decision of the pending case. It thus confirmed its previous ruling by holding that “*a theft committed in a customs warehouse results in those goods being removed from the customs warehouse without having been cleared through customs. The Court’s presumption in its judgment in Esercizio Magazzini Generali and Melina Agosta, according to which, in the case of theft, the goods enter the economic circuit of the European Union, is therefore still relevant notwithstanding the fact that the Customs Code no longer contains the wording of the ninth recital in the preamble to Directive 79/623 referred to in that judgment*<sup>611</sup>.”

It must be noted that at issue was not a legal presumption. The insertion of the theft among the chargeable events for customs purposes only, appears to be the result of interpretation based on the rationale of the provisions concerned. *Per se*, the legislative data (Article 203 on the origin of customs debt, Article 206 on the extinction) does not establish a presumption of entrance in the economic circuit with reference to stolen goods. Nonetheless, the Court extrapolates such presumptive rationale from the relevant EU provisions and in different decisions applies it with the effect that the chargeable event covers a circumstance where such entrance occurs by hand of a third person in respect of the one liable to pay customs duties. Here, as said, budget considerations seems to prevail, as the only one who can be charged is the holder of the stolen goods. Moreover, even though not explicitly, the Court may have considered that, as the Italian government maintained in the case *Esercizio Magazzini Generali and Melina Agosta*, a different conclusion would have encouraged ‘arranged thefts’, i.e. theft organized for the purpose of

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<sup>611</sup> In any event, the Court held that Article 206 of the Customs Code, laying down the hypotheses of extinction of the customs debt, did not apply in the case of the main proceedings. Indeed, Article 206 only derogates from Articles 202 and 204, para 1, let. a), of the Code, as it is explicitly said in its first paragraph. However, a theft of goods placed under a suspensive procedure (customs warehousing arrangements) is covered by Article 203, which links the origin of the customs debt to the unlawful removal from customs supervision of goods liable to import duties from the moment of the removal and it is not referred to in Article 206.

evading customs duties. It being impossible for national customs authorities to ascertain the actual release for consumption of goods, this event is thus presumed facing theft. On the other hand, it has to be said that such conclusion is in line with the legislative data. An interpretation that classified a theft of goods as a loss due to force majeure, would have meant forcing beyond measure the applicable legislation.

#### 4.4 Conclusion

As said, several presumptive provisions may be identified in Customs law. Among these, it can be further mentioned the presumption of origin laid down in Article 41 of the implementing regulation<sup>612</sup>, or the presumption as to the amount of the customs debt for the purpose of the guarantee provided for by Article 379 of the same Regulation<sup>613</sup>. The list could continue. However, for our purpose, it is sufficient to underline the following.

Legal presumptions play in EU customs law the same role that is assigned to them at national level. They basically live up to the uncertainties as to the determination or ascertainment of certain elements of or ancillary to the tax obligation, in order to secure a simplification of the proceedings and above all a rapid collection. This, even when the taxation ends up having a fictitious basis, like when the holder of stolen goods (irrespective of the ascertainment of his negligence) is called upon to pay customs duties and other charges. Looking at some judgments, the Court appears inclined to interpret the relevant Community legislation literally, or said differently, to give a close interpretation of the legislative data, taking into consideration primarily the effective application of

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<sup>612</sup> Pursuant to which “1. *Accessories, spare parts, or tools delivered with any piece of equipment, machine, apparatus or vehicle which form part of its standard equipment shall be deemed to have the same origin as that piece of equipment, machine, apparatus or vehicle.* 2. *Essential spare parts for use with any piece of equipment, machine, apparatus or vehicle put into free circulation or previously exported shall be deemed to have the same origin as that piece of equipment, machine, apparatus or vehicle provided the conditions laid down in this section are fulfilled.*”

<sup>613</sup> Article 379 stipulates that the principal is allowed to make use of a comprehensive guarantee or a guarantee waiver up to a reference amount. As to the calculation of such amount, it establishes that “2. *The reference amount shall be the same as the amount of customs debt which may be incurred in respect of goods the principal places under the Community transit procedure during a period of at least one week. The office of guarantee shall establish the amount in collaboration with the party concerned on the following basis: (a) the information on goods he has carried in the past and an estimate of the volume of intended Community transit operation as shown, inter alia, by his commercial documentation and accounts; (b) in establishing the reference amount, account shall be taken of the highest rates of duty charges applicable to the goods in the Member State of the office of guarantee. Community goods carried or to be carried in accordance with the Convention on a common transit procedure shall be treated as non-Community goods. A calculation shall be made of the amount of the customs debt which may be incurred for each transit operation. When the necessary data is not available the amount is presumed to be EUR 7 000 unless other information known to the customs authorities leads to a different figure.* 3. *The guarantee office shall review the reference amount in particular on the basis of a request from the principal and shall adjust it if necessary.*”

Customs law (and budgetary interests) and putting into the second place the protection of the traders.

Nonetheless, when corroborated by the wording of the Community Customs regulation, as in the case of the presumption of representativeness of the samples, the Court does not refrain from giving an interpretation that conciliates the effectiveness of Customs law (as well as the EU's and Member States' financial interests) with the protection of the taxpayer, through the recognition of the widest possibility of contrary proof. This is in line with the overall customs framework, and in particular with what is stated in the ninth recital of the preamble to the Community Customs Code, according to which "*in order to secure a balance between the needs of the customs authorities in regard to ensuring the correct application of customs legislation, on the one hand, and the right of traders to be treated fairly, on the other, the said authorities must be granted, inter alia, extensive powers of control and the said traders a right of appeal*".

##### **5. National tax law presumptions in the field of Customs law**

Given that customs duties are governed by Community legislation, there is not much room for purely national legal presumptions in this field. There are though a few significant judgments wherein the EUCJ has dealt with national presumptive measures implementing single Community provisions and mostly introduced with the purpose of simplifying the ascertainment of the customs debt or the collection of the customs duty owed. Some of these judgments are illustrated below as they give an insight into how the Court considers national presumptions in the field of Community customs law; that is, in a legal context where the integration between EU law and national rules is far-reaching.

In this regard, it has to be immediately said that the cases to be discussed below concern irrebuttable presumptions of law only. There are not, to my knowledge, cases concerning national rebuttable presumptions. In fact, presumptions introduced at national level in the field of customs law are mostly aimed at guaranteeing the collection of the customs debt and to simplify as much as possible the determination of such debt by customs authorities, so that the ascertainment of the real facts, for the purpose of which normally the contrary proof is provided, is undermined. As such, they appear to embody more fictions or legal definitions than presumptions, as it is hard to see a rule of experience.

Consequently, while some conclusions can be drawn as regards the approach to irrebuttable presumptions on the grounds of the EUCJ rulings, the question is still open

with reference to rebuttable presumption of law which interfere with Community customs law. In this regard, it is nonetheless possible to foresee the view that the EUCJ would take if ever questioned, on the basis of the rulings analysed so far and the ones to be discussed below, as well as in the light of the general principle permeating the case-law in customs law.

### **5.1 National irrebuttable presumptions and Customs law**

The examination of the case-law on national irrebuttable presumptions in the area of customs law is to be conducted taking into consideration two main points of departure, which represent the key of the reading of any other decision on the same matter. Both of them result from considerations already expressed, respectively in the previous chapters dealing with the concept of presumptions, particularly in tax law, and in the previous paragraph of this chapter dealing with the principles guiding the EUCJ rulings in customs matters.

First, irrebuttable presumptions of law have a substantive nature, which means that they may affect the tax obligation, for instance under the profile of the persons liable, or the amount of levy, and so on. This entails that in introducing such measures the national legislator interferes with the regulation that the EU legislator has chosen to give to a certain issue. Unlike when the EU law is covered by a directive, from the use of a regulation it follows that national implementing measures are normally not only superfluous, but even prohibited in the light of the principle of sincere cooperation when they depart from the former. Such principle requires, among other things, Member States to refrain from introducing any measures that could jeopardise the attainment of the Union's objectives.

In the light of the foregoing, one expects that the Community Customs law precludes not only national measures that are in contrast with what is stated in the Customs legislation, but also those ones that, albeit not diverging from any explicit Customs provision, adds further provisions, for example in terms of requisites for benefits or extent of tax liability.

Second, the importance of avoiding the introduction of further (presumptive) provisions, when not-requested, is obviously readable in the light of securing the uniformity as to the application of Customs law within the Community territory. This principle, which arises also when dealing with EU law rules, is even more cogent when facing national (presumptive) measures in customs law. In the latter hypothesis, indeed, the risk of



diverging applications is higher and so is the risk of a non-equal treatment of traders, which must be combated in an internal market. Not surprisingly, before the Court are brought not only legislative provisions, but also administrative or judicial practices due to the unlawful interpretation of the legislation in force, which exactly like the former are able to jeopardise the application of customs law.

### 5.1.1 The Spedition Ulustrans Case

The Spedition Ulustrans case<sup>614</sup> is a good example for the purpose of showing the Court's line of thought when confronting irrebuttable presumptions of law. Here, the Austrian Act implementing customs law (Paragraph 79(2) of the ZollR-DG) was at issue, which provided as follows: *“When an employee or other person contracted by an undertaking incurs liability for a customs debt because that person has, in the discharge of the affairs of his employer or the undertaking which engaged him, acted unlawfully with regard to customs obligation, the employer or undertaking shall simultaneously incur liability for that customs debt in so far as it has not become the customs debtor in respect thereof pursuant to any other provision.”*

The provision was considered to lay down an irrebuttable presumption of imputability of the employee's conduct to the employer. Indeed, the case of the main proceedings originated from the demand for payment, following the unlawful introduction of goods in the Community's territory, not only to the driver who had failed to fulfil the customs obligations, but also to his employer (Spedition Ulustrans). The latter, in particular, was notified of the same amount of duty claimed from its employee in its capacity as joint and several co-debtor, on the basis of the combined provisions of Articles 202, para 1, let. a), of the Community Customs Code<sup>615</sup> and Paragraph 79, para 2, of the Austrian implementing legislation. Spedition Ulustrans brought an action against that decision by contending that it could not legally be considered as a debtor of that duty as it had not taken part in the commission of the driver's offences. The appeal was rejected in the first and second instance, and therefore the dispute arrived before the Austrian Court of last instance, which doubting the compatibility of the Austrian provision with the notion of 'customs debtor' resulting from Article 202, para 3, CCC, decided to stay the proceedings and to refer to the Court such question for a preliminary ruling.

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<sup>614</sup> ECJ 23 September 2004, case C-414/02, Spedition Ulustrans.

<sup>615</sup> Pursuant to which “1. A customs debt on importation shall be incurred through: (a) the release for free circulation of goods liable to import duties (...).”

In the order of reference the referring Court made two interesting remarks, which are worthy of attention in order to frame the main question.

On the one side, it gave account of the different interpretations, among the academic scholars, of the concept of ‘debtor’ set out in Paragraph 79, para 2, and of its possible (in)consistency with the Community regulation. As a matter of fact, the Customs Code itself, at Article 202, para 3, defines who the debtor is of the customs debt on importation incurring because of the unlawful introduction in the Community’s customs territory of the goods liable to import duties. It includes, apart from the person who introduced the goods infringing customs obligation (1<sup>st</sup> indent), “*any persons who participated in the unlawful introduction of the goods and who were aware or should reasonably have been aware that such introduction was unlawful*” (2<sup>nd</sup> indent) and “*any persons who acquired or held the goods in question and who were aware or should have been aware at the time of acquiring or receiving the goods that they had been introduced unlawfully*” (3<sup>rd</sup> indent). Some authors inferred from this provision the necessity of taking into account the subjective conditions. Given that Paragraph 79(2) extended the meaning of ‘debtor’ so as to include employers or principals irrespective of their participation to the infringement carried out by their employees or agents, it was incompatible with Article 202, para 3, second indent. According to other authors, instead, the extent of the concept of ‘debtor’ depended on the interpretation of the first indent of Article 202, para 3, which refers to the person who introduced the goods unlawfully. This person, it was argued, is always, at least indirectly, the undertaking, as it has the legal custody of the transported goods. In this view, Paragraph 79, para 2, is not incompatible with the second indent of Article 202, 3, CCC, but it is rather superfluous in respect of the first indent, thereby in line with the Community frame. On the other side, the referring court submitted that Paragraph 79, para 2, is a ‘rule on liability’, thereby falling in the competence of the Member States. In fact, such provision might at first sight appear as concerning the collection of the duty, rather than the design of the tax obligation under the subjective point of view. Not surprisingly, it is on this argument that the observations submitted by the Austrian government rotated, by contending that it falls within the competence of Member States the choice of the methods that they consider the most effective for the purpose of securing the recovery of customs duties<sup>616</sup>.

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<sup>616</sup> In particular, the Austrian government referred to Article 8(1) of the Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the Euratom Communities’ own resources (OJ 2000 L 253, p. 42), according to which Common Customs Tariff duties are collected by the Member States in accordance

The Court did not embrace such perspective. Instead, it framed the rule at hand in a substantive setting. In this view, far from being a pure procedural rule on the recovery of customs duties which is normally left in the hands of Member States, it is regarded as a provision capable of widening the subjective scope of the customs obligation beyond the scope defined by the Community legislation. In this regard, the Court observed that if it is true that from the wording of Article 202, para 3, CCC the attempt to give a broad definition of ‘debtor’ can be inferred, nonetheless that provision “*does not make the employer automatically co-debtor of the customs debt of an employee who has unlawfully introduced the goods*”.

By using a formula which is used in many other judgments dealing with presumptions, the Court thus shows to reject of a national provision that presumes *automatically* a certain circumstance or a qualification, thereby overlapping the wording of the Community legislator; automatically and, I would add, also conclusively, given that the national measure was construed as an irrebuttable presumption of law, or a legal definition, without permitting the employer to prove that he was not involved in the irregularity committed.

To reach such conclusion, the Court made reference, firstly, to what is provided by Article 202, para 3, CCC, by underlying that the first indent presupposes that the person (in hypothesis, the employer) is by his own action responsible for the unlawful introduction of the goods, while the second and third indents request the knowledge of the unlawful introduction or the culpable ignorance<sup>617</sup>. In other words, in order for the employer to be called upon for the payment of the customs debt it is requested either his actual (physical)

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with the national provisions imposed by law, regulation or administrative action, which are, where appropriate, to be adapted to meet the requirements of Community rules. In such a frame, Paragraph 79, para 2, is aimed at rendering more effective the customs collection, by making co-debtors the employers who derive an economic benefit from their employees’ acts and are notoriously economically less weak than the latter. By contrast, the Commission observed that if interpreted as an irrebuttable presumption of the imputability of the employee’s conduct to the employer, then Paragraph 79, para 2, fell outside Article 202(3).<sup>617</sup> See paras. 26-27-28. At paras 29 and 30 the Court summarized as follows: “*It follows from the examination of the first, second and third indents of Article 202(3) of the Customs Code that the Community legislature has distinguished between cases covered by the first indent and those set out in the second and third indents. In the circumstances provided for by the first indent, the employer can be regarded as having itself unlawfully introduced the goods and as becoming, as a result, liable for the customs debt, either solely or jointly with its employee. In the circumstances covered by the second and third indents, the employer has only ‘participated’ in such introduction and can be regarded as a joint debtor only if certain subjective conditions are met. In those circumstances, where it appears that the unlawful introduction of the goods cannot be attributed to the employer but is the act of the employee, the employer may be a debtor of the customs debt if he has participated in that introduction, which may be the case, in particular, if the unlawful introduction was made using the resources or staff of his business, and if he knew or should reasonably have known that such introduction was unlawful.*” The Court confuted the opinion of those authors who argued that Paragraph 79, para 2, specified the condition for applying the first indent of Article 202(3). Such an interpretation, indeed, by regarding the employer as the ‘person who has unlawfully introduced the goods’, would render the second indent superfluous.

participation in the infringement of the customs obligation or his even indirect participation accompanied by a subjective condition (he knew or should reasonably have known that the introduction carried out by his employee was unlawful). Hence, the employer cannot *sic et simpliciter* be considered as liable for the customs debt without carrying out an ascertainment as to the existence of such objective or subjective elements.

Besides that, the Court went over the normative evolution that had been brought to the current definition of ‘debtor’ included in Article 202, para 3. This, in order to show, on the one side, that Article 202, para 3, is more specific, in respect of the previous regulation of the same matter, as to the individualization of the persons ‘participating’ in the unlawful introduction, thereby indicating the intent of the Community legislator to lay down exhaustively the conditions for determining the debtors. On the other side, the normative evolution reveals the need for harmonization, legal certainty and uniformity of interpretation and implementation which since from the beginning have grounded any provisions on the definition of customs debtors<sup>618</sup>.

In the light of the foregoing, the national provision relevant in the main proceedings betrays<sup>619</sup> both the wording and the *ratio* of the Community definition of debtor facing an unlawful introduction of goods. The EUCJ left to the referring court its interpretation, but not before having ‘warned’ that “*if Paragraph 79(2) of the ZollR-DG were interpreted as meaning that it establishes an irrebuttable presumption that the employer is co-debtor of the employee’s debt, that paragraph would be incompatible with Article 202, para 3, of the Customs Code*”<sup>620</sup>. This holds true even where such provision applied only when the

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<sup>618</sup> Though, at para. 38 the Court recognizes that “*all those regulatory amendments were not intended to and did not even have the effect of depriving the Member States of the possibility of adopting measures to contribute effectively to the implementation of the objectives of the customs regulation, in particular the recovery of the customs debt. Nor did they prevent the Member States from prescribing, if appropriate, rules specifying, in compliance with those objectives and in accordance with the principle of proportionality, the conditions for applying the Community texts (...)*”

<sup>619</sup> See para 40: “*The provision of a national law contradict that clearly manifested intention of the Community legislature and the very letter and purpose of Article 202(3) of the Customs Code, as described in this judgment, if, disregarding the subjective conditions set out in the second and third indents of Article 202(3), they automatically extend to the employer the employees’ status as debtor, without it being established that the employer has taken part in the introduction of the goods, in particular when he knew or ought reasonably to have known that the said introduction was unlawful.*”

<sup>620</sup> On the contrary, in his opinion to the case (Opinion of Advocate general Tizzano delivered on 6 May 2004, OJ 1992 L 302, p. 1), the General Advocate concluded that the Austrian provision complied with Article 202, para 3, second indent of the CCC as “*By limiting liability to cases of infringement of customs obligations by employees in the performance of the tasks allocated to them, it ensures that employers are to be responsible for customs debts only in the exact instances envisaged by that provision of the Code. The employer will first of all be liable for having delegated the task of transporting goods into the Community and for having thus participated in the introduction of those goods into the customs territory. 44. In addition, the employer will be liable because, owing to his position, it is reasonable to believe that he knew (or should have known) the manner in which the employee discharges his duties; and in any event it is for him to ensure*

employee acts “*in the conduct of his employer’s affairs*”, because in this case its responsibility would request the ascertainment of the subjective element<sup>621</sup>.

From this decision, one could thus infer that, as a rule, national irrebuttable presumptions affecting the tax obligation are inconsistent with the Customs law. This is because they are capable of jeopardizing the harmonized customs regulation as established by the Community legislator. The main concern is undoubtedly the uniform application of Article 202, para 3, by national customs authorities. Notably, the decision does not mention the preclusion to the counterproof, from which the effect of the automatic definition as ‘debtor’ follows. The circumstance that the Court rejects the national provision if interpreted as *automatically* presuming the status of debtor upon the employer leaves open the question of whether this might entail that the same provision laid down as a rebuttable presumption of law would have been judged differently.

In the particular case of the main proceedings, it depends on the interpretation of Article 202, para 3, under the aspect of the distribution of the burden of proof as to the objective or subjective elements requested in order to regard a person liable to pay. If the burden of proving that the employer has himself introduced unlawfully the goods into the Community or that he was aware or should have been aware of that, lies on the customs authority, then even a rebuttable presumption may be considered inconsistent with the Community regulation, as it would not comply with the latter. However, from the decision conclusive arguments in favour of one or another division of such burden cannot be inferred. Neither the reference to the need of an ascertainment of the conditions for the definition of debtor, nor the mention of the possibility for the employer to claim his ignorance about the customs infringement, are indicative enough. One could further rely on the general rule on the division of the burden of proof, which in other decisions the EUCJ has referred to, for the purpose of arguing that it is up to customs authorities the proof of the above conditions, so that a reversal of such burden as the effect of a rebuttable presumption would not be in line with Article 202, para 3.

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*that the employee complies with the relevant rules in the course of those duties.”* (paras 42 et seq.) This interpretation of the national provision, however, ends up to be what the Court rejects in its decision, i.e. an irrebuttable presumption of imputability of the employees’ conduct to the employer. By contrast, the ECJ requests the actual ascertainment of this requisite, in particular of the subjective requirements.

<sup>621</sup> Moreover, the Court took into consideration the possibility for the employer to obtain repayment or remission of the customs debt under Article 239 of the CCC, once he paid it. Even then, there remain doubts as to the proportionality of the extension of the status of debtor to the employer with the objectives pursued.

On the other side, precisely the rejection of the national provision in the extent to which it ‘automatically’ presumed the liability to pay upon the employer may suggest that a rebuttable presumption would instead be in line with the relevant Customs legislation.

### 5.1.2 The Kenny Roland Lyckeskog case

Further indications as to the extent to which Member States are allowed to have recourse to presumptions in the area of customs law result from the case *Kenny Roland Lyckeckog*<sup>622</sup>. At issue was the Swedish provisions which apparently established an irrebuttable presumption of commercial nature of imports – as such, not admitted to free-import duties – where they concerned an amount of goods exceeding a certain quantity. More in detail, in the main proceedings the measure of the customs’ authorities assumed the commercial character of the import on the grounds that an amount higher than 20 kg of rice per person was imported (equivalent to the price of SEK 240)<sup>623</sup>.

Such provision, in the extent to which it had the effect of excluding the relief from customs duties for the import of a quantity of goods higher than the maximum fixed, beyond which the commercial nature of the operation was presumed, diverged from the wording of the Regulation on the Community system of relief from customs duties<sup>624</sup>. As a matter of fact, by virtue of the combined provisions of Articles 45 and 47 of that Regulation the goods contained in the personal luggage of the travellers coming from a third country were admitted free of import duties on condition that such operations did not have a commercial nature and within the limit of 175 ECU (equivalent to 1700 SEK) for each traveller<sup>625</sup>.

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<sup>622</sup> ECJ 4 June 2002, Case C-99/2000, *Kenny Roland Lyckeckog*.

<sup>623</sup> The case originated from a decision of the Sweden District Court which had found Mr Lyckeskog guilty of attempted smuggling as he had sought to import 500 kg of rice from Norway without declaring that importation.

<sup>624</sup> Council Regulation (EEC) No 918/83 of 28 March 1983 (OJ 1983 L105, p. 1) setting up a Community system of reliefs from customs duty.

<sup>625</sup> More in detail, Article 45 provided that “1. *Subject to Articles 46 to 49, goods contained in the personal luggage of travelers coming from a third country shall be admitted free of import duties, provided such imports are of a non-commercial nature.*” The same article, at para 2, let. (b) defined the notion of ‘imports of a non-commercial nature’ as those ones which “- are of an occasional nature, and consist exclusively of goods for the personal use of the travelers or their families, or of goods intended as presents; the nature and quantity of such goods should not be such as might indicate that they are being imported for commercial reasons.” Article 47 granted such relief, with reference to goods other than those listed in Article 46<sup>625</sup> (a series of goods, like tobacco products, alcoholic beverages, perfumes and toilet waters, to which particular quantitative limits per traveller apply), up to a total value of ECU 175 per traveller, meaning that for any higher amount the import was considered as having a commercial nature. In the case of the main proceedings, given that the quantity of rice admitted free of import duties by virtue of the national provision was much below the amount established by the Community provision albeit under a different parameter, the question of the compatibility of the former with the latter arose.

The EUCJ, by underlying the *ratio* grounding the Regulation No 918/83, which is the creation and the application of a uniform system of reliefs from customs duties within the Community, excluded that Member States are allowed to introduce “*irrebuttable presumptions that imports are commercial*”. Differently, the uniform application of such system, which the Regulation itself aims at, would be jeopardized. The Court further specified that, by contrast, customs authorities of the Member States are permitted to issue mere non-binding ‘instructions’ or ‘practices’ – presumably, addressed towards the customs officials - which for the purpose of simplifying the customs procedure fix, for certain type of goods, the threshold below which the traveller is released from giving evidence of the non-commercial nature of the import carried out.

This, at least, seems to be the sense of the wording of the EUCJ, where it held that (para 32):

*“If Member States were entitled to impose quantitative restrictions on the grounds other than morality or public policy, the uniform nature of the system of relief from customs duties throughout Community territory would be jeopardised. However, instructions drawn up by the customs authorities, as long as they are not an indirect way of introducing an irrebuttable presumption that imports are commercial, but are simply a non-binding criterion designed to facilitate customs procedure, are not incompatible with the system established by Regulation No 918/83”.*

Accordingly, in answering the question on the criteria determining the commercial nature of an importation pursuant to Article 45, para 1, the Court requested a case-by-case assessment, because the reference to the ‘personal use’ in that article implies that “*the designation, for reference purposes of a typical use would be for that reason unsatisfactory*”. In this view, authorities cannot confine their examination to the type or quantity of products imported (i.e. objective factors), but they have also to take into consideration, where appropriate, further indicators such as the traveller’s and his family’s lifestyle and habits<sup>626</sup>.

Notably, in his opinion to the case the Advocate General also pointed out that the national measure at hand did not comply with the principle of effectiveness. In his view, the probative burden upon the traveller does not have to be as such to render difficult or impossible to prove the non-commercial nature of the import<sup>627</sup>.

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<sup>626</sup> See in particular paras 26-27 of the judgment.

<sup>627</sup> Opinion of Advocate General Tizzano delivered on 21 February 2002. He agreed with the observations submitted by the parties, according to which “*Member States cannot adopt binding provisions laying down*

Before the attempt to infer some general indications from the judgment under discussion, it has to be observed that from the latter it is not possible to understand if the national measure of the main proceedings actually embodies a presumption. It is not clear if the provision fixes a proper presumption of commercial nature of the imports on the grounds that the established maximum quantities are exceeded, or it rather sets the quantity of goods importable free of customs duty thereby considering the overcoming of such limit an index of the commercial nature of the operation. Above all, as underlined by the European Commission in its observations submitted to the Court, it is not clear if such provisions are binding or not and which position of the legal sources' hierarchy they cover. While it seems to be plain that they are issued by customs authorities, it does not evidently result whether this is under the form of a decision, a general act or a settled practice<sup>628</sup>.

Nonetheless, these considerations cannot refrain from the attempt of inferring from the judgment at hand some indications as to the approach of the EUCJ facing national presumptions. Similarly to the ruling handed down in *Spedition Ulustrans*, the Court explicitly rejects any irrebuttable presumptions, even where construed as quantitative restrictions, on the grounds that they may counter the uniform nature of the relief from customs duties in the Community's territory.

As often, here the Court puts on the same level national legislation and administrative practices. Accordingly, while it disregards the nature of the national provision - one thing

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*quantitative limits on duty-free imports or even an absolute presumption that an import is of a commercial nature because of the quantity of goods imported. At most, the customs authorities may issue administrative instructions indicating the quantity of certain goods that may be admitted free of duty, on the understanding that the traveller may prove that a larger quantity is not being imported for commercial reasons*". In addition, he underlined that Regulation No 918/83 is based on the recognition that common rules are required in the area concerned under the international conventions to which Member States are parties. As a result, he specified that "while it is legitimate to allow any Member State to issue 'instructions' or 'recommendations' to customs officers, laying down quantitative limits not provided for in the Regulation, even if such instructions or recommendations are not binding, that must not jeopardise in practice the uniform application of the Community system of reliefs from customs duty". This entails that "any quantitative limit on imports indicated in a national administrative measure must be reasonable and appropriate". Ultimately, he observed, as referred in the text, that "the traveller should be able to protect his own interests without too much difficulty, as regards both knowledge of the precise content of his own right to relief from customs duty as defined in Regulation No 918/83 and the evidence he is required to provide, which should not be too rigorous or such as to make it effectively impossible to prove that the import is of a non-commercial nature".

<sup>628</sup> In the order of reference, the Swedish Court asked "What is the legal significance of a national authority's provisions which indicate the duty-free quantity of a certain product - to which Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty is applicable - normally to be admitted?". But in the judgment the relevant provisions are not reported. This leads one to think that they were administrative practices. In his opinion, the Advocate general explained at para. 12 that the total value of ECU 175 fixed in Article 47 of the Regulation No 918/83 was calculated by the *Generaltullstyrelse* (the Swedish Board of Customs) and subsequently by the *Tullverket* to be equivalent to SEK 1700. Then, a decision of the customs authorities set the permitted duty-free quantity for private imports of rice at 20 kg per person.



is if it was a normative provision, another thing if it was a mere administrative practice – it focuses on the effects, by distinguishing between binding instructions on the one side, and pure indicative measures on the other side. The evaluation of Community (in)compatibility developed by the Court is exclusively centred on the effects of the national presumption in turn under examination, as in the extent to which it is binding and it does not give the possibility to give the counterproof, it is capable of affecting the customs obligation. Such evaluation is functional to the effective application of the Community customs regulation. In this perspective, the interest of the Member State to tackle abusive practices<sup>629</sup>, or, which is more the case of the main proceedings, to simplify the assessment of the (non-) commercial nature of a certain operation, must be balanced with the need to secure the effectiveness of the above regulation. Thus, the EUCJ regards as inconsistent with the

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<sup>629</sup> Such interest was put forward by the Danish government in the context of an infringement proceedings brought before the Court by the Commission: ECJ 6 December 1999, Case C-208/88, *Commission v Kingdom of Denmark*. The case concerned a question similar to the one referred to in the text, though with regard to turnover taxes and excise duties on intra-Community imports. At issue was an Order of the Minister of Finance which fixed an allowance limited to 10 litres for beer imported in a traveller's personal luggage, thereby presuming the commercial character of imports of a higher quantity. In the view taken by the Commission, such measure was in contrast with Articles 2(1) and 3(2) of the Council Directive 69/169/EEC (of 28 May 1969 on the harmonization of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel, as amended by Council Directive 87/198/EEC of 16 March 1987) “*on the grounds that imports of more than 10 liters of beer cannot be regarded as automatically having a commercial character*”. Indeed, the beer was not included among the goods for which the Directive provided quantitative limits (Article 4(1), so that it could be imported in travel between Member States free of turnover and excise duty on condition that the import had not a commercial character and that the total value of the goods did not exceed ECU 390 per person (Article 1(2), meaning that they are intended for personal or family use or as presents (Article 3(2)(b)). The Danish government justified the introduction of the presumption in view of numerous abuses of the right to duty-free allowances committed by travellers (who imported a large quantity of beer free of duty for the purpose of subsequent retail sale) and also the difficulties to conduct case-by-case checks of the (non-)commercial nature. After having recalled that in the area concerned the left powers of Member States are confined to what is assigned to them by that Directive, the Court states that “*the contested measure raises an irrebuttable presumption that an importation has a commercial character where it exceeds 10 liters of beer, which is tantamount to adding to the wording of Article 4 of the directive goods not referred to therein*” (para. 9). In this case, the ECJ does not draw a distinction between binding and not-binding measures, while the Advocate General does in his opinion (Opinion of Mr Advocate General Darmon delivered on 3 July 1990, in particular at para. 18). By supporting the position maintained by the Commission, he observes that “*As the Commission acknowledged at the hearing, it seems reasonable, and in conformity with the directive, for customs officers to be able to presume that over and above a certain quantity an importation has a commercial character, without barring a traveller altogether from furnishing proof to the contrary. The issue here is the difference which exists between laying down a mandatory rule, which precludes consideration of specific situations, and laying down, for instance by means of internal administrative regulations, quantitative criterion which permits a presumptions to be raised without, however, preventing it from being rebutted. The implementation of the latter procedure would not seem to be in any way incompatible with Article 7a of the directive in so far as the possibility for travellers ‘to confirm tacitly or by a simple oral declaration that they are complying with the authorized limits and conditions for the duty-free entitlements may be deemed to be set aside once the limit is reached which in practice raises a simple presumption that an importation has a commercial character. Moreover, the Commission’s Agent has informed the Court that, provided the quantitative limit viewed in those terms corresponds to a level that is reasonable and is not excessively low, the national authorities may be exacting as regards the proof they require to be adduced in order to rebut the presumption of a commercial character*”. Cf. also ECJ 6 December 1990, case C-367/88, in particular at para 9.

customs regulation those presumptions (or similar notions, like fictions or legal definitions) that are conclusive, meaning that they cannot be contested, while this makes safe non-binding guidelines intended to simplify the customs procedure.

Having said this, one could further question whether the response of the Court would be negative also facing a rebuttable presumptions of law.

In this regard, precisely the interest consisting in the simplification of the customs procedure may justify not only practical instructions, but also rebuttable presumptions of law which through the escape of the counterproof would guarantee the concrete situation to be considered. Especially in a field where the tax obligation is owed instantly at the moment of the customs operation, practical instructions and all the more rebuttable presumptions – which, given the normative nature, would imply more certainty for the economic operators - would contribute to speeding up trade.

Looking at the facts of the case in *Kenny Roland Lyckeskog*, the national provision was probably aimed at speeding up the customs procedures at the frontiers. In fact, asking the customs officers to ascertain the price of the goods carried by travellers in their luggage in order to verify if the duty-free tariff applied would have meant excessively burdening them. In this view, the provision of specific maximum quantities for different goods, which if overcome give rise to the customs debt, is able to avoid the difficulties of controls and also to meet the need of certainty to a certain degree. From the perspective of the traveller, which the Court takes into consideration while re-affirming the observations submitted by the parties, such a provision implies that when a quantity of products below the maximum is imported he is not required to provide other evidence that the importation is non-commercial<sup>630</sup>. One may conjecture from this that, *a contrariis*, should a national legislation lay down a rebuttable presumption of commercial nature with regard to imports of a certain quantity of goods which departs from the quantitative limit fixed in the Community provision, it would not be in contrast with the latter insofar as the traveller had the possibility to prove the non-commercial nature of the import. Yet, the Court appears to be inclined to accept non-binding instructions only.

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<sup>630</sup> At para. 31 of the judgment, the Court states that “*the parties which have submitted observations contend that Community law does not preclude non-binding instructions drawn up by the customs authorities indicating, for a particular product, the maximum quantity below which a traveller is not required to provide other evidence that the importation is non-commercial*” and at para. 32 “*Such an analysis of Regulation No 918/83 is in accordance with the reply given to the third person*”.

## **6. Conclusion**

Before exploring the role of national legal presumptions in other areas of taxation, with special reference to the approach of the European Court of Justice, a few general considerations should be emphasized.

As a matter of fact, though the case-law concerning presumptions (or deemed as such), some of which are illustrated in the previous paragraphs, might be indicative of the view *normally* taken by the Court when confronting national presumptive measures, nonetheless, it (the case-law) may reflect contingent circumstances, meaning that the rulings are inextricably linked to the facts of the main proceedings. Hence, one has to be cautious in elaborating general principles or schemes.

In the light of this, the analysis of the case-law has been conducted by bearing in mind the relation between the European Union on the one side, and the national legal orders on the other side, in the context of customs law. Having recalled at the beginning of this section the legal basis, the main characters of customs law and the general principles of Community law applicable, and having reported a few significant judgments of the European Court, we have the necessary ‘tools’ for fixing some lines.

Unlike other fields of indirect taxation, customs law is governed almost entirely at EU level, as the use of a Regulation (having a general and binding nature and directly applicable in each Member State) instead of a Directive renders it also formally evident. If this entails that the positive integration goes further than a mere harmonisation, it nonetheless does not embody an altogether uniformity, at least under few residual aspects. In fact, due to the absence of a Community (administrative) service, Member States continue to play a crucial role in administering customs law, both with legal provisions and administrative measures, as well as with their judicial systems.

Generally speaking, Member States may govern those aspects that explicitly (one for all, the appeal procedure) or implicitly the Customs Code refers to their competence. In addition, they may regulate those areas where the rules of the Code are rudimental or not even existent, in order to fill in the gap.

Among the latter, Member States are engaged with the collection of the customs duties, which not surprisingly represent the major sector of ‘interference’ of national measures with Community customs law. Given the importance of customs duties in financing the common expenditure of the Community and the fact that a percentage of the levies is retained at national level as collection costs, Member States are inclined to introduce

presumptive measures aiming at securing the recovery of the duty by simplifying the procedure of control, assessment and collection. Looking at the observations submitted by the governments in these types of cases, they contend that the Community Customs legislation lays down a minimum harmonisation in the field of customs collection, leaving them the possibility to pursue the recovery in the most effective way possible and possibly to tackle abusive practices.

The room for national provisions is not, however, unlimited, as it has to comply with the principle of equivalence and effectiveness. In this regard, the Court of Justice has clarified, with regard to national measures on the recovery of duties or in general on procedural aspects, that, albeit the absence of relevant provisions of Community law, it falls in the competence of national legal orders to set out the necessary rules, the latter cannot be less effective than those provided for merely internal situations and cannot render impossible or even excessively difficult the implementation of Community legislation or the rights which individuals derive from the direct effect of Community law<sup>631</sup>. This is all the more so where national presumptive provisions fashioned as recovery measures actually embody rules that do not leave the customs obligation unaffected. By presuming, for instance, that the employer is liable for the payment of the levies where his employee infringes customs obligations, the national provision is not a merely procedural measure on the collection of the duty, but it rather touches the customs debt under the subjective point of view.

In this regard, from the case-law on national and also EU presumptive provisions in the field of customs law it results that irrebuttable presumptions and similar concepts, like fictions or legal definitions, are normally susceptible to be inconsistent with the relevant Community law applicable, as they may threaten the effective and uniform application of the latter. Nonetheless, the Court does not disregard the interest grounding such provisions, namely the guarantee of the customs recovery and in general the simplification of the procedures. The latter, together with the legal certainty, is considered by the Court as being in the interest both of the customs authorities entitled to conduct controls and to assess the additional duties owed, and the economic operators themselves. It follows that rebuttable presumptions of law may not be *per se* in contrast with the Community law in the extent to which they embody a balance between the different values in play. Indeed, always generally speaking, they are capable of securing the legal certainty which is fundamental

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<sup>631</sup> See T. Lyons, *EC customs law*, 2 ed., Oxford, Oxford University press, 2008, and in particular at p. 120 et seq.

for traders operating in an international market and for customs authorities entitled to ascertain the facts. At the same time, the possibility to give proof to the contrary may entail the verification of the concrete circumstances and the effective application of the relevant Community law.

However, precisely on this issue the Court, and the same holds true for the European Commission and the Advocate General, seems to overlap the question of the effects assigned to different measures with the question of the contrary proof. When stating that non-binding instructions issued by the customs authorities are consistent with the Community law, as long as they are not an indirect way to introduce an irrebuttable presumption, it mixes up merely administrative practices (or acts) with normative sources (the law).

Though the lack of accuracy in the order of reference may not help, such (at times) non-technical recourse to national categories should be read in the light of the spasmodic statement by the Court of the need to guarantee the primacy and uniformity of Community customs law.

## **Chapter III - Section I - Part II**

### **VAT**

#### **1. VAT and national tax law presumptions**

Valued added tax is commonly deemed as representing a Community tax, meaning that it finds its root in the Community legal order. Indeed, it was introduced from 1967 in order to replace all other national turnover taxes, in view of the realization of the single market. In addition, a quota of the tax collected by Member States falls within the own resources of the European Union.

Similarly to excise duties, VAT is harmonised by means of a directive, which is to be transposed by Member States in their own legal orders. Yet, many of the provisions included in the Directive 2006/112/EC, which is a recast of the Sixth Directive 77/388/EEC and is currently the essential piece of VAT legislation, are directly applicable within the national tax systems, insofar as they clearly recognise rights to taxpayers.

As a matter of fact, more than in the area of excise duties, in the field of VAT there is an extensive and quite detailed legislative body. From this, two main corollaries follow.

Firstly, Member States are requested to faithfully transpose the text of the directive in their own legal order. In the event that Member States are permitted to derogate from a certain provision, they must comply with the procedure envisaged and strictly interpret the exception. Secondly, whereas in the area of direct taxation the shortcoming of harmonisation has contributed to a massive interference of the EUCJ case-law on national legislation through the application of general EU law principles, when it comes to VAT the Court rules based on the set of provisions included in the directive, in addition to general principles.

In this context, the recourse to tax law presumptions by the national legislator is in principle limited by the existence of a detailed set of rules. This statement has, however, to be clarified. Indeed, the extent to which the national presumptive measures are permitted or not varies in relation to the kind of presumption, in particular if rebuttable or irrebuttable. The reason is that while the former mostly impact on the distribution of the burden of proof, the latter irretrievably affect the definition of the situation envisaged in the norm. Besides that, national presumptive measures embody mechanisms which are susceptible to fall either in the derogations from single provisions of the VAT Directive or within the procedural law rules left to the competence of Member States.

As to the first aspect, we will see how a number of national tax law presumptions which the Court has ruled on have been laid down in accordance with a decision of the Council authorising an exception. In fact, the Directive 112/2006/EC contains – and so did the Sixth Directive – several provisions which permit Member States to introduce measures derogating from a certain provision of the Directive for the purpose of simplifying the assessment, securing the payment or combat tax avoidance or evasion, normally on condition that a certain procedure implying a decision of the Council or a proper Committee is followed. Tax law presumptions are precisely the main instruments employed by national legislators to attain such objectives. Once they are introduced into a national legal order, even though fully in accordance with the procedure to be followed, they may nonetheless be found inconsistent with one of the principles inspiring the VAT Community legal system and the decision authorising them to be invalid.

As to the second aspect, the regulation of the exercise of rights set forth in the Directive (e.g. forms, time-limits, procedures) is mainly left in the hand of Member States and their implementing measures. This room may be covered with legal presumptions or similar measures. Nonetheless, in the extent to which such measures restrict the content of rights

that the taxpayer derives from the Directive, then the Court may be called upon to verify their correspondence to the principles governing the system of VAT. In this event, the provision of juridical instruments aimed at securing the effectiveness of EU rights, such as a reasonable division of the burden of proof, the possibility to give proof to the contrary and in general the defence rights, may compensate for the limitation to the substantive content of the right and lead to a positive ruling.

In the light of the foregoing, after having briefly recalled the fundamental principles peculiar to the VAT system, the more significant EUCJ decisions on tax law presumptions (or deemed as such) are examined, in order to infer the interpretative trends regarding the Court's case-law on the matter and to draw some general conclusions.

## 2. EU VAT principles: fiscal neutrality and right of deduction

In the field of VAT, the general principles of Community law apply, such as the principle of non-discrimination, proportionality, legal certainty and legitimate expectations, and recently the (prohibition of) abuse of law. In addition, there is a number of principles peculiar to the system of VAT, which are constantly referred to in the EUCJ case-law, as they embody the reasons for the introduction of such tax and the aim pursued at the same time.

Among these, the principle of fiscal neutrality and the right to deduct the input VAT represent the pillars on which the entire structure of VAT rests.

On several occasions (for example, with regard to reduced rates, exemptions or illegal activities) the EUCJ has reiterated that “*the principle of fiscal neutrality [is] inherent in the common system of VAT*”<sup>632</sup> and Member States are required to transpose the Directive

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<sup>632</sup> ECJ 3 May 2001, C-481/98, *Commission v. France*, at par. 21. In the subsequent paragraph, the Court clarified the content of the principle and agreed with the Commission as to the inclusion of certain sub-principles: “*That principle in particular precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes (see, to this effect, the eighth recital in the preamble to the First Directive and paragraphs 21 and 27 of the judgment in Case C-283/95 Fischer [1998] ECR I-3369). (...) The principle of fiscal neutrality for that reason also includes the other two principles invoked by the Commission, namely the principles of VAT uniformity and of elimination of distortion in competition. Cf. ECJ 29 June 1999, case C-158/98, Coffeeshop Siberië, at para 21, where the Court held that “the principle of fiscal neutrality prevents any general distinction in the levying of VAT as between lawful and unlawful transactions. Consequently, the mere fact that conduct amounts to an offence is not sufficient to justify exemption from VAT. The exception applies only in specific situations where, owing to the special characteristics of certain products or certain services, any competition between a lawful economic sector and an unlawful sector is precluded”.* Given the fact that the activity to be taxed was the supply of services consisting of making a place available for the sale of narcotic drugs, rather than the sale of those products per se, the Court concluded (para 22) that the former fell in the scope of VAT in accordance with the neutrality criterion: “*In this case, however, there is no such special situation. Renting out a place intended for commercial activities is, in principle, an economic activity and therefore falls within the scope of the Sixth Directive. The fact that*

concerned in compliance with it. Basically, it refers to the conditions of competition for economic operators, which are equal by virtue of the fact that in each Member State similar goods and services bear the same tax burden, irrespective of the length of the production and distribution chain<sup>633</sup>.

The neutrality of VAT upon economic operators is guaranteed through the mechanism of the taxation on consumption on the one side, and the deductibility of the input VAT on the other side. This manifestly results by Article 1, para 2 of the Directive 112/2006/EC, pursuant to which “*The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged. On each transaction, VAT, calculated on the price of the goods or services at the rate applicable to such goods or services, shall be chargeable after deduction of the amount of VAT borne directly by the various cost components*”.

In fact, VAT is a tax which ends up being borne by the consumers, who are charged with it on occasion of receiving the supply of goods and services falling into the scope of the Directive and are not allowed any deduction. Instead, the tax does not in principle weigh on economic operators, though they bear several administrative and accounting requirements and are formally the persons liable to pay VAT to the State when they carry on taxable operations. From this perspective, they are a sort of VAT collector in place of the State, thereby playing a pivotal role in view of the VAT recovery.

On the other hand, from the tax for which the economic operators are liable in respect of their taxable operations, they are entitled to deduct the amount of tax invoiced to them in relation to goods or services supplied to them or (intra-Community) acquired or imported by them in the exercise of their economic activity.

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*the activities pursued there constitute a criminal offence, which may make the renting unlawful, does not alter the economic character of the renting and does not prevent competition in the sector, including that between lawful and unlawful activities. Not to charge VAT thereon would undermine the principle of fiscal neutrality of the VAT scheme”.*

<sup>633</sup> See No (7), Preamble to the Directive 112/2006/EC: “*The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain*”. That neutrality is interrelated with the right of deduction results immediately from the Preamble, which at No (30) provides that “*In order to preserve neutrality of VAT, the rates applied by Member States should be such as to enable, as a general rule, deduction of the VAT applied at the preceding stage*”. Thus, the principle of fiscal neutrality requires economic decisions to not be influenced by tax factors.



The right to deduct given to taxable persons embodies in this way a fundamental principle of the EU VAT system. As said, it is interlinked with the principle of fiscal neutrality and actually it is a corollary of the latter. Since its earlier decisions, the EUCJ has underlined that the deduction system “*is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities*”<sup>634</sup> and that limitations and derogations to such right are consented to only if explicitly envisaged in the Directive and in any case are to be interpreted strictly<sup>635</sup>.

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<sup>634</sup> ECJ 14 February 1985, C-268/83, Rompelman, at para 19, which continued as follows: “*The common system of value-added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way*”. In the same decision, the Court stated at the outset (para 16) that “*a basic element of the VAT system is that VAT is chargeable on each transaction only after deduction of the amount of the VAT borne directly by the cost of the various components of the price of the goods and services and that the deduction procedure is so designed that only taxable persons may deduct the VAT already charged on the goods and services from the VAT for which they are liable*”.

<sup>635</sup> The right to deduct arises at the moment when the deductible tax becomes chargeable, it must be exercised immediately and it is confined to goods and services that are used for the purpose of taxable transactions (direct link between a particular input and a particular output transaction). See Articles 167 et seq. Directive 112/2996/EC. *Ex multis*, ECJ 11 July 1991, C-97/90, Lennartz. At para 27, in particular, the Court held that “*As the Court observed in its judgment in Case 50/87 Commission v France [1988] ECR 4797, paragraphs 16 and 17, it is apparent from the scheme of the Sixth Directive, and in particular from Articles 4 and 17, that in the absence of any provision empowering the Member States to limit the right of deduction granted to taxable persons, that right must be exercised immediately in respect of all the taxes charged on transactions relating to inputs. Such limitations on the right of deduction must be applied in a similar manner in all the Member States and therefore derogations are permitted only in the cases expressly provided for in the directive*”. Cf. ECJ 8 June 2000, C-98/98, Mindland Bank. See also ECJ 21 March 2000, Joined cases C-110/98 to C-147/98, Gabalfrija. At issue was a national legislation that, in the event of an economic activity’s start-up, conditioned the exercise of the right of deduction to heavy administrative burdens (in terms of request and time-limits), and envisaged the deferment of the deduction or even the disregarding of the right amongst the possible consequences of the infringement of such fulfilments. As such, it was found in contrast with the principle of proportionality, as embodied an excessive restriction to the right of deduction. The decision gives to the Court the occasion for reiterating statements of previous judgments on the matter as follows (paras 43-47): “*It should be noted, first, that the Court has consistently held that the right to deduct provided for in Article 17 et seq. of the Sixth Directive is an integral part of the VAT scheme and in principle may not be limited. The right to deduct must be exercised immediately in respect of all the taxes charged on transactions relating to inputs (see, in particular, Case C-62/93 BP Supergas v Greek State [1995] ECR I-1883, paragraph 18). Next, it must be recalled that the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way (see, in particular, Case 268/83 Rompelman v Minister van Financiën [1985] ECR 655, paragraph 19, and Case C-37/95 Ghent Coal Terminal [1998] ECR I-1, paragraph 15). As the Court held in Rompelman, paragraph 23, and in Case C-110/94 INZO v Belgian State [1996] ECR I-857, paragraph 16, the principle that VAT should be neutral as regards the tax burden on a business requires that the first investment expenditure incurred for the purposes of and with the view to commencing a business must be regarded as an economic activity and it would be contrary to that principle if such an activity did not commence until the business was actually exploited, that is to say until it began to yield taxable income. Any other interpretation of Article 4 of the directive would burden the trader with the cost of VAT in the course of his economic activity without allowing him to deduct it in accordance with Article 17, and would create an arbitrary distinction between investment expenditure incurred before actual exploitation of a business and expenditure incurred during exploitation. Article 4 of the Sixth Directive does not, however, preclude the tax authority from requiring objective evidence in support of the declared intention to commence economic activities which will give rise to taxable transactions. In that context, it is important to state that a taxable person acquires that status definitively only if he made the*

### 3. EU law principles in the field of VAT: the principles of proportionality and the principle of effectiveness

Although in interpreting the VAT system the EUCJ may count on a detailed legislative body, it is not rare the recourse to general principles of EU law in order to solve questions which do not find an immediate answer in a provision of law and imply a balance between different interests in play.

An instructive example of this is represented by the event that a Member State avails itself of a derogation from the Directive in order to simplify the recovery of the tax or to prevent fraud or avoidance. In cases like that the Court bases its decisions on general principles peculiar to VAT (for instance, when the national measure restricts the right of deduction) and also on general EU law principles, some of which have been mentioned at the beginning of the previous paragraph.

Amongst such principles, for our purpose a pivotal role is played by the principle of proportionality and the principle of effectiveness, as they are relevant in one way or another for the evaluation of tax law presumptions.

The essence of the proportionality principle has been illustrated at the beginning of this third chapter, with particular regard to the rule of reason applied in direct tax cases, of which it constitutes the last step. Nonetheless, the general character of such principle implies that it is increasingly invoked by the Court in its judgments even in the area of VAT. This is especially in relation to national measures limiting the rights conferred by the VAT system to the taxable persons or governing the forms of exercise of such rights. The consistency of measures of this kind with the VAT legislation very much depends on their capacity of balancing the attainment of fiscal interests (to the recovery, to combat tax

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*declaration of intention to begin the envisaged economic activities in good faith. In cases of fraud or abuse, in which, for example, the person concerned, on the pretext of intending to pursue a particular economic activity, in fact sought to acquire as his private assets goods in respect of which a deduction could be made, the tax authority may claim repayment of the sums retroactively on the ground that those deductions were made on the basis of false declarations (Rompelman, paragraph 24, and INZO, paragraphs 23 and 24). It follows that a person who has the intention, confirmed by objective evidence, to commence independently an economic activity within the meaning of Article 4 of the Sixth Directive and who incurs the first investment expenditure for those purposes must be regarded as a taxable person. Acting in that capacity, he has therefore, in accordance with Article 17 et seq. of the Sixth Directive, the right immediately to deduct the VAT payable or paid on the investment expenditure incurred for the purposes of the transactions which he intends to carry out and which give rise to the right to deduct, without having to wait for the actual exploitation of his business to begin".* The Court then recognised that Member States are permitted, pursuant to Article 22, para 8 Sixth Directive, to introduce measures aimed at ensuring the correct levying and collection of VAT and at preventing fraud, but they must not go beyond what is necessary to attain such objectives. In other words, *"They may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT, which is a fundamental principle of the common system of VAT established by the relevant Community legislation"*.

avoidance or evasion etc.) with the most reduced sacrifice of the EU right concerned. Put otherwise, national measures affecting principles or rights that the single taxable persons derive from the VAT Directive may be deemed as consistent with the latter insofar as they are appropriate to pursue the objective for which the derogation is permitted, necessary to pursue it and no alternative measures that are less restrictive may be envisaged<sup>636</sup>.

Therefore, the content of the principle does not vary in relation to the area in which it is applied. There are slight differences, though. For instance, whereas in direct taxation the proportionality of the national measure is normally confronted with respect to Treaty freedoms, in the field of VAT the effects of such measure are confronted with a right whose content is often regulated in detail at EU level.

Notwithstanding this, the outcomes of the EUCJ's reasoning based on the proportionality principle are not easily predictable. On the other hand, when the Court has the occasion to depart from the strict wording of the VAT legislation, it has at its disposal a wider manoeuvre for a teleological interpretation<sup>637</sup>.

Looking at tax law presumptions, the evaluation of proportionality entails a severe examination of the national measure, which indeed is at times left to the judge of the main case. In fact, an overall reading of such measure may reveal that a limitation to the content of a certain right is not systematic but founded on specific circumstances (e.g. certain indices of fraud), or that it constitutes a good compromise between the need for simplification and the recognition of the right, or that it is accompanied by procedural instruments (e.g. the hearing of the taxpayer during the administrative proceedings, the proof to the contrary) in order to safeguard the effectiveness of the right concerned.

Precisely the principle of effectiveness represents the other general principle relevant in order to gain the EUCJ's interpretative trends in relation to tax law presumptions. Although it is not often invoked in VAT case-law, it appears to permeate especially those decision where at issue are procedural rules that create obstacles to the exercise of a right conferred to taxable persons by the VAT directive.

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<sup>636</sup> For an in-depth examination of the principle of proportionality in the field of VAT, see A. MONDINI, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, Pisa, Pacini editore, 2012.

<sup>637</sup> Meaning a method "that entails an interpretation in light of the objectives, purposes and aims of the provisions of Community law". R. de la Feira, *The EU VAT System and the Internal Market*, Amsterdam, IBFD Doctoral Series, No 16, 2009, 261. The Author identified three kinds of interpretative methods adopted by the ECJ in reaching its decisions on VAT cases: the strict interpretation, the historical interpretation, and the teleological interpretation. The decisions handed down employing the last method have caused the most significant impact on the VAT system. They are based on the purpose of the provision concerned, the objective of the Directive, and above all on the principles of the EU VAT system and the general principles of EU law.

#### **4. Scope of derogations from the VAT Directive and room for tax law presumptions**

In the Preamble to the VAT Directive, at the recital No (59), it is stated that “*Member States should be able, within certain limits and subject to certain conditions, to introduce, or to continue to apply, special measures derogating from this Directive in order to simplify the levying of tax or prevent certain forms of tax evasion or avoidance*”.

Thus, holding the obligation of Member States to transpose the provisions of the Directive in their own legal systems, they are nonetheless permitted to derogate from one or more of such provisions, provided that the conditions laid down at EU level are observed. The limits which No (59) refers to are presumably the principles proper to the VAT system as well as the general EU law principles. The conditions may diverge depending on the type of derogation, and, if provided, they may consist of a supervision by a special committee or a decision of the Council. Even the general interests which solely can justify any derogations from the Directive are established, so that national measures may depart from the wording of the VAT legislation insofar as they are intended either to simplify the procedures or to combat frauds.

Accordingly, the Directive 2006/112/EC includes a number of articles dealing with specific aspects of the tax and governing the possible derogations. Some of these articles replace provisions included in the Sixth Directive (e.g. for deductions, persons liable to tax etc.), whereas some others have been amended or introduced *ex novo* (e.g. the transfer pricing for VAT taxable amount).

The most general provisions in this regard are Articles 394 and 395, Directive 2006/112/EC. Article 394 authorizes Member States to retain the special measures aimed at simplifying the procedure for recovering VAT or preventing tax evasion or avoidance schemes which were in force at 1 January 1977. However, it makes this conditional to the double circumstances that they have been notified by the Commission prior to 1 January 1978 and that they do not considerably affect the amount of the tax revenue collected by the single Member State on consumers. Besides the already (i.e. before the Sixth Directive) existing measures, Member States are permitted to introduce *ex novo* measures derogating from the Directive with the same aim (simplification of tax collection, prevention of certain forms of tax evasion or avoidance), provided that they obtain the authorization by the Council on a proposal from the Commission and that, with particular regard to the provisions for the simplification of tax recovery, they do not impact, except to a slight

extent, on the overall amount of the tax revenue collected at the stage of final consumption<sup>638</sup>.

The above articles apply in the matter of derogations insofar as other specific provisions are not provided. In fact, the Directive includes further rules governing derogations from specific aspects of taxation.

Among these, Article 273, Directive 2006/112/EC, placed under the Title XI dedicated to the obligation of taxable persons and certain non-taxable persons<sup>639</sup>, stipulates that Member States are permitted to impose further obligations, in respect to those established by the Directive, which are necessary to secure the correct collection of the tax and to prevent evasion. This is on the condition that such obligations do not discriminate transactions between Member States with respect to domestic transactions, or do not create formalities connected with the crossing of frontiers with regard to intra-EU trades, save for the prohibition to enact additional invoicing obligations<sup>640</sup>. We will see how this provision represents – and has already, in the previous format included in the Sixth Directive – the legal basis for extending the obligation to pay VAT on a person other than

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<sup>638</sup> See Article 395, para 1. The provision requests a unanimous decision of the Council. In the subsequent paragraphs of the same article, the fulfilments to be complied with by a Member State willing to introduce a special measure and the procedure to be followed are regulated in detail. They read as follows: “2. A Member State wishing to introduce the measure referred to in paragraph 1 shall send an application to the Commission and provide it with all the necessary information. If the Commission considers that it does not have all the necessary information, it shall contact the Member State concerned within two months of receipt of the application and specify what additional information is required. [2<sup>nd</sup> ind.] Once the Commission has all the information it considers necessary for appraisal of the request it shall within one month notify the requesting Member State accordingly and it shall transmit the request, in its original language, to the other Member States. 3. Within three months of giving the notification referred to in the second subparagraph of paragraph 2, the Commission shall present to the Council either an appropriate proposal or, should it object to the derogation requested, a communication setting out its objections. 4. The procedure laid down in paragraphs 2 and 3 shall, in any event, be completed within eight months of receipt of the application by the Commission”. Clear time-limits by which the EU institutions must act are laid down in order to secure in view of the Member State’s interest to legal certainty, as affirmed in No (60) of the Preamble to the VAT Directive. It reads as follows: “In order to ensure that a Member State which has submitted a request for derogation is not left in doubt as to what action the Commission plans to take in response, time-limits should be laid down within which the Commission must present to the Council either a proposal for authorisation or a communication setting out its objections”. It has to be recalled that Article 395 corresponds, albeit with some amendments, to Article 27 of the Sixth Directive, which is relied on in many of the decisions analysed in the following. Cf. Also Article 199 VAT Directive.

<sup>639</sup> This Title of the Directive includes numerous provisions dealing with the obligation to pay VAT to tax authorities and accounting fulfilments, with particular regard to the issuing of the invoice.

<sup>640</sup> As this matter is fully harmonized in the Directive. The limitations are intended to balance the flexibility in allowing Member States to introduce special measures with the need to safeguard the uniform application of the VAT system. Cf. No (45) of the Preamble to the Directive 112/2006/EC, pursuant to which “The obligations of taxable persons should be harmonised as far as possible so as to ensure the necessary safeguards for the collection of VAT in a uniform manner in all the Member States.”

the one liable to tax, which as a general rule coincides with any taxable person carrying out a taxable operation<sup>641</sup>.

Turning to the taxable base, the VAT Directive dedicates several provision to the determination of the taxable amount for supply of goods and services, intra-Community acquisitions of goods and importation of goods. As a rule, a subjective value applies, which refers to the consideration agreed upon by the parties. This results from Article 73, Directive 112/2006/EC, pursuant to which “*In respect of the supply of goods or services, other than as referred to in Articles 74 to 77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply*”. In further articles, particular situations are envisaged and regulated, such as self-supplies or private use etc., to which an objective value applies, like the purchase price, the cost price, or the market value.

Besides those provisions, where the EU legislator instructs Member States as regards the taxable amount to be considered, Article 80 of the VAT Directive is particularly interesting. It has to be noted that the taxable amount may be altered by the parties of a certain transaction in view of different factors, such as the alteration of the pro-rata fraction. For this reason, it is not rare that the national legislator has recourse to a minimum taxable base or a certain forfait as criteria for the determination of the taxable amount. Indeed, it goes without saying that abusive practices may be avoided by establishing an objective value to be adopted by the parties. In the light of the foregoing, Article 80 has been inserted into the Directive 2006/112/EC, by crystallizing certain anti-avoidance rules that Member States have over the last years introduced as derogation from the Sixth Directive pursuant to Article 27. Article 80 seems to introduce, albeit as an option for Member States, a sort of transfer pricing for VAT purposes, thereby implicitly suggesting that such instrument is suitable to combat tax fraud. It entitles Member States to (re)determine the taxable amount at the open market value<sup>642</sup> when a certain transaction takes place among connected parties

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<sup>641</sup> See, No (44) of the Preamble to the VAT Directive, which provides that: “*Member States should be able to provide that someone other than the person liable for payment of VAT is to be held jointly and severally liable for its payment*”, and Article 205 VAT Directive, pursuant to which “*In the situations referred to in Articles 193 to 200 and Articles 202, 203 and 204, Member States may provide that a person other than the person liable for payment of VAT is to be held jointly and severally liable for payment of VAT*”. Cf. Article 21, para 3, of the Sixth Directive.

<sup>642</sup> Which in Article 72 is defined as follows: “*For the purposes of this Directive, ‘open market value’ shall mean the full amount that, in order to obtain the goods or services in question at that time, a customer at the same marketing stage at which the supply of goods or services takes place, would have to pay, under conditions of fair competition, to a supplier at arm’s length within the territory of the Member State in which*

and one of the following conditions alternatively applies: a) the consideration is lower than the open market value, VAT has been charged and the recipient of the supply does not have a full right of deduction; b) the consideration is lower than the open market value, the supply is exempt from VAT and has not been charged, and the supplier has not a full right to deduct; c) the consideration is higher than the open market value, VAT has been charged and the supplier has not a full right to deduct<sup>643</sup>.

Ultimately, with regard to the right of deduction, any limitation or derogation from the provisions of the Directive may be introduced only insofar as they are envisaged in the Directive and in accordance with the necessary requirements in terms of procedure therein. Given the pivotal role recognised to such right in the VAT system and within the EUCJ's case-law, Article 176 of the Directive 112/2006/EC, is quite strict in providing that "*The Council, acting unanimously on a proposal from the Commission, shall determine the expenditure in respect of which VAT shall not be deductible.*"<sup>644</sup>

As we will see later on, various national presumptive measures aimed at simplifying the determination of the tax, reducing the administrative or probative burden and tackling abusive schemes, are precisely targeted at the right to deduct. In particular, the national interests to simplification and prevention of abuse emerge facing mixed-use goods or services (i.e. used for both business and private purposes) or situations where the taxable person carries on both transactions in respect of which VAT is deductible and transactions in respect of which VAT is not deductible. This being the case, the ascertainment of the correct amount of VAT that is to be deducted according to the rules of the Directive may

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*the supply is subject to tax. Where no comparable supply of goods or services can be ascertained, 'open market value' shall mean the following: (1) in respect of goods, an amount that is not less than the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost price, determined at the time of supply; (2) in respect of services, an amount that is not less than the full cost to the taxable person of providing the service."*

<sup>643</sup> According to A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, cited above, 375, the provision uses the technique of the pure typification or of the irrebuttable presumption (of the existence of a risk of fraud or tax avoidance), according to the method of the generalization. Under this format, the provision does not deem as necessary permitting the taxpayer to escape the application of the revaluation by demonstrating the divergence between the concrete/personal situation and the situation envisaged in the norm (i.e. there is not any risk of fraud). In this regard, the provision leaves the question open as to whether national measures fixing the minimum taxable amount at the market value are requested or not to allow the proof to the contrary. The question arises in particular as the provision does not fix a presumption of sham (of the consideration), but it rather presumes that the effective consideration has been manipulated in view of the sole aim of obtaining tax advantages.

<sup>644</sup> It continues by stating that "*VAT shall in no circumstances be deductible in respect of expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment. Pending the entry into force of the provisions referred to in the first paragraph, Member States may retain all the exclusions provided for under their national laws at 1 January 1979 or, in the case of the Member States which acceded to the Community after that date, on the date of their accession*". This article replaces para 6 of Article 17, Sixth Directive.

be hard on the side of the tax administration, and the taxpayer may on the other side be tempted to carry on abusive practices. For these reasons, when the above situations occur Member States tend to limit in various forms the right of deduction, by excluding it or more often by establishing the percentage of deduction, a forfait, or other simplified methods of determination.

Having illustrated to what extent Member States are allowed to depart from the provision of the Directive, it must be observed that, generally speaking, the normative techniques which the legislator has recourse to the most are legal presumptions, both irrebuttable and rebuttable, and similar categories as defined in the previous chapter, like typifications or legal definitions or predeterminations.

Below, three main groups of possible derogations from the Directive, which may be construed by national legislators as presumptive measures, are examined through the reference to the EUCJ case law and with a view to infer the interpretative trends. They are the provisions concerning the obligations for the payment of VAT, the taxable amount and the right of deduction. Especially with regard to the last issue, there is a wide case law on national presumptive measures limiting such right, not only by means of substantive rules (affecting directly the position of the taxpayer) but also through rules falling into the 'formal' tax law, i.e. governing the procedures (assessment, recovery) but equally susceptible to impact on the content of the right.

##### **5. Possible legal presumptions as to the joint and several tax liability. The FTI case**

Among the measures aimed at securing the tax recovery and above all preventing tax avoidance or evasion, there are those extending the liability to pay VAT to a person other than the taxable person, for instance a party of the transaction or even a third party. A measure of this kind may be construed under the form of a typification or a legal definition, an assimilation, or a presumption of joint and several liability to pay of a certain person based on objective indices of abusive conduct. Always generally speaking, the presumption may be irrebuttable, thereby presuming in an irrefutable way that the non-liable person for that particular operation shared the avoidance aim. In this case, however, the fact-base should be drawn as specifically as possible, so as to render the presumption proportionate and in line with the purpose of combating tax avoidance. A provision systematically extending the obligation to pay to a person other than the one liable to pay would hardly be deemed proportionate. Yet, the absence of the possibility for the taxpayer



concerned to give proof to the contrary might be deemed as infringing the principle of proportionality. By contrast, a rebuttable presumption, which entails the possibility to contest the result of the inference, may overcome the proportionality test, at least insofar as the contrary proof may be effectively given.

At the beginning of this third chapter, some judgments concerning the distribution of the probative burden facing VAT abusive schemes, wherein one the party who was denied tax benefits was in good faith, have been recalled. Those cases put the focus on the possibility to disregard a certain right when a party – *in casu*, claiming the right of deduction – involved in a VAT abusive scheme did not know or could not reasonably know that the transaction was part of a tax evasion.

Now, the question is more precisely whether and above all to what extent national legislative measures that presume the joint and several liability to pay of a person other than the person liable to VAT, based on certain circumstances, are in line with the EU law. To answer this question, some indications may be inferred from the Federation Technological Industries case<sup>645</sup>, where at issue was a national legislation including various provisions combating the missing-trader intra-Community fraud. Among these, it established the joint and several liability of traders in the supply chain of certain goods where the tax went unpaid and the recipient of the supply at the time of the supply “*knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid*”. To this purpose, it added that “*a person shall be presumed to have reasonable grounds for suspecting matters to be as mentioned in paragraph (b) of that subsection if the price payable by him for the goods in question (a) was less than the lowest price that might reasonably be expected to be payable for them on the open market, or (b) was less than the price payable on any previous supply of those goods*”.

The Court recognized that Member States are permitted, under the conditions that at the time of the proceedings were laid down in Article 21, para 3, Sixth Directive, to make a person, other than the one actually liable, jointly and severally liable to pay VAT. Nonetheless, the exercise of such option envisaged in the Directive must comply with the general principles of Community law, among which are the principles of proportionality and legal certainty. The former is particularly relevant in resolving the question of the above national measure’s compatibility with EU law. The Court held that (paras 30-31-32):

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<sup>645</sup> ECJ 11 May 2006, case C-384/04, Federation Technological Industries.

“With more particular regard to the principle of proportionality, it must be pointed out that, whilst it is legitimate for the measures adopted by the Member State, on the basis of Article 21(3) of the Sixth Directive, to seek to preserve the rights of the public exchequer as effectively as possible, such measures must not go further than is necessary for that purpose (see, to that effect, *Molenheide and Others*, paragraph 47).

While Article 21(3) of the Sixth Directive allows a Member State to make a person jointly and severally liable for the payment of VAT if, at the time of the supply, that person knew or had reasonable grounds to suspect that the VAT payable in respect of that supply, or of any previous or subsequent supply, would go unpaid, and to rely on presumptions in that regard, it is none the less true that such presumptions may not be formulated in such a way as to make it practically impossible or excessively difficult for the taxable person to rebut them with evidence to the contrary. As the Advocate General observed in point 27 of his *Opinion*, those presumptions would, *de facto*, bring about a system of strict liability, going beyond what is necessary to preserve the public exchequer's rights.

Traders who take every precaution which could reasonably be required of them to ensure that their transactions do not form part of a chain which includes a transaction vitiated by VAT fraud must be able to rely on the legality of those transactions without the risk of being made jointly and severally liable to pay the VAT due from another taxable person (see, to that effect, *Joined Cases C-354/03, C-355/03 and C-484/03 Optigen and Others* [2006] ECR I-483, paragraph 52).”

Having ruled this, the Court concluded by referring to the judge of the main proceedings the ascertainment of the compatibility of the national measure with the principles of EU law indicated. At any rate, it appears to suggest that even a rebuttable presumption is not *per se* compatible with the principle of proportionality. To this end, the taxpayer must have the concrete possibility to exercise his defence rights. The proportionality, in other words, is ascertained also as regards the means (are all the means of proof available?) and object (is it a positive or a negative fact to be proved?) of the contrary proof<sup>646</sup>.

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<sup>646</sup> As observed by A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, cited above, 404, the EUCJ's jurisprudence rejects a system of strict liability, as it is not proportionate in respect of the aim of combating tax evasion. But at the same time, it requests the means and content of the contrary proof (or more in general the evidence for avoiding the tax liability) to be construed as objective and 'positive', so as to allow the taxpayer the proof that he took all the precautions that could be reasonably asked of him to ensure that the operation(s) is not part of a tax evasion. This format paradoxically is a reminder of the proof normally required to rebut the presumption of liability peculiar to the hypotheses of strict liability.

### **5.1 The Vlaamse Oliemaatschappij NV case**

As said, in principle, the joint and several liability may be established even upon a third party that was in contact with a certain transaction. In this event, the liability of that party should nonetheless ground all the more on objective circumstances indicating the awareness of involvement in an abusive scheme, which was conceived by one or more parties carrying on the transaction concerned. Moreover, the third party bearing the joint and several liability should be allowed to demonstrate his non-involvement in the tax evasion.

In this regard, it is worth mentioning the decision handed down by the EUCJ in the Vlaamse Oliemaatschappij NV case<sup>647</sup>. At issue was Article 51-bis, para 3, of the Belgian VAT Code, which provided that, in case of warehousing arrangements other than customs warehousing, the warehouse keeper, the person responsible for the transport of the goods from the warehouse, as well as, where applicable, his principal, are jointly and severally liable towards the State for the payment of the tax, together with the persons who are liable for the tax. On the basis of such provision, the Belgian tax authorities proceeded to recover from the warehouse-keeper the unpaid VAT on goods supplied for valuable consideration and released by the (insolvent) owner from the warehouse where they had been stored.

The EUCJ's decision does not differ from the ruling in Federation Technical Industries examined above.

It must be observed that at first sight the provision appeared not to be technically construed as a presumption, but at most as a legal definition, as it merely imposed the liability to pay on a party different than the one initially liable to pay. Yet, the ruling on such provision is significant, because it seems to reflect a certain 'preference' of the Court for presumptive measures which permit the taxpayer to demonstrate that the concrete case does not correspond to the situation envisaged in the norm. On the other hand, even when the liability of a third party is established by means of a mechanism other than a presumption, it has nonetheless a presumptive ratio, meaning that it is based on the presumption that the third party (the warehouse-keeper, for example) did not comply with one of his (juridical) duties, such as taking the necessary precautions not to get involved in a fraud. If this is the case, the national legislation has to let the taxpayer prove that he took all the measures which could reasonably be asked of him to avoid that result<sup>648</sup>.

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<sup>647</sup> ECJ 21 December 2011, case C-499/10, Vlaamse Oliemaatschappij NV.

<sup>648</sup> A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, cited above, 403, observes that from the judgment in Federation Technical Industries a dichotomy between the joint

In reaching the above conclusion, the Court makes reference to the principle of legal certainty, and above all to the principle of proportionality, which entails that “*Member States must employ means which, whilst enabling them effectively to attain the objectives pursued by their domestic laws, cause the least possible detriment to the objectives and principles laid down by the relevant European Union legislation*”<sup>649</sup>.

The focus is once again on the effects of the provision, which are not proportionate in respect of the aim to combat tax evasion. The EUCJ held, indeed, that (para 24):

“(…) *national measures which bring about, de facto, a system of strict joint and several liability go beyond what is necessary to preserve the public exchequer’s rights (see Federation of Technological Industries and Others, paragraph 32). Imposing responsibility for paying VAT on a person other than the person liable to pay that tax, even where that person is an authorised tax warehouse-keeper bound by the specific obligations referred to in Directive 92/12, without allowing him to escape liability by providing proof that he had nothing whatsoever to do with the acts of the person liable to pay the tax must, therefore, be considered contrary to the principle of proportionality. It would clearly be disproportionate to hold that person unconditionally liable for the shortfall in tax caused by acts of a third party over which he has no influence whatsoever (see, to that effect, Netto Supermarkt, paragraph 23).*”

On the contrary, the Court found to be in line with the principle of proportionality requiring from the person other than the one initially liable to pay the VAT a duty of

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liability to pay on the one side, and the obligation to provide securities, on the other side, emerges, as the latter implies the former. In his opinion, such dichotomy can be explained only by attributing to the joint liability to pay VAT a foundation different from the mere guarantee for a debt. This theory, he argues, finds a confirmation in the *Vlaamse Oliemaatschappij NV* decision, where it has been held that a third party (the warehouse-keeper) may not be made liable to pay VAT debt instead of the taxable person (the owner of the goods stored in the warehouse) without a participation, albeit indirect and with negligence or in non-good faith, of the former to the tax fraud. See *Id.*, *Falso materiale e ideologico nelle frodi Iva e tutela dell’affidamento e della buona fede del contribuente nell’apparenza di situazioni fattuali e giuridiche prodotta da terzi*, cited above, p.1788, where he argues that the issue of the distribution of liabilities among the economic operators, when a fraud is ascribable to one of the parties of the transaction or even to a third party, appears to be faced through two different ‘juridical models’. On the one side, the EU model, which make the (joint) liability to pay conditional to the infringement of a duty of diligence and the awareness (albeit potential) of the fraud. Under this pattern, the status of good-faith or mala fide are relevant, but there are not clear indications as to what kind of objective elements could ground the existence of one subjective status or another. For this reason, only rebuttable presumptions are conceivable, and not even irrebuttable ones. On the other side, the national model, which “*instead of explicitly laying down irrebuttable presumptions of participation or knowledge to the fraud committed by another party (or, at most, with a limited contrary proof) prefers conceal them by introducing specific and objective event giving rise to the liability to pay of the supplier or the recipient (see Article 60-bis, Italian D.P.R. No 633/72) when the other contracting party does not comply with his obligation to pay. In the perspective of the taxpayers’ protection, the former model appears to guarantee more than the second one that the aim of combating tax evasion is pursued in accordance with the proportionality principle*”.

<sup>649</sup> Paragraph 21 of the judgment.

diligence, consisting in doing what is necessary in order to exclude that he is taking part in a tax evasion. By illustrating the content of the duty of diligence which a national measure may impose on the third party, the Court also suggests the content of the possible contrary proof to be given by the latter. Indeed, before referring to the national judge the ascertainment as to the proportionality of the national measure pursuant to the criteria indicated in the decision, the EUCJ concluded that “*the fact that the person other than the person liable to pay the tax acted in good faith, exhibiting all the due diligence of a circumspect trader, that he took every reasonable measure in his power and that his participation in fraud is excluded are important points in deciding whether that person can be obliged to account for the VAT owed*”<sup>650</sup>.

Following the above judgment, Article 51-bis, para 3, CTVA, has been amended by adding a further indent which permits the third party held by tax authorities jointly and severally liable for unpaid VAT debt to escape from the liability by proving that he acted in good faith and was not guilty of fault or negligence<sup>651</sup>.

Notably, the Italian legislation in the field of VAT includes a provision concerning the liability to pay of a person different from the taxable person. Article 60-bis, of the Presidential Decree No 633/72 provides, with regard to the goods that are to be identified in a ministerial decree, that when the supplier does not pay the VAT on goods sold at a

<sup>650</sup> Paragraph 21 of the judgment.

<sup>651</sup> The French version of Article 51-bis, para 3, CTVA reads as follows: “*Dans le régime de l'entrepôt autre que douanier, l'entreposeur des biens, la personne qui se charge du transport des biens hors de l'entrepôt ainsi que son mandant éventuel sont solidairement tenus au paiement de la taxe envers l'Etat avec la personne qui en est redevable en vertu des articles 51, § 1er, 1° et 2°, § 2, alinéa 1er, 3°, 4° et 5°, ou 52, § 1er, alinéa 2. Sous réserve de l'article 55, § 4, alinéa 2, la personne visée à l'alinéa 1er qui démontre sa bonne foi ou l'absence de faute ou de négligence dans son chef est déchargée de la responsabilité solidaire* ». According to I. Lejeune, S. Vandenberghe, T. Racquet, *Limited Third-Party Liability in EU VAT Matters*, *International Vat Monitor*, 2012, 397 et seq., who commented on the judgment of the ECJ in the case *Vlaamse Oliemaatschappij NV*, the effect of such decision ‘*is not limited to the joint and several VAT liability of keepers of excise duty and VAT warehouses. The same principles should equally apply to all other third-party liabilities for VAT debts that are laid down by the national VAT legislation, such as the unconditional joint liability of VAT representatives (article 55 of the Belgian VAT Code), of anyone who is also liable for payment of import duties (article 68 of the VAT Code and article 8 of Royal Decree No. 7) and of suppliers and customers involved in supplies of goods or services, as the case may be*’ (at p. 398). They also underline how the Belgian legal provision on chain liability is now aligned with the Court’s decision in the case *Federation Technological Industries*. The reference is to Article 51-bis, para 4, CTVA, introduced with the Law 20 July 2006, pursuant to which “*Tout assujetti est solidairement tenu d'acquitter la taxe avec la personne qui en est redevable en vertu de l'article 51, §§ 1er et 2, si, au moment où il a effectué une opération, il savait ou devait savoir que le non-paiement de la taxe, dans la chaîne des opérations, est commis ou sera commis dans l'intention d'éluder la taxe*”. It must be noted that, as regards to Article 68 and Article 8 of the Royal decree mentioned by the Authors, the latter has been amended by Article 4, Royal decree 13 June 2013 (M.B. 24.06.2013, p. 40184). Article 8, para 2 of the Royal decree currently provides as follows: “*Les personnes visées au paragraphe 1er, alinéa 1er, 1° à 3° et alinéa 2, qui démontrent l'absence de faute ou de négligence dans leur chef, sont déchargées de la responsabilité solidaire. En tout état de cause, ces personnes ne peuvent être déchargées de cette responsabilité lorsqu'elles savaient ou devaient savoir que la taxe due à l'importation n'est pas versée ou ne sera pas versée à l'Etat.*”

price lower than the normal value, the transferee is jointly and severally liable to pay such VAT. However, the same provision allows the latter to prove, by means of documents, that the lower price is due to objective and detectable circumstances, or to specific provisions of law and that in any event it is not related to the non-payment of the VAT debt<sup>652</sup>.

## **6. Presumptive criteria of determination of the taxable amount. Minimum taxable amount and VAT transfer pricing**

The taxable base represents one of the basic elements of the structure of VAT and it is in fact harmonized under the rules laid down in Article 11 et seq. of the Directive 112/2006/EC. Member States may in principle introduce measures derogating from the provisions of the Directive, insofar as they are strictly necessary to combat tax evasion or avoidance and the procedures envisaged in the Directive are followed.

In a number of judgments, the EUCJ has reiterated that the exercise of the power to derogate from the ordinary way of determination of the taxable amount has to be tested against the proportionality principle. Precisely in the light of the latter, a national measure that systematically derogates from Article 11 of the Directive, by introducing a minimum taxable base, for instance, is deemed as going beyond what is necessary to prevent tax evasion and avoidance.

The EUCJ has ruled on a national measure that derogated from the Directive by imposing a minimum taxable amount in the cases *Commission v. Belgium*<sup>653</sup> and *K LINE AIR*<sup>654</sup>. Summarizing, in both of them the provisions concerned were enacted pursuant to Article 35 CTVA, which authorised the government to provide a minimum taxable amount for

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<sup>652</sup> Such presumption operates only as regards the goods listed in the Ministerial decree 22 December 2005. See M. Miccinesi, *Le frodi carosello nell'Iva*, cited above, at p. 1101, who classifies it as a rebuttable presumption of law and supports its compatibility with EU law, on the basis of the FTI case. Moreover, with Article 1, para 164, Law 24 December 2007, No 244, a further paragraph (3-bis) has been inserted. It stipulates that when the amount of consideration indicated in a contract for the transfer of an immovable property and in the related invoice is different from the real one, the transferee (even if he does not operate in the quality of economic operator) is jointly liable to pay together with the supplier for the difference between the real amount and the amount declared as well as for the fine.

<sup>653</sup> ECJ 10 April 1984, case C-324/82, *Commission v. Belgium*. At issue were in particular special measures governing the basis for charging VAT on new cars, either sold in Belgium, or imported, and on the so-called 'voitures de direction'.

<sup>654</sup> ECJ 9 July 1992, case C-131/91, *K Line Air*. The national measure concerned provided, in particular, a minimum basis of assessment for sale of second-hand cars between taxable persons. The Court concluded that "*Measures of the kind at issue in the present case derogate from the general rules laid down in Article 11 of the Sixth Directive even more completely and generally than those on which the Court had occasion to adjudicate in its judgment in Commission v Belgium. In that case, the Belgian State was criticized for not taking into account, in determining the basis of assessment, the discounts or rebates allowed on prices. In the present case, it is the price itself as agreed between the parties which was not taken into account and was replaced by the minimum basis of assessment.*"

certain goods and services<sup>655</sup>, and concerned certain transactions in the sector of the motor trade. In the first judgment, the Court held (paras 30-31):

*“It is not disputed that the Belgian Government was justified in taking the view that there was a real risk of tax evasion or avoidance in the motor trade which justified the adoption of measures of the kind which Article 27 of the Sixth Directive allows to be retained. Such measures may, where appropriate, entail the application of standard amounts, provided that the special measures do not derogate from the rules laid down by Article 11 further than is necessary to avoid the risk of tax evasion or avoidance.*

*However, by applying to all new cars the catalogue prices notified to the Belgian authorities, the Belgian legislation entails such a complete and general amendment of the basis of assessment that it is impossible to accept that it contains only the derogations needed to avoid the risk of tax evasion or avoidance. In particular, it has not been proved that, in order to attain the aim in view, it is necessary that the taxable amount should be fixed on the basis of the Belgian catalogue price or that the taking into account of any form of price discount or rebate should be excluded in such a comprehensive manner.”*

As such, the national measure at hand was susceptible to cover even situations in which there was not a risk of tax avoidance or evasion, as it did not envisage any possibility to demonstrate the absence of that risk or that the taxable amount is actually lower than the minimum fixed in the legislation.

Significantly, in another case (Skripalle) where the national measure applied by tax authorities imposed for certain transactions involving associated parties to consider the cost-price, even if the consideration agreed upon by the parties was at the market value, the Court held that *“there is nothing to prevent a provision formulated in fairly general or abstract terms from excluding cases in which the agreed rent is lower than the amount normally necessary to amortize building costs but is in accordance with normal market rent”*<sup>656</sup>.

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<sup>655</sup> Currently, Article 35 CTVA reads as follows: *“Le Roi peut fixer une base minimale d'imposition pour les livraisons, les acquisitions intracommunautaires et les importations: 1° de voitures automobiles, motocyclettes et autres véhicules terrestres à tous moteurs, et leurs remorques; 2° de yachts, bateaux et canots de plaisance; 3° d'avions, hydravions, hélicoptères et autres appareils analogues, et de planeurs. Il peut aussi fixer la base d'imposition de la prestation de services visée à l'article 18, § 2, alinéa 2, à un pourcentage du total des sommes que l'agence de voyages au sens de l'article 1er, § 7, alinéa 1er, 2°, porte en compte au voyageur».*

<sup>656</sup> ECJ 29 May 1997, case C-63/96, Skripalle. By reiterating its previous case-law, the Court confirmed that (paras 24-25-26) *“As the Court has already held, national derogating measures designed to prevent the evasion or avoidance of tax must be strictly interpreted and may not derogate from the basis for charging VAT laid down in Article 11 of the Sixth Directive, except within the limits strictly necessary for achieving that aim (Case 324/82 Commission v Belgium [1984] ECR 1861, paragraph 29). The question to be examine*

To this puzzle a further piece must now be added, that is Article 80, VAT Directive, illustrated above. First, the reference to the ‘open market value’ facing certain transactions among related parties and other alternative circumstances concerning the taxable amount (overvaluation, undervaluation) and the right of deduction, suggests that the reference to that value embodies a suitable criterion for combating tax evasion or avoidance. However, for any evaluation in terms of proportionality, the single national measure implementing Article 80 has to be considered, which is designed as being merely optional. If a national measure transposing Article 80 was construed as an irrebuttable presumption of law, as the case may be, by imposing taxpayers to determinate the taxable amount at the open market value, its consistency with the proportionality principle would be questionable. This is even though Article 80 is quite specific in drawing objective circumstances from which a considerable risk of tax evasion or avoidance may be inferred. In fact, such provision derogates from the ordinary rule applicable for the determination of the taxable amount, which is the consideration effectively obtained by the supplier from the purchaser. As such, it has to be interpreted (and implemented) strictly, and tested against all the general principles of Community law<sup>657</sup>. If it was construed as a procedural presumption, by

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*is whether those conditions are satisfied in this case. It is not disputed that, as between family members or associated persons, there may be a certain risk of tax evasion or avoidance justifying measures of the type which Article 27 of the Sixth Directive permits. However, there is no such risk where the objective facts show that the taxable person has acted properly. In retaining as the taxable amount the costs incurred where there is a relationship between associated persons, including cases where it is clear that the agreed income, which corresponds to normal market rent, is lower than those costs, the German rules are not confined to introducing the derogations strictly necessary to deal with the risk of tax evasion or avoidance. They are not, therefore, covered by Article 27 of the Sixth Directive.”*

<sup>657</sup> This clearly results from ECJ, 26 April 2012, case C-621/10 and C-129/11, *Balkan*, where at issue was the Bulgarian VAT legislation imposing the open market value even under circumstances that are not envisaged in Article 80 of the VAT Directive, and in particular when there is a full right of deduction. Though the national provision was not enacted to implement Article 80 and the latter envisages an option rather than an obligation upon Member States, the ECJ reasoned the possibility for the complainant in the main proceedings to rely upon Article 80 in order to oppose the application of the national measure that was not in line with it. With regard to the strict interpretation to be given to Article 80, the ECJ held as follows (paras 43 to 48) “*In accordance with the general rule set out in Article 73 of the VAT Directive, the taxable amount for the supply of goods or services for consideration is the consideration actually received for them by the taxable person. That consideration is thus the subjective value, that is to say, the value actually received, and not a value estimated according to objective criteria (...). Article 73 of the VAT Directive is the expression of a fundamental principle, the corollary of which is that the tax authorities may not collect as VAT an amount exceeding the tax paid to the taxable person (...). By allowing the taxable amount to be taken as the open market value of the transaction in certain cases, Article 80(1) of the VAT Directive lays down an exception to the general rule stated in Article 73 of the directive, which must as such be interpreted strictly (...). It should be recalled that, as stated in recital 26 in the preamble to the VAT Directive, the objective of Article 80(1) is to prevent tax evasion or avoidance. As the Advocate General observes in point 30 of her Opinion, where goods or services are supplied at an artificially low or high price between parties who both enjoy a full right of deduction of VAT, there cannot be any evasion or avoidance of tax at that stage. It is only at the stage of the final consumer, or of a mixed taxable person enjoying only a proportional right of deduction, that an artificially low or high price can lead to a loss of tax revenue. Consequently, it is only where the person concerned by the transaction does not enjoy a full right of deduction that there is a risk of tax evasion or*



entitling tax authorities to correct the taxable amount of a transaction between related parties when certain conditions established in the legislation occur, then it would presumably be considered in line with the principle of proportionality, especially provided that the defence rights of the taxpayers involved (the right to be heard during the administrative proceedings, the right to demonstrate that there is not any tax fraud) are secured<sup>658</sup>.

## 7. Restrictions on the right of deduction by means of legal presumptions

The right of the VAT input deduction represents not only a principle inherent to the system of the VAT, but a right immediately and directly recognised upon the economic operators by the VAT Directive<sup>659</sup>. As a result, every national measure departing from the rules set forth in the Directive must be authorised and comply with the general principles of EU law. Under these conditions, Member States are allowed to limit the right to deduct insofar as strictly necessary to simplify the recovery of the tax and to combat VAT. On the other hand, the Directive itself envisages certain mechanisms aimed at simplifying the determination of the deductible VAT, as the case is for the pro-rata.

Generally speaking, a limitation to the right of deduction with a national measure may be construed under different forms. It may be irrefutably excluded with an irrebuttable

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*avoidance which Article 80(1) of the directive allows the Member States to prevent*". The Court employs a teleological interpretation of Article 80, para 1: if it is intended to prevent from tax avoidance or evasion, then it may not apply to cases where such a risk does not exist. A broader interpretation of the option given by Article 80, para 1, to Member States, could have the effect of legitimating the collection of an amount of VAT exceeding the amount actually paid to the taxable person.

<sup>658</sup> According to A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, cited above, 376, even where a provision proposing to consider the normal value was construed as a procedural provision, i.e. as a provision affecting only the content of the motivation that tax authorities must satisfy in the notice of assessment, the consistency with the proportionality principle would still be questionable. In this regard, he reminds the legal presumption introduced by the Law decree No 223/2006 in the Italian legal order (within Article 54 of the VAT legislation) and abrogated by the Law No 88/2009 following an infringement procedure initiated by the European Commission (No 2007/4575). In brief, the provision under discussion inferred the 'direct and certain' proof of the existence of more VAT taxable operations or the inaccurate indication of the operations giving rise to deduction, from the divergence between the consideration reckoned in the accounting records and the invoice on the one hand, and the normal value of a certain immovable property on the other hand. By virtue of such provision, in the administrative stage the motivation of the analytical assessment was fulfilled by referring to that divergence, from which the manipulation of the invoicing consideration was inferred. By contrast, the provision did not introduce a minimum taxable amount. Nonetheless, according to the Commission, it was "a non-proportionate provision as it shifts the onus of proof on the persons liable to tax in the absence of any other proof of tax fraud". Cf. T. Tassani, *L'accertamento dei corrispettivi nelle cession immobiliari e la nuova presunzione fondata sul valore normale*, *Rass. Trib.*, 2007, 137; A. Pischetola and T. Tassani, *L'accertamento immobiliare in base al valore normale dopo la legge comunitaria n. 88/2009*, *Studi e Materiali*, 2009, 1489.

<sup>659</sup> *Ex multis*, see A. van Doesum and G.-J. Van Norden, *The Right to Deduct under EU VAT*, *International VAT monitor*, 2011, 323 et seq.

presumption of law, or the taxpayer may be given the possibility to prove that, in the concrete case, the risk of fraud or avoidance that justify the restriction do not occur. Instead of the technique of the presumption, the legislator may prefer to use a typification or a predetermination of the amount deductible and so on. Yet, the limitation may concern the entire amount of deductible VAT or fix a flat-rate limit for the deduction.

In this regard, some indications as to the interpretative trends of the EU CJ, result from two cases dealing with the restriction on the right of deduction in relation to the VAT charged on certain mixed (i.e. for business and private purposes) expenditure.

### **7.1 The total exclusion of the right to deduct. The Ampafrance and Sanofi case**

In the Ampafrance and Sanofi case<sup>660</sup>, the Court was called upon to rule on the validity of the Council Decision 89/487/EEC that, on request of France, had authorised the latter to introduce a measure excluding the right to deduct expenditure consisting of accommodation, food, hospitality and entertainment, thereby derogating from the VAT Directive.

In the view taken by the Member State involved, which was shared by the Council and the Commission as well, the measure was justified by the high risk of abuse and the (administrative) difficulty in analytically checking the nature of the expenditure<sup>661</sup>. On their side, the appellants (Ampafrance and Sanofi) contended the invalidity of the decision because of its inconsistency with the principle of proportionality. In fact, it introduced a general and systematic exclusion of the deduction based on the presumption of the risk of tax avoidance and evasion facing certain expenditure having a mixed nature. In their view, the measure would have been proportionate by providing either the necessary proof (by tax

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<sup>660</sup> ECJ 19 September 2000, joined cases C-177/99 and C-181/99.

<sup>661</sup> The Council and the French government also recalled the exclusion of deduction in relation to similar expenditure provided for in Article 17, para 6, of the Sixth Directive. See at para 52: “(...) *Decision 89/487 is justified independently of the finding of intended or actual systematic tax evasion or avoidance. By its very nature, expenditure in respect of accommodation, hospitality, food and entertainment can be used as a means of tax evasion and avoidance owing to the risk that final consumption will not be subject to VAT, which is difficult for the authorities to control since it is not easy to determine whether such expenditure was incurred in order to satisfy business or private needs. It is relevant in that regard that the first subparagraph of Article 17(6) of the Sixth Directive provides that under the Community rules to be adopted VAT is in no circumstances to be deductible from expenditure which is not strictly business expenditure, such as that on luxuries, amusements or entertainment.*” They also contended (para 53) the specific scope of the limitation: “(...) *the exclusion of the right to deduct VAT charged on expenditure in respect of accommodation, hospitality, food and entertainment is not a disproportionate means in the light of the objective of combating tax evasion and avoidance defined in Article 27 of the Sixth Directive since, in the present case, the exclusion of the right of deduction was expressly limited to situations in which there were genuine risks of tax evasion and avoidance, which correspond to situations in which it is impossible to determine whether the expenditure was of a business or a private nature.*”

authorities) of the existence of such risk or the possibility for the taxable person to demonstrate the absence of any evasion or avoidance and the actual incurrence of the expenses for business purposes. Though this was the main complaint, they also argued that the measure was introduced for reasons other than those envisaged in Article 27 of the Sixth Directive, as the French government aimed at bypassing the controls on the nature of the expenditure concerned. Ultimately, they underlined that the national tax system included already means less detrimental to the principles of the Directive equally able to combat evasion and avoidance<sup>662</sup>.

The EUCJ upheld the arguments put forward by the appellants and deemed the Decision to be in contrast with the proportionality principle, and was thereby invalid. To reach this decision, the Court took into primary consideration the ‘effects of irrebuttable presumption’ that ensue from a systematic denial of the right of deduction with regard to business expenditure, which impacts on the neutrality of the tax.

In the words of the Court (para 58):

*“It follows that the application of the system of exclusion of the right of deduction authorised by Decision 89/487 may have the effect that undertakings are unable to deduct the VAT charged on business expenditure which they have incurred and that VAT is thus charged on certain forms of intermediate consumption, contrary to the principle of the right to deduct VAT, which ensures the neutrality of that tax.”*

As a result, the Court concluded that (paras 61-62):

*“A measure which consists in excluding as a matter of principle all expenditure in respect of accommodation, hospitality, food and entertainment from the right to deduct VAT, which is a fundamental principle of the VAT system established by the Sixth Directive, although appropriate means less detrimental to that principle than the exclusion of the right of deduction in the case of certain expenditure can be contemplated or already exist in the national legal order, does not appear to be necessary in order to combat tax evasion and avoidance.”*

Notably, after having found the measure not in line with the proportionality principle, the Court went further by suggesting the existence of less detrimental measures, either because of the lower (in terms of quantity) impact on the right of deduction itself or because of the apportionment of procedural instruments (like the contrary proof) by virtue of which the

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<sup>662</sup> Id. at paras 44-45-46.

taxable person would be entitled to demonstrate the absence of tax evasion or avoidance. More in detail, it held:

*“Although it is not for the Court to comment on the appropriateness of other means of combating tax evasion and avoidance which might be contemplated, including limiting authorised deductions to a fixed amount or introducing a control modelled on that employed in connection with income tax or corporation tax, it must be pointed out that, as Community law now stands, national legislation which excludes from the right to deduct VAT expenditure in respect of accommodation, hospitality, food and entertainment without making any provision for the taxable person to demonstrate the absence of tax evasion or avoidance in order to take advantage of the right of deduction is not a means proportionate to the objective of combating tax evasion and avoidance and has a disproportionate effect on the objectives and principles of the Sixth Directive.”*

In conclusion, one could infer from this decision that a national measure systematically excluding the right to deduct the VAT charged on specific (mixed) expenditure is deemed to be non-proportional. This is because it does not request the tax authority to prove the existence of the risk of avoidance or evasion (which is presumed); in addition, it prevents the taxable person from proving that a certain expenditure has been incurred for business reasons and there is not such a risk in the concrete case. According to the Court *“it cannot be disputed that there may be a risk of tax evasion or avoidance justifying special measures of the type which Member States may be authorised to introduce pursuant to Article 27 of the Sixth Directive”*, but *“that risk does not exist where it follows from objective evidence that the expenditure was incurred for strictly business purposes”*<sup>663</sup>. As a consequence, though such general measure may be appropriate to tackle tax avoidance or evasion, it nonetheless goes beyond what is strictly necessary to pursue such objective, being possible to have recourse to alternative measures less detrimental to the principle of neutrality.

It has to be noted that notwithstanding Member States tend to construe measures limiting the right of deduction or other rights conferred to taxable persons by the Directive under forms other than legal presumptions<sup>664</sup>, the Court gathers their presumptive ratio and tends

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<sup>663</sup> Id. para 56.

<sup>664</sup> For instance, Article 7, first indent, of the Decree 27 July 1967, No 67/604 relevant in the case *Ampafrance and Sanofy*, stated: *“The tax on expenditure incurred in order to provide accommodation or login for the management and staff of undertakings shall not be deductible”*. Likewise, Article 11, first indent: *“The tax on expenditure incurred in order to provide accommodation or lodging for the management and staff of undertakings shall not be deductible”*.

to put the attention on the probative side. As we will see, this is a corollary of the overall EUCJ approach which focuses on the effects of the presumptive provisions. Such effects, in case of irrebuttable presumptions, do not differ from those of other similar legal concepts.

## 7.2 The partial exclusion of the right to deduct. The Sudholz case

The conclusion reached by the Court in *Ampafrance* and *Sanofi* appears to clash with the decision handed down on a similar case (*Sudholz*<sup>665</sup>), referred to the European Court a few months later than that judgment.

The case was similar because it concerned a Council Decision (2000/186) which authorised a measure derogating from the Directive as regards the right of deduction in respect of certain expenditure. There were, though, two main differences, which apparently led the Court to rule differently, i.e. in favour of the validity of the Decision.

First, whereas in *Ampafrance* and *Sanofi* the French measure implied a complete exclusion of the right to deduct, in *Sudholz* at issue was the German measure which set at 50% the flat-rate limit on permitted deduction of the input VAT paid on the purchase of vehicles used primarily for business purposes<sup>666</sup>. Thus, the taxable person was not prevented from deducting the VAT charged on certain (mixed) expenditure, but that right was limited to 50% of the input VAT, without any possibility to demonstrate that the proportion of business use, for which his vehicle was used, was higher<sup>667</sup>.

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<sup>665</sup> ECJ 29 April 2004, case C-17/01, *Sudholz*. See, for a comment of the decision, and a general overview of the case-law on special measures introduced or retained under Article 27 of the Sixth Directive found incompatible with the principle of proportionality, J. Swilkels, *Impact of Walter Sudholz on Special Measures*, *International VAT Monitor*, 2005, 23 et seq.

<sup>666</sup> The Court observed indeed (paras 51-52): “(...) unlike the facts underlying the main proceedings, the decision at issue in *Ampafrance* and *Sanofi* involved a complete exclusion of the right to deduct and not a flat-rate limit on that right. Moreover, the purpose of that decision was solely the prevention of tax evasion or avoidance, and not the simplification of the procedure for charging VAT. Lastly, the expenditure in question was subject to effective verification by checks on the documents or on the premises for income tax or corporation tax purposes. By contrast, the German authorities have not referred to any method for ensuring effective verification in the main proceedings. It must also be noted that in paragraph 62 of the judgment in *Ampafrance* and *Sanofi* the Court reserves its position on the question whether other possible methods of preventing tax evasion and avoidance may exist, including imposing a flat-rate limit on authorised deductions, without commenting on their validity.”

<sup>667</sup> In the case of the main proceedings, Mr. *Sudholz*, who ran a painting business, had purchased a passenger car that he had allocated to his business. He contended that he had used it as to 70% for business purposes and as to 30% for non-business purposes. But, as explained in the text, he could not deduct input VAT beyond the flat-rate fixed by the para 15(1b) of the German Law of 1999 on turnover taxes, pursuant to which “Amounts of input tax charged on the purchase or manufacture, importation, acquisition within the Community, hire or operation of vehicles within the meaning of Paragraph 1b(2) which are also used for the private purposes of the trader or for other non-business purposes shall be deductible only at the rate of 50%”.

Second, the request for authorisation submitted to the Council by the German authorities was primarily justified in view of simplifying the procedures for charging VAT and rendering verifications more straightforward, and only secondarily at preventing tax evasion and avoidance<sup>668</sup>. Moreover, the German authorities underlined how the percentage chosen was not arbitrary, as it corresponded to the average use of the vehicles concerned for private purposes.

The latter circumstance is incidentally considered by the Court, and it seems to embody a further factor leading to deem the national measure as being proportional. In this regard, the Court also considered that the same flat-rate limit in relation to the purchase of vehicles had been adopted by other Member States, and by the Commission as well in a proposal for an amendment to the Sixth Directive. These circumstances indicated, in the view taken by the Court, that the limit was reasonable<sup>669</sup>.

In the light of the foregoing, the Court disagreed with the opinion of the Advocate General<sup>670</sup> and the observations of the Commission<sup>671</sup>, which argued the non-proportionality of the measure because it did not allow any contrary proof, and with particular regard to the appropriateness and proportionality of the measure in respect of the aim pursued, stated as follows (paras 54-55-57):

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<sup>668</sup> *Id.*, at para 30 (“it must be held that the Council was entitled to treat the terms of the request for authorisation made by the German authorities as meaning that it was directed specifically at simplifying the procedures relating to returns and verification of VAT and not only at preventing tax evasion and avoidance. It follows that the Council did not go beyond the wording of that request in the statement of the reasons on which Decision 2000/186 was based”) and at para 47.

<sup>669</sup> *Id.*, at para 58: “The Court notes that the accuracy of the figure stipulated by the German authorities for the average use of vehicles for private purposes has not been challenged. Furthermore, the fact that the same flat-rate limit has been adopted by other Member States and by the Commission in the proposal for a directive referred to above suggests that such a limit is reasonable”. The Court continued by underlying that the Decision envisaged the non-application of the flat-rate when the use of the vehicle for private purposes was negligible. At para 59 it observed: “Moreover, as the 5 0% limit on deductions of the input VAT paid is an average, the Council took the view that it was necessary to avoid the figure applying to cases involving use below a certain level, that is to say where the use of the vehicle for private purposes does not exceed 5% of its total use. Decision 2000/186 accordingly excludes the application of that limit in those particular cases.”

<sup>670</sup> See Opinion of Advocate General Geelhoed to the case C-17/01, at para 59: “The case of *Ampafrance and Sanofi* related to a complete exclusion from the right to deduct VAT, whilst the present case concerns a flat-rate ceiling on that right. However, since in both cases the right to deduct is subject to a quantitative restriction — entirely or to a considerable extent — the principle of proportionality requires that in both situations the taxable person must have an opportunity to demonstrate that there is no tax evasion or avoidance in his case”. He also pointed out the proposal of the Commission provided the possibility for the taxable person to demonstrate that the purchased vehicles would be used more than 50% for business purposes (see para 63).

<sup>671</sup> As reported by the Court at para 48, “According to the Commission, that decision is not necessary and appropriate for the attainment of the first objective referred to, that is to say the prevention of tax evasion and avoidance, and infringes the principle of proportionality in that ataxable person, such as Mr Sudholz, who uses his passenger car as to 70% for business purposes, and can prove that he does so, is nevertheless permitted to deduct only 50% of the amount of the input VAT paid on the purchase of the vehicle.”

*“(…) it is necessary to consider the factors mentioned by the German authorities, which are not contested by either the Commission or the Council, that is to say the difficulty for the taxable person of establishing in advance the proportions of private and business use to which his vehicle will be put, the difficulty, for verification purposes, of proving precisely what use is made of the vehicle, and the discovery of irregularities in almost all cases where verification is carried out.”*

*These factors disclose a serious risk of tax evasion or avoidance. In those circumstances, the imposition of a flat-rate limit on the right to deduct would appear to be a measure to prevent that risk, while at the same time making verification more straightforward and simplifying the system for charging VAT.*

*(…) German authorities have stated that that percentage corresponds to the average use for private purposes of the vehicles concerned. It also corresponds to the figure applied in other Member States and to the figure put forward by the Commission in its proposal for a Council directive of 17 June 1998 amending Directive 77/388 as regards the rules governing the right to deduct value added tax (OJ 1998 C 219, p. 16).”*

The Court acknowledged that under such measure the taxable person who actually uses his vehicle as to more than 50% for business purposes is prevented from deducting a corresponding proportion of the input VAT even when he is able to prove that circumstance. Nonetheless, it noted, this is a mere corollary of measures aimed at simplifying the procedures for charging VAT, which cannot in principle regard the personal situations.

### **7.3 The relevance of the justification for restrictions on the right to deduct: tax avoidance and evasion versus simplification**

The decision in *Sudholz* is quite interesting because it seems to draw a distinction among those presumptive measures (derogating from the Directive) aimed at combating tax avoidance or evasion on the one side, and those presumptive measures primarily justified by the need of simplifying the procedures for charging VAT, and to treat them differently under the length of the proportionality principle.

The reasoning developed by the Court is as follows. In the first event, the right of deduction is excluded on the basis of a presumption of tax avoidance or evasion. As a result, the taxable person should be permitted to prove that the circumstance which justifies the denial of the right does not exist, i.e. that in the concrete case there are not risks for the

State's budgetary. By contrast, when the measure concerned is primarily inspired by the need of simplification, it merely reflects a legislative predetermination of the amount of input VAT deductible on the basis of average values. In this event, in the view taken by the Court, the possibility for the taxable person to prove a higher percentage of business use would undermine the aim pursued by the measure concerned. The Court does not find the ruling given in *Sudholz* as being in contrast with the decision previously handed down in *Ampafrance*. Therein, it had envisaged alternative measures in respect of the complete exclusion of the right of deduction, among which either the contrary proof or a flat-rate limit, though without explicitly ruling on their proportionality.

Although it is controversial, in the cases *Ampafrance* and *Sanofi and Sudhoz* the Court seems to interfere with the way in which the national legislator is expected to construe the norm limiting the right of deduction. When such right is completely excluded based on a presumption of tax evasion or avoidance in relation to certain expenditure, then the Member State is requested – in order to comply with the proportionality principle – to apportion a juridical instrument (the counterproof) capable of guaranteeing that the limit applies only when the risk of tax avoidance and evasion actually exists. In other words, the measure has to be construed as a rebuttable presumption of law. Instead, when the right to deduct input VAT is subject to a quantitative restriction justified by the need of simplification, the legislator may have recourse to an irrebuttable presumption (or a predetermination, a typification, a fiction), provided that it is reasonable. This is due to two interrelated reasons: the possibility to prove a higher amount of deductible VAT would jeopardize the aim pursued by the measure. As a result, the balance between the different interests in play, which is the essence of the proportionality test, is found in a flat-rate limit which, in the arguments of the Member State involved, reflects the average private use<sup>672</sup>.

## **8. National procedural autonomy in the field of VAT and tax law presumptions**

So far, the analysis of the EUCJ's approach to tax law presumptions in the field of VAT has mostly concerned provisions having a substantive nature, i.e. directly affecting one of

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<sup>672</sup> A. Mondini, *Contributo allo studio del principio di proporzionalità nel sistema dell'IVA europea*, cited above, 391, observes that the distinction made by the Court (on the basis of the aim pursued by the national measure) may be put in relation with the distinction between presumptive mechanisms in a proper sense and typifications. The flat-rate deduction corresponds to the typification of certain quantitative values, and in view of the Constitutional tradition of some Member States, it does not imply the need of the contrary proof, being only requested the reasonableness in respect of the reality. However, in the EU context, the recourse to such category could not justify a complete exclusion of the right of deduction, being in this event necessary to permit the contrary proof.



the fundamental rights conferred by the Directive to the taxable person. As explained, Member States often construe the provision limiting the right of deduction, exemption, or defining the persons liable to tax or the taxable amount differently from the Directive, by having recourse to legal concepts other than presumptions, like predeterminations, legal definitions, and so on. Irrespective of this, however, the Court basically tends to frame such provisions among legal presumptions of tax avoidance or evasion, thereby requesting the possibility for the taxpayer to escape the application of the provision by demonstrating that the risk of tax avoidance or evasion does not exist. This is particularly the case where the scope of the provision is general and does not provide for exceptions so as to include even hypotheses in relation to which the effects of the provision are non-proportionate.

In addition to substantive and direct limitations to fundamental rights derived from the VAT Directive, the examination of the EUCJ case-law shows that further, albeit indirect, limitations may be embodied by national measures, which may be construed under the form of legal presumptions, concerning the exercise of those rights (in terms of conditions, time-limits and so on) or, in general, procedural aspects.

As is well known, the latter are not fully harmonized, meaning that the VAT Directive does not include detailed provisions in relation to the practical conditions of exercise of the rights conferred to taxable persons, tax audits, inquiries, tax assessment, tax recovery and so on. As a consequence, the regulation of these aspects is up to the single Member States, so as to render effective the EU rights which individuals may rely on. In doing so, they are requested to secure the effectiveness of the juridical positions granted by the VAT Directive to taxpayers (principle of effectiveness), and in the event of procedural limits justified by the need to safeguard the fiscal interest, they are required to sacrifice such juridical positions only in the extent to which it is necessary (principle of proportionality).

Therefore, the discretionary power of Member States finds a first bind in the aims, principles and rights laid down in the Directive. A second bind is represented by the principle of equivalence and effectiveness, on the basis of which they have to guarantee to a taxable person who relies on a right deriving from the VAT Directive the same protection given to similar domestic juridical positions, and the possibility to effectively exercise that right. A third bind is the principle of proportionality, which, given that it implies the balance between the national fiscal interest and the VAT right or principle in respect of national procedural means, is susceptible to have important repercussions on national legal orders.

There is a rich case-law dealing with the conditions set by Member States in order to exercise a certain right that the taxable person derives from the VAT Directive. The major problems arise when the infringements of formalities cause the denial of the right, as this would exceed the aim pursued at national level<sup>673</sup>. This will presumably happen less frequently, at least with regard to certain formalities related to the issuing of the invoice, which are currently harmonized. By contrast, the regulation of the application of the tax, i.e. the assessment, the recovery, the means of proof of the event or conditions giving rise to the right, the judicial stage, continue to fall in the competence of Member States, as they imply the existence of administrative and judicial bodies. In this regard, the case-law offers two decisions interesting for our purpose, as they concern presumptive measures affecting the procedure of refund of VAT credit. They show how incisive the impact of the EU law can be, through the ruling of the EUCJ, on procedural aspects and in particular on the extent to which legal presumptions may be used by national legislators.

### **8.1 Legal presumptions as to the conditions for refundable VAT credit retention. The Garage Molheneide case**

One of the most significant rulings as regards tax law (procedural) presumptions in the field of VAT is Garage Molheneide<sup>674</sup>. The decision is often recalled by the scholars in order to demonstrate the impact of the principle of proportionality on aspects of the taxation that in principle fall outside the scope of the Directive<sup>675</sup>.

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<sup>673</sup> One for all, ECJ 8 May 2008, Joined cases C-95/07 and C-96/07, Ecotrade.

<sup>674</sup> ECJ 18 December 1997, Joined cases C-286/94, C-340/95, C-401/95 and C-47/96, Garage Molenheide. See A. Mondini, *Principio di proporzionalità ed attuazione del tributo*, in *Attuazione del tributo e diritti del contribuente in Europa*, (ed.) T. Tassani, Roma, Aracne, 2009, 99.

<sup>675</sup> See P. Pistone, *Presunzioni assolute, discrezionalità dell'amministrazione finanziaria e principio di proporzionalità in materia tributaria secondo la Corte di Giustizia*, Note to ECJ 18 December 1997, Joined cases C-286/94, C-340/95, C-401/95 and C-47/96, Riv. Dir. Trib., 1998, 91 et seq. He highlighted how the proportionality principle, for the first time, showed its potential influence on issues concerning the tax proceedings, in particular the use of presumptions and the limitations as regards the attribution of discretionary powers to tax authorities. With particular reference to the scope of the proportionality principle with respect to presumptions, the Author inferred from the cases Garage Molenheide and Goldsmiths the key for reading the evolution of the Court's position on the use of presumptions in tax law. In his opinion, such key is represented by "the need, perceived by the ECJ jurisprudence, of limiting, in the extent to which it is possible, the use of irrebuttable presumptions as legal means of proof in the area of taxation". To this end, on the one side the Court avails itself of the proportionality principle in order to screen the hypotheses where irrebuttable presumptions are indispensable for securing the tax recovery; on the other side, it prods the national legislator to opt for presumptions of fact. More in general, the Author concluded that the decision in Garage Molenheide made a breach in the traditional *favor fisci* of the national legislator, which was reflected in a number of measures that weighed on taxpayers beyond what was necessary to secure an effective tax recovery. Accordingly, he foresaw a higher protection of the taxpayers' juridical position facing (irrebuttable) presumptions, stemming from Community law and the ECJ jurisprudence ("the Court places itself as the first guarantor of the taxpayer") rather than national legal orders and Constitutional Courts, the latter being bound

At issue were the Belgian measures<sup>676</sup> which presumed the existence of the requisites (urgency and necessity) for the preventive attachment of a refundable VAT credit where either there were serious grounds for a presumption (or proof) of tax evasion or there was a VAT debt claimed by tax authorities and contested by the taxpayer. Therefore, the situations envisaged in the norm and alternatively occurring in each of the joined cases referred to the EUCJ, were essentially two. Both of them, though, implied the, albeit temporary, denial of the VAT credit to the taxable person claiming it in his tax return. This, based on certain circumstances that were assumed as founding a presumption of urgency

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by the structure of their domestic systems. In this sense, he found instructive that the Belgian measures discussed in the case and the similar measures included in Article 38-bis of the Italian VAT legislation, which were both in line with the Constitutional framework (p. 107). It has to be clarified that the judgment to which the Author refers, apart from *Garage Molenheide*, is ECJ 3 July 1997, case C-330/95, *Goldsmiths*, commented by P. Pistone, *Il processo di armonizzazione in materia di Iva ed i limiti alla derogabilità della normativa comunitaria*, Riv. Dir. Trib., 1997, 794 et seq. In this decision, at issue was the UK legislation (section 11 of the Finance Act 1990) which excluded the refund where the reduction of the taxable amount due to non-payment of consideration concerned a consideration that was not expressed in money, as in this case there was a greater risk of evasion. See, in particular, para 22, where the Court stated: “By excluding, generally and systematically, all transactions alike in which the consideration is not expressed in money from the refund of VAT, legislation of the kind at issue in the main proceedings alters the taxable amount for that class of transactions in a manner which goes beyond what is strictly necessary in order to avoid the risk of tax evasion. That is all the more obvious because in the circumstances of the case, as the United Kingdom Government acknowledges in its written observations, there was no risk of evasion”. The Author pointed out that here the inconsistency of irrebuttable presumptions with the proportionality principle concerns the concrete existence of the risk of avoidance or evasion.

<sup>676</sup> Article 8, paras 3 and 4, Royal decree No 4, enacted on the basis of the VAT legislation. Article 76, para 1, CTVA, provided, in the first indent, that any excess outstanding at the end of the calendar year is to be refunded in accordance with the conditions to be established by the King, on application by the taxable person, and in the second indent, that the King can permit the grant of refunds even before the end of the calendar year. Ultimately, the third indent, which is relevant in the case of the main proceedings, stipulated that “[W]ith respect to the requirements laid down in the first and second subparagraphs, provision may be made by Royal Decree for a retention in favour of the VAT, Registration and Property Authority, having the effect of a preventive attachment within the meaning of Article 1445 of the Judicial Code”. Based on the latter provision, Article 8, Royal decree No 4 of 29 December 1969, para 3 stated as follows: “If the tax debt referred to in the first paragraph does not constitute, in favour of the administration, a debt which is, in whole or in part, certain, definite and due for payment, which is *inter alia* the case where it is disputed or has given rise to an order for recovery within the meaning of Article 85 of the Code, execution of which is opposed by an objection within the meaning of Article 89 of the Code, the tax credit shall be retained by the administration up to the amount of the tax claimed. That retention shall take effect as a preventive attachment until the dispute has been definitively resolved, either in the administrative procedure or by a final court judgment. The condition laid down by Article 1413 of the Judicial Code shall be deemed to have been satisfied as regards the implementation of that retention [fourth subparagraph]”. At para 4 a second further hypothesis of retention was laid down: “If, with regard to the balance refundable resulting from the return referred to in Article 55(1)(3) of the Code, and in respect of which the taxable person has or has not opted for a refund, either there are serious grounds for presuming or there is evidence that the aforesaid return or returns concerning previous periods contain inaccurate information and if such grounds for presumption or evidence point to the existence of a tax debt the actual existence of which cannot, however, be established before the time for the payment order or for the operation equivalent to payment, no payment order shall be made in respect of the balance nor shall the balance be carried forward to the following tax period, and the tax credit shall be retained in order to permit the administration to verify the accuracy of the information [fifth subparagraph]”. Both of the hypotheses of retention of the refundable VAT credit are relevant for the decision. Indeed, the judgment is handed down on four preliminary rulings made by Belgian courts: two of them deal with para 3 and the other two with para 4. They manifestly present the same issues, though the events on which the presumption is based are different.

and necessity of a retention of the VAT credit. Such circumstances embodied, in the view of the legislator, a serious risk for the possible recovery of the tax debt, which would have taken place if the tax evasion or the claim lodged by tax authorities were finally ascertained.

The measures under discussion, as underlined by the applicants, were not covered by the Sixth Directive, at that time in force, which at Article 18, para 4, (now, Article 183, Directive 112/2006/EC) stated that “*where for a given tax period the amount of authorized deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to the conditions which they shall determine*”. Article 18 only provided for the main criteria inspiring the exercise of the right of deduction, whereas, as resulting from the cited wording of para 4, it was left to each Member State the detailed regulation.

In fact, the decision of the Court started from the premise that the issue relevant in the proceedings falls within the competence of Member States<sup>677</sup>, which are therefore permitted to introduce measures of the kind taken into consideration<sup>678</sup>. Nonetheless, in the extent to which such measures may impact on the authorities’ obligation to make an immediate refund, and to the correspondent right of the taxable person, they have to comply with the principle of proportionality. The latter entails a balance between the national interest (preserving the rights of the Treasury) and the Community principles and objectives (as laid down in the Directive) to be realized through means (national) which are the least detrimental to the common system of VAT. In this sense, the Court reiterated that these means “*may not therefore be used in such a way that they would have the effect of systematically undermining the right to deduct VAT*”<sup>679</sup>, because this goes beyond what is necessary for the purpose of attaining the domestic interests.

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<sup>677</sup> As contended by the Commission, the Belgian, Greek, Italian and Swedish governments, which classified the retentions provided for by the Belgian legislation under the label of protective ‘measures of recovery’ (see paras 40-41). Notably, various Member States presented observations, as measures similar to the one examined in the decision are included in several legal orders. As to Italy, see Article 38-bis, para 3, Presidential decree No 633/72.

<sup>678</sup> See paras 42: “*It is clear from the Sixth Directive as a whole that it is intended to establish a uniform basis so as to guarantee the neutrality of the system and, as indicated in the 12th recital in its preamble, to harmonize the rules governing deductions ‘to the extent that they affect the actual amounts collected’ and to ensure that ‘the deductible proportion [is] calculated in a similar manner in all the Member States’*” and 43: “*It follows that Title XI of the Sixth Directive, which deals with deductions, and in particular Article 18, relates to the normal functioning of the common system of VAT and does not in principle concern measures such as those described in paragraph 41 above*”.

<sup>679</sup> *Id.* at para 47.

Similarly to what has been stated in the *Ampafrance* case, the Court rejects national provisions that have the effect of automatically jeopardizing a right which is fundamental to the functioning of the common system of VAT and that the taxable persons derive directly from the Directive. This, irrespective of the nature of the provision concerned, whether substantive (thus, affecting directly the content of the right) or procedural (concerning the powers of the tax authorities, but equally capable of concretely affecting the juridical position of the taxpayer).

With regard to the specific case examined, the Court left to the judges of the main proceedings the evaluation of proportionality of the measures concerned. Nonetheless, it provided them with clear and unequivocal criteria, which did not leave much room for alternative solutions. It basically agreed with the arguments put forward by the appellants, which showed that the retention applied automatically (“*by virtue of the actual wording of that provision*”) whenever one of the situation envisaged in the norm occurred (a dispute between tax authorities and taxpayer, serious grounds of tax evasion), without any possibility to contest before the court the matter of the necessity of the retention or the urgency of the matter. Notably, in this regard the Court basically excluded the proportionality of irrebuttable presumptions, as follows (para 51-52):

*“It must be held that, where a preventive attachment procedure constitutes a derogation from the ordinary law applicable to preventive attachments, in that necessity and urgency are irrebuttably presumed, doubts may legitimately be entertained as to whether it is an indispensable instrument for ensuring recovery of the sums due.*

*It must therefore be held that an irrebuttable presumption, as opposed to an ordinary presumption, would go further than is necessary in order to ensure effective recovery and would be contrary to the principle of proportionality in that it would not enable the taxable person to adduce evidence in rebuttal for consideration by the judge hearing attachment proceedings.”*

From the overall overview of the ruling, the absence of contrary proof appears to be *per se* decisive in order to reach a decision of inconsistency with the proportionality principle, as the purpose attained by the national legislator may be pursued through means that are less detrimental to the fundamental right of deduction. Among these, the Court incidentally refers to the ‘ordinary presumptions’. This term is translated in other versions of the same judgment as indicating the presumptions of fact<sup>680</sup>, which as is well-known are left to the

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<sup>680</sup> The Italian version reports ‘presunzioni semplici’; the French one ‘présomption simple’.

discretion of the tax administration and the judge. Nonetheless, in my opinion the reference could be extended to rebuttable presumptions of law, which, alike presumptions of fact, permit the proof to the contrary, and in addition guarantee legal certainty, which is one of the general EU law principles applicable in the field of VAT.

It must be noted that the measures under discussion, unlike those commented on above which excluded (altogether or partially) the right of deduction, did not deny the right, but they delayed *sine die*<sup>681</sup> the refund of the VAT credit, until the definition of the controversy or the ascertainment as to the existence of the evasion. Nonetheless, such (procedural) limitation was deemed by the Court as exceeding what was strictly necessary to secure the tax recovery.

To reach this conclusion, the Court took into consideration further factors that contributed to the evaluation of non-proportionality. Among these, the absence of a judicial review of the retention, either before the judge hearing the attachment proceedings or before the judge adjudicating on the substance of the case, as well as the absence of the possibility to request a different protective measure, should be mentioned. These are corollaries of the legal and irrebuttable nature of the presumption concerned, wherein the inference is drawn by the legislator, so that it cannot be challenged in legal proceedings. As a result, the judge was prevented from issuing, and the taxable person was prevented from obtaining, a lift in whole or in part of the retention of the refundable balance or an alternative protective measure that was less onerous for the taxpayer. These adversary effects on the right of deduction were deemed by the Court disproportionate in respect of the aim to ensure the effective recovery. It thus concluded as follows (para 64):

*“The answer to be given must therefore be that it is for the national court to examine whether or not the measures in question and the manner in which they are applied by the competent administrative authority are proportionate. In the context of that examination, if the national provisions or a particular construction of them would constitute a bar to effective judicial review, in particular review of the urgency and necessity of retaining the refundable VAT balance, and would prevent the taxable person from applying to a court for replacement of the retention by another guarantee sufficient to protect the interests of the Treasury but less onerous for the taxable person, or would prevent an order from being made, at any stage of the procedure, for the total or partial lifting of the retention, the national court should disapply those provisions or refrain from placing such a*

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<sup>681</sup> In other words, without a fixed time-limits.

*construction on them. Moreover, in the event of the retention being lifted, calculation of the interest payable by the Treasury which did not take as its starting point the date on which the VAT balance in question would have had to be repaid in the normal course of events would be contrary to the principle of proportionality.”*

In this way, the decision of the EUCJ is not solely able to affect the use of certain means of proof when an EU right is at hand, by expressing a certain favour towards those probative mechanisms that allow the proof to the contrary. It goes further: it sets out a number of minimum procedural guarantees, which are basically embodied by the judicial review of the measure and end up interfering with the powers of the tax administration and the administration of justice. The formula ‘need of a judicial review’, which occurs also in direct tax cases, reflects the need, in the view taken by the Court, of a concrete examination of the case, against an automatic application of any measures affecting an EU right.

## **8.2 The Sosnowska case**

The Garage Molenheide case confirms that the VAT deduction mechanism is an essential element of the VAT system, which may in principle not be limited. Possible derogations or procedural limitations to such principle must be strictly interpreted and comply with the proportionality principle. At any rate, national legislation or tax authorities may not make the exercise of such right impossible or excessively difficult, pursuant to the principle of effectiveness.

More recently, such rules have been reiterated by the EUCJ in the case Sosnowska<sup>682</sup>. At issue was the Polish legislation which extended from 60 to 180 days, starting from the date of submission of the VAT return, the period of time available to tax authorities for repayment of excess VAT to taxable persons who had started up the economic activity less than 12 months earlier and had carried out intra-community purchases. The provision was expressly justified by the need to allow the inquiries necessary to prevent tax evasion and avoidance, and was based on the (irrebuttable) presumption that for new economic operators a longer period is required to ascertain the entitlement to the VAT credit, as they are not known to the tax office. Similarly to the measure relevant in Garage Molenheide, the right to the refund of the VAT credit emerging from the taxable person’s VAT return

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<sup>682</sup> ECJ, 10 July 2008, case C-25/07, Sosnowska. See the Note to the case of A. Mondini, *Giurisprudenza delle Imposte*, 2008, in [www.giurisprudenzaimposte.it](http://www.giurisprudenzaimposte.it).

was not altogether denied, but rather delayed. In addition, it was possible to escape the application of such delay by lodging a security deposit.

Notwithstanding this, the EUCJ found the provision to have disproportionate effects on the principles and objectives of the VAT Directive. Once again, although the national legislator construed the measure as a mere rule of law, at most a typification, the Court moved the question to the probative level, by deeming as decisive the absence of the possibility for the taxable person to demonstrate that the risk of tax evasion or avoidance (which is assumed by the provision concerned) did not occur in the concrete case. After having premised that the means which Member States avail themselves in view of (legitimately) protecting their financial interests have to comply with the proportionality principle, the Court held that (paras 24-25):

*“It is clear from the case-law that national legislation determining conditions for repayment of excess VAT which are more onerous for one category of taxable persons because of a presumed risk of evasion, without making any provision for the taxable person to demonstrate the absence of tax evasion or avoidance in order to take advantage of less restrictive conditions, is not a means proportionate to the objective of combating tax evasion and avoidance and has a disproportionate effect on the objectives and principles of the Sixth VAT Directive (see, by analogy, in relation to exclusions from the right to deduct, Joined Cases C-177/99 and C-181/99 Ampafrance and Sanofi [2000] ECR I-7013, paragraph 62, and, in relation to preventive attachment, Molenheide and Others, paragraph 51).*

(...)

*It is clear from the order for reference that Article 97(5) and (7) of the Law on VAT apply generally and preventively to new taxable persons, without making any provision for such persons to demonstrate the absence of a risk of tax evasion or avoidance.”*

In the view taken by the Court, this conclusion was not mitigated, but rather supported, either by the length of the period provided for new taxable persons, which was much longer in respect to the normal time-limits applied to other taxable persons<sup>683</sup>, or by the

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<sup>683</sup> Id., at para 27: *“Similarly, the national provisions at issue do not appear to be in conformity with the condition laid down in the case-law, as stated in paragraph 17 of this judgment, that repayment of the excess VAT must be made within a reasonable time. As was stated in the order for reference, the period for repayment of 180 days laid down for new taxable persons is, on the one hand, six times longer than the one month applicable accounting period for VAT and, on the other hand, three times longer than the period applied to other taxable persons, while the Polish authorities have offered no argument capable of explaining why it is necessary, in order to prevent tax evasion and avoidance, to establish a difference in treatment of such a scale.”*



possible security deposit, whose amount was not connected with the amount of excess VAT or with the size of the taxable person<sup>684</sup>.

## **9. Conclusion**

The examination of the most relevant case-law on national presumptive measures in the area of VAT offers a significant sample of how the EUCJ approaches to the latter.

The key factor is represented by the exclusive focus on the effects of the single presumptive measure with respect to the principles, rights and objectives set forth in the common system of VAT. This results from the reasoning followed by the Court and it is even immediately evident from the wording of some rulings, where the Court refers to the ‘effects of irrebuttable presumption’, by underlining their systematic and general characters.

In the light and as corollaries of the foregoing, the distinction between substantive presumptive measures and procedural presumptive measures, the former affecting harmonized matters whereas the second falling within the competence of the Member States, does not significantly influence the evaluation of EU (in)consistency. The same holds true for the dichotomy legislative measures and administrative or judicial practices or interpretation, which in the perspective of the EUCJ are susceptible of having similar effects on the functioning of the VAT system.

As long as a certain provision undermines a right or principle laid down in the Directive, albeit authorised or retained under the procedure provided for derogations from the Directive, the EUCJ places it under the length of the principles of proportionality, legal certainty, effectiveness and equivalence. The evaluation is mainly the result of the interaction between two general principles of EU law, that is the principle of proportionality and the principle of effectiveness. Both of them concern the effects of a certain national provision. The former, under the perspective of the relation between means employed and aim pursued, requires the least sacrifice possible for the principles and

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<sup>684</sup>Id., paras 31 and 32: “*In particular, the lodging of such a security deposit is likely, contrary to what is required by the case-law referred to in paragraph 17 of this judgment, to entail a not inconsiderable financial risk for undertakings which have just commenced their activities and may, consequently, lack significant resources. In reality, the effect of the obligation to put in place such a security deposit, in order to be able to take advantage of the period which ordinarily applies, is only to replace the financial burden associated with the fact that the amount of the excess VAT is tied up for a period of 180 days with the burden consequent on the amount of the security deposit being tied up. There is even less justification when, first, the latter amount may, as in the case in the main proceedings, be greater than the amount of the excess VAT at issue, and, second, the length of time over which the security deposit is tied up is greater than the period for repayment of the excess VAT laid down for new taxable persons. Under Article 97(6) of the Law on VAT, the security deposit can be released only after a period of 12 months, on condition that the taxable person has paid all of the taxes relating to that period for which he is liable to the State.*”

objectives of the VAT system; the second, under the perspective of the conditions of exercise and proof of the rights conferred to taxable persons by the VAT Directive, requests to effectively guarantee the exercise of such rights and the ‘effet utile’ of the relevant EU provision. The principle of effectiveness comes into play, in particular, when procedural provisions (i.e. falling into the ‘formal’ tax matter) are at issue, even though it is rarely explicitly mentioned by the Court in its decisions.

In this framework, irrebuttable presumptions and in general all those similar mechanisms, which do not operate on the probative level, being rather construed as mere rules of law, are deemed as being disproportionate insofar as they assume the existence of certain facts (risk of avoidance or evasion, *fumus boni iuris* and *periculum in mora*<sup>685</sup> etc.) from which adverse effects on a right or principle of the VAT system systematically follow, without any chance for the taxable person to give the proof to the contrary and to obtain a judicial review of his personal situation.

Rebuttable presumptions of law may embody, in this sense, a good balance between the different interests in play and appropriate and proportionate means, insofar as the taxable person is concretely and effectively enabled to give proof to the contrary. Where, instead, the reversal of the onus of proof renders excessively difficult or even impossible the exercise of a right conferred to the taxable person by the Directive, it may likewise be deemed inconsistent with the common system of the Directive. This may be the case, for instance, because of the limitations regarding the means of proof available to the taxpayer, or to the facts that he is entitled to prove (negative facts, *probatio diabolica*).

With particular reference to the difficulties met by taxpayers in giving the contrary proof, there is an extensive case-law concerning the presumption of the passing on of indirect taxes levied in contravention of EU law, to which the reimbursement of the unduly collected tax was made conditional in some Member States. This case-law will be briefly examined in the next part, with a view of inferring further elements on the EUCJ’s approach to legal presumptions in the domain of indirect taxation.

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<sup>685</sup> *Fumus boni iuris* and *periculum in mora* indicate respectively the presumption of sufficient legal basis and the danger in delay.

## **Chapter III - Section I - Part III**

### **Reimbursement of Overpaid (Indirect) Taxes**

#### **Levied in Contravention of EU law**

##### **1. Presumptions of passing on of overpaid indirect taxes levied in contravention of EU Law**

Dealing with tax law presumptions in the area of indirect taxation, separate attention must be paid to an extensive EUCJ case-law concerning national provisions that restricted on the right to the refund of indirect taxes levied in contravention of EU law.

To set the stage, it has to be clarified that the situation from which the right of reimbursement arose, in the cases at issue, is the imposition by Member States of unlawful taxes or charges, meaning prohibited by EU law, or the levy of taxes or charges in an unlawful manner, meaning in contrast with EU law, as the case may be for discriminatory levies. Once the contrast with EU law has been ascertained, typically by a judgment of the EUCJ, then the Member State concerned is prevented from continuing to levy the unlawful charges and is further requested to refund the amount of charges that have been unlawfully collected. In the absence of EU rules governing the procedure of reimbursement, the refund is regulated under national rules, which nonetheless must neither be discriminatory nor render the exercise of the refund impossible or excessively difficult (EU principle of equivalence and effectiveness).

Leaving for the next paragraph the examination of the EUCJ's rulings, it is convenient to hold now a domestic perspective, in order to illustrate how the issue of the right to the refund of undue charges touches the issue of tax law presumptions.

In this regard, it has to be noted that when the refund of indirect taxes is at issue, Member States normally meet several difficulties in 'quantifying' the amount of the repayment. As a matter of fact, most indirect taxes are not separately recharged by the undertakings who remit the tax to the authorities to their customers, because they are not set aside from the selling price. As a result, it is likely that the undertaking who has remitted to the Treasury the taxes levied in breach of EU law, has shifted the burden of such taxes onto his customers, by incorporating them in the prices of goods and services supplied. Sometimes, they are even legally obliged to do that. Based on these features peculiar to indirect taxes and with the aim of alleviating the burden of proof on the side of the tax authorities as well

as of avoiding the unjust enrichment of undertakings, a number of Member States had introduced in the past presumptions that indirect taxes are passed on to customers.

The EUCJ case-law on the above national measures offers several elements of interest for our purpose, for three main reasons. First of all, from a large number of judgments issued precisely on the right of refund, the Court interferes with national procedural rules to such an extent that it rejects a reversal of the burden of proof on the undertaking. As a consequence, even a rebuttable presumption of law, which shifts onto the taxpayer the burden of proving that the unjust enrichment did not occur, or a presumption of fact, are deemed as being not in line with EU law. To reach this conclusion, the EUCJ takes into consideration that the object of the contrary proof is construed so as to render impossible or excessively difficult the exercise of the EU right, because it is a negative fact. In addition, the Court, perhaps for the first time, argues the inconsistency of presumptions from the fallaciousness of the inference, which in its view is based on a wrong individualization of the known fact. In drawing such reasoning, the EUCJ avails itself of the principle of effectiveness and, though not invariably and not explicitly, the principle of proportionality. To which extent the scheme followed at EU level resembles or diverges from the rationale of a national Constitutional Court, may be verified with regard to the presumption of transfer of certain taxes collected in breach of EU law provided in the Italian tax system, as the EUCJ and the Italian Constitutional Court have on various occasions ruled on it.

Below, after an overview of the main rulings on the issue of repayment of indirect taxes unlawfully levied, the attention is put on a few significant judgments in order to infer some indications as regards the limitations to the division of the burden of proof and the use of legal presumptions met by national legislators in this area.

## **2. The right to repayment of undue taxes under EU law and possible restrictions**

The question of the repayment of taxes inconsistent with EU law has originated in various EUCJ judgments, mostly in relation to the actions or juridical tools available to taxpayers in their own national legal orders. From the case law, it is thus possible to infer a few principles or rules which can be held true in the matter.

First of all, it is settled case-law that the right to a refund of taxes or charges levied in a Member State in breach of EU law is the “*consequence of, and completely to, the rights*

conferred on individuals by the Community provisions<sup>686</sup>. As a result, the Member State is in principle ‘obliged’ to repay taxes and charges levied in contravention of EU law. It follows that the right to the refund of unlawful taxes embodies a general principle of EU law, which is ancillary to other general principles of EU law<sup>687</sup>. Indeed, looking at the decisions of the Court, such right derives from the conjunct application of the EU rule of law which has been contravened by the Member State, the principle of cooperation, and the principle of equivalence and effectiveness<sup>688</sup>.

Therefore, such right may not in principle be limited. Moreover, in the absence of any harmonization on the repayment of taxes or charges wrongly levied, it falls within the competence of each Member State the definition of detailed procedural rules governing actions for the protection of rights conferred upon individuals by EU law. Yet, Member States are basically bound in the exercise of such competence by the principle of effectiveness and equivalence. It entails that procedural rules governing the refund of taxes collected in breach of EU law are neither less favourable than those regulating similar domestic actions (i.e. not discriminatory), nor render impossible or even excessively difficult the exercise of the right of EU origin<sup>689</sup>.

However, from the same settled case-law it results that there are a few delimited exceptions to the above obligation. There are, in other words, hypotheses in which a Member State may restrict the exercise of reimbursement rights derived from EU law. Again, the EUCJ clarifies that the limitation to national procedural possibilities must not discriminate actions based on EU law against domestic actions, and above all, confines the legitimacy of such a limitation to the existence of a general interest justifying it<sup>690</sup>. This may be represented, looking at the case-law, by the principle of legal certainty for both taxpayers and tax administration, which may justify the setting out of (reasonable) time-

<sup>686</sup> ECJ, 21 September 2000, Joined cases C-441/98 and C-442/98, Michailidis, at para 30. See the decision in Dir. Prat. Trib., II, 2003, 979, with the comment of E. Frixione, *Sui tributi incompatibili con il diritto comunitario e la ripetizione dell’indebito*, Dir. Prat. Trib., 2003, 987.

<sup>687</sup> See ECJ 11 July 2002, case C-62/00, Marks & Spencer, at para 39: “Member States are required as a matter of principle to repay taxes collected in breach of Community law”.

<sup>688</sup> See, among the others, ECJ, 16 December 1976, case C-33/76, at para 5; ECJ 15 December 1976, case C-45/76, Comet, at paras 11-12-13. While in the latter paragraph the principle of equivalence and effectiveness is recalled, in the other two it is stated that “The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect. Thus, in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law.”

<sup>689</sup> *Ex multis*, ECJ 27 March 1980, case C-61/79, Denkavit Italiana, paras 25-26; ECJ 27 February 1980, case C-68/79, Just, paras 25-26.

<sup>690</sup> This, on the basis of a procedural rule of reason that the ECJ establishes starting from the principle of effectiveness, according to B.J.M. Terra and P.J. Wattel, *European tax law*, cited above, 126.

limits for bringing proceedings<sup>691</sup>. A further collective interest which may entitle Member States to resist refund to the undertaking of a tax levied in breach of EU law is the prevention of unjust enrichment<sup>692</sup>.

The Court has explicitly acknowledged that Member States may refuse to the trader the reimbursement of taxes levied in breach of EU law when he has shifted the burden of the tax onto other persons. Otherwise, the repayment would result in an unjust enrichment of the trader himself. However, similarly to the justification of legal certainty, the Court makes the consistency of national measures which impose restrictions on the right of reimbursement conditional to certain requirements. First, presumably on the basis of the proportionality principle, the Court clarifies that the amount of the denied refund has to correspond to the amount of charge passed on to third persons. In practice, the right may be denied altogether if the burden of the tax has been borne in its entirety by someone other than the undertaking. If, instead, such burden has been transferred only in part, the trader is due the amount that he has effectively borne. This first condition implies a further requirement for national measures limiting the right of repayment: the ascertainment of the concrete occurring of an unjust enrichment. In this regard, the question arises as to which party (tax authorities or undertaking) has to bear the burden of proving the existence or the inexistence of that circumstance from which the reimbursement depends on.

As explained in the previous paragraph, due to the features characterising most indirect taxes, the determination of the if and amount of repayment owing to the trader is not an easy challenge. This is particularly so, as in the view taken by the Court the ascertainment of the shifting of the tax burden onto third parties does not *per se* entail an unjust enrichment. In other words, from the circumstance that the transfer of the economic burden of the undue tax took place, cannot be automatically inferred the unjust enrichment of the trader claiming reimbursement. The Court, thus, requests an overall economic analysis of all the factors and circumstances relevant in the concrete case<sup>693</sup>. It may happen, for

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<sup>691</sup> Insofar as the time-limits apply indiscriminately, they are reasonable and established in advance and provide for transitional arrangements. The compatibility of a national legislation curtailing the period within which recovery may be claimed is thus made by the Court conditional to certain requirements. See in this regard, ECJ 11 July 2002, case C-62/00, Marks & Spencer, in particular at para 35 to 39.

<sup>692</sup> J.J.P. Swinkels, *Unjust Enrichment under EU VAT*, International VAT Monitor, 2011, 249 et seq. The Author gives an overview of the case-law where the Court has defined the conditions for the principle of unjust enrichment (which is not a general principle of EU law) to apply. Interestingly, the Author shows how these conditions are different depending on whether the refund concerns a tax levied in breach of EU law or instead VAT charged by an undertaking to his customers because of a mistake.

<sup>693</sup> From the judgment in the case Comet, cited above, one would infer that national courts are entrusted with ensuring that all the factors influencing the determination of the repayment are taken into account. The ECJ has on several occasions reiterated that “*The Court has already observed on several occasions that it would be*

instance, that the undertaking suffered as a consequence of such tax levied in breach of EU law, because an increase in the prices of his merchandise due to the incorporation of the tax has caused the effect of reducing the turnover. In this event, an unjust enrichment would not occur, or would occur only partially.

In principle, the existence of the unjust enrichment, established according to the manner indicated by the EUCJ, falls within the probative burden of tax authorities. It is up to the latter to give evidence of the actual unjust enrichment of the party claiming the refund of taxes that he has remitted to the Treasury and have been collected in breach of EU law so as to deny the reimbursement<sup>694</sup>.

### **3. Legal presumptions of passing on of indirect taxes levied in breach of EU law. The San Giorgio case**

As said at the end of the previous paragraph, according to the Court it lays upon tax authorities the burden of proving that the charge levied in breach of EU law has been passed on to third persons and that a reimbursement would constitute an unjust enrichment. The corollary of this statement is the inconsistency with EU Law of any presumptions or rules of evidence which, by reversing the burden of proof onto the taxpayer or limiting the means of proof available, render impossible or excessively difficult the repayment of charges unduly paid.

The Court has stated that in several decisions where national legislation, or administrative or even judicial practices were at issue.

Among these cases, the judgment handed down with reference to Article 19, Italian Law Decree 20 September 1982, No 688 is worth mentioning. Article 19 made the repayment of charges unduly levied conditional to the documentary proof that the charge had not been

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*compatible with the principles of Community law for courts before which claims for repayment were brought to take into consideration the damage which the trader concerned might have suffered because measures such as the disputed charge had the effect of restricting the volume of exports (Just, paragraph 26; and Comateb, paragraph 30)."* The case-law on reimbursement of tax levied in breach of EU law shows how the Court mostly disregards the legislative rather than administrative or judicial source of the measure in contrast with EU law. As we will see infra in the text (case C-129/2000), even a jurisprudential interpretation which causes the denial of a right derived from EU law may be found inconsistent with the latter.

<sup>694</sup> In this regard, as it will be explained in the next paragraph, the Court reiterated that "(...) *any rules of evidence which have the effect of making it virtually impossible or excessively difficult to secure repayment of charges levied in breach of Community law are incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence*". See ECJ, 21 September 2000, Joined cases C-441/98 and C-442/98, Comateb, at para 36.

passed on to other persons<sup>695</sup>. In this way, the provision governed the refund of customs duties and other charges on consumption that the taxpayer had remitted to the Treasury, by relieving tax authorities from the burden of proving the transfer of the charge. It was based on the presumption that normally economic operators shift the indirect taxes onto customers, and indeed it was interpreted as laying down a rebuttable presumption of law, with a contrary proof confined to documentary evidence. In fact, the same provision included in a previous law decree, which was not converted into law because of the expiry of the time-limits, was explicitly construed as a rebuttable presumption of law<sup>696</sup>. As such, an order for a preliminary ruling was submitted by an Italian national court to the European Court of Justice, asking in essence if the probative restriction to the claims for refund was compatible with Community law<sup>697</sup>.

Notably, in the observations submitted to the Court, the Italian government underlined how the Italian provision was justified in the light of preventing unjust enrichment, according to a principle applicable in other Member States<sup>698</sup>, and in pursuing this aim it did not discriminate depending on the legal basis of the right of refund (Community law or national law). Similarly, the European Commission, albeit expressed doubts about the retroactivity of the norm, argued that “*the presumption, as regards taxes on consumption on certain goods, that the charge is passed on to other traders when the goods are transferred merely reflects a normal commercial practice*” and accordingly found that the probative burden put on the undertaking “*does not seem, in practice, extremely difficult to fulfil*”.

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<sup>695</sup> Converted into law by the Law 27 November 1982, No 873. At para 1, Article 19 stated as follows: “Any person who has paid import duties, manufacturing taxes, taxes on consumption or State taxes which have been unduly levied, even prior to the entry into force of this decree, is entitled to repayment of the sums paid if he provides documentary proof that the charge in question has not been passed on in any way whatsoever to other persons, except in cases of substantive error”. Cf. G. Marongiu, *Il rimborso dei diritti doganali e ... le fatiche d’Ercole*, Dir. Prat. Trib., 1991, 961; L. Comucci, *Osservazioni in ordine ai tributi doganali incompatibili con la normativa comunitaria e alla ripetizione dell’indebitato*, Riv. Dir. Trib., 1998, 142; L. del Federico, *Azioni e termini per il rimborso dei tributi incompatibili con l’ordinamento comunitario*, Giurisprudenza delle imposte, 2003, 275.

<sup>696</sup> Article 10, Law decree 10 July 1982 No 430, which at the first paragraph was exactly alike Article 19 cited in the text. At the second paragraph it added that “*The charge is presumed to have been passed on whenever the goods in respect of which the payment was effected have been transferred, even after processing, transformation, erection, assembly or adaptation, in the absence of documentary proof to the contrary*”. From the decision it clearly results that Article 10, which was applicable when the national court decided to refer the case to the ECJ, was subsequently reproduced in Article 19, which is ‘substantially identical’. See para 6 of the judgment.

<sup>697</sup> ECJ 9 November 1983, C-199/82, San Giorgio. See F. Amatucci, *I vincoli posti dalla giurisprudenza comunitaria nei confronti della disciplina nazionale del rimborso d’imposta*, Riv. Dir. Trib., 2000, 291 et seq.

<sup>698</sup> It noted that Article 10, Law-decree No 430, was alike Article 4 of the French Law of Finance for 1981, and reflected a principle common to other Member States, such as Denmark.



The Court dismissed such arguments and held as follows (para 14-15):

*“(...) any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law. That is so particularly in the case of presumptions or rules of evidence intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or of special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence. Once it is established that the levying of the charge is incompatible with Community law, the court must be free to decide whether or not the burden of the charge has been passed on, wholly or in part, to other persons.*

*In a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal charge imposed on an importer has actually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot be systematically held responsible.”*

Notably, the Court puts the attention on the difficulty of proof as regards the actual transfer of indirect taxes onto third persons. The burden of such proof, in its view, cannot lay upon a taxpayer claiming for the refund of a tax that a Member State is responsible for having collected in breach of EU law.

To reach this conclusion, the EUCJ refers to the principle of effectiveness, which prohibits national probative provisions that render impossible or excessively difficult the repayment of a tax levied contrary to EU law. Besides that, it seems that the decision is in part influenced by the circumstance that the tax to be refunded was collected by a Member State contrary to EU law. As a consequence, the right to refund that is conferred upon the taxpayer from EU law, cannot be undermined by ‘systematically’ burdening him with the proof of a fact that is *per se* difficult to give. Notably, in suggesting a different distribution of the burden of proof between tax authorities and taxpayer, the Court does not make reference to the reasonableness of the criterion, but is rather guided by the need to secure the effective exercise of the EU right.

### 3.1 ... and the subsequent cases *Bianco and Girard*, *Comateb*

In a number of decisions handed down after the case *San Giorgio*, the Court had the occasion to clarify the reasoning surrounding the conclusion of inconsistency of legal presumptions in the matter under discussion.

In the case *Bianco and Girard*<sup>699</sup>, the Court acknowledged that indirect taxes are normally shifted upon customers, but added that it is not possible to assume that such translation concretely took place, as it depends on several factors. In other words, *“it is quite probable, depending on the nature of the market, that the charge has been passed on. However, the numerous factors which determine commercial strategy vary from one case to another so that it is virtually impossible to determine how they affect the passing on of the charge”*.

One would expect that, on the basis of the above statements, the Court rejects irrebuttable presumptions of law, which systematically assume the passing on of the charge upon third parties, while it accepts rebuttable presumptions of law. This is not the case. By contrast, the Court appears to reject every means of proof that establishes the burden of proving the non-transfer (i.e. a negative fact<sup>700</sup>) upon the taxpayer claiming for the refund. The question as to whether the undertaking has passed on to customers the tax is a question of fact which, in the view taken by the Court, must be assessed by the national court freely, meaning without being bound by evidence having effects of legal proof<sup>701</sup>.

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<sup>699</sup> ECJ, 25 February 1988, Joined cases C-331/85, C-376/85, C-378/85, *Bianco and Girard*. The decision concerned the French legislation (Article 13 (V), Finance Law of 31 December 1980) pursuant to which: *“Where a person has unduly paid indirect duties governed by the General Tax Code or national duties and charges collected according to the procedures of the Customs Code, he may, except in cases of substantive error, only obtain repayment if he can demonstrate that the duties were not passed on to the buyer”*. In the view of the French government, especially when indirect taxes are involved, the presumption that they have been passed on is justified, since they are by their own nature to be borne ultimately by consumers.

<sup>700</sup> By rejecting the argument put forward by the French government contending that a positive fact was to be proven the Court observed, at para 11 of the judgment, that *“The provision contained in the French legislation at issue in fact requires traders to prove a negative fact inasmuch as where the authorities merely allege that traders have passed on the taxes, these traders must prove that they have not passed on the unduly paid para-fiscal charge to other persons. The fact that the provision at issue may have been framed in positive terms is irrelevant for the person upon whom the burden of proof rests”*.

<sup>701</sup> *Id.*, at para 17 stated as follows: *“In this respect it must be stressed that, even though indirect taxes are designed in national law to be passed on to the final consumer and in commerce are normally passed on in whole or in part, it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts. Consequently, the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court which may freely assess the evidence. However, in the case of indirect taxes, it may not be assumed that there is a presumption that they have been passed on and that it is for the taxpayer to prove the contrary. This in no way prejudices the solution of the specific problem that arises as regards the burden of proof where the taxpayer has been obliged to pass on a charge by the relevant legislation itself.”*

In a subsequent judgment (Comateb)<sup>702</sup>, the Court clarified two points, which incidentally or implicitly resulted already from its previous decisions in the matter. First, the conclusion reached as regards the inconsistency with EU law of rebuttable presumptions that the indirect tax passed on, holds true even when the undertaking is legally obliged to incorporate the tax in the cost price of his products<sup>703</sup>. Moreover, the Court excluded that a causal direct link exists between the passing on of the tax to third parties and the unjust enrichment of the undertaking, which only can ground the denial of the right of refund<sup>704</sup>. Again, the unjust enrichment constitutes a question of fact which must be freely ascertained by the national court. The latter will take into consideration the amount of damages that the undertaking has suffered, in terms of a decrease in sales, because of the incorporation of the tax in the prices of his products.

The foregoing confirms the primary role assigned by the Court to the national judge, which is entrusted with ensuring the effective enforcement of the EU right to a refund of taxes levied in breach of EU law. It is up to the national judge to ascertain, based on the facts of the pending case, if and to what extent the passing on of the tax and the unjust enrichment took place. None of these two events may be presumed by national legislation, as this would imply binding its decision in the concrete case.

#### **4. The presumption of passing on of indirect taxes levied in breach of EU law as the effect of the national and judicial practice**

One of the most interesting decisions, dealing with probative restrictions on the right of refund, is *Commission v. Italy*<sup>705</sup>, handed down following an infringement procedure. It is often recalled not only for the issue at hand, but also because it represents a cornerstone

<sup>702</sup> ECJ, 14 January 1997, Joined cases from C-192/95 to C-218/95, *Comateb*.

<sup>703</sup> *Id.*, para 26: “*The same applies where taxpayers have been obliged by the relevant legislation to incorporate the charge in the cost price of the product concerned. The fact that such a legal obligation exists does not mean that there is a presumption that the entire charge has been passed on, even where failure to comply with that obligation carries a penalty*”.

<sup>704</sup> *Id.*, at para 29: “*It should be borne in mind, however, that even where it is established that the burden of the charge has been passed on in whole or in part to the purchaser, repayment to the trader of the amount thus passed on does not necessarily entail his unjust enrichment*”.

<sup>705</sup> ECJ 9 December 2003, case C-129/00, *Commission v. Italy*. See the decision in *Rivista di diritto finanziario e scienza delle finanze*, II, 2004, 57, with the comment of C. Attardi, *Presunzione di traslazione del tributo: in tema di responsabilità di uno Stato membro per inadempimento degli obblighi comunitari*, *Riv. Dir. Fin. Sc. Fin.*, 2004, 65. The Author inferred from the ruling the prohibition of presumptions in Community law, as they conflict with the principle of effectiveness. Cf. the comment to the same judgment of V. Mercurio, *La ripetizione dei tributi riscossi in violazione del diritto comunitario tra “diritto vivente” e principio di effettività*, *Riv. Dir. Trib.*, 2004, 85; see also N. Pennella, *Il caso italiano della presunzione di traslazione dei tributi sui consumi*, *Note to case C-129/2000*, *Rass. Trib.* 2004, 114.

with regard to the State's responsibility for the operating of its administrative and judicial bodies.

At issue was again the Italian legislation on the refund of taxes levied in breach of EU law. In particular, Article 29, para 2, Law No 428/90, provided that such taxes were reimbursed "unless the amount thereof has been passed on to others". The provision was *per se* 'neutral'<sup>706</sup>, meaning that it did not establish any presumption as regards the relevant facts. It was instead supposed to imply that the burden of proof rested upon tax authorities pursuant to the ordinary rule. Indeed, it was introduced to replace Article 19, Law decree No 688/82, which was twice found to be inconsistent with Community law<sup>707</sup>.

Notwithstanding this, Article 29, para 2, was applied by Italian courts as laying down a presumption of translation of the tax on customers<sup>708</sup>. In other words, the practice showed

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<sup>706</sup> This term is used by the Court itself in the decision, at para 31, where it held that "Such a provision is in itself neutral in respect of Community law in relation both to the burden of proof that the charge has been passed on to other persons and to the evidence which is admissible to prove it. Its effect must be determined in the light of the construction which the national courts give it."

<sup>707</sup> In the decision *San Giorgio* cited above, and also in another decision of the Court handed down in an action brought by the Commission against Italy for failure to fulfil obligations: ECJ 24 March 1988, case C-104/86, *Commission v. Italy*. See M. Olivieri, *Normativa italiana in tema di rimborso di imposte nazionali corrisposte in violazione dei principi comunitari*, *Dir. Prat. Trib.*, 1990, 473 et seq. Notably, following the judgments of the ECJ on Article 19, the Italian legislator regulated the claims for refund in a different way depending on the legal basis, whether national or of Community law. The result was that Article 19 continued to apply to domestic actions for refund of undue taxes, while Article 29 applied to actions for refund based on Community law.

<sup>708</sup> As such, it had also give rise to a judgment of the European Court of Justice following a reference for a preliminary ruling. It is ECJ, 9 February 1999, case C-343/96, *Dilexport*, where the Court held that "If, as the national court considers, there is a presumption that the duties and charges unlawfully levied or collected when not due have been passed on to third parties and the plaintiff is required to rebut that presumption in order to secure repayment of the charge, the provisions in question must be regarded as contrary to Community law", whereas "If, on the other hand, as the Italian Government maintains, it is for the administration to show, by any form of evidence generally accepted by national law, that the charge was passed on to other persons, the provisions in question are not to be considered contrary to Community law". A similar interesting judgment is ECJ 2 October 2003, case C-147/01, *Weber's Wine World*. With particular reference to the relationship established within the practice between the passing on of the tax and the unjust enrichment the Court held as follows (para 113-114): "Although the tax authority and the Austrian Government contend that the burden of proof is wholly borne by the national authority, it is also apparent from the order for reference that the tax authority concluded that the economic burden of the duty on alcoholic beverages had not been borne by the claimants in the main proceedings simply because the price invoiced to consumers of those beverages included that duty. That approach might constitute a presumption that the duty has been passed on to third parties, and also of unjust enrichment of the taxable persons, of such a kind as to render repayment of the duty levied though not due impossible or at least excessively difficult, which is contrary to Community law. It is for the national court to determine whether, in the absence of a statutory presumption, the tax authority's practice has the effect of establishing such a presumption of unjust enrichment". The Court thus concluded that (para 117) "(...) the principle of effectiveness referred to at paragraph 103 of this judgment precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties."

that the probative regime under Article 19 cited above, which was found by the EUCJ to be inconsistent with Community law, was restored by tax authorities and judges<sup>709</sup>.

In accordance with its previous case-law, and disregarding the fact that the presumption was a result of interpretation, the EUCJ found Italy responsible for having failed to amend Article 29, para 2, which was interpreted and applied by administrative authorities and the majority of courts in such a way that it rendered excessively difficult for the taxpayer the right to repayment of charges levied in breach of Community rules.

Apparently, there is nothing new in respect of other decisions, as the Court grounds its conclusion on the principle of effectiveness. Though, presumably due also to the detailed frame presented by the Commission and the need to consider the interpretation of the provision given by Italian courts, the EUCJ gives an insight of the structure of the presumption concerned and seems to question its rationality.

The European Commission argued that the jurisprudence of the Italian Supreme Court, which was followed by the lower courts, resulted in the establishment of a presumption that a taxpayer claiming refund of charges incompatible with Community law on the basis of Article 29, para 2, Law No 428/90, has passed on the tax to subsequent sales. National courts' reasoning rested mainly on the assumption that normally commercial companies pass on indirect taxes to their customers. In particular, the Commission gave account of a specific decision of the Italian Supreme Court<sup>710</sup> and of some circular letters issued by Italian tax authorities. In the former, the Italian judge identified a series of elements capable of grounding a presumption of translation: the commercial/industrial nature of the activity carried out by the taxpayer, the normality of the trading and the absence of insolvency, the undue charges had been applied over a long period in the entire territory without any objection being raised, the failure to produce accounting documents (even when the period of obligatory preservation was expired). Such widespread judicial approach, in the view taken by the Commission, "establishes a *de facto* presumption that taxpayers pass on to third parties the charges contrary to Community law of which they seek repayment, a presumption which it is then for them to rebut by adducing evidence to the contrary, in disregard of the Court's holding in paragraph 52 of the judgment in *Dilexport*". Moreover, the Commission underlined that the reasoning developed by the

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<sup>709</sup> This appears a typical example of a 'jurisprudential presumption', which refers to a certain inference that, born as a presumption of fact, ends up to be constantly applied by courts, as if it was a presumption provided for by the law.

<sup>710</sup> Supreme Court 28 March 1996, No 2844.

Italian courts was illogical, as the premise (companies usually pass on indirect taxes) of the presumption coincides with the result of the premise, and the elements sometimes put forward in such reasoning (nature of the taxpayer, non-insolvency, general application of the charge) were arbitrary. Likewise, in some circular letters<sup>711</sup> the passing on of charges to third parties was inferred by the circumstance that such charges had not been accounted for, for the year of their payment, as payments to the public purse for undue tax and credited as an asset in the balance sheet of the taxpayer claiming their refund. In such line of thought, the lack of this accounting record showed that the undertaking had considered the charges as being ordinary expenses and thus had passed them on to customers.

The Court agreed with the arguments put forward by the Commission, and held as follows (para 35):

*“The reasoning followed in the cited judgments of the Corte suprema di cassazione is itself based on a premiss which is a mere presumption, namely that indirect taxes are in principle passed on by subsequent sales by economic operators where they have the chance. The other factors, if any, taken into account, namely the commercial nature of the taxpayer's business, the fact that its financial situation is not parlous and the levying of the tax in question throughout the national territory for an appreciable period without objection, permit the conclusion that an undertaking which has carried on its business in such a context has in fact passed on the charges in question only if one relies on the premiss that all economic operators act thus, save in special circumstances such as the absence of one or other of those factors. However, as the Court has already held (see *San Giorgio*, cited above, paragraphs 14 and 15; *Joined Cases 331/85, 376/85 and 378/85 Bianco and Girard [1988] ECR I-1099*, paragraph 17; *Commission v Italy*, cited above, paragraph 7, and *Comateb and Others*, paragraph 25), and for the economic reasons pointed out by the Advocate General in points 73 to 80 of his Opinion, such a premiss is unjustified in a certain number of situations and is merely a presumption which cannot be accepted in the context of the examination of claims for repayment of indirect taxes contrary to Community law.”*<sup>712</sup>

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<sup>711</sup> In the decision the following are mentioned: Circular letter 11 March 1994, No 21/2/VII; Circular letter 12 April 1995, No 480/VIII.

<sup>712</sup> In the subsequent paragraphs, the Court focused on the documentary requirements that national authorities asked from the taxpayer and that, if not fulfilled, gave rise to a presumption of passing on the charges. It stated as follows (paras 37 to 40): “Such a requirement, concerning the years for which repayment is claimed, which is raised during the period for which the accounting documents in question must obligatorily be preserved, cannot be regarded in itself as reversing, to taxpayers' disadvantage, the burden of proof that the charges have not been passed on to third parties. Such documents provide neutral factual information from

In the reasoning of the EUCJ, the judicial approach goes to deny the right of refund on the basis of a premise which is itself a presumption, according to which indirect taxes are passed on to customers by commercial companies. On such presumption further inferences are added and are based on certain elements, such as the nature of the activity, the non-insolvency, the general and undisputed collection of the tax due, the failure to comply with accounting requirements and so on. The result is, in the view taken by the Court, a sort of double presumption (i.e. a presumption based upon another one), wherein the first inference is wrong and contrary to Community law. In fact, the passing on to customers of indirect taxes does not systematically happen and the uncertainty related to the occurring of such circumstance in the concrete case cannot be put upon the taxpayer. Accordingly, the presumption that the indirect tax passed on to customers cannot be admitted in the context of claims for refund of taxes levied in breach of EU law<sup>713</sup>.

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*which, in particular, the authorities may try to show that the charges have been passed on to others (see, to that effect, Case C-147/01 Weber's Wine World and Others [2003] ECR I-11365, paragraph 115). In that situation, and in the absence of special circumstances upon which the claimant could rely, failure to produce accounting documents when they are requested by the authorities can be regarded by them or by the courts as a factor to be taken into account in showing that the charges have been passed on to third parties. However, that factor cannot, by itself, be sufficient for it to be presumed that those charges have been passed on to third parties nor, a fortiori, to impose on the claimant the onus of rebutting such a presumption by proving the contrary (see, to that effect, Weber's Wine World and Others, cited above, paragraph 116). In any event, in situations where the authorities seek the production of those documents after the expiry of their statutory preservation period and the taxpayer fails to produce them, the fact of drawing the conclusion therefrom that the taxpayer has passed on the charges in question to third parties or of drawing the same conclusion subject to the taxpayer proving the contrary amounts to establishing to the taxpayer's disadvantage a presumption which results in making excessively difficult the exercise of the right to repayment of charges contrary to Community law. In relation to the fact that the authorities consider that the passing on of a charge to third parties is established if the amount of that charge has not been accounted for, from the year of its payment, as a payment to the public purse for undue tax, and credited as an asset in the balance-sheet of the undertaking seeking its repayment, it must be held as follows. Such reasoning leads to the establishment of an unjustified presumption to the claimant's disadvantage. In view of the conditions in which a claim for repayment of a charge occurs, to add the amount of that charge as an asset to the balance sheet for the year of its payment assumes that the taxpayer immediately considers that it has a high chance of successfully disputing its payment, although, under the very terms of Article 29(1) of Law No 428/1990, it has a period of several years to bring such claim. Furthermore, the taxpayer may very well, even while challenging the payment of the charge, consider its chances of success insufficiently sure to take the risk of accounting for the corresponding amount as an asset. In that regard, in view of the difficulties of obtaining a favourable outcome to a claim for repayment in the circumstances revealed in this case, such an entry could even be alleged to be contrary to the principles of lawful accounting. In addition, to consider that the passing on of the charge to third parties is established on the ground that its amount has not been added as an asset to the balance sheet already depends on the presumption that indirect taxes are usually passed on by subsequent sales, a presumption which has been declared to be contrary to Community law in the course of the consideration of the first aspect criticised by the Commission."*

<sup>713</sup> Notably, following the ECJ's judgments, the Italian legislator has amended, with Article 21, Law 6 February 2007, No 13, the wording of Article 29, para 2, Law No 428/90, by adding that the passing on of the tax may not be assumed by the tax offices by means of presumptions. See C Sandò, *Le presunzioni tributarie nazionali alla luce del diritto comunitario*, in *Attuazione del tributo e diritti del contribuente in Europa*, (ed.) T. Tassani, Roma, Aracne, 2009, at 115.

#### **4.1 Some considerations on the EUCJ's line of reasoning as to the rationality of the presumptive inference in Commission v. Italy**

It must be observed at the outset that the construction given by the EUCJ in the case Commission v. Italy as regards the national judicial reasoning is not completely correct. In fact, at issue was not a double presumption (or a chain of presumptions), but rather a series of indices (notorious facts and known facts) which led the judge to assume that, in the pending case, a passing on to the customers had taken place. Such presumption may be classified as a 'jurisprudential presumption', because it is almost systematically applied by lower courts and the Supreme Court as if it was a legal presumption.

Having clarified this, it is still worthy of attention that the EUCJ pauses to reflect on the structure of the national presumption, under the point of view of its reasonableness. It is illogical a presumption wherein the premise coincides with the result and the former is wrong and contrary to Community law. Notably, when the Court goes to examine some single indices, especially those related to documentary burden upon the taxpayer, it explicitly finds certain facts as being inappropriate to ground a presumption (of law or even of fact)<sup>714</sup> or as establishing to his disadvantage a presumption which results in making excessively difficult the exercise of the right to repayment of charges levied in breach of EU law<sup>715</sup>.

However, the peculiar reasoning developed by the EUCJ in the decision at hand, which to a certain extent resembles the reasoning of a national Constitutional Court, while undoubtedly it deserves to be emphasized, it has also to be properly contextualized. In fact, from the jurisprudence of the EUCJ in the field of presumptions or rules of evidence restricting on the claims of refund, it results that the EUCJ rejects basically every means of proof which, by shifting the burden of proof (as to the passing on of the tax or the unjust enrichment) upon the claimant, excessively hinders the right of refund of the undue levy. With particular regard to presumptions, the disfavour of the EUCJ covers not only irrebuttable presumptions, but also rebuttable (and irrespective of any limitations concerning the counterproof) or jurisprudential presumptions. One could argue that unlike tax law presumptions provided in other areas of law, in this case the EUCJ rejects even presumptions that may be rebutted precisely in view of the lack of reasonableness of the inference. Another (more likely) explanation is that in the balance of the interests in play

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<sup>714</sup> See *Id.*, para 37.

<sup>715</sup> This, in particular, when the presumption is based on the taxpayer's failure to produce documents for which the compulsory preservation period. See *Id.* at para 38.



the protection of the effectiveness of a right conferred to undertakings by Community law (right of refund) prevails over the interests to simplify national administrative procedure or to avoid unjust enrichment of economic operators when the latter are raised by a Member State responsible for having collected taxes contrary to EU law<sup>716</sup>.

### **5. Some conclusions on the EUCJ's approach to presumptions of passing on of taxes levied in breach of EU law confronted with the approach of the Italian Constitutional Court**

The case of Article 19, Law decree No 688/82 is an extraordinary example of how the reasoning of a national Constitutional Court diverges from the one developed by the EUCJ, and at the same time of how the EU context is able to impact on national legal orders and on the protection of European taxpayers even beyond the purely substantive matters<sup>717</sup>.

The Italian Constitutional Court was called upon to rule on the compatibility of such provision with Article 24 of the Italian Constitution, which safeguards the right of defence<sup>718</sup>. It acknowledged that in previous ordinances issued on the same matter the question had been judged manifestly unfounded<sup>719</sup>, but noted that such conclusions needed to be reviewed in the light of the 'changed normative frame', which was basically constituted by the judgments of the European Court of Justice handed down on Article 19 either on a preliminary ruling or following an infringement procedure<sup>720</sup>. In this renovated normative environment, the Court confirmed that it falls within the discretionary powers of the legislator establishing the reversal of the burden of proof, which is not *per se* in contrast with Article 24 of the Constitution. However, where such burden may be satisfied exclusively by means of a documentary proof, then the right to access the court is undermined. This is because the judicial protection of the right of refund is made conditional to a kind of proof which is usually impossible to give, as it would entail the

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<sup>716</sup> In other words, it seems that the division of the burden of proof indicated by the Court has in part the significance of a 'sanction' towards the Member State concerned.

<sup>717</sup> See in this regard, C. Attardi, *Il ruolo della Corte europea nel processo tributario: manuale con massimario*, Assago, Ipsoa, 2008, at p. 226 et seq.

<sup>718</sup> Const. Court 21 April 2000, No 114. See the decision in *Rivista di diritto tributario*, II, 2001, 565 with the comment of F. Porporino, *Disciplina legale del rimborso dei tributi sui consumi e rilevanza della translazione: la sentenza costituzionale n. 114 del 21 aprile 2000*, *Riv. Dir. Trib.*, 2001, 575; cf. A. Comelli, *Sulla illegittimità costituzionale della limitazione dell'onere probatorio alla sola prova documentale*, *Rass. Trib.*, 2000, 1545; A. Poddighe, *Prova del fatto negativo e diritto della difesa*, *Rass. Trib.*, 2001, 1691.

<sup>719</sup> See ordinance No 651/1988; ordinance No 807/1988; ordinance No 172/1989; ordinance No 197/1989. In this ordinances the Court excluded that either the reversal of the burden of proof on the taxpayer as regards the passing on of the tax, or the request of the documentary proof, jeopardized the access to the court.

<sup>720</sup> The reference is to the cases cited above *San Giorgio* and *Commission v. Italy*.

availability to the taxpayer of a document wherein the passing on of the tax (i.e. a negative fact) results.

Therefore, the judgments of the EUCJ which rejected every presumption or means of proof rendering excessively difficult or impossible the exercise of the right of refund, led the Italian Constitutional Court to reconsider the compatibility of the reversal of the burden of proof established by the legislator in Article 19.

In a subsequent decision<sup>721</sup>, the same article was found inconsistent also with Article 3 of the Italian Constitution, in particular under the parameter of reasonableness. The Italian Constitutional Court argued from the structure of the presumption of the passing on of the tax to third persons and from the nature of the presumed fact. It confirmed that in tax law a derogation from the ordinary regulation of the action for the refund of undue payments is in principle legitimate. Indeed, under the general rule on the repayment of sums paid but not due<sup>722</sup>, the claimant is requested to prove only the occurring of the payment and the circumstance that it was undue. In tax law, the right to refund may be limited in order to avoid the unjust enrichment of the claimant, when the latter has passed on the economic burden of the tax on other persons. In this event, the burden of proving the translation of the tax, which is a fact that impedes the exercise of the right to refund and as such should be proved by the tax administration, is put upon the taxpayer. Precisely such legal reversal of the burden of proof is, in the view taken by the Italian Constitutional Court, non-reasonable. Indeed, it aims at alleviating the probative burden of tax authorities in a dispute concerning the repayment of a tax that has been unduly levied by the latter. In other words, there is not an interest worthy of protection which may justify a privileged position of the tax administration to the disadvantage of the taxpayer upon which the burden of proof is shifted. The Constitutional Court thus concluded that even though usually a transfer of the tax on other persons occurs, this circumstance cannot *per se* justify the reversal of the burden of proof on undertakings. If ever, it may be put forward by tax authorities before the court of the concrete case.

At the end of the day, the EUCJ and the Italian Constitutional Court offer similar solutions, but with a slightly different process. The Italian Constitutional Court reconsiders the question of constitutional compatibility of Article 19 only after the conclusions reached at

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<sup>721</sup> Const. Court 9 July 2002, No 332. See C. Attardi, *L'inversione dell'onere della prova nelle azioni di rimborso e principio costituzionale di ragionevolezza*, Giur. It., 2003, 1278; E. De Mita, *Fisco e Costituzione*, III (1993-2002), Milano, 2003, 896 et seq., 1284 et seq.

<sup>722</sup> Set forth in Article 2033 Italian Civil Code.

European level, where the probative settlement resulting from the national measure was found to hinder the effective enforcement of the Community right of refund. Based on this, the Constitutional Court did not deny the opposite conclusions that it had previously reached, where the inconsistency was excluded on the grounds that the passing on of the tax usually occurs and that the right of defence is guaranteed by the possibility to rebut the presumption<sup>723</sup>. Indeed, it did not discuss the legitimacy, in principle, of a reversal of the burden or proof in favour of the tax authorities. Instead, it noted that in the particular case at issue such reversal implied that the taxpayer was called to demonstrate a negative fact (i.e. that the passing on of the tax had not taken place) by means of documents: a proof in practice impossible to give; moreover, the presumed fact (the passing on of the tax) was not constitutive of the right of refund, but it was rather a fact impeding the exercise of that right: as such it was up to the defendant to demonstrate that it occurred, according to the general rule on the distribution of the burden of proof<sup>724</sup>. A derogation from the general rule was not reasonably justified when the tax authorities were requested to repay charges unduly collected.

The EUCJ, on the other side, though arguing from the difficulty of proof of a negative fact and the wrongness of the fact on which the presumption of translation was based, appears to be guided by the aim of guaranteeing the effectiveness of the right of refund of taxes levied in breach of EU law. To this end, it rejects altogether every presumptive mechanism – irrespective of the nature of the presumption – and every procedural settlement of the division of the burden of proof or even of administrative burdens<sup>725</sup>, which are *per se* identified by the EUCJ as rendering excessively difficult the right of refund.

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<sup>723</sup> See the ordinances referred to in footnote No 724.

<sup>724</sup> Article 2697 Italian Civil Code.

<sup>725</sup> Indeed, from the case-law it results that even the obligation of producing documents put upon the taxpayer may mask a presumption that the tax was passed on and the correlative burden of rebutting it. See, for instance, ECJ 2 October 2003, case C-147/01, Weber's Wine World (para 115-116): "*It is true that in the case of a 'self-assessed' charge, proof that the charge has actually been passed on to third parties cannot be adduced without the cooperation of the taxable person concerned. In that regard, the tax authorities may demand access to the supporting documents which the taxable person was required to keep under the rules of national law. It is also for the national court to determine to what extent the cooperation required on the part of taxable persons in establishing that the economic burden of the duty on alcoholic beverages was not passed on amounts in practice to establishing a presumption that the duty was passed on, unless the taxable persons rebut such a presumption by adducing evidence to the contrary.*"

## Chapter III - Section II

### Direct Taxation

#### Introduction

Unlike indirect taxes, which are envisaged in Article 113 TFEU, direct taxes are not explicitly covered by any provision of the Treaty. As a consequence, their positive harmonization basically rests upon Article 115 TFEU, pursuant to which “*Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure 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 internal market*”.

Such legal basis entails either procedural constraints or substantive constraints for possible measures enacted in the area of direct taxation. On the one side, it requires unanimous decision-making, meaning that each Member State still keeps the power to veto the European Commission’s initiatives; moreover, it explicitly refers to directives, which in fact are the privileged (binding) legal instrument for the approximation of national laws and practices, as they leave to Member States the choice of the means to attain the aim sought. On the other side, Article 115 legitimates harmonization in the extent to which national rules hinder the establishment and the functioning of the internal market.

These being the conditions for enacting EU legislative measures in the domain of direct taxation, one cannot be surprised to see that basically so far only four direct-tax directives have been adopted on the basis of Article 115 TFEU (previously, Article 94 EC Treaty) on specific issues<sup>726</sup>. Member States are indeed still very much reluctant to give up their sovereignty in the area of direct taxation, which has been traditionally perceived as affecting, less than indirect taxes, the functioning of the internal market and cross-border trades.

In this context, a fundamental role in view of the (negative) integration of national legislations in direct taxation has been played by the rulings of the EUCJ, and to a certain extent by the soft-law acts of the European Commission.

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<sup>726</sup> As is well known, they are the Parent-Subsidiary Directive, the Tax Merger Directive, the Interest and Royalty Directive and the Savings Interest Directive.

In more recent years, the European Commission has issued a number of Communications on specific topics, aimed at promoting the enforcement of the EUCJ's rulings on national tax measures found to be inconsistent with EU law even beyond the single legal jurisdiction involved in the case before the EUCJ. Very often these Communications follow up on case-law concerning delicate direct-tax matters, such as exit taxes, cross-border offsetting of losses or anti-abuse measures. They give a qualified reading of the EUCJ's findings so as to indicate to Member States the requisites which national measures have to comply with in order to be in line with EU law.

Above all, negative integration is entrusted with the EUCJ's application and interpretation of Treaty freedoms and EU principles facing unharmonized domestic provisions which are suspected to clash with the former. Looking at the case-law in the field of direct taxes, the Court is mainly called upon to interpret one of the fundamental freedoms or principles set forth by the Treaty in order to serve the referring judge with all the necessary criteria in the light of which can be tested the EU consistency of the domestic provision relevant in the case. Instead, there are very few cases wherein the Court, similarly to indirect-tax case law, is asked to interpret secondary EU law on direct-tax matters facing national implementing measures. In other words, direct tax cases mostly imply a balance between EU principles and rights of movements, on the one side, and national interests which boil down to protective measures restrictive on the former, on the other side.

Since its earlier case-law, the Court has reiterated that "*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*"<sup>727</sup>. Said otherwise, the Court acknowledges that in the absence of harmonized EU legislation, direct taxation falls within the competence of national jurisdictions, but the latter are prevented from introducing or maintaining legislative or administrative provisions which conflict with EU principles and fundamental freedoms. In testing domestic provisions against EU rules or principles, the Court avails itself of the rule of reason, which basically embodies the reasoning developed by the EUCJ for verifying the in(consistency) of the former with respect to the latter. In fact, once it has found the national measure to discriminate among comparable situations or to restrict on one of the fundamental freedoms, the Court goes further to verify whether an 'overriding reasons related to the public interest' exists that may justify such discrimination or restriction on

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<sup>727</sup> ECJ 14 February 1995, case C-279/93, Schumacker. Most of the direct-taxation decisions include a similar incipit.

the exercise of an EU right, and if the case is so, whether the measure does not go beyond what is necessary to attain that (national) purpose.

### **1. Tax law presumptions and direct taxation**

Turning from the question of how tax law presumptions are dealt with in the context of indirect taxation, to the domain of direct taxation, one would expect to face different solutions and a lower interference in the competence of the single Member States. Apart from a few provisions included in Directives in direct-tax matters, the most important being the anti-abuse clause set forth by the Merger Directive, there are neither rules establishing presumptions (like for customs duties) directly applicable in national legal orders, nor rules permitting under certain conditions the introduction of presumptive measures (like for VAT).

Notwithstanding this, the impact of EU law, through the rulings of the ECJ, on the recourse to presumptive measures by the national legislator is massive, and even merely procedural provisions may not escape from the minimum standards set out at EU level.

This is a corollary of the role played by legal presumptions in the field of direct (especially income) taxation at national level, wherein they are introduced either in view of alleviating the burden of motivation and proof laying upon tax authorities, or in view of preventing tax evasion or avoidance. The need to simplify the assessment or recovery of the tax debt as well as to prevent abusive practices is clearly more compelling when cross-border transactions, or more generally situations involving non-resident (even legal) persons, are at issue. These being the cases, indeed, national tax authorities are confronted with more difficulties in carrying on inquiries, collecting information, recovering the tax owed or enforcing their own provisions or decisions towards subjects placed in another national jurisdiction, than those that would meet with merely internal situations. Similarly, cross-border situations and generally the exercise of one of the fundamental freedoms may increase the opportunities of abusive practices consisting of reducing the taxable base in the State of origin or shifting taxable base towards low tax jurisdictions.

Not surprisingly, in cases before the ECJ wherein presumptive national measures are at issue, two of the most recurrent justifications put forward by Member States basically coincide with the above needs<sup>728</sup>. In some, especially less recent, cases, they have argued,

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<sup>728</sup> In the dissertation, as explained, the focus will be on some of the justifications relied on by Member States. For an overview of the most common justifications put forward by Member States in the area of direct taxation, see S. van Thiel, *Justifications in Community Law for Income Tax Restrictions on Free Movement*:

rarely successfully, that the national presumption relevant in the case was necessary in order to secure the ‘effectiveness of fiscal supervision’. In other cases, they have contended that it is targeted at the ‘prevention of tax avoidance’ (or tax evasion, or abusive practices). As we will see, the latter justification has been more successfully raised than the first one. Indeed, along with a national interest, there is an EU interest in combating tax avoidance, evasion or the abuse of EU fundamental freedoms. Nonetheless, once the existence of ‘mandatory requirements of public interest’ is accepted, the EUCJ goes further to check if the means adopted by the national legislator to attain the aim sought are appropriate, necessary and if alternative measures may be conceivable that are less detrimental to a certain EU right or movement of freedom. This is very likely to be the case when irrebuttable presumptions of law are at issue, because rebuttable presumptions manifestly embody a more suitable instrument to attain the overriding interest without conclusively hindering the exercise of the Treaty freedoms.

In this regard, it must be observed at the outset that similarly to other areas of EU (tax) law, the EUCJ deals with presumptions in such a way that the risk is to enlarge the legal concept further beyond its traditional meaning. Such risk is even higher in the field of direct taxes. In this area, indeed, the Court tends to refer to ‘general presumptions of avoidance’ in a broad sense, which potentially includes all those national provisions that provide for a less favourable tax treatment in respect of domestic situations, when a transnational situation is at issue. This particularly results from a series of (non-taxation) cases involving national measures on broadcasting television which discriminated against foreign broadcasters and were classified by the Court as general presumptions of abusive practices. These decisions have been briefly referred to above, as from them some indications with regard to the requisites (in terms of degree of specificity) that a presumption of tax avoidance should have in order to comply with the EU law may be inferred. Nonetheless, one should refrain from automatically classifying the national measures at issue as legal presumptions. In some cases they end up to be mere rules of law or administrative practices or decisions, which for instance prevent non-residents from supplying certain kinds of services and so on.

Generally speaking, the Court employs a teleological interpretation of the national measure under examination and usually disregards the possible structure of the situation envisaged

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*Acte Clair Rules That Can Be Readily Applied by National Courts –Part 1*, European Taxation, 2008, 279; S. van Thiel, *Justifications in Community Law for Income Tax Restrictions on Free Movement: Acte Clair Rules That Can Be Readily Applied by National Courts –Part 2*, 2008, p.347.

in the norm. In other words, it looks at the aim that in its view has inspired the national provision (e.g. avoiding the risk of abuse) and the means used to attain such aim, but it does not check the demonstrative nature of the facts on which the inference is based. In this view, every national measure aimed at tackling abuse becomes susceptible to embodying a presumption of abuse. The known fact would be represented by the exercise of an EU freedom and the inference would be exclusively based on the territorial component of the situation, i.e. the transnational characteristics of the latter. More exactly, as will be shown, the Court takes into consideration how the situation envisaged in the norm is designed, but mainly in order to check if its scope is specific or rather too general so as to include even hypotheses where a risk of abuse does not occur and the restriction on the fundamental freedom may not be accepted.

In the light of the foregoing, below the focus will be mainly on the most significant EUCJ judgments concerning national tax presumptions or presumptive regimes, in line with some of the presumptive measures taken into consideration in the second chapter.

Given the extensive and chaotic case-law in the field of direct taxation, wherein very often the Court seems to be guided by considerations related to the concrete case and it is difficult to draw general conclusions, the analysis will be divided as follows. First, a number of less recent decisions, where the justification of the ‘need to safeguard the effective fiscal supervision’ are dealt with. Afterwards, some judgments wherein certain presumptive regimes (CFC; thin capitalization, transfer pricing), justified in the light of the ‘need to prevent the risk of tax avoidance’ are examined. In this stage, the anti-abuse clause included in the Merger Directive and the case law on the matter are referred to. Then, a more recent case-law wherein a further justification was (successfully) raised is illustrated (SGI), that is the ‘need to preserve a balance allocation of taxing rights’. Finally, the case SIAT is discussed, which throws a new light on the extent to which legal presumptions may be admitted in the field of direct taxation and on the role played by legal certainty. These decisions, and SGI in particular, confirm the importance of the rationale founding the single presumptive measure brought before the EUCJ in view of the acceptance or the rejection of a certain justification. In other words, and not differently from what has been underlined in the field of VAT, the way in which the Member State presents a certain presumptive measure influences the outcome of the decision. On the other hand, given that legal presumptions may be restrictive on an EU right or freedom, the



conditions of consistency with EU law depend on their possible justifications and afterwards on their proportionality.

## **2. National tax presumptions restrictive on a fundamental freedom on the grounds of the need for effective fiscal supervision**

Given the function of tax law presumptions, which are usually intended to face the gap of information on the side of tax authorities, Member States have in a number of decisions justified their introduction by invoking administrative difficulties where cross-border situations are at issue. This kind of argument has been labelled by the EUCJ under the format “*need to secure the effectiveness of fiscal supervision*”. It constitutes a sort of procedural justification, since it basically concerns the practical possibility of tax authorities to carry on the necessary checks for the purpose of determining precisely the tax due or the requisites for claiming a certain tax treatment and so on.

In fact, from a merely national angle, one could understand why measures are introduced that make the grant of a certain tax treatment conditional to further (substantive or procedural) conditions when cross-border situations are at issue, whereas it is granted automatically to domestic situations. The enforcement of national laws, the monitoring, the tax assessment and the tax recovery reflect the State’s sovereignty, so that they cannot be exercised in another jurisdiction unless with the assistance of the latter. On the other hand, if Member States could systematically rely on internal administrative difficulties in obtaining relevant information and be consequently allowed to discriminate against transnational situations, the entire system of fundamental freedoms would be undermined.

The EUCJ has reiterated that the “*effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of a fundamental freedom guaranteed by the Treaty*”. But from this abstract statement, a concrete acceptance of such justification has rarely followed up<sup>729</sup>. Before

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<sup>729</sup> Anyway, mostly in cases where the mutual assistance or recovery instruments were not applicable. See, for instance, as regards the similar formula ‘need to ensure the effective collection of income tax’, ECJ 3 October 2006, C-290/04, *Scorpio*. Cf. with special regard to the necessary proportionality of burdens put upon taxpayers exercising a Treaty freedom, ECJ 15 May 1997, case C-250/95, *Futura and Singer* (at. para 31 et seq.); the first decision to deal with these matters was ECJ 20 February 1979, case C-120/78, *Rewe-Zentral*. Partially different considerations may be drawn for restrictions on the freedom of movement with third countries, as in this case the administrative cooperation instruments do not apply. See ECJ 28 October 2010, case C-72/2009, *Établissements Rimbaud*. The issue is touched by D. S. Smit, *EU Freedoms, Non-EU Countries and Company Taxation: An Overview and Future Prospect*, EC Tax Review, 2012, 233, and in particular at p. 243. See also E. Nijkeuter, *Exchange of Information and the Free Movement of Capital between Member States and Third Countries*, EC Tax review, 2011, 232, who underlines that indeed the free movement of capital between Member States and third countries “*has its own dynamic that finds its*

denying a certain tax benefit or tax treatment to a taxpayer exercising a fundamental freedom, tax authorities must seek to obtain the necessary information through the administrative cooperation instruments<sup>730</sup> or ask the taxpayer himself to produce the probative elements that they necessitate<sup>731</sup>. This has been asserted in cases involving both direct and indirect taxes, some of which (Elisa, Teleos, Twoh, Persche) have been illustrated in this dissertation dealing with the impact of the procedural principle of effectiveness on national procedural law. Most of these cases concerned elements able to reduce taxation (exemptions, deductions, etc.), which usually, according to national procedural laws, are to be proved by the taxpayer claiming for them. Facing cross-border situations, tax authorities are tempted from denying a certain tax advantage on the grounds of the lack of the necessary information to their satisfaction, and thereby presuming (also by means of presumptions of fact) the non-entitlement to the advantage concerned.

These rules on the division of the burden of proof elaborated by the EUCJ in its case-law hold true, to a certain extent, where national tax law presumptions reversing the burden of proof facing cross-border situations are at issue. In this view, a Member State may not, in principle, distinguish between domestic and cross-border situations by providing solely for the latter a legal (irrebuttable or even rebuttable) presumption as to the existence of certain facts on which the enjoyment of a tax treatment depends. More exactly, it may not introduce such a distinction on the grounds that transnational situations encompass more administrative difficulties in terms of possibility of conducting checks and collecting

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*expression in the increased possibilities available to justify the restriction*". It is true that the Court tends to be more open to the use of the justification at hand when the free movement of capital involves third States. On the other hand, however, the increasing transparency requested internationally in the OECD model convention and bilateral treaties, as it has been underlined at the beginning of this chapter, let foresee that the Court will be less inclined to accept the justification of the 'needs to safeguard the effectiveness of fiscal supervision'.

<sup>730</sup> For a case-law overview see S.J.C. Hemels, *References to the Mutual Assistance Directive in the Case Law of the ECJ: A Systematic Approach*, European Taxation, 2009, p. 583.

<sup>731</sup> In the reading of the most recent jurisprudence given by M. Lang, *The Legal and Political Context of ECJ Case Law on Mutual Assistance*, European Taxation, 2012, 199, tax authorities are not requested to rely primarily on mutual assistance options, being rather permitted to demand evidence from taxpayers that they necessitate for assessing the taxes and duty concerned, and to deny the equal treatment where the taxpayers fail to provide such evidence. In his view, the pressure on Member States to make more effective use of mutual assistance tools (which may be inferred from older case-law) has diminished and the Court currently tends to pay greater attention to arguments presented by national governments, to permit additional grounds of justifications and to occasionally reduce the threshold when reviewing proportionality. Now, in my view it is true that in the most recent case-law the Court implicitly allows national tax authorities to demand the taxpayer exercising a fundamental freedom the necessary information, and that they are not obliged, instead, to have recourse to administrative cooperation instruments. Nonetheless, the fact that the Court has not recognised the right of the taxpayer to demand tax authorities to make use of such instruments (and of the related obligation upon the latter) does not necessarily imply that tax authorities may primarily shift their administrative burden on taxpayers. If so, the proportionality principle must be taken into account.

information. This is because the tax administration can rely upon the mutual assistance instruments in order to get the necessary information and it is not prevented from asking for such information, apparently on a case-by-case basis and in the context of the administrative proceedings, from the taxpayer involved.

In conclusion, in the view taken by the Court, Member States are not, in principle, permitted to exclude cross-border situations from the entitlement of a certain tax treatment on the grounds of administrative difficulties, either by means of irrebuttable presumptions of law, or similar provisions having a presumptive ratio and the ‘effect of irrebuttable presumption’<sup>732</sup>, or in some cases even by rebuttable presumptions of law.

## 2.1 The Vestergaard case

In the Vestergaard case<sup>733</sup>, at issue was a Danish measure which made the deduction in the State of residence of cross-border expenses met for professional training courses conditional to the proof of the professional-related nature of such expenditure, whereas the entitlement to the deduction was automatic when the course was held in Denmark.

More in detail, Mr. Vestergaard was denied by tax authorities to deduct from his taxable income the costs incurred for a professional course organized abroad in a tourist resort<sup>734</sup>, on the grounds that, pursuant to the applicable national rules, “*When a course is held in an ordinary tourist resort abroad, and this location cannot be justified as such on*

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<sup>732</sup> See ECJ, 8 July 1999, case C-254/97, Baxter. At issue was the French legislation that allowed the deduction from the taxable amount (of a special levy) of expenditure on research carried out in the State of taxation (France), and thereby (indirectly) discriminated between French laboratories carrying out research mainly in France and foreign laboratories which have their principal research unit outside France. In the case of the main proceedings, Baxter and the other applicants were subsidiaries of parent companies established in other Member States and were denied such deduction. The French Government basically justified the limitations to the deductibility of research costs on the grounds that tax authorities of the levying Member State could ascertain the nature and genuineness of such costs (see para 16). The Court rejected this argumentation. It recalled that ‘effectiveness of fiscal supervision’ is an overriding requirement of general interest that may justify a restriction on a Treaty freedom, so that “*A Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely*” (see para 18). However, at para 19 and 20 it held that “*(...) national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred cannot be justified in the name of effectiveness of fiscal supervision. The taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the levy to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States*”. Cf. E. Werlauff, *Remedies Available to Individuals under EC Law against Discriminatory National Laws*, European Taxation, 1999, 475. Cf. also ECJ, 29 March 2007, case C-347/04, Rewe Zentralfinanz, particularly at paras 54 to 58.

<sup>733</sup> ECJ 28 October 1999, case C-55/98, Vestergaard.

<sup>734</sup> Mr. Vestergaard was a certified auditor and employed by an auditing company, of which he was the sole shareholder. He had attended a tax training course on the Island of Crete, which had been organised solely for Danish participants by a firm of Danish auditors and a travel agency. He had spent one week in Greece, and out of the overall days, three whole days and two half days were dedicated to the course. Notably, the national court of first instance found that Mr Vestergaard had succeeded in rebutting the presumption.

*professional grounds, there is a presumption that the course involves such a significant tourism element that the course expenditure cannot be regarded as constituting deductible operating costs*". From the wording of the decision it results that such presumption was laid down in the guidelines issued by the Danish Ministry of Fiscal Affairs in accordance with the relevant law that generically permitted the deduction of 'operating costs'<sup>735</sup> and based on settled case-law of Danish courts<sup>736</sup>. Presumably, it was thus a jurisprudential presumption, applied within the administrative and judicial practice as if it was a presumption established by the law itself. According to such presumption, courses taken at an ordinary tourist resort abroad (in a location that could not be justified as such on professional grounds) were presumed to involve a significant tourism element, so that the related expenses were not deemed as deductible operating costs. From the decision, it further results that such presumption could be rebutted by producing information concerning the content and duration of the course and of the stay abroad. Moreover, it is clearly stated that such presumption did not operate when the course was held in an ordinary tourist resort placed in Denmark.

After having clarified that the services at issue in the main proceedings (organisation of training professional courses provided to nationals of a Member State on the territory of another Member State) fell within the freedom to provide services, the Court found the national rule to be in contrast with the latter. This is because it provided a difference in treatment based on the place where the service was supplied, by introducing a procedural obstacle to the deduction of cross-border business-related expenditure and not even to the same costs incurred in the State of residence<sup>737</sup>.

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<sup>735</sup> Article 6, para 1, let. a, Law 10 April 1922, No 149, defined the 'operating costs', which were to be deducted from the taxable income as follows: "(...) expenses which, during the course of the year, have been incurred with a view to acquiring, ensuring or maintaining income, including ordinary depreciation."

<sup>736</sup> Reading the judgment, it results that initially the Ministry's guidelines stipulated as follows: "Expenditure relating to participation in professional courses is deductible in the case of courses intended to maintain and update the professional knowledge and training of participants. (...) In the case where a professional conference or course is transferred to a foreign country (generally ordinary tourist resorts), this will have the effect of setting aside the right to deduct, unless the travel destination/course location can as such be treated as justified on professional grounds". Following some judgments handed down by courts of merits and the Supreme Court, it was then added that: "It is thus presumed that the holding of the course in a foreign tourist resort involves such a significant tourism element that the course expenditure cannot be regarded as constituting deductible operating costs".

<sup>737</sup> The Court stated, at paras 21 and 22 as follows: "As regards the question whether the rules of a Member State, such as at issue in the main proceedings, contains a restriction prohibited under Article 59 of the Treaty, it must be observed that, by making the right to deduct costs relating to participation in professional training courses held in an ordinary tourist resort abroad conditional upon the rebuttal, by the taxpayer, of a presumption that such courses involve such a significant tourism element that the costs cannot be treated as deductible operating costs, while such a presumption does not exist for courses held in ordinary tourist resorts located in the said Member State, those rules subject the provision of services constituted by the

Having stated this, the Court went to check the national justifications put forward by the Danish government. While it quickly rejected the ‘need to preserve the cohesion of a tax system’<sup>738</sup>, it spent a few more words on the need to secure the ‘effectiveness of fiscal supervision’. In this regard, it held as follows (paras 25-26):

*“(...) while a Member State may, in the interests of the effectiveness of fiscal supervision, apply measures which allow the amount of costs deductible in that State as operating costs to be ascertained clearly and precisely, and in particular those incurred in taking part in professional training courses (...), it cannot however provide any justification for that Member State to make the deduction subject to different conditions according to whether the courses take place in that State or in another Member State.*

*In that regard, it should be remembered that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) can be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer himself to produce the proof which they consider necessary to assess whether or not the deduction requested should be allowed (...)”*<sup>739</sup>.

Therefore, the Court acknowledged the national interest to make the deduction of certain business-related costs conditional upon the accurate assessment and reckoning of such costs. Nonetheless, the conditions of deductibility cannot diverge depending on the place

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*organisation of professional courses to different tax arrangements depending on whether the services are provided in other Member States or in the Member State concerned. Rules of a Member State which, like those in question in the main proceedings, make it more difficult to deduct costs relating to participation in professional training courses organised abroad than to deduct costs relating to such course organised in that Member State involve a difference in treatment, based on the place where the service is provided, prohibited by Article 59 of the Treaty.”*

<sup>738</sup> The Court agreed with the opinion of Advocate general in excluding a direct link, in the case at issue, between the income taxation and the deductibility of costs incurred for the participation in professional training courses. A direct link (between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts), was instead found in the cases *Bachmann* (ECJ 28 January 1992, case C-204/90, *Bachmann*) and *Commission v. Belgium* (ECJ 28 January 1992, case C-300/90, *Comm. v. Belgium*) cited in the judgment under discussion. As is well known, the justification based on the ‘need to protect fiscal coherence’ has been accepted by the Court in the above cases, but afterwards it has been almost systematically rejected. More recently, it seems that it reappeared under the vest of the ‘need to protect a balanced allocation of taxing power’ (see *infra*), even though the relationship between the two justifications is still not clear.

<sup>739</sup> See also paras 27 and 28, where the Court rejected the objection of the Danish government concerning the inadequacy of the Directive No 77/799 for obtaining the information they need in cases like the one at hand. The scope of that Directive, indeed, covers all the information that appears to the requesting authorities to be necessary to ascertain the correct amount of revenue tax payable by the taxpayer involved, in relation to their own legislation.

where the course takes place (i.e. the service is supplied). Although a rebuttable presumption does not prevent the taxpayer who incurred costs for services provided abroad to demonstrate that he is entitled to deduct them from his taxable income, it nonetheless renders more difficult the enjoyment of the deduction in comparison to the situation of taxpayers incurring similar costs in the State of residence. In the view taken by the Court, this procedural obstacle to the exercise of the freedom to receive services cannot be justified by tax authorities on the grounds of difficulties met in ascertaining the actual nature and amount of the expenditure in order to recognize or deny the deduction. In fact, on the one side, they may have recourse to the Mutual Assistance Directive, in order to obtain the necessary information. On the other side, besides the instrument of the exchange of information, the Court asserts that tax authorities may directly ask the taxpayer for the necessary information for the purpose of ascertaining the existence of the right to deduct.

In this regard, it has to be noted that the wording used by the Court, which refers to the possibility for tax authorities to require the taxpayer “*to produce the proof which they consider necessary to assess whether or not the deduction requested should be*”, would seem to suggest that rebuttable presumptions of law are admitted. Since this would be in contrast with the outcome of the decision, it is likely that such proof is to be intended as referring to the general obligation laying upon the taxpayer consisting of delivering the documentation on the basis of which a request for the deduction of certain costs is based, and in general all the information that is in his availability and may be needed by the tax administration.

## **2.2 Equal procedural treatments. The Talotta case on the minimum taxable profits or earnings for non-residents**

In the second chapter, when dealing with estimated methods of assessment set forth by Belgian income tax legislation, the case Talotta<sup>740</sup> has been referred to, as it has led the Belgian legislator to amend the scope of the minimum taxable profits originally applicable solely to non-residents.

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<sup>740</sup> ECJ 22 March 2007, case C-383/05, Talotta. Mr. Talotta was resident in Luxembourg and ran his restaurant in Belgium. Since he had not established his tax domicile in Belgium, here he was taxed pursuant to the income tax rules concerning non-residents natural persons, namely solely in respect of the income earned in the State’s territory (see Article 227-228 CIR). He was late in submitting his tax return for the 1992 tax year, and tax authorities had thus determined his taxable income on the basis of the minimum taxable profits fixed by the Royal decree 27 August 1993 for the hospitality sector.

In this case, at issue was Article 342, para 2 CIR, implemented by Article 182 AR/CIR, which facing the absence of evidence provided either by the taxpayer concerned or by the tax authorities, permitted the latter to determine the tax due by foreign undertakings operating in Belgium on the basis of the turnover and size of the workforce by referring to the minimum taxable profits established in the royal decree.

The most critical part of this provision consisted of the presumptive determination of the tax base for foreign businesses in a fixed amount depending on the industry sector. Indeed, the minimum tax base did not apply when the absence of evidence concerned resident taxpayers: their profits could be determined by analogy with the normal profits of at least three similar taxpayers (Article 342, para 1 CIR) or by signs or indices that the economic well-being enjoyed is higher than that resulting from the income declared. As a consequence, the national legislation concerning the assessment of undertakings' tax base discriminated against taxpayers depending on whether they were resident in Belgium or elsewhere.

From the decision, it results that the Belgian government contended that resident taxpayers and non-resident taxpayers are not in a comparable situation *“as regards the means of proof available to the tax authorities for the purposes of establishing the base of the taxable income”*. The argument of the difficulty of assessment and controls on the side of tax authorities was thus put forward by the national government to underline that the national measure did not discriminate between comparable situations. In its view, these situations were objectively different. To argue this, it referred to the case where the non-resident taxpayer's operations were carried out in part in the territory of a Member State other than that in which he carried out his self-employed activity. In such event, neither the comparison-based taxation nor the exchange of information with his State of residence were feasible<sup>741</sup>.

Such objection was rejected by the Court, which by contrast underlined that tax authorities meet the same difficulties when self-employed activities are in part carried out abroad, irrespective of whether the taxpayers concerned are resident or non-resident in Belgium,

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<sup>741</sup> As regards the second instrument, the Belgian government contended that the conditions of application of the Mutual Assistance Directive failed. See para 27: *“(…) it seems neither realistic nor effective, as a means of overcoming the practical problems entailed by the application of comparison-based taxation, to engage in an Exchange of information with the State of residence using the mechanism provided for in Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15). In the first place, the Belgian tax authorities do not have the benefit, in such cases, of information sent by the State of residence in the context of spontaneous or automatic exchanges of information and, secondly, they do not have precise factual evidence, with the result that the request for exchange of information would not be admissible”*.

and in any case they may rely on the Mutual Assistance Directive in order to obtain the information necessary to determine the income tax due by a certain taxpayer<sup>742</sup>.

Having found that the national measure clashed with the freedom of establishment<sup>743</sup>, the Court went further to see if an overriding requirement of general interest existed that was capable of justifying the restriction on the fundamental freedom. In this regard, the Belgian Government put forward the same justification that in its view grounded the non-comparability of non-resident undertakings and resident undertakings, namely the “need to ensure the effectiveness of fiscal supervision”. Yet, such argument was weak. Firstly, this was because of the way in which it was presented by the Member State, which generically claimed practical difficulties of application of the comparison-based method of assessment and even the impossible recourse to the Mutual Assistance Directive. Secondly, this was because in the case of the main proceedings the assessment did not concern the entire taxable income attributable to the non-resident person, but the amount of proceeds imputable to his self-employed activity carried out in Belgium. The hypothesis envisaged

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<sup>742</sup> More in general, the Court stipulated that, at paras 25 and 26, that “*It cannot be accepted that the Member State of establishment may apply minimum tax bases solely to non-resident taxpayers merely by reason of the fact that their tax residence is situated in another Member State, without depriving Article 52 of the Treaty of all meaning*”, since “*In fact, the income received by a resident taxpayer in the context of a self-employed activity in the territory of the Member State concerned and the income acquired by a non-resident taxpayer also in the context of a self-employed activity carried out in the territory of that Member State are in the same category of income, that is to say, income arising from self-employed activities carried out in the territory of the same Member State*”. It also found non-relevant the circumstance that, as contended by the Belgian Government, the minimum tax base is often more favourable to non-resident taxpayers than the comparison-based taxation applied to resident taxpayers. In fact, the case may be that the minimum tax base is disadvantageous for non-resident taxpayers, thereby an unequal treatment in respect of resident taxpayers results and a hindrance to the freedom of establishment (see para 31). Besides that, the Advocate General (see Opinion of Advocate General Mengozzi delivered on 16 November 2006) noted that the national provisions at issue did not appear to lay down an optional method of assessment (to be used as a ‘last resort’ for the Belgian Government), meaning applicable only when the recourse to other presumptive methods of assessment, in particular the comparison-based procedure, was impossible (see paras 27-32). In this regard, it was not clear if and how (i.e. by what type of evidence) the taxpayer “*could defeat the presumption inherent in the flat-rate determination of his taxable amount*”. The Advocate General further clarified that, irrespective of such circumstance, a difference in treatment arose. He observed at para 36 that “*Whilst, when ascertaining the taxable amount for non-residents, the tax authority, finding it objectively difficult to apply the comparison-based procedure, may limit itself to applying the minimum tax bases at issue when determining the taxable amount of residents, it is, in contrast, required to obtain the information necessary to determine the taxable amount using a presumptive method. Consequently, it is only for non-residents that the tax authority will, at a particular stage in the process of determining the taxable amount, be relieved of the burden of determining, albeit by way of presumption, the income that is subject to taxation and so be able to apply the minimum tax bases*”.

<sup>743</sup> See para 32 where the Court held that “*In those circumstances, legislation of a Member State, such as the rule resulting from Article 342(2) of the Income Tax Code 1992 and Article 182 of the Royal Decree of 27 August 1993, which lays down minimum tax bases only for non-resident taxpayers constitutes indirect discrimination on grounds of nationality within the meaning of Article 52 of the Treaty. In fact, even if such legislation provides for a distinction on the basis of residence, in that it denies non-residents certain tax benefits which are, conversely, granted to persons residing within the national territory, it is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners (see, by analogy, Schumacher, paragraph 28)*”.



by the national Government, i.e. the exercise of the same activity in part abroad, was able to concern even resident undertakings. As such, it did not embody a serious support for a different tax treatment for non-residents under the perspective of the procedures for determining the taxable base. This was indeed the view taken by the Court, according to which “*the need to guarantee the effectiveness of fiscal supervision does not justify a difference in treatment, and the treatment applied to non-resident taxpayers must therefore be identical to that provided for resident taxpayers*”<sup>744</sup>.

Before drawing some considerations on the above decision, it must be noted, at the outset, that albeit the provision relevant in the main proceedings is inserted among the means of proof in the hands of tax authorities for the assessment of the taxable base, it in fact ends up to be a substantive determination of the amount of profits. It is only apparently merely procedural. In fact, Article 182 AR/CIR establishes a certain amount on the basis of several factors, such as the industry, the workforce and so on. It then adds that the profits in this way determined cannot be lower than 19.000 euro. In other words, the provision may be classified as a presumptive method of assessment only *lato sensu*, as among other things it is not clear on the basis of what (statistical data, for instance, or other criteria), the amount is fixed. The impression is rather that it is an improper sanction, justified in the light of the unlawful situation in which a (foreign) taxpayer places himself by failing to comply with the obligations laying upon him.

Having clarified this, from the decision some indications worthy of attention for our purpose may be inferred.

Notably, primary EU law is able to affect not only substantive regimes or provisions, but even measures that within the domestic systems fall within the so-called ‘formal’ tax law, that is measures concerning the monitoring, inquiring and assessment powers of tax authorities. A discrimination against foreign taxpayers, and more in general a restriction on the exercise of a fundamental freedom, may well derive from a heavier burden (in terms of procedure that tax authorities are permitted to follow) established upon taxpayers on the grounds that tax authorities usually meet higher administrative and probative difficulties in assessing their tax position.

This holds true as regards minimum taxable proceeds or, presumably, presumptive methods of assessment. As a matter of principle, Member States are prevented from

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<sup>744</sup> See para 37 of the judgment. See N. Bammens, *The Principle of Non-Discrimination in International and European Tax Law*, Amsterdam, IBFD Doctoral Series, Vol. 24, 2012, p. 813. The Author notes that, as underlined in the text, “*the Court seems to attach some weight to the applicability of the Mutual Assistance Directive in the comparability analysis*”.

applying them solely to foreign persons on the grounds that they may not have the necessary information in order to apply the methods of assessment provided for residents. In the case of the main proceedings, facing the lack of evidence, tax authorities were entitled to rely on a presumptive method of assessment even for determining the tax base of resident undertakings. However, such method was based on a comparison with similar taxpayers and did not imply the application of a minimum taxable amount. The Court skipped the last step of the rule of reason, as it rejected the justification based on the effectiveness of the fiscal supervision. Therefore, it did not consider the measure under the perspective of the proportionality principle. Under such perspective, the absence of the possibility for the foreign taxpayer to demonstrate the actual amount of his profits would probably have been deemed as disproportionate with respect to the aim attained.

### **3. National tax presumptions restrictive on fundamental freedoms on the grounds of the need to combat tax avoidance**

From the examination of the case-law where the ‘need to secure the effectiveness of fiscal supervision’ is invoked by Member States, it can be inferred that the Court is inclined to reject tax law presumptions, either irrebuttable or rebuttable, justified on that ground. This is basically because the administrative cooperation instruments and the participation of the taxpayer in the administrative proceedings where he may produce the necessary evidence, are (proportionate) means able to secure monitoring and controls.

By contrast, the Court tends to accept as a justification for tax law presumptions the ‘need to combat tax avoidance’, though with limitations concerning the definition of the situation envisaged in the norm (i.e. the design of the known fact) and above all of the contrary proof<sup>745</sup>.

Despite the fact that the two justifications are inextricably interrelated and in fact are often jointly invoked by Member States, the Court usually deals with them separately. The ‘need to combat tax avoidance or evasion’ is framed within the more general overriding reason of public interest in tackling abusive practices, which may consist either in the abuse of EU freedoms or rights or in the circumvention of national provisions by means of the exercise of an EU freedom or right. Not surprisingly, most decisions dealing with tax law

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<sup>745</sup> Cf. A. Pieron, *Le rôle actif de la Cour de justice de l’Union européenne dans les luttes contre les discriminations fiscales et perspectives en droit fiscal belge*, in *Les dialogues de la fiscalité*, (eds.) E. Traversa, O. Hermand, E.-J. Navez, V. Deckers, C.-A. Helleputte, Y. Hougardy, A. Lecocq, D. Lequeux and B. Vintras, Bruxelles, Larcier, 2012, 369, in particular at 374 et seq.

presumptive measures include wording similar to that referred to in this dissertation dealing with the application of the proportionality principle in non-taxation cases where abusive practices were at issue. Likewise, the EUCJ recognises that taxpayers may not seek to circumvent their legislation by relying on EU freedoms or rights, or to abuse EU law. Accordingly, Member States are not prevented from taking proper measures aimed at tackling such conduct.

However, cross-border situations which reflect the exercise of a fundamental freedom or a right conferred to taxpayers by a Directive, cannot *per se* be assumed as embodying an abusive exercise of that freedom solely on the grounds of the transnational nature of the situation or the enjoyment of a more favourable tax regime. In this regard, the case-law concerning exit taxes is significant, and in particular the well-known case *Hughes de Lasteyrie du Saillant*<sup>746</sup>. At issue was the French legislation that applied an immediate taxation on latent increases in value of company securities to taxpayers with a substantial holdings who intended to transfer their residence abroad. The Court held that “*the transfer of a physical person’s tax residence outside the territory of a Member State does not, in itself, imply tax avoidance. Tax avoidance or evasion cannot be inferred generally from the fact that the tax residence of a physical person has been transferred to another Member State and cannot justify a fiscal measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty*”<sup>747</sup>.

More in general, in the context of an internal market, indeed, it is legitimate that commercial strategies of taxpayers aim also at minimizing the overall tax burden or

<sup>746</sup> ECJ, 11 March 2004, C-9/02, *Hughes de Lasteyrie du Saillant*.

<sup>747</sup> *Id.*, para 51. The Court continued (paras 52-53): “*Article 167a of the CGI cannot, therefore, without greatly exceeding what is necessary in order to achieve the aim which it pursues, assume an intention to circumvent French tax law on the part of every taxpayer who transfers his tax domicile outside France. Similarly, a taxpayer who sells his securities before the expiry of the five-year period following his departure from France will also be liable for the tax under Article 167a of the CGI, even if he has no intention of returning to that Member State and continues to live abroad after the expiry of that period*”. Notably, in this case the argument of the fiscal cohesion invoked by the Netherlands Government, was rejected by the Court noting that the national legislation at issue granted the exoneration where after five years from the transfer of residence the increases in value were not realized. In this dissertation, it is not possible to deal in depth the issue of exit taxes. In general, they embody a regime based on the recovery of a certain tax on increases in value applied on occasion of the transfer of the residence either of individuals or of companies. By means of a fiction, such values are deemed as being realized on occasion of the transfer. As with other regimes, the way in which the provision is construed may constitute a (legal presumption of tax avoidance). Cf. Commission Communication of 19 December 2006 on exit taxation, COM(2006)825. Cf. ECJ 29 November 2011, C-371/10, *National Grid Indus BV*. See A. Carinci, *Il diritto comunitario alla prova delle exit taxes, tra limiti, prospettive e contraddizioni*, Studi Tributari Europei, 2009, (<http://www.seast.it/rivista/>).

choosing the most favourable tax route, insofar as the arrangements entered into in order to pursue such aim do not amount to abusive practices<sup>748</sup>.

As a result, the question shifts to the design of the situation which is presumed as embodying avoidance, evasion or abuse, and on the distribution of the burden of proof as regards the facts concerned. Under the first aspect, the Court requests legal presumptions to be specifically targeted at ‘wholly artificial arrangements’ or non-arm’s length transactions and, more generally, to be based upon objective elements, so as to comply not only with the principle of proportionality, but also with the principle of legal certainty. This entails, among other things, that, unlike when the ‘need to secure fiscal supervision’ is invoked, a different treatment between domestic situations and cross-border situations is tolerated facing certain regimes that would be meaningless if applied to merely internal situations. Under the second aspect, the Court tends to reject any provisions or regimes that assume automatically and conclusively the existence of avoidance or evasion as regards situations or transactions that constitute exercise of EU freedoms or rights. In fact, in the view often taken by the Court, rebuttable presumptions of law are less detrimental to the exercise of such freedoms and rights than irrebuttable presumptions of law or in general any other normative technique having the ‘effect of an irrebuttable presumption’. Accordingly, rebuttable presumptions of law as to the existence of tax avoidance or evasion where certain elements of fact occur, are not per se in contrast with EU law, insofar as the taxpayer is effectively given the possibility to rebut the presumption and escape the application of the anti-avoidance provision or regime. Limitations to the object or means for counterproof are, albeit under a different extent, looked at with disfavour by the EUCJ, not only when they render it excessively difficult or impossible to give the contrary proof, but also when they imply excessive administrative burden upon taxpayers. These are very general considerations, which will be tested against some of the most relevant presumptive provisions or regimes. Below, a number of EUCJ’s decisions handed down on CFC rules, thin capitalization, transfer pricing and limitation to deduction of costs will be illustrated, as they aim at tackling the shifting of the taxable base towards low tax jurisdictions by assuming certain circumstances to be indicative (or demonstrative) of tax avoidance, tax evasion or abusive tax schemes.

Looking at them, the overall line of reasoning of the EUCJ is not as plain as it has been presented above, but it rather contains several contradictions. The first one has been

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<sup>748</sup> *Ex multis*, ECJ 26 October 1999, C-294/97, *Eurowings*.

already underlined, and consists of the circumstance that similar justifications put forward by Member States appear to bring to completely different outcomes. Others will be pointed out below. It must be noted, though, that in the field of direct taxation the consistency of a certain presumption of law depends on whether the Court considers the latter as being proportionate with the aim sought. To this end, the EUCJ is called upon to strike a balance between the interests in play<sup>749</sup>. In a domain which is not bound by EU detailed legislative provisions, it is inevitably influenced by the interests surrounding the specific national measure relevant in the pending case.

### 3.1 EU's interest in combating abuse

Tackling abusive practices carried out by taxpayers relying upon Treaty freedoms or rights conferred to them by Directives does not constitute a purely Member State's interest. Accordingly, EU institutions have taken action in order to provide Member States with the tools they require for preventing more effectively tax avoidance and evasion. In this sense, on the one side, steps have been taken recently in view of a more efficient administrative cooperation between Member States, since the lack of information facing cross-border situations may certainly contribute to the putting into place of abusive schemes. On the other side, secondary EU law includes articles that legitimize Member States to introduce anti-abuse measures aimed at combating tax avoidance or evasion and/or simplifying the ascertainment of the tax due. Besides the VAT Directive, which contains several articles where derogations from the wording of the Directive itself are envisaged to that end, either the Merger Directive<sup>750</sup> or the Interest and Royalty Directive<sup>751</sup> permit Member States to

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<sup>749</sup> See, on the application of the principle of proportionality in direct taxation, with particular reference to anti-avoidance national measures, P.L. Jezi, *Integrazione negativa e fiscalità diretta: l'impatto delle libertà fondamentali sui sistemi tributari dell'Unione Europea*, Pisa, Pacini, 2012, 269 et seq.

<sup>750</sup> Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfer of assets and exchange of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (codified version). Article 15, para 1, let. a), provides that a Member State may refuse to apply or withdraw the benefit provided for in Articles 4 to 14 where it appears that one of the operations that enter the scope of the Directive (Article 1) “has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives”.

<sup>751</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. Article 5 provides as follows at paras 1 and 2: “This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive”. Similarly, Council Directive 2011/96/EU of

deny the benefits provided thereof where the principal objective of the operation carried out is tax evasion, avoidance, or abuse.

It follows that the task of combating abuse of EU law covers both harmonized and non-harmonized sectors of tax law, and the Court itself has stated that its abuse-doctrine constitutes a general principle of EU law, applying throughout EU law<sup>752</sup>. Since the cases *Emsland-Stärke* and *Halifax*, the EUCJ has elaborated on an objective and subjective test on the basis of which abusive practices can be detected. It requires “*a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved*” and “*the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it*”<sup>753</sup>.

Such text has been exported in the field of direct taxation, where however some relevant differences must be pointed out at the outset. Firstly, the abuse of law doctrine, if ever considerable as a general principle of EU law, does not play the role of general principle applicable in direct tax cases under primary EU law. It remains a mere justification in respect to a restrictive national measure and as such it is opposed to one of the fundamental freedoms of movement. Secondly, from the more recent case-law it results that the objective and subjective elements, which are difficult to separate even in non-direct tax cases, tend to flow into ‘objective, independent and verifiable’ elements from which the actual or the artificial character of the arrangement carried out may be inferred. The intention to obtain an advantage contrary to the purpose of EU law, which would be per se difficult to demonstrate, is then inherent to the concrete situation or transaction. In fact, from the conditions that the Court requests for national anti-abuse measures to be deemed proportional, it follows that the examination focuses on the absence of ‘wholly artificial

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30 November 2011, on the common system applicable in the case of parent companies and subsidiaries of different Member States (recast), provides in Article 1, dealing with the scope of the Directive, at para 2, that “*This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse*”. Cf. also Article 3, para 2, which permits Member States to make the benefits of the Directive conditional to certain holding period requirements.

<sup>752</sup> See ECJ 5 July 2007, C-321/05, *Kofoed*, where the Court held (para 38) that Article 11, para 1, let. a) of the Merger Directive (old version), “*reflects the general Community law principle that abuse of rights is prohibited. Individuals must not improperly or fraudulently take advantage of provisions of Community law. The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law*”. As it will be explained in the text, the extent to which Member States may refuse or withdraw the benefits of the Directive is subject to a strict interpretation, as the wording of para 37 (“by way of exception and in specific cases”) reveal.

<sup>753</sup> ECJ, 14 December 2000, C-110/99, *Emsland-Stärke*; ECJ, 21 February 2006, C-255/02, *Halifax*. Recently, ECJ 22 December 2010, C-277/09, *RBS Deutchland Holdings*, in particular at para 49.

arrangements' that do not reflect 'economic reality', or transactions that would not have been concluded between non-related parties, and so on. Since the purpose of Treaty freedoms is precisely to let taxpayers participate in the economic life of a Member State other than the one of origin, where this effectively occurs through a real economic structure or transaction, there is neither circumvention of EU law nor intention of obtaining a certain advantage with artificial settings. The importance of the subjective element over the objective element may appear to re-emerge as regards the object of the proof to the contrary, where the Court requires Member States to allow the taxpayer to prove the 'valid commercial reasons' for the arrangement. Yet, what the taxpayer is in fact called upon to demonstrate is the effective settlement abroad, or that the conditions of the cross-border transactions are at arm's length and so on, rather than the motives behind the operation carried out.

### **3.1.1 European Commission's guidelines on anti-abuse measures**

In the previous paragraph, a reference was made to the active role of European Institutions in promoting the coordination of Member States' policy in order to cope with abusive practices. In this light may be read the Communication issued in 2007 by the European Commission on the application of anti-abuse measures in the area of direct taxation<sup>754</sup>.

Generally speaking, the Communication is an instrument of soft-law which permits the Commission to address Member States with non-binding indications as to the requisites set by EU law on a certain issue, based on the settled jurisprudence of the EUCJ. In this way, the Commission offers its reading of the relevant judgments, which is likely to be followed in possible infringement procedures. Member States are thus 'invited' to align their national provisions to that requisites.

The Communication on anti-abuse measures in the area of direct taxation is interesting because the Commission, while endorsing the rulings of the EUCJ handed down in the cases *Cadbury Schweppes* and *Thin Cap GLO*, sees in legal presumptions of tax avoidance a proportionate means for attaining the aim of combating the erosion of the taxable base, provided that they are sufficiently specific to affect only 'wholly artificial arrangements' and the taxpayer is given the right to rebut the presumption.

From the above decisions, the Commission infers that "*for the purposes of determining whether a transaction represents a purely artificial arrangement, national anti-abuse rules*

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<sup>754</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 10 December 2007, No 785.

may comprise 'safe harbour' criteria to target situations in which the probability of abuse is highest". In this regard, it shares the opinion delivered by Advocate General Geelhoed in *Thin Cap*, according to which "the setting out of reasonable presumptive criteria contributes to a balanced application of national anti-abuse measures as it is in the interest of both legal certainty for the taxpayers, and workability for tax authorities". In addition, the Commission requests that where the existence of 'wholly artificial arrangements' is presumed, the taxpayer must be given the opportunity, "without being subject to undue administrative constraints", to produce evidence of any commercial justification for the arrangement he entered into. This amounts to recognising that the taxpayer has the right to prove that his arrangement is justified by business objectives that are protected under the Treaty<sup>755</sup>.

Therefore, the Commission is clear in approving rebuttable presumptions included in anti-abuse rules, since they satisfy the need of legal certainty on the side of the taxpayer – given that the inference is fixed in the law - and on the side of tax authorities, which are also relieved from the burden of proof.

However, when turning to the shifting of the burden of proof on the taxpayer, the reasoning of the Commission becomes more cryptic and difficult to translate into real provisions. Firstly, it refers to the proof that transactions carried out by the taxpayer "served *bona fide* purposes", where the reference to the *bona fide* appears to be misleading. Secondly, it supports a case-by-case determination of the extent to which such burden of

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<sup>755</sup> With regard to the supplementary conditions set by the European Commission for anti-abuse measures L. De Broe, *Some observations on the 2007 communication from the Commission: 'The application of anti-abuse measures in the area of direct taxation within the EU and in relation to third countries'*, EC Tax Review, 2008, 143, in particular at p. 145, observes that once the taxpayer has proved that his arrangement pursues the object and purpose of Community law of which he avails himself, it is no longer relevant the circumstance that such arrangement lets him minimize the tax liability in his home State. He further underlines that in principle the burden of proof that there is abuse of Community law and tax avoidance is incumbent on tax authorities, which have to satisfy it in each concrete case. The Court has thus facilitated the task of tax authorities by permitting Member States to enact measures including presumptions of avoidance. In the light of this, the Author believes that both the requisites concerning the design of the presumptive criteria and the counterproof should be jointly taken into account. In other words, an anti-avoidance measure containing a broad presumptive criteria establishing tax avoidance is not *per se* consistent with EU law solely because it permits taxpayers to rebut that presumption. Similarly, the taxpayer's right of proving the contrary "may not be unnecessarily burdensome". As to the first requisite the Authors asserts: "Where rebuttable presumptions of tax avoidance are couched in such general terms that they render meaningless the burden of proof of tax avoidance on the part of the tax authorities and shift this burden almost automatically to the taxpayer, not very much remains of the requirement that the rule be specific and that the tax authorities prove case-by-case the existence of abuse. Accordingly, anti-avoidance rules which are based on the presumption that the exercise of a Treaty freedom by the taxpayer is abusive unless the taxpayer proves otherwise, are likely to be incompatible with Community law". With reference to the second requisite, based on the case *Cadbury Schweppes*, the Author finds the escape construed under the form of a motive test to be unsuitable, as the circumstance that a fundamental freedom is exercised with the intention of obtaining tax relief does not *per se* constitute abuse.



proof may be placed upon the taxpayer, and in view of the proportionality principle states that the “*burden of proof should not lie solely on the side of the taxpayer and that account should be taken of the general compliance capacity of the taxpayer and of the type of arrangement in question*”. Ultimately, it finds necessary to guarantee that the result of the assessment by tax authorities “*can be made subject to an independent judicial review*”.

The question arises as to whether the right to produce counterproof in the context of the administrative proceedings or trial may be considered sufficient in order to comply with these requisites. This solution would meet the need of certainty, and also the need to take into consideration the circumstances of the concrete case. It remains in part unclear the reference to the necessity that the burden of proof does not lie solely upon the taxpayer and that his compliance capacity is taken into account. The Commission presumably suggests that the national legislator is to distribute the burden of proof, depending on the type of transaction or arrangement concerned (CFC; transfer pricing, thin cap, etc.) and to demand from tax authorities at least the proof case-by-case of the indices from which the avoidance is (legally) inferred.

### **3.1.2 Anti-abuse clauses in direct tax directives. The Leur-Bloem case**

Before examining the EUCJ case-law under primary EU law, separate attention should be paid to anti-avoidance measures enacted by Member States based on provisions provided under secondary EU law. Similarly to other harmonized sectors, in this event the EUCJ is called upon to interpret a provision of tax law included in a Directive, against which a national measure transposing it into national legislation has to be tested. Consequently, the judgment results from the interpretation given to the wording of the EU rule in the light of the object and purpose pursued by the Directive concerned.

The question of the interpretation to be given to an anti-abuse clause provided under secondary EU law, and in particular to Article 11 of the Merger Directive (now, Article 15) was dealt with for the first time by the Court in the well-known case *Leur-Bloem*<sup>756</sup>. At issue was the Dutch legislation transposing the Merger Directive, which departed from the definition of ‘merger by exchange of shares’ envisaged in Article 2 of the Directive and provided the condition of “*merging the business of two companies permanently in a single unit from a financial and economic point of view*”<sup>757</sup>. The provision was justified, in the

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<sup>756</sup> ECJ 17 July 1997, C-28/95, *Leur Bloem*.

<sup>757</sup> More in detail, in the case of the main proceedings, the Dutch legislation was potentially able to exclude from the scope of the Directive hypotheses where tax evasion or avoidance did not occur. It provided that a

arguments of the Dutch Government, by the need to prevent tax advantages being granted for operations that had as their principal objective tax evasion or avoidance, in accordance with Article 11 of the Merger Directive. The latter permitted Member States to refuse or withdraw the benefits of the Directive where the operation has as its principal objective (or as one of the principal objectives) tax evasion and abuse, and added that the absence of valid commercial reasons for the operations carried out may be assumed as index of the fact that tax avoidance or evasion is the principal (or one of the principal) objective(s)<sup>758</sup>.

Once again, the EUCJ employs a teleological interpretation. Member States may introduce presumptions of tax avoidance or evasion based on the absence of valid commercial reasons, but such ‘reservation of competence’ cannot amount to undermining the objectives inspiring the Directive, which is to introduce tax rules that are neutral from the point of view of competition for the operations designated within the Directive itself<sup>759</sup>. By excluding certain categories of operations from the scope of the Directive, on the grounds that they are presumed to have been carried out without any valid commercial reasons, especially when the presumption cannot be rebutted, the objectives of the Directive are undermined. Such competence must then be exercised by Member States in accordance with the principle of proportionality, which among other things implies the recourse to suitable (specific) criteria indicating the absence of valid economic reasons. The Court held as follows (paras 43 to 45):

*“In the absence of more detailed Community provisions concerning application of the presumption mentioned in Article 11(1)(a), it is for the Member States, observing the*

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share exchange is only exempt when it is carried out “with a view to combining in a single unit, on a permanent basis from an economic and financial viewpoint, the undertaking of the acquired company and that of another person”, thereby adding further requisites in respect of the implemented Community provision (Article 2, para 1, let. d) of the Merger Directive).

<sup>758</sup> It provided that “A Member State may refuse to apply or withdraw the benefits of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares: a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.”

<sup>759</sup> To be more precise, the Council Directive 2009/133/EC of 19 October 2009 (formerly, Council Directive 90/434/EEC of 23 July 1990) concerns mergers, divisions, paratial divisions, transfers of assets and Exchange of shares between companies of different Member States, and aims at creating within the Community conditions analogous to those of an internal market for the effective functioning of the latter. As stipulated in the second recital in the Preamble, “Such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. To that end it is necessary, with respect to such operations, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.”

*principle of proportionality, to determine the provisions needed for the purposes of applying this provision.*

*However, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, on the basis of criteria such as those mentioned in the second question (a) to (d), whether or not there is actually tax evasion or tax avoidance, would go further than is necessary for preventing such tax evasion or tax avoidance and would undermine the aim pursued by the Directive. This would also be the case if a rule of this kind were to be made subject to the mere possibility of the grant of a derogation, at the discretion of the administrative authority.*

*Such an interpretation is consistent with the aims both of the Directive and of Article 11 thereof. According to the first recital of its preamble, the aim of the Directive is to introduce tax rules which are neutral from the point of view of competition in order to allow enterprises to adapt themselves to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level. That same recital also states that mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is only when the planned operation has as its objective tax evasion or tax avoidance that, according to Article 11 and the last recital of the preamble to the Directive, the Member States may refuse to apply the Directive.”<sup>760</sup>*

In summary, Member States may introduce legal presumptions which assume the existence of tax evasion or avoidance, thereby the non-entitlement of the Directive’s benefits, based on certain facts embodying the absence of valid commercial reasons<sup>761</sup>. But any overkill is

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<sup>760</sup> Cf. also para 41 of the judgment, where the Court censured the use of ‘predetermined general criteria’ by the competent national authorities and required a general examination of each particular case to be open to judicial review.

<sup>761</sup> Recently, in ECJ, 20 March 2010, C-352/08, *Zwijnenburg*, the Court has had occasion to reiterate that the option envisaged in Article 11, para 1, let. a) of the Merger Directive, which sets out an exception, is subject to strict interpretation “*regard being had to its wording, purpose and context*” (para 46). Thus, the anti-abuse clause may not be applied for the purpose of withholding the Directive benefits from a taxpayer who has sought, by means of a legal stratagem involving a company merger, to avoid the levying of a tax (transaction tax) which is not covered by the scope of the Directive. It is held, indeed, at para 47 that Article 11, para 1, let. a), “*By making reference, as regards valid economic reasons, to the restructuring or rationalisation of the activities of the companies participating in the operation in question, in which case there can be no presumption of tax evasion or tax avoidance, that provision is therefore clearly limited to company mergers and other reorganisational operations concerning them and is applicable only to taxes arising from those operations*”. Such anti-abuse clause (which in the case of the main proceedings was implemented in the Dutch law on corporation tax) covers solely taxes levied on the company or its shareholders on occasion of cross-border restructurings of undertakings, namely capital gains tax.

excluded, as it would overlap the Directive and jeopardize the objectives pursued by the latter<sup>762</sup>.

### 3.1.3 National measures implementing the anti-abuse reservation of the Merger Directive

If the interpretation given by the EUCJ of the anti-abuse clause included in Article 15, para 1, let. a) of the Merger Directive (formerly, Article 11) is plain in the abstract, difficulties arise on the side of Member States which decide to implement it in their legal orders, so that the question of the division of the burden of proof seems to be open to different interpretations. Under the interpretation given by the EUCJ, Member States are permitted to enact a presumption of tax avoidance or evasion based on the fact that a certain operation is not carried out for valid commercial reasons. But the automatic exclusion of entire categories of operations, without individual assessment, on the grounds that they are suspect is found to be disproportionate.

One could thus wonder in which way a legal presumption transposing the anti-abuse measure should be construed in order to be judged consistent with the Directive.

If it was formulated as a presumption of tax avoidance or evasion based on the absence of valid commercial reasons, then it would place upon tax authorities the proof of a negative fact, *per se* difficult to bring up. Presumably in the light of this, several Member States had transposed such clause by making the Directive benefits conditional to further requisites in

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<sup>762</sup> F. Hoenjet, *The Leur-Bloem judgment: the jurisdiction of the European Court of Justice and the interpretation of the anti-abuse clause in the Merger Directive*, EC Tax Review, 1997, 206, particularly at p. 212 et seq., made a parallel between the strict and literal interpretation of Article 11, para 1, let. a), of the Merger Directive given by the Court in the Leur-Bloem case and the strict interpretation of Article 3, para 2, of the Parent-Subsidiary Directive given by the Court in the case Denkavit-VI77C-Voomeer (ECJ, 17 October 1996, Joined cases C-283/94, C-291/94 and C-292/94), which in the view taken by the Court was aimed at countering a specific form of abuse. Interestingly, the Author raised the question as to whether the presumption envisaged in Article 11 of the Merger Directive is to be considered refutable (“*The first question that arises is whether the presumption of tax avoidance or tax evasion where valid commercial reasons are absent, is refutable*”). In his opinion, from the Leur-Bloem case it results that even in the absence of valid commercial reasons, it should be determined if there actually was tax evasion or avoidance. Thus, the role assigned to the presumption of tax avoidance or evasion is to shift the burden of proof upon the taxpayer in case valid commercial reasons are absent. In this event, the taxpayer can prove that tax evasion or avoidance is not the principal motive or one of the principale motives for which the transactions concerned have been carried out, or presumably he can give the (positive) evidence of reasons other than tax abuse. Of the same opinion is D. Weber, *A closer look at the general anti-abuse clause in the Parent-Subsidiary Directive and Merger-Directive*, EC Tax Review, 1996, 67. The interpretation given by the Author is in line with the jurisprudence of the ECJ, which rejects irrebuttable presumptions or similar normative mechanisms that automatically exclude certain categories of operations from the tax advantage of the Directive based on factors established in the national implementino legislation. It must be noted, though, that this interpretation does not result from the wording of Article 11, which is neutral as to the rebuttable or irrebuttable nature of the presumptions that Member State are allowed (and not obliged) to introduce.

respect to the ones laid down in the Directive. For instance, the Belgian legislation required the operation (merger, exchange of assets and so on) to fulfil ‘legitimate need of a financial or economic nature’. Provisions like that, however, in the extent to which potentially excluded from the scope of the Directive entire categories of cases, without a case-by-case assessment and the opportunity for the taxpayer to prove the existence of commercial non-fiscal reasons, were not in line with the criteria set by Community law.

The safest way to implement the provision remains the literal transposition of Article 15 para 1, let.a), in the national legislation, and in fact this is the solution which several Member States have opted for. Amongst these, Belgium has replaced the reference to the legitimate financial needs with an article that is identical to Article 15, para 1, let.a), of the Merger Directive, save for the explicit possibility to give proof to the contrary recognised to taxpayers<sup>763</sup>. However, even in this case, the question of who has to (dis)prove what is not fully clear.

Presumably, under a national provision transposing literally Article 15, para 1, let. a), tax authorities may deny or withdraw the Directive benefits when they show that the operation concretely carried out does not reflect economic reality or does not appear at first sight justified by reasonable financial reasons<sup>764</sup>. From the EUCJ case-law it results that the “constituent elements of the presumption of tax evasion or avoidance”, amount to a complex fact; that is a series of factors that show the absence of non-fiscal reasons<sup>765</sup>. It is

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<sup>763</sup> Article 183-bis CIR, stipulates, in the first and second indent as follows: “*Pour l'application des articles 45, § 1er, alinéa 1er, 46, § 1er, alinéa 1er, 2°, 95, alinéa 1er, 211, § 1er, alinéa 1er, et 231, § 2, alinéa 1er, l'opération ne peut avoir comme objectif principal ou comme un de ses objectifs principaux la fraude ou l'évasion* *fiscales.*”

*Le fait que l'opération n'est pas effectuée pour des motifs économiques valables, tels que la restructuration ou la rationalisation des activités des sociétés participant à l'opération, permet de présumer, sauf preuve contraire, que cette opération a comme objectif principal ou comme un de ses objectifs principaux la fraude ou l'évasion fiscales.*”

<sup>764</sup> In the wording of Article 15, para 1, let. a) of the Directive exemplifications are given of valid commercial reasons: the restructuring or rationalisation of the activities of the companies participating in the operation. Recently, the Court has reiterated, in ECJ, 10 November 2011, C-126/10, Foggia, with regard to the meaning of ‘valid commercial reasons’, that “*the concept involves more than the attainment of a purely fiscal advantage. Consequently, a merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not predominant in the context of the proposed transaction. Accordingly, under Article 11(1)(a) of Directive 90/434, where the merger operation has the sole aim of obtaining a tax advantage and is not carried out for valid commercial reasons, such a finding may constitute a presumption that the operation has tax evasion or avoidance as one of its principal objectives*” (paras 34-35-36).”

<sup>765</sup> Id, at para 52, where the Court concluded that “*(...) Article 11(1)(a) of Directive 90/434 is to be interpreted as meaning that, in the case of a merger operation between two companies of the same group, the fact that, on the date of the merger operation, the acquired company does not carry out any activity, does not have any financial holdings and transfers to the acquiring company only substantial tax losses of undetermined origin, even though that operation has a positive effect in terms of cost structure savings for that group, may constitute a presumption that the operation has not been carried out for ‘valid commercial reasons’ within the meaning of Article 11(1)(a). It is incumbent on the national court to verify, in*”

up to the taxpayer, then, to demonstrate that neither tax evasion nor tax avoidance occur, by giving the positive evidence of the existence of commercial reasons for which he entered into that operation or of the genuineness of the latter.

By contrast, an interpretation that placed upon the taxpayer the (negative) proof of the absence of any tax avoidance or evasion purposes, based on the first part of Article 15, para 1, let. a), which implies that business reasons and tax avoidance reasons may coexist and nonetheless the Directive benefits be denied if the former are dominant, is likely to be deemed disproportionate.

### **3.2 National anti-abuse measures under primary EU law**

In the previous paragraph, at issue were operations carried out by taxpayers seeking to obtain a favourable tax treatment by invoking the Merger Directive. The abuse, if existent, concerned directly EU (tax) rules, and consisted in relying on a provision of the Directive which has not been intended to cover those situations. More in general, abuse of EU law usually concerns sectors where the harmonization is far-reaching or even uniform under secondary EU law. In these cases, the Court employs a double test for detecting abusive practices, which basically occur when a certain operation is carried out with the intention of obtaining a tax advantage contrary to the objective and purpose of an EU rule that is in this way only formally observed. Remedies for combating such practices are left to the competence of each Member State, albeit they may neither render ineffective the EU rule relevant in the case nor interfere with the scope of the EU regulation beyond what is necessary to protect the national financial interests.

Turning to abusive practices realized by circumventing or avoiding the application of national legislation, the relevance at EU level depends on the transactional character of the situation or operation carried out by taxpayers and by the circumstance that the latter relies on EU law, typically on one of the freedoms of movement. In these cases, which normally fall within non-harmonized domains, the situation or operation is regulated under the national legislation, which may presume the existence of tax avoidance or evasion. Nonetheless, pursuant to settled case-law, such competence must be exercised in accordance with EU law. In this regard, within the more recent case-law of the EUCJ, the double test appears to yield in favour of standard formulations that concern the artificial

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*the light of all the circumstances of the dispute on which it is required to rule, whether the constituent elements of the presumption of tax evasion or avoidance, within the meaning of that provision, are present in the context of that dispute.”*

character of the operation or transaction carried out ('wholly artificial arrangements')<sup>766</sup>, which may be labelled as a genuineness or economic reality test. It follows that, irrespective of the motives behind a certain arrangement, the focus is on the artificial or genuine character of such arrangement, which may be inferred from specific criteria.

In fact, when ruling on legal presumptions included in national anti-abuse measures or regimes, the EUCJ makes the consistency of the latter with EU law conditional upon two main conditions: the design of the known fact by means of objective criteria verifiable by third parties and subject to a judicial review, and the right of the taxpayer to rebut the presumption by giving evidence of the genuineness of the arrangement or the arm's length value of the transaction and so on.

Below, the more significant EUCJ judgments will be illustrated, with a view to pointing out the set of rules elaborated by the Court under primary EU law with regard to specific anti-abuse measures or regimes including legal presumptions.

### 3.2.1 The legal presumption of tax avoidance included in CFC rules

As underlined also in the Communication of the European Commission, looking at the EUCJ's more recent judgments on anti-abuse measures in the field of direct taxes, it is reiterated that restrictions on fundamental freedoms must be targeted at "*wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory*".

This formula is further specified by the Court dealing with single regimes, such as CFC, thin capitalization and transfer pricing.

Starting from the CFC rules, the degree of the non-artificial nature of the arrangement is given by the physical existence of the controlled foreign company in terms of premises, staff and equipment, as well as by its economic integration and participation within the host State. When these elements do not occur, and in addition the subsidiary is subject to a 'very favourable tax regime', the case may be that a tax avoidance scheme is present. These objective factors play a pivotal role in determining the consistency rather than the clash of the legal presumption of avoidance included in a CFC legislation with EU law. In

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<sup>766</sup> As to whether the Court distinguishes between combating abuse at the EU level (in harmonized sectors or where the law has been made uniform) or at the national level (in non-harmonized sectors, like direct taxation), D. Weber, *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part I*, European Taxation, 2013, 251, in particular at p. 264, believes that there should not be any differences, because "*the core question remains whether Community law allows for the presumed combating of abuse, independent of the question of whether or not the abuse takes place at the EU level or at the national level*".

fact, they are relevant at least on a double level: as regards the design of the known fact and the object of the contrary proof.

Such general considerations and the ones developed below concerning the minimum requisites set at EU level for approving legal presumptions provided in anti-abuse rules, hold true irrespective of the rules on the details (type of income to be imputed, level of taxation in the host State, possible advance tax ruling, mechanisms to avoid double taxation), though the latter are surely important in order to evaluate the proportionality of the single regime.

In fact, it goes without saying that CFC legislations, which are provided in several Member States, may diverge on several aspects. Though, the essence of the regime is represented by the current taxation in the hands of the parent company holding a foreign subsidiary of the profits generated by the latter. This is done either by considering the subsidiary as a branch of the resident parent company to which profits are imputed on an accrual basis, or by assuming the yearly distribution of such profits to the parent company irrespective of the circumstance that this took place or not. Therefore, if the form in which a CFC rule is construed within each legal order may vary, the essence and the purpose of the regime remain. It aims at tackling tax avoidance practices planned by resident companies, which consist of diverting passive income towards companies located in low-tax jurisdictions.

From the scope and main features of the regime at hand it manifestly results how it is naturally targeted at cross-border situations. In the abstract, it is conceivable also for merely internal situations, and in fact some Member States include similar regimes, but usually they are directed to individual undertakings and limited partnerships (which are deemed as transparent entities rather than separate legal entities) in order to simplify their tax treatment and avoid tax deferral. By contrast, given the aim pursued by means of CFC rules, that is avoiding the shifting of taxable base to tax havens, the inclusion of domestic subsidiaries in the scope of the regime would not make much sense, there being other forms of anti-avoidance rules applicable. In the light of this, usually CFC legislations discriminate resident parent companies holding one or more subsidiaries in low tax jurisdictions against parent companies holding subsidiary in their State of residence. Or, at least, they restrict on the freedom of establishment of the former, by discouraging them from investing abroad through the establishment and the maintaining of a subsidiary.



### 3.2.1.1 The Cadbury Schweppes case. The facts

The consistency of the CFC legislation with Community law, in particular with the freedom of establishment, has been examined by the EUCJ in the well-known case Cadbury Schweppes<sup>767</sup>.

At issue was the UK CFC legislation, providing that the profits of a foreign company in which the resident parent owned a holding of more than 50% were attributed to the resident company and taxed in its hands ‘as they arise’, irrespective of their distribution in the form of dividends. This occurred when the foreign company was subject, in the State where it was established, to a lower level of taxation, which amounted to less than three quarters of the amount of tax which the CFC would have paid in the UK on the same taxable profits. The legislation included a system of tax credit in order to avoid double taxation on the same profits, and provided for a number of exceptions, which worked as ‘carve out’, impeding the application of the regime, either because the circumstances envisaged were incompatible with an artificial arrangement or artificial transactions (acceptable distribution policy, trading activities, public quotation) or because of the negligible character of the latter (*de minimis* exception). In addition, the UK’s CFC legislation provided an escape, at first sight, under the form of a sort of counterproof to be given by the resident parent company, which was labelled as ‘motive test’. Such test was satisfied where two conditions jointly applied: a) when transactions giving rise to the CFC’s profits in a certain accounting period caused the lowering (upon a certain threshold) of the tax that otherwise would have been paid, the resident company was called upon showing that this was not the main purpose or one of the main purposes for carrying on those transactions; b) likewise, it had to show that the main reason or one of the main reasons for the existence of the CFC was not reducing the tax burden in the UK by diverting profits, which otherwise would have been received and taxed in the hands of a UK resident. Ultimately, from the decision it results that on the basis of this legislation, tax authorities published a list of States wherein, provided that certain conditions were met, a CFC could be established without being subject to the CFC legislation.

In the facts of the main proceedings, none of the above exceptions applied and the company resident in the UK was not able to fulfil to the satisfaction of the tax authorities

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<sup>767</sup> ECJ, 12 September 2006, case C-196/04, Cadbury Schweppes. See S. Whitehead, *CFC Legislation and Abuse of Law in the Community*, in *The Influence of European Law on Direct Taxation, Recent and Future Developments*, (ed.) D. Weber, Alphen aan den Rijn, Kluwer Law International, 2007, 1 et seq.; M. Beghin, *La sentenza Cadbury-Schweppes e il “malleabile” principio della libertà di stabilimento*, *Rass. Trib.*, 2006, 990.

the motive test, therefore a tax notice was issued originating the dispute before the national court. Such resident company (Cadbury Schweppes) was the parent company of a group including numerous subsidiaries. Amongst the latter, it indirectly owned two group finance subsidiaries established in Ireland, wherein they were subject to a tax rate of 10%<sup>768</sup>.

This being the juridical and factual background and turning to the decision, the EUCJ found that the UK's CFC rules could be compatible with Community law provided that they were targeted at 'wholly artificial arrangements' aimed at circumventing national legislation and that the taxpayer was given the possibility to prove the absence of any fictitious arrangement. The main doubts concerned the 'motive test' and indeed the EUCJ referred the matter back to the national court, which was entrusted with the ascertainment of whether such test could be interpreted in such a way that taxation was restricted solely to 'wholly artificial arrangements'.

As usual, the EUCJ reasoning is developed through three main steps, which basically consist of assessing if the national measure discriminates or is restrictive on the fundamental freedom concerned, in checking the justifications invoked by the Member State involved and ultimately in the test of appropriateness and proportionality of such measure to reach the purpose sought. Notably, in this decision, the last two steps are strongly interrelated, as the analysis of whether the national measure is targeted at 'wholly artificial arrangement' implies already an evaluation of its proportionality.

As was predictable, the EUCJ found the CFC rules to be restrictive on the freedom of establishment<sup>769</sup>, and after having quickly rejected the justifications of the need to prevent the reduction of tax revenue<sup>770</sup>, it focused on the need to prevent a form of tax avoidance involving the creation by a resident company of a subsidiary in a low tax jurisdiction and

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<sup>768</sup> From the decision it seems that they carried on financing business, that is they raised finance and provided that finance to other members of the Cadbury Schweppes' group of companies around the world. At first sight they were not merely 'letterbox' or 'front' subsidiaries.

<sup>769</sup> *Id.*, at paras 43. The Court observed that (paras 43-44) "*it is common ground that the legislation on CFCs involves a difference in the treatment of resident companies on the basis of the level of taxation imposed on the company in which they have a controlling holding. Where the resident company has incorporated a CFC in a Member State in which it is subject to a lower level of taxation within the meaning of the legislation on CFCs, the profits made by such a controlled company are, pursuant to that legislation, attributed to the resident company, which is taxed on those profits. Where, on the other hand, the controlled company has been incorporated and taxed in the United Kingdom or in a State in which it is not subject to a lower level of taxation within the meaning of that legislation, the latter is not applicable and, under the United Kingdom legislation on corporation tax, the resident company is not, in such circumstances, taxed on the profits of the controlled company*". It follows a difference in treatment which creates a tax disadvantage for the resident companies falling under the scope of the CFC regime (as it is taxed on the profits of another legal person) and as such dissuade them from establishing, acquiring or maintaining a subsidiary in a Member State in which their subsidiaries would be subject to a lower level of taxation (see paras 45-46).

<sup>770</sup> *Id.*, para 49.

the carrying on of transactions in order to artificially transfer profits from the Member States where they are generated towards that low tax State.

### 3.2.1.2 Core of the ruling on CFC rules

This being the frame, the decision appears to be based on two main pillars.

On the one side, the EUCJ reiterated its case-law concerning the circumvention of national law by means of abuse of Treaty rights. In the view constantly taken by the Court, the fact that a Community taxpayer seeks to benefit from tax advantages in force in a Member State other than his State of residence does not per se embody abuse and as a consequence may not *per se* deprive him of the right to rely on a fundamental freedom<sup>771</sup>. This entails, with special regard to the possible limitations to the exercise of the freedom of establishment, that a ‘general presumption of tax evasion’ based on the mere fact that a resident company establishes a subsidiary in another Member State is not in principle approved by the Court<sup>772</sup>.

On the other hand, precisely when examining the possible justification for the restriction to the freedom of establishment on the grounds of prevention of abusive practices, the EUCJ employs a marked teleological interpretation of the content of such freedom and the approved limitations. In this instance, the Court notes that the freedom of establishment “*is intended to allow a Community national to participate, on a stable and continuing basis, in the economic life of a Member State other than his State of origin and to profit therefrom*”. Thus, the concept of establishment here implies “*the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period*”, which in turn

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<sup>771</sup> The Court stated as follows (para 35-36): “*It is true that nationals of a Member State cannot attempt, under cover of the rights created by the Treaty, improperly to circumvent their national legislation. They must not improperly or fraudulently take advantage of provisions of Community law (...). However, the fact that a Community national, whether a natural or a legal person, sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty (...)*”. From the decision making the reference it resulted, and the UK government contended, that the establishment of the two Irish subsidiaries in the IFSC was aimed at benefiting from the favourable tax regime therein. The Court specified the content of the general statements referred to above and objected that “*As to freedom of establishment, the Court has already held that the fact that the company was established in a Member State for the purpose of benefiting from more favourable legislation does not in itself suffice to constitute abuse of that freedom*” (para 37).

<sup>772</sup> *Id.* at para 50, while the possible justifications were analysed by the Court. This is settled case-law, as it has been explained when dealing with the proportionality in non-taxation cases and tax avoidance under secondary EU law. *Ex multis*, ECJ, 26 September 2000, C-478/98, *Commission v. Belgium*, on Eurobonds, especially at para 50, where it is held that “*As appears from Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, paragraph 44, a general presumption of tax evasion or tax fraud cannot justify a fiscal measure which compromises the objectives of a directive.*”

presupposes “*actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there*”<sup>773</sup>.

Based on these two lines, the EUCJ gives its guidance to the national court as to the requisites that a legal presumption of tax avoidance included in CFC rules must meet in order to be justified on the grounds of preventing abuse and to be proportionate to such aim<sup>774</sup>.

Considering that the establishment of a subsidiary in a low-tax jurisdiction cannot per se be deemed as an abusive conduct provided that the settlement abroad is real and so are the

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<sup>773</sup> Id., paras 52 to 54.

<sup>774</sup> The Court agreed with the Opinion given by the Advocate General. Though, the reasoning developed by the latter as regards the legal presumption of avoidance included in CFC rules is interesting. Notably, it is more articulated in explaining why, unlike previous decisions where the EUCJ prompted the use of administrative cooperation tools, in the case at hand the recourse to a legal presumption does not excessively burden the taxpayer; on the contrary, it guarantees legal certainty. From the Opinion it results that the Irish Government contended that the objective pursued with the CFC legislation could have been attained by means of less restrictive measures, among which the Exchange of informations pursuant to the Directive 77/799, and that such legislation placed a ‘significant and disproportionate burden’ upon UK resident companies holding subsidiaries in Ireland (para 34). The Advocate General objected as follows (paras 135-145): “*I am not particularly persuaded by Ireland’s assessment. Admittedly, exchange of information under Directive 77/799 is designed to facilitate counteraction of tax avoidance and that directive has often been relied on by the Court as offering the Member States sufficient opportunities to overcome administrative obstacles associated with knowledge of a non-resident’s circumstances. (It is equally true that the United Kingdom legislation on CFCs sets up a presumption. Accordingly, when none of the first four conditions stated above applies and transactions between a subsidiary and its parent company result in reducing, by more than a minimum amount, the tax which would have been owed by the latter if those transactions had not taken place, it is for the taxpayer to prove the absence of tax avoidance. In view of the particular situation covered by the legislation in question, however, I am not convinced that exchange of information under Directive 77/799 could be as effective as the legislation at issue. Likewise, I do not share the view that that legislation should be regarded, owing to the presumption it introduces, of imposing an unreasonable burden on the companies to which it applies. First, the United Kingdom legislation on CFCs, in view of all of its conditions for application and exemption, is designed to apply only in very specific circumstances which correspond to cases in which the probability of the risk of tax avoidance is highest.(...) Thus, as the Commission stated at the hearing, it is much easier to establish an artificial CFC which purports to provide services than one which is to carry on activity producing consumer goods. (...) Further, such artificial arrangements are probably more to be feared when the CFC is established in a very low tax State. Finally, the finding that the transactions between the CFC and its parent company have resulted in a reduction of more than a minimum amount in the tax due in the United Kingdom and the fact that no taxable dividends are distributed in the State of origin constitute objective circumstances which may corroborate the inference of tax avoidance. In such a case, given the ease with which such services can be relocated, I do not find it excessive for a Member State to introduce a presumption of tax avoidance instead of relying on the subsequent communication of information. Second, the existence of such legislation has the advantage of contributing to the legal certainty of economic operators. It enables them to know in advance that, in the aforementioned case, there is a presumption of tax avoidance. Those operators are thus on notice that they must be able to show that their subsidiary is genuinely established in the host State and that the transactions with the subsidiary are real. Nonetheless, I do not believe that preparing that proof constitutes an unreasonable workload. It is reasonable to believe that such proof might also have to be adduced in an ‘ordinary’ tax check, carried out on the basis of the ordinary national legal rules designed to counteract tax avoidance. The legislation in question, since it lays down in advance the cases in which proof is to be provided, seems to me to be rather to the advantage of economic operators. On the other hand, what is important is that the presumption set up by the law in question may in fact be rebutted. (...) In accordance with the case-law, the taxable person must be able to provide that proof in accordance with the rules of evidence under national law, provided that the effectiveness of Community law is not thereby undermined.”*

transactions carried out, a restriction on the freedom of establishment may solely be confined to ‘wholly artificial arrangements which do not reflect economic reality, with a view of escaping the tax normally due on the profits generated by activities carried out on national territory’’. In terms of how a legal presumption (of tax avoidance) included in the CFC rules should be construed, this formulation means that objective circumstances must be assumed as indicative of tax avoidance. In addition, the EUCJ insisted on the right of contrary proof which must be recognised to the resident parent company. Considering that the CFC rules embody a regime, as such with a general scope of application, the counterproof is what secures a case-by-case ascertainment of the concrete situation and the application of the regime only to ‘fictitious establishment[s] not carrying out any genuine economic activity in the territory of the host Member State’. Such contrary proof cannot be confined solely to the ascertainment of the intention of obtaining a tax advantage, as this circumstance is not sufficient in order to identify an abusive conduct in the view taken by the Court. A *quid pluris* is needed<sup>775</sup>.

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<sup>775</sup> Cf. *Id.*, paras 63-64-65: “As stated by the applicants in the main proceedings and by the Belgian Government and the Commission, the fact that none of the exceptions provided for by the legislation on CFCs applies and that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement intended solely to escape that tax. In order to find that there is such an arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment, as set out in paragraphs 54 and 55 of this judgment, has not been achieved. (...) In those circumstances, in order for the legislation on CFCs to comply with Community law, the taxation provided for by that legislation must be excluded where, despite the existence of tax motives, the incorporation of a CFC reflects economic reality.” Such finding, according to the Court (see para 67) must be based on ‘objective factors which are ascertainable by third parties’, concerning the physical existence of the CFC abroad in terms of premises, staff, equipment. It is not clear what the Court refers to in using the wording ‘verifiable by a third party’. In my opinion, it assumes a necessary judicial stage, before which the party may give evidence to the contrary and a concrete ascertainment of the relevant facts may take place. *Contra*, D. Weber, *Abuse of Law in European Tax Law: An overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 2*, European Taxation, 2013, 313, in particular at p. 315, who finds this reference redundant. The crucial role played by objective factors in the ascertainment of the existence of a ‘wholly artificial arrangement intended to avoid national tax law’ is pointed out by the Advocate General in its Opinion to the case. See Opinion of Advocate General Léger delivered on 2 May 2006, case C-196/04, Cadbury Schweppes, at paras 119-120-121, where referring to abusive conducts in general and afterwards to the pending case, it stated that “The competent national authorities which are responsible for making that finding are not therefore called upon to inquire into the parties’ subjective intentions, which would be very difficult to prove and would give rise to legal uncertainty. They are to take into account circumstances such as collusion between an exporter and an importer or the wholly artificial nature of the transactions in question and the links of a legal, economic and/or personal nature between the operators involved in the scheme for reduction of the tax burden. If we apply that analysis to our case, we encounter again the objective criteria proposed by the United Kingdom and the Commission. We have, in fact, a situation in which a resident company has established a subsidiary under its control in a Member State with a more favourable tax regime than that of the State of origin and has entered into transactions with that subsidiary which have resulted in a reduction in its taxation in that State. In such a case, proof that the establishment of that subsidiary and the transactions in question could have no purpose other than that of obtaining a reduction in tax which would be contrary to the objective of freedom of establishment entails, as I have already stated, an examination of whether the subsidiary is

The foregoing results explicitly from the final paragraphs of the judgment, but it is a cornerstone in the more recent jurisprudence concerning anti-avoidance (or more in general anti-abuse) rules which include legal presumptions. The Court held that (paras 70-71):

*“The resident company, which is best placed for that purpose, must be given an opportunity to produce evidence that the CFC is actually established and that its activities are genuine.*

*In the light of the evidence furnished by the resident company, the competent national authorities have the opportunity, for the purposes of obtaining the necessary information on the CFC’s real situation, of resorting to the procedures for collaboration and exchange of information between national tax administrations introduced by legal instruments such as those referred to by Ireland in its written observations, namely Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) and, in this case, the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains of 2 June 1976.”*

Testing such criteria against the UK CFC legislation, it must be observed that the latter assumed the existence of tax avoidance on the basis of objective circumstances (resident parent company holding a controlling participation in a subsidiary established in a low tax jurisdiction with which transactions were carried out, exemptions) and its suitability to attain the aim pursued could not be discussed<sup>776</sup>. The main issue remained the appropriateness of the exceptions, and above all of the ‘motive test’ to warrant that the CFC rules applied solely to fictitious arrangements and that actual establishment and genuine transactions were instead carved out.

The Court concluded by referring again to the probative aspects of the issue (paras 72-75):

*“In this case, it is for the national court to determine whether, as maintained by the United Kingdom Government, the motive test, as defined by the legislation on CFCs, lends itself to*

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*genuinely established in the host State and whether those transactions are genuine, without there being any need to address the motives and subjective intentions of those concerned”.* See F. Vanistendael, *Halifax and Cadbury Schweppes: one single European theory of abuse in tax law?*, EC Tax Review, 2006, 193.

<sup>776</sup> As recognised by the Court at para 59, *“By providing for the inclusion of the profits of a CFC subject to very favourable tax regime in the tax base of the resident company, the legislation on CFCs makes it possible to thwart practices which have no purpose other than to escape the tax normally due on the profits generated by activities carried on in national territory (...).”*

*an interpretation which enables the taxation provided for by that legislation to be restricted to wholly artificial arrangements or whether, on the contrary, the criteria on which that test is based mean that, where none of the exceptions laid down by that legislation applies and the intention to obtain a reduction in United Kingdom tax is central to the reasons for incorporating the CFC, the resident parent company comes within the scope of application of that legislation, despite the absence of objective evidence such as to indicate the existence of an arrangement of that nature.*

(...)

*In the light of the preceding considerations, the answer to the question referred must be that Articles 43 EC and 48 EC must be interpreted as precluding the inclusion in the tax base of a resident company established in a Member State of profits made by a CFC in another Member State, where those profits are subject in that State to a lower level of taxation than that applicable in the first State, unless such inclusion relates only to wholly artificial arrangements intended to escape the national tax normally payable. Accordingly, such a tax measure must not be applied where it is proven, on the basis of objective factors which are ascertainable by third parties, that despite the existence of tax motives that CFC is actually established in the host Member State and carries on genuine economic activities there.”*

The concrete ascertainment of the national measure’s consistency with Community law was thus left in the hands of the national court. Nonetheless, the decision did not leave much doubt as to the opportunity to broaden the scope of the motive test, which was confined to the subjective component and to the lowering of the tax burden in the UK<sup>777</sup>.

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<sup>777</sup> T. O’Shea, *The UK’s CFC rules and the freedom of establishment: Cadbury Schweppes plc and its IFSC subsidiaries – tax avoidance or tax mitigation?*, EC Tax review, 2007, 13 et seq., observed that the Court had expressed sufficient doubts in its judgment that it was likely that the UK CFC rules would have had to be radically overhauled to comply with the requirements of Community law set therein. He believed that “*the outcome of the Cadbury Schweppes case will depend on the findings of the national court and the evidence offered by the parent company to rebut the presumption of ‘wholly artificial arrangements’, but it seems that the UK’s CFC rules are in any event disproportionate and will need to be amended*”. In his analysis of the judgment, the Author emphasized that, besides the impact on Member States’ CFC rules and the clarification of the concept of ‘abuse’ of the freedom of establishment, it is noteworthy in the light of further aspects. First, it draws a distinction between tax avoidance and tax mitigation in line with previous decisions, by clarifying that the second (at time termed as ‘forum shopping’ or ‘rule shopping’) is allowed within the Internal Market insofar as there is a legitimate exercise of a fundamental freedom, whereas the motives behind a certain arrangement or transaction, “*though relevant, may not trigger automatic proof of actual tax avoidance/evasion*”. Second, it elucidates the concept of ‘establishment’ and the relation between the freedom of establishment, the freedom to provide services and the free movement of capital, and extends the reasoning given in the Marks and Spencer decision, wherein the justification of the need to ensure a balanced allocation of taxing rights between Member States was firstly introduced. Ultimately, it is a confirmation that the ‘migrant/non-migrant test’ from the origin State perspective is the correct comparison when it comes to ascertaining whether a discrimination or a restriction occurs when a resident in the origin Member State

### 3.2.2 The legal presumption of tax avoidance included in thin capitalization rules

Among the regimes mentioned in the European Commission Communication on anti-abuse provisions there are the thin capitalization rules. Similarly to the CFC rules, they include a legal presumption of tax avoidance and aim at preventing the erosion of the taxable base, so that they are mainly targeted at cross-border situations.

As is well known, the concept of thin capitalization refers to the situation whereby companies have a high proportion of loan capital in respect to equity capital. This may happen because of the more favourable tax treatment to which commonly the debt financing is subject, in respect of the equity financing. In particular, where cross-border situations are at issue, the case may be that a subsidiary is financed through loan capital by its parent company (or shareholders in general) located in a lower-tax State; in this way, the former is entitled to deduct the interest payment in the State where it is established and at the same time income may be shifted towards the Member State of the latter where it is subject to a more advantageous tax regime.

In order to prevent groups from putting in place such arrangements based on the exploitation of excessive debt financing, several Member States have introduced over time rules limiting the deductibility of the interest payments or re-classifying the interests as dividends under certain circumstances. Generally speaking, similarly to other anti-abuse mechanisms, thin capitalization rules may be construed under different forms and in fact the regimes that are currently in force in many of the EU countries vary in several aspects. For instance, the discrepancy may concern the way in which the thin capitalization of a company is detected. In this regard, one possibility is referring to a fixed debt/equity ratio, another one is to apply the arm's length criterion, or a mixture of both of them. Once it is established that a certain loan falls within the thin capitalization rule, the interest payment may be deemed as being non-deductible or may be re-classified as a dividend, and this may concern the entire amount or the sole amount of debt exceeding the ratio or the arm's length criterion. Finally, the scope of the thin capitalization legislation may be confined to international transactions, i.e. involving a borrower and a lender located in different countries, or may be extended to cover domestic situations as well so as to apply indifferently to resident and non-resident shareholders.

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exercises a fundamental freedom. In my opinion, though, the judgment under discussion does not add much as regards to the justification on the grounds of the need to secure the balance in the allocation of taxing rights, as the Court quickly refers to such justification whereas it focuses on the need to prevent abusive practices. A clarification results from the SGI case, to be discussed below.



However, the essence of the regime remains common. This allows the drawing of general considerations irrespective of the details characterising the different national thin capitalization rules, and to indicate the requirements that it should meet to comply with EU law as interpreted by the EUCJ.

In this regard, it has to be said at the outset that, before the landmark case *Thin Cap GLO*, the Court had first dealt with thin capitalization in the older case *Lankhorst-Hohorst*<sup>778</sup>. At issue was the German thin capitalization legislation, which provided the re-characterization as dividend distributions of the interest exceeding a certain debt/equity ratio (3:1) paid to shareholders that were not entitled to a German imputation credit, unless the taxpayer could demonstrate that the loan capital could have been obtained from a third party under similar conditions. The judgment is quite straightforward. The Court found that the national measure discriminated *de facto* against resident subsidiaries receiving a loan from their non-resident parent company<sup>779</sup>. Afterwards, it rejected all the justifications invoked by the Member States submitting observations, such as the coherence of the tax system, the need to ensure the effectiveness of fiscal supervision, the reduction in tax revenue. Even the argumentation based on the risk of tax evasion was not convincing for the Court, as “the legislation at issue here does not have the specific purpose of preventing wholly artificial arrangements, designed to circumvent German tax legislation, from attracting a tax benefit, but applies generally to any situation in which the parent company has its seat, for whatever reason, outside the Federal Republic of Germany. Such a situation does not, of itself, entail a risk of tax evasion, since such a company will in any event be subject to the tax legislation of the State in which it is established”<sup>780</sup>.

In the view taken by the Court, therefore, the German thin capitalization was not sufficiently specific, as it ‘automatically’ applied facing a transnational loan. No particular

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<sup>778</sup> ECJ, 12 December 2002, C-324/00, *Lankhorst-Hohorst*. The decision, and more in general the thin capitalization rules in the context of EU law, are analysed by L. Brosens, *Thin capitalization rules and EU law*, EC Tax Review, 2004, 188 et seq.

<sup>779</sup> *Lankhorst-Hohorst*, paras 27 and 32: “Article 8a(1), Head 2, of the KStG applies only to repayments in respect of loan capital which a company limited by shares subject to unlimited taxation has obtained from a shareholder not entitled to corporation tax credit’. As regards the taxation of interest paid by subsidiary companies to their parent companies in return for loan capital, such a restriction introduces a difference in treatment between resident subsidiary companies according to whether or not their parent company has its seat in Germany. Such a difference in treatment between resident subsidiary companies according to the seat of their parent company constitutes an obstacle to the freedom of establishment which is, in principle, prohibited by Article 43 EC. The tax measure in question in the main proceedings makes it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure.”

<sup>780</sup> *Lankhorst-Hohorst*, para 37.

regard was given to the possibility that apparently the legislation envisaged for the taxpayer to demonstrate that the loan terms were at arm's length, which at any rate in the case of the main proceedings the subsidiary was not able to substantiate given its loss situation.

Confronted with the risk of a clash with Community law, following such a decision several Member States took measures to amend their thin capitalization rules, mostly by extending them to domestic situations.

Presumably also in view of these regrettable effects, the Court revised its position, and in Thin Cap GLO identified in the arm's length a suitable criterion in order to detect 'wholly artificial arrangements'; said otherwise, it embodies an 'objective and verifiable element' on the grounds of which a presumption of tax avoidance may be based.

### 3.2.2.1 The Thin Cap GLO case

The Thin Cap GLO case<sup>781</sup> originated precisely from a series of claims for restitution of tax or damages brought by taxpayers who contended the contrast between the UK's thin capitalization legislation and the right of establishment, following the judgment in Lankhorst-Hohorst. The legislation at issue was quite articulated and had been subject to several amendments over the years, but in substance it limited the deductibility of interest on loans granted by a non-resident (direct or indirect) parent company to a resident company. Such interest was indeed re-classified into a non-deductible profit distribution *"to the extent to which it exceeds the amount that would have been paid at arm's length between the payer and the payee of the interest"*.

Similarly to the German thin cap legislation, the UK's thin cap provisions were found restrictive on the freedom of establishment, as they *"give rise to a difference in treatment between resident borrowing companies according to whether or not the related lending company is established in the United Kingdom"*<sup>782</sup>. In cross-border situations, the borrowing company was subject to a higher tax burden, not only due to the fact that its taxable profits could not be reduced with the interest paid, but also because due to the classification of that interest as a dividend, the company could be liable to advance corporation tax when that transaction took place<sup>783</sup>. The possible compensation deriving

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<sup>781</sup> ECJ, 13 March 2007, C-124/04, Test Claimants in the Thin Cap Group Litigation.

<sup>782</sup> Para 40.

<sup>783</sup> See para 39. At para 61 the Court held that *"(...) a difference in treatment between resident subsidiaries which is based on the place where their parent company has its seat constitutes a restriction on freedom of*

from the corresponding adjustment made in the State of the group creditor pursuant to Article 9 of the applicable tax treaty, which the UK government invoked so as to exclude *de facto* a restriction, was not deemed by the Court as a safe tool for removing the difference in treatment created by the national measure.

Unlike the German thin cap rule, though, the UK's legislation was deemed as being suitable for detecting abusive practices normally put in place with intra-group loan financing<sup>784</sup> and the Court went further to check if that legislation was also proportionate to attaining the objective sought<sup>785</sup>. At this stage, it accepted the arm's length criterion as a legitimate element in the light of which verifying the existence or not of the artificial character of the transaction carried out. In this view, the circumstance that a loan would not have been granted to the subsidiary or would have been granted under different conditions by third parties, may give rise to a legal presumption that the loan arrangement is artificial. However, from the decision two more requisites emerge for the thin cap rule to comply with EU law. One of these resulted already from the Cadbury Schweppes judgment: the taxpayer must be given the possibility to demonstrate the existence of any commercial justifications for the arrangement put in place, without being subject to undue administrative constraints. In addition, the Court clearly conditioned the proportionality of the thin cap rule to the circumstance that the 'reaction' of the tax system when the

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*establishment, since it makes it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the Member State which adopts that measure (...)*".

<sup>784</sup> At paras 76 and 77 it stated as follows: "As the United Kingdom Government observes, national legislation such as the legislation at issue in the main proceedings is targeted at the practice of thin capitalisation, under which a group of companies will seek to reduce the taxation of profits made by one of its subsidiaries by electing to fund that subsidiary by way of loan capital, rather than equity capital, thereby allowing that subsidiary to transfer profits to a parent company in the form of interest which is deductible in the calculation of its taxable profits, and not in the form of non-deductible dividends. Where the parent company is resident in a State in which the rate of tax is lower than that which applies in the State in which its subsidiary is resident, the tax liability may thus be transferred to a State which has a lower tax rate. By providing that that interest is to be treated as a distribution, such legislation is able to prevent practices the sole purpose of which is to avoid the tax that would normally be payable on profits generated by activities undertaken in the national territory. It follows that such legislation is an appropriate means of attaining the objective underlying its adoption".

<sup>785</sup> The ECJ appeared to justify the different approach to the UK's thin cap in respect to the German one based on the more specific character of the former and instead the automatic operating of the latter in cross-border situations. At paras 79 and 80, in particular, it argued that "As the Court held in paragraph 37 of its judgment in *Lankhorst-Hohorst*, that requirement [proportionality] is not met by national legislation which does not have the specific purpose of preventing wholly artificial arrangements designed to circumvent that legislation, but applies generally to any situation in which the parent company has its seat, for whatever reason, in another Member State. By contrast, legislation of a Member State may be justified by the need to combat abusive practices where it provides that interest paid by a resident subsidiary to a non-resident parent company is to be treated as a distribution only if, and in so far as, it exceeds what those companies would have agreed upon on an arm's-length basis, that is to say, the commercial terms which those parties would have accepted if they had not formed part of the same group of companies".

arrangement is ascertained as artificial is confined to the interest in excess. It held as follows (paras 81 to 83):

*“The fact that a resident company has been granted a loan by a non-resident company on terms which do not correspond to those which would have been agreed upon at arm’s length constitutes, for the Member State in which the borrowing company is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State. In that regard, the question is whether, had there been an arm’s-length relationship between the companies concerned, the loan would not have been granted or would have been granted for a different amount or at a different rate of interest.*

*As the Advocate General stated at point 67 of his Opinion, national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement.*

*In order for such legislation to remain compatible with the principle of proportionality, it is necessary, in the second place, that, where the consideration of those elements leads to the conclusion that the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the re-characterisation of interest paid as a distribution is limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties or between those parties and a third party been one at arm’s length.”<sup>786</sup>*

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<sup>786</sup> The Court concluded that “Article 43 EC precludes legislation of a Member State which restricts the ability of a resident company to deduct, for tax purposes, interest on loan finance granted by a direct or indirect parent company which is resident in another Member State or by a company which is resident in another Member State and is controlled by such a parent company, without imposing that restriction on a resident company which has been granted loan finance by a company which is also resident, unless, first, that legislation provides for a consideration of objective and verifiable elements which make it possible to identify the existence of a purely artificial arrangement, entered into for tax reasons alone, and allows taxpayers to produce, if appropriate and without being subject to undue administrative constraints, evidence as to the commercial justification for the transaction in question and, secondly, where it is established that such an arrangement exists, such legislation treats that interest as a distribution only in so far as it exceeds what would have been agreed upon at arm’s length”. It thus referred back to the national court the

The Thin Cap GLO judgment, thus, confirms the line of reasoning that can be extracted from Cadbury Schweppes as regards the minimum requirements that a legal presumption of tax avoidance included in anti-abuse measures has to fulfil in order to be approved at EU level.

With particular reference to the thin capitalization legislation, the indications given by the Court may be summarized as follows. Firstly, the presumptive inference which determines the operating of the disallowance of interest deduction or the re-classification of interest as dividend may be based on the arm's length test applied to loans involving related parties placed in different Member States. Secondly, even when the arm's length test is not satisfied, the taxpayer must always be given the opportunity to prove that the single transaction carried out served commercial reasons personal to its case. In this way, the real and effective nature of the arrangement, though not supported by the arm's length test, can be put to the attention of tax authorities or, at least of the court in a possible tax litigation. Finally, the limitation to the interest deductibility cannot go beyond what is necessary in order to re-establish the situation as it would have been if the transaction would have implied non-related parties<sup>787</sup>.

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ascertainment as to whether the national provision allowed the taxpayer to produce evidence of the commercial justification for the transaction when the latter did not pass the arm's length criterion.

<sup>787</sup> The Court basically agreed with the position taken by the Advocate General. See Opinion of Advocate General Geelhoed delivered on 29 June 2006, Case C-524/04. Notably, he explicitly rejected fixed criteria, such as the debt/equity ratio, which do not allow the development of a case-by-case analysis, and he outlined how regrettable is the tendency showed by some Member States to extend their thin capitalization rules to domestic situation as a means for eliminating any risk of contrast with EU law. In particular, at paras 66 to 68 he observed: "(...) it is my view that, depending on its formulation and application, legislation aimed at avoiding thin capitalisation may in principle be a proportionate anti-abuse measure. It is true that the idea that companies have the right to structure their affairs as they wish means that, in principle, they should be allowed to finance their subsidiaries by equity or debt means. However, this possibility reaches its limit when the company's choice amounts to abuse of law. It seems to me that the arm's length principle, accepted by international tax law as the appropriate means of avoiding artificial manipulations of cross-border transactions, is in principle a valid starting point for assessing whether a transaction is abusive or not. To use the reasoning of the Court developed in the indirect tax sphere and other non-tax spheres, the arm's length test represents in this context an objective factor by which it can be assessed whether the essential aim of the transaction concerned is to obtain a tax advantage. Moreover, it is in my view valid, and indeed to be encouraged, for Member States to set out certain reasonable criteria against which they will assess compliance of a transaction with the arm's length principle, and in case of non-compliance with these criteria for them to presume that the transaction is abusive, subject to proof to the contrary. The setting out of such criteria is, to my eyes, in the interests of legal certainty for taxpayers, as well as workability for tax authorities. This approach is to be contrasted, for example, with the use of a single fixed criterion to be applied in all cases – such as a fixed debt-equity ratio – which does not allow other circumstances to be taken into account. However, the formulation and application in practice of such a test must also satisfy the requirements of proportionality. This means in my view that: It must be possible for a taxpayer to show that, although the terms of its transaction were not arm's length, there were nonetheless genuine commercial reasons for the transaction other than obtaining a tax advantage. In other words, as the Court noted in its Halifax judgment, 'the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages'. An example that comes to mind is the situation on the facts in Lankhorst-Hohorst, where the purpose of the loan, as accepted by the Court, was

### 3.2.2.2 Lemmers & Van Cleeff case and Itelcar case confirm the EUCJ's line of reasoning on thin capitalization rules

The above lines have been confirmed by the Court in two more recent cases dealing respectively with the (older) Belgian and Portuguese thin capitalization rules.

In the case *Lemmers & Van Cleeff*<sup>788</sup>, at issue was a Belgian provision that automatically denied the deductibility of interest paid by a Belgian subsidiary to its non-resident parent company/director on the basis of a 1:1 ratio, whereas the same limitation was not provided in merely domestic situations.

The Court found the measure to restrict on the freedom of establishment, since it introduced a difference in treatment between resident subsidiaries depending on the seat (whether in Belgium or abroad) of their parent company that, as director, had granted them a loan<sup>789</sup>. It then went on to check if such measure, though restrictive, could be justified on the grounds of prevention of abusive practices and if it was proportionate. In this regard, after having echoed the ruling in *Thin Cap GLO*, the EUCJ concluded that (paras 31 to 33):  
*“In the present case, it is apparent from the order for reference that the interest payments made by the Belgian subsidiary on a loan granted by a non-resident company which is a director were reclassified as dividends because the limit laid down in the second indent of Article 18(1), point 3, of the ITC 1992 had been exceeded, that is to say, at the beginning*

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*a rescue attempt of the subsidiary via minimising the subsidiary's expenses and achieving savings on bank interest charges. One could imagine, however, that similar situations (i.e., where a transaction was not concluded on arm's length terms, but was nonetheless made non-abusively and not purely to obtain a tax advantage) would be relatively exceptional; If such commercial reasons are put forward by the taxpayer, their validity should be assessed on a case-by-case basis to see if the transactions should be seen as wholly artificia designed purely to gain a tax advantage; - The information required to be provided by the taxpayer in order to rebut the presumption should not be disproportionate or mean that it is excessively difficult or impossible to do so; - In cases where the payments are found to be abusive (disguised distributions) in the above sense, only the excess part of the payments over what would have been agreed on arm's length terms should be re-characterised as a distribution and taxed in the subsidiary's state of residence accordingly; and - The result of such examination must be subject to judicial review. Nor am I of the view that, in order to conform with Article 43 EC, Member States should necessarily be obliged to extend thin cap legislation to purely domestic situations where no possible risk of abuse exists. I find it extremely regrettable that the lack of clarity as to the scope of the Article 43 EC justification on abuse grounds has led to a situation where Member States, unclear of the extent to which they may enact prima facie 'discriminatory' anti-abuse laws, have felt obliged to 'play safe' by extending the scope of their rules to purely domestic situations where no possible risk of abuse exists. Such an extension of legislation to situations falling wholly outside its rationale, for purely formalistic ends and causing considerable extra administrative burden for domestic companies and tax authorities, is quite pointless and indeed counterproductive for economic efficiency. As such, it is anathema to the internal market.”*

<sup>788</sup> ECJ 17 January 2008, case C-105/07, *Lemmers & Van Cleeff*. Pursuant to Article 18, para 1, point 3, CIR, dividends included “interest on loans where one of the following limits is exceeded and to the extent of that excess: either the limit set out in Article 55; or the total of the interest-bearing loans is higher than the paid-up capital plus taxed reserves at the beginning of the taxable period”. From the subsequent para 2, point 3, it resulted that such re-classification of interest as dividend did not apply where the payment was made to a director that was a Belgian company.

<sup>789</sup> See in particular paras 20 to 24.

*of the taxable period the total of the interest-bearing loans was higher than the paid-up capital plus taxed reserves.*

*It is clear that, even if the application of such a limit seeks to combat abusive practices, it goes in any event beyond what is necessary to attain that objective.*

*As the Commission of the European Communities stated in its submissions, the limit laid down in the second indent of Article 18(1), point 3, of the ITC 1992 also affects situations in which the transaction concerned cannot be regarded as a purely artificial arrangement. If interest payments made to non-resident companies are reclassified as dividends as soon as they exceed such a limit, it cannot be ruled out that that reclassification will also apply to interest paid on loans granted on an arm's length basis".*

The Belgian measure was thus deemed as being manifestly disproportional in view of the aim of combating abusive practices, as “[t]he mere fact that a resident company is granted a loan by a related company which is established in another Member State cannot be the basis of a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty”<sup>790</sup>.

One could wonder if from this decision a certain preference of the Court for the arm's length test in respect to the debt/equity ratio test may be inferred. In the case of the main proceedings, the ratio was such (1:1) that it had a wide range of application, so that it was unable to leave out the genuine transactions. In addition, the taxpayer was not given the opportunity to provide evidence of the possible commercial justification for the loan, which could have compensated for the mechanical disallowance of the deduction.

The very recent case *Itelcar*<sup>791</sup> is particularly interesting for two main reasons. Firstly, the Portuguese thin capitalization did not apply to domestic situations and EU Member States, but rather it solely covered loans granted to a resident company by a company established in a non-EU Member State. Secondly, the wide scope of the national presumptive measure was explicitly censured by the Court under the perspective of the absence of legal certainty,

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<sup>790</sup> *Id.*, para 27.

<sup>791</sup> ECJ 3 October 2013, C-282/12, *Itelcar*. The case of the main proceedings involved a Portuguese company (*Itelcar*) running the activity of hiring out light motor vehicles. Until 2005 it was entirely held by a Belgian company, whose capital was for more than 10% held by a company resident in a non-EU country (*GE Capital*). Since 2006, the latter acquired 0.02% of the capital of *Itelcar*. In 2001, *Itelcar* and *GE Capital* signed a loan agreement for a period of 10 years, according to which the former had the use of a line of credit in return for a certain interest. From the decision, it results that *Itelcar* approached tax authorities to prove that the conditions of the loan were at arm's length, but they were not satisfied with such proof and proceeded to make adjustments to the company's base of assessment of tax for the years under inspection. After having brought two administrative appeals that were dismissed, *Itelcar* went before the court that decided to refer the question of compatibility of the national thin capitalization with the free movement of capital to the EU CJ.

which encompasses non-proportionality. In this way, the role of legal certainty as a requisite of proportionality in the construction of a certain presumptive inference is confirmed, after having been clearly asserted in the case SIAT (to be discussed below), the last of which is repeatedly echoed in the judgment at hand.

The Portuguese thin capitalization legislation was an example of a mixture of approaches. It provided that interest applied to the part of an overall debt classified as ‘excessive’, paid by a resident company to a lending company established in a non-EU Member State with which the former had ‘special relations’, was not deductible as an expense for the purpose of determining the taxable profit. The debt was deemed as being excessive based on a debt/equity ratio 2:1<sup>792</sup>. Yet, the taxpayer was given the opportunity to demonstrate, taking into account several criteria peculiar to the concrete case, that it could have obtained the same level of credit under similar conditions from an independent party. This, except when the interest was paid to an entity resident in a country where there is a ‘significantly more favourable tax regime’<sup>793</sup> which was inserted in a sort of ministerial black-list.

In the decision, it is quite relevant for the findings of the Court the interpretation of the concept of ‘special relations’, which at first glance appears to cover various forms of relationships between the borrower and the lender, not only legal but also contractual, commercial, financial. On the one side, this concept led the Court to deem the case as falling in the scope of the free movement of capital. Indeed, though the Portuguese Government argued that the direct or indirect shareholding of the lending company in the borrowing company was always required for the thin cap rule to apply, the Court noted the minimum threshold fixed (10%) did not necessarily imply that the holder/lending could exert a definite influence over the decision of the borrower company in which it had a participation<sup>794</sup>. On the other side, the same concept led the Court to exclude the

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<sup>792</sup> More in detail, article 61, paras 3-4-5 of the Portuguese Corporation Income Tax Code stated as follows: “The overall debt shall be regarded as excessive where, at any time during the tax year, the sum of the debts owed to each of the entities referred to in paragraphs 1 and 2 exceeds double the amount of that entity’s holding in the taxable person’s equity capital. For the purposes of calculating overall debt, account shall be taken of all forms of credit, whether in cash or in kind, whatever the type of remuneration agreed, extended by the entity with which there are special relations, and including credit deriving from commercial transactions, where more than six months have passed since the debt became due. For the purposes of calculating equity capital, the subscribed and paid-up share capital shall be added to the other items categorised as such by the accounting rules in force, with the exception of those items that reflect potential or unrealised capital gains or capital losses, in particular those resulting from re-evaluations not permitted under tax legislation or from the application of the equity method of accounting.”

<sup>793</sup> Article 61, para 6, of the Portuguese Corporation Income Tax Code.

<sup>794</sup> See paras 20, 22, 23: “So far as concerns the rules at issue in the main proceedings, the term ‘special relations’, as defined in Article 58(4) of the CIRC, does not – as *Itelcar* and the European Commission observe – relate only to situations in which the lending company of a non-member country exerts a definite



Portuguese measure to be proportionate to the aim sought, that is combating tax evasion or avoidance put in place through the thin capitalization of the resident company with the intention to transfer taxable revenues abroad.

In fact, after having found the thin capitalization rule to be restrictive on the freedom of capital, the EUCJ went on to verify if it was specifically targeted at ‘wholly artificial arrangements’ and if so, whether it was proportionate. The national provision was deemed an appropriate means of attaining the objective of combating the practices realized through thin capitalization, but the way in which the ‘objective and verifiable circumstances’ grounding the presumptive inference were drafted in the law were considered to be disproportionate. In this regard, after having echoed the rules extracted from the Thin Cap GLO judgment, The EUCJ held (paras 41-42):

*“(...) [T]he term ‘special relations’, as defined in Article 58(4) of the CIRC, encompasses situations that do not necessarily involve the lending company of a non-member country holding shares in the resident borrowing company. Where there is no such shareholding, the effect of the method for calculating the excess indebtedness laid down in Article 61(3) of the CIRC is that any credit arrangement between those two companies falls to be regarded as excessive.*

*It is clear that, in the circumstances described in the paragraph above, the rules at issue in the main proceedings also affect conduct the economic reality of which cannot be disputed. In presuming that, in such circumstances, the basis of assessment for corporation tax payable by the resident borrowing company is being eroded, those rules go beyond what is necessary to attain their objective.”*

Therefore, in the view taken by the Court, the scope of the thin cap rule is excessively wide, and as such is able to affect even genuine situations. In this regard, the Court did take into

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*influence, within the meaning of the abovementioned case-law of the Court, over the resident borrowing company by reason of its shareholding in that company. In particular, the situations listed in Article 58(4)(g) of the CIRC, which relate to the commercial, financial, business or legal relationships between the companies in question, do not necessarily involve the lending company holding shares in the borrowing company. (...) [E]ven if the application of the rules at issue in the main proceedings is confined to situations concerning dealings between a borrowing company and a lending company holding at least 10% of the shares or voting rights in the borrowing company, or between companies in which the same shareholders have such a holding, as contemplated in Article 58(4)(a) and (b) of the CIRC, it is clear that a holding of such a size does not necessarily imply that the holder exerts a definite influence over the decisions of the company of which it is a shareholder (...). It follows that a resident company may, irrespective of whether the lending company of the non-member country has a shareholding in it, or of the size of any such shareholding, rely upon the Treaty provisions on the free movement of capital in order to call into question the legality of such national rules (see, by analogy, Case C-35/11 Test Claimants in the FII Group Litigation, paragraph 104). See paras 4 of the judgment where Article 58, para 4 of the Portuguese Corporation Income Tax Code is reported, which contains the list of hypotheses when ‘special relations’ occur.”*

consideration the argument raised by the Portuguese Government, according to which the national measure applied only when the lending company had a direct or indirect shareholding in the borrowing company. But even in this event, the EUCJ found the thin cap rule likewise in contrast with the principle of proportionality, as its scope of application did not clearly result from the legislation and was able to create uncertainty to the disadvantage of taxpayers. It stated as follows (paras 43-44):

*“ (...) [T]he fact remains that such a limitation on the scope of those rules does not follow from their wording, which tends, on the contrary, to suggest that they do cover special relations where there is no such shareholding.*

*That being so, the rules in question do not make it possible, at the outset, to determine their scope with sufficient precision. Accordingly, they do not meet the requirements of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, especially where they may have unfavourable consequences for individuals and companies. As it is, rules which do not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued (see SIAT, paragraphs 58 and 59).<sup>795</sup>”*

Further indications as to the minimum requirements that a legal presumption included in a thin cap rule must have, may be inferred from this decision. The Court seems to request the presumption of tax avoidance to be necessarily based on the existence of specific circumstances that substantiate a qualified relation. In this regard, commercial or financial relations are not sufficient, being necessary a holding of the foreign lending company in the resident borrower company. The parameter of legal certainty becomes in this way a necessary requisite of proportionality, in the light of which are evaluated national legal presumptions included in anti-abuse measures. In this sense, it is possible to (fore)see a certain preference of the Court for legal presumptions that may be rebutted, which are

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<sup>795</sup> The Court then concluded (para 45): *“In light of the foregoing, the answer to the question referred is that Article 56 EC must be interpreted as meaning that, in the case of rules of a Member State which provide that, where interest applied to the part of an overall debt categorised as excessive has been paid by a resident company to a lending company established in a non-member country with which the borrowing company has special relations, it is not deductible as an expense for the purposes of determining taxable profit, but where such interest is paid to a resident lending company with which the borrowing company has special relations, it is deductible for those purposes, those rules are precluded where, if the lending company established in a non-member country does not have a shareholding in the resident borrowing company, they nevertheless presume that the overall debt owed by the borrowing company forms part of an arrangement designed to avoid the tax normally payable or where they do not make it possible, at the outset, to determine their scope with sufficient precision.”*

predictable by taxpayers who are also aware of the evidence that they may be called upon to give.

#### **4. The balanced allocation of taxing powers between Member States read in conjunction with the need to prevent tax avoidance**

The ‘need to secure the balanced allocation of Member State’s taxing rights’ is a justification often invoked by Member States in recent EUCJ case-law concerning national anti-abuse measures aimed at avoiding the erosion of tax base and in this way safeguarding the right of each Member State to exercise its taxing power upon income generated under its jurisdiction. As such, it is interrelated with the need to prevent tax evasion or avoidance, which has been accepted by the Court on several occasions. Though the format of the justification might appear relatively new, similar arguments have been raised in older cases under a different format, such as ‘fiscal coherence’ or ‘territoriality’, though mostly unsuccessfully<sup>796</sup>.

More recently, however, in a number of cases concerning the cross-border offsetting of losses and profits (Marks and Spencer<sup>797</sup>, Rewe Zentralfinanz<sup>798</sup>, Oy AA<sup>799</sup>, X Holding<sup>800</sup>) the ground of the ‘preservation of the allocation of the power to impose taxes between Member States’ has been accepted by the Court, albeit in correlation with other justification grounds. It has been observed that this case-law shows how “*the Court sometimes deviates from its own case law, taking a flexible approach in order to come to the desired result*”<sup>801</sup>. In fact, it basically approves the combination of the two justification(s) under discussion based on the consideration that if company groups could discretionarily determine the Member State in which their profits are to be taxed or their losses to be deducted, the entitlement of the Member State to levy tax on the profits generated in its territory, *in casu* by a subsidiary established therein, would be undermined.

<sup>796</sup> See M. Poulsen, *Freedom of Establishment and the Balanced Allocation of Tax Jurisdiction*, Intertax, 2012, 200 et seq.

<sup>797</sup> ECJ, 13 December 2005, case C-446/03, Marks & Spencer.

<sup>798</sup> ECJ, 29 March 2007, case C-347/04, Rewe Zentralfinanz.

<sup>799</sup> ECJ, 18 July 2007, case C-231/05, Oy AA.

<sup>800</sup> ECJ, 25 February 2010, case C-338/08, X Holding.

<sup>801</sup> D. Weber, *Abuse of Law in European Tax Law: An overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 2*, cited above, 321. D. Weber and B. Da Silva, *From Marks & Spencer to X holding: the future of cross-border group taxation*, Alphen aan den Rijn, Kluwer Law International, 2011, at p. 6.

It is significant, however, that the ‘need to preserve the Member States’ taxing powers does not seem to embody an autonomous justification capable *per se* of justifying a restriction on a fundamental freedom.

#### 4.1 The SGI case on Belgian transfer pricing

The general and brief considerations developed in the previous paragraph contribute to the reading of the judgment handed down in the case SGI, where a Belgian transfer pricing rule was at issue.

Dealing with the Belgian tax system in Chapter II, Section II, some presumptive provisions included in the Belgian Income Tax Code (CIR) and embodying a type of transfer pricing rules have been discussed, amongst which there is Article 26 CIR.

In the case SGI<sup>802</sup> the Court was questioned about the consistency with the free movement of capital and the freedom of establishment of Article 26 CIR, where it provides (para 2, subparagraph 1) that ‘unusual or gratuitous advantages’ granted to a foreign taxpayer with which the undertaking established in Belgium is, directly or indirectly, ‘in some form of relationship of interdependence’, are added back to the resident undertaking’s own profits. The provision has a wider scope, because it also applies when such advantages are granted to non-related foreign taxpayers established in low tax States and to foreign taxpayers having common interests with the foreign taxpayer related to the resident taxpayer or with the foreign taxpayer established in a low tax State. Nonetheless, the case of the main proceedings involved companies which were related and the holdings owned were as such to guarantee the exercise of a definite influence over the other company’s decision. As a consequence, the Court decided to examine the compatibility of Article 26, para 2, subparagraph 1 (requesting a ‘relationship of interdependence’) with the sole freedom of establishment and not even with the free movement of capital<sup>803</sup>.

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<sup>802</sup> ECJ 21 January 2010, case C-311/08, SGI. See A.M. Jiménez, *Transfer Pricing and EU Law Following the ECJ Judgement in SGI: Some Thoughts on Controversial Issues*, Bulletin for International Taxation, 2010, 271 et seq.;

<sup>803</sup> More in detail, the case of the main proceedings originated from the adjustments made by Belgian tax authorities to the taxable profits of a Belgian company (SGI). The latter had granted an interest-free loan to its French subsidiary (in which it had a 65% holding) and had paid a certain amount per month as management fee to its parent company (a company resident in Luxembourg with a holding of 34%) for management services that in the view taken by the tax administration were not actually performed. Thus, pursuant to Article 26 CIR tax authorities added back to SGI ‘own profits the notional interest on the loan granted to its French subsidiary. Moreover, pursuant to Article 49 CIR (which is not discussed in the decision) it disallowed the deduction of the management fee, on the grounds that it was unrelated to the economic benefit of the service. Notably, the revised assessment issued by tax authorities based on Article 26 was appealed by SGI, but the court of first instance agreed with the view of the tax authorities as it did not see

Admittedly, Article 26, para 1, subparagraph 2, is based on objective criteria, that is the ‘relationship of interdependence’ and the ‘unusual or gratuitous advantages’, but these are formulated in a quite generic way. Yet, in the decision the Court took into great consideration the observations submitted by the Belgian Government concerning the interpretation/application of the provision by tax authorities and national courts, which was confirmed by how the referring court dealt with the pending case.

The Belgian Government explained that the legislation under discussion is intended to combat tax avoidance by allowing adjustments, for taxation purposes, of “*situations in which the companies concerned apply conditions to their relationships which go beyond what would have been agreed under fully competitive conditions*”. To this end, Belgian tax authorities were entitled to make the adjustments of the resident company’s profits on the basis of the arm’s length principle, as the system of Article 26 itself was based on Article 9 of the OECD Model and Article 4 of the Arbitration Convention. Such profit adjustments were allowed only when the non-resident recipient was enriched whereas the person granting the advantage, which was linked to the former by any direct or indirect form of interdependence, received no real consideration equivalent to that advantage, either because that consideration did not correspond to the ‘normal course of events’ and established practices, or because no obligation or consideration was provided<sup>804</sup>.

The Court considered that the Belgian arm’s length legislation applied solely to cross-border situations, and that in comparable domestic situations the gratuitous or unusual advantage was not added back to the payer (albeit on condition that such advantage was used to determine the taxable income of the recipient company). This amounted to a difference in the treatment of resident companies based on the place where the company receiving the advantage was resident, and as such constituted a restriction on the freedom of establishment<sup>805</sup>.

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any economic justification for the loan. The Court dismissed the arguments raised by the Belgian Government seeking to minimize the less favourable treatment facing cross-border situations. On the one hand, it relied upon some limitations to certain tax deductions for resident companies which have benefited from unusual or gratuitous advantages (Article 79 and 207 CIR). On the other hand, it contended that the risk of double taxation that a unilateral adjustment of profit could cause was reduced by the availability of the Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.

<sup>804</sup> See *Id.*, paras 29, 58, 59.

<sup>805</sup> Both from the perspective of resident companies and non-resident companies (paras 44-45): “*Such a difference in the tax treatment of resident companies based on the place where the companies receiving the advantages in question have their registered office is liable to constitute a restriction on freedom of establishment within the meaning of Article 43 EC. A resident company could be deterred from acquiring, creating or maintaining a subsidiary in another Member State or from acquiring or maintaining a substantial holding in a company established in that State because of the tax burden imposed, in a*

Turning to the verification of whether a compelling general interest was present, the EUCJ took into special consideration the importance of the measure in securing Belgium's right to tax income generated in its own territory. This justification, in conjunction with the need to combat tax avoidance, was deemed as constituting an overriding reason in the public interest<sup>806</sup> and as having sufficient weight to permit a general measure, meaning not specifically aimed at 'wholly artificial arrangement'. The Court held as follows (paras 60-63-66):

*“First, as regards the balanced allocation between Member States of the power to tax, it should be recalled that such a justification may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory (...).*

*In the present case, it must be held that to permit resident companies to transfer their profits in the form of unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States may well undermine the balanced allocation of the power to impose taxes between the Member States. It would be liable to undermine the very system of the allocation of the power to impose taxes between Member States because, according to the choice made by companies having relationships of interdependence, the Member State of the company granting unusual or gratuitous advantages would be forced to renounce its right, in its capacity as the State of residence of that company, to tax its income in favour, possibly, of the Member State in which the recipient company has its establishment.*

*In that context, national legislation which is not specifically designed to exclude from the tax advantage it confers such purely artificial arrangements – devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory – may nevertheless be regarded as justified by the*

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*cross-border situation, on the grant of advantages at which the legislation at issue in the main proceedings is directed. Moreover, that legislation is liable to have a restrictive effect on companies established in other Member States. Such a company could be deterred from acquiring, creating or maintaining a subsidiary in Belgium or from acquiring or maintaining a substantial holding in a company established in that State because of the tax burden imposed there on the grant of the advantages at which that legislation is directed.”*

<sup>806</sup> Id., para 69. Cf. Opinion of Advocate General Kokott, delivered on 10 September 2009, case C-311/08, SGI, who considers the need to combat abusive practices in the form of artificial arrangements aimed at tax avoidance to be a 'sub-category' of the justification of safeguarding a balanced allocation of the power to tax (para 63).

*objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States.*<sup>807</sup>”

Therefore, the Court admitted a general anti-avoidance measure, which it explicitly deemed unable to target ‘wholly artificial arrangements’, basically on the grounds that otherwise the Member State’s taxing power would be jeopardised<sup>808</sup>.

This is not the only aspect that departs from the line of reasoning extracted from the cases Cadbury Schweppes and Thin Cap. In fact, Article 26 CIR under discussion did not provide for any contrary proof. The Belgian Government contended that it was interpreted as not precluding to the taxpayer the proof of commercial reasons for the transaction carried out. Surprisingly, unlike other cases (e.g. Itelcar) where the Court requested an explicit legislative provision, here it was satisfied with this explanation, albeit it referred back to the national court the verification of this point. It held (para 73):

*“According to the Belgian Government, the burden of proof as to the existence of an ‘unusual’ or ‘gratuitous’ advantage within the meaning of the legislation at issue in the main proceeding rests with the national tax authorities. It states that when those authorities apply that legislation, the taxpayer is given an opportunity to provide evidence of any commercial justification that there may have been for the transaction in question. The taxpayer has a month, a period which may be extended, within which to establish that*

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<sup>807</sup> Id., at paras 67 and 68 the Court explained the relevance of the provision in combating tax avoidance when related parties are established in countries having quite different tax regimes in terms of taxable base and rates: “As regards the relevance of that ground of justification in the light of circumstances such as those of the main proceedings, to permit resident companies to grant unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States, without making provision for any corrective tax measures, carries the risk that, by means of artificial arrangements, income transfers may be organised within companies having a relationship of interdependence towards those established in Member States applying the lowest rates of taxation or in Member States in which such income is not taxed (...). By providing that the resident company is to be taxed in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State, the legislation at issue in the main proceedings is able to prevent such practices, liable to be encouraged by the finding of significant disparities between the bases of assessment or rates of tax applied in the various Member States and designed only to avoid the tax normally due in the Member State in which the company granting the advantage has its seat (...)”.

<sup>808</sup> In fact, national Governments invoked the need to maintain the balanced allocation of the power to tax between Member States, the need to prevent tax avoidance and ultimately the need to combat abusive practices. In this regard, interestingly, P. Baker, *Transfer Pricing and Community Law: The SGI Case*, Editorial, Intertax, No 4, 2013, 194, observes that apparently “the Court is recognizing a difference between combating wholly artificial arrangements (which is a justification by itself) and combating tax avoidance (which is a justification when taken together with the need to preserve the balanced allocation of the power to tax)”. Moreover, he points out that the ECJ seemed to deem the burden of proof as part of the proportionality test. This might indicate, in his view, that similar provisions in national legislation would be judged proportionate if “the initial burden of proof falls on the revenue authorities”. Finally, he notes that if the Court had rejected the Belgian legislation in the case SGI, this would have raised questions as to the maintaining of several transfer pricing legislation and cross-border anti-avoidance provisions across the European Union.

*no unusual or gratuitous advantage is involved, having regard to the circumstances in which the transaction was effected. If, however, those authorities persist in their intention of issuing a revised assessment and do not accept the taxpayer's arguments, the latter can challenge the assessment to tax before the national courts."*

At the end of the day, this decision does not introduce new criteria of compatibility with the EU law where legal presumptions that are included in anti-avoidance measures are at issue. It rather confirms that the arm's length test is deemed a suitable means for detecting abusive practices and reacting to them<sup>809</sup>. However, it appears that this decision contains indications as regards the compatibility with the EU law leaning towards a more flexible application of those criteria when the sovereignty of Member States in direct taxation is at risk. In this event, the EUCJ demonstrates the application of a less strict test of specificity with regard to the way in which the situation envisaged in the norm is construed, thereby tolerating the use of (slightly more) general concepts for detecting abusive practices. This, however, is on condition that the adjustments are made for the part that exceeds the arm's length value and the resident taxpayer is given the opportunity to demonstrate that in its specific case no artificial transactions have been carried out because they find a justification in its commercial or financial needs. The irremissible importance of the

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<sup>809</sup> G.T.K. Meussen, *The SGI Case: ECJ Approves Belgian System of Selective Profit Corrections in Relation to Foreign Group Companies*, European Taxation 2010, 245. The Author notes that the arm's length principle, on the basis of which dealings between related parties should be made as if they were unrelated third parties, is a well-established principle within all EU Member States. In some of these it is laid down in personal and corporate income tax legislations, in other words it is a non-written principle applied by national courts. Furthermore, from the case SGI it is possible to infer that the EUCJ accepts that such principle constitutes a principle of EU law that Member States may avail themselves of in order to secure their tax abses facing cross-border situations that involve related parties. The Authors also discusses the importance of the decision as regards the division of the burden of proof when transfer pricing adjustments are at issue. Following Article 9 of the 2008 OECD Model, and other acts issued at EU level (Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD), 2006/C 176/01; Communication of the Commission on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, 26 February 2007, COM (2007) 71 final), several Member States have enacted specific transfer pricing legislations. Some of them contemplate placing upon the taxpayer severe documentation fulfilments. In this way, according to the Author, they put the burden primarily upon the taxpayer, who is called upon to give evidence of how the price was established in the absence of a third-party market price. In his opinion, the burden should lie upon the party which is "best equipped to prove the respective situation". Therefore: "While with regard to anti-abuse provisions to counter wholly artificial arrangements, such as the contested Belgian tax legislation in the SGI case, the burden of proof lies primarily with the tax authorities, the author finds it understandable that in transfer pricing matters the burden of proof lies primarily with the taxpayer. In transfer pricing matters, the taxpayer has the best knowledge of the companies involved, the group structure, the profit calculation concerning transactions in the group, market prices, etc.". The Author seems in this way to distinguish 'normal' or 'ordinary' situations, and cases where there are conditions that make suspect abuse (e.g. unusual profits granted to foreign related party).



procedural guarantees for the taxpayer (proof to the contrary, but also administrative hearing, judicial review) finds thus a confirmation in the judgment at hand<sup>810</sup>.

### **5. The Belgian SIAT case. The principle of legal certainty as a parameter of proportionality of national legal presumptions...**

At first sight, the SIAT case, handed down on the Belgian limitation to the deductibility of certain expenditure related to cross-border transactions, appears to slightly depart from the lines of reasoning that emerge from the cases Cadbury Schweppes, Thin Cap GLO and SGI.

The case concerned Article 54 of the Belgian Income Tax Code (CIR), which has been discussed in Chapter II, Section II, of this dissertation, as it derogates from the general rule on deduction of business expenditure (Article 49 CIR) by relieving tax authorities from the evidence of abusive practices. More in detail, Article 54 CIR provides that payments for supplies or services made by Belgian taxpayers to taxpayers established in another State, in which the latter are not subject to tax on income or are subject as regards the relevant income to a ‘more advantageous tax regime’ than the one applicable in Belgium, are not regarded as being deductible business expenditure. This is unless the Belgian taxpayer proves that such payments are related to a genuine transaction and do not exceed the normal limits. Instead, under the general rule laid down in Article 49 CIR applicable to domestic situations, such payments are regarded as deductible business expenditure provided that they are necessary for acquiring or retaining taxable income and the taxpayer demonstrates the authenticity and amount of the expenditure incurred<sup>811</sup>.

Given that Article 54 applies solely to cross-border payments, for the deductibility of which it lays down stricter conditions than those envisaged in the general provision for domestic payments, it was found by the Court to be restrictive on the freedom to provide services. In fact, it was able either to dissuade Belgian taxpayers from making use of the

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<sup>810</sup> Cf. M. Glahe, *Transfer pricing and EU Fundamental Freedoms*, EC Tax Review, 2013, 222 et seq. The Author underlines how the decision in the SGI case leaves several issues unsolved, in particular as regards the arm’s length principle, which the Court apparently endorses. As underlined in the text, it is controversial how the requirement of the ‘evidence of any commercial justification’ to be granted to taxpayers has to be interpreted: whether confined to an arm’s length test or rather extended to cover a wide range of non-tax business reasons for a deviations from an arms’ length proce. The second intepretation is not in line with the purely objective and arm’s length based approach followed by the OECD and several national legislations.

<sup>811</sup> For the sake of completeness, such ordinary rule must be read in conjunction with Article 53, para 1, No 10 CIR, according to which business expenses do not included “*any expenditure which exceeds business needs to an unreasonable extent*”.

services of providers established in another Member State, or such providers from offering their services to Belgian recipients. The EUCJ reasoned as follows (para 21 to 23):

*“(…) under the general rule, the taxpayer must provide proof of the authenticity and amount of the expenditure incurred, there being a presumption on the part of the tax authority, according to the Belgian Government, that the expenditure is necessary for acquiring or retaining taxable income. In addition, under Article 53(10) of the 1992 Income Tax Code, the amount of that expenditure must not exceed business needs to an unreasonable extent.*

*By contrast, under the special rule, in order to rebut the presumption that that expenditure is not deductible, the taxpayer must prove, first, that it relates to genuine and proper transactions, which means – according to the administrative guidelines for the 1992 Income Tax Code, to which both SIAT and the Commission have made reference before the Court – that he must prove that the expenditure falls within the normal framework of business transactions, that it meets an industrial, commercial or financial need and that, over time, recompense is forthcoming, or should as a rule be forthcoming, through the activities of the undertaking as a whole. It also follows from that commentary that it is not sufficient, in this connection, to submit acts and documents which meet legal requirements as to form, but that it is essential above all that the tax authority official be reasonably satisfied that the transactions in question are genuine and proper. As the Belgian Government notes in its written observations as submitted to the Court, in order to obtain a deduction, the resident taxpayer must prove that there has been no simulation of business transactions.*

*Secondly, the taxpayer must prove that the business expenses in question do not exceed the normal limits, which means, according to the explanations provided by the Belgian Government at the hearing before the Court, that a comparison must be made between the transaction in question and the normal practice of operators on the market, whereas – as was noted in paragraph 21 above – in the case of business expenses incurred towards taxpayers established in Belgium, Article 53(10) of the 1992 Income Tax Code prohibits the deduction only of those expenses which are shown to be ‘unreasonable’.*”

Notably, already at this instance (while developing the restriction test) the EUCJ took into consideration the lack of certainty of the provision concerned, being absent any statutory definition or administrative instructions able to throw light on the formula ‘tax regime which is appreciably more advantageous than the applicable regime in Belgium’. This

might be read in the sense that legal uncertainty with regard to such formula contributes either to render more difficult the exercise of the deduction (compared to the clearer conditions of Article 49 CIR) or to dissuade from exercising the freedom to provide services, especially considering the room left for administrative discretion<sup>812</sup>. Yet, at this stage the Court considered the argument invoked by the Belgian, French and Portuguese Governments; that the Belgian taxpayer/recipient of the service ‘is better placed to produce evidence relating to the genuine and proper nature of the transaction’. However, such argument, which in other decisions, like in *Cadbury Schweppes*, had contributed to support the proportionality of the reversal of the burden of proof, was dismissed by the Court. This is because at issue in the main proceedings was the exercise of the freedom to provide services on the side of the resident recipient, which could be subject to inspections and checks by tax authorities; likewise resident recipients of services supplied by resident providers.

Having found the national measure to be restrictive on Article 49 of the Treaty, the Court went further to examine possible justification grounds, and quite surprisingly accepted not only the need to prevent tax evasion or avoidance and to secure the balanced allocation of taxing rights between Member States<sup>813</sup>, but even the need for preserving the effectiveness of fiscal supervision. Article 54 was then deemed suitable for attaining such objectives<sup>814</sup>, but not proportionate to that end.

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<sup>812</sup> In particular, at paras 25 to 27, which are then echoed by the Court in the same decision dealing with the proportionality of the measure, read as follows: “*In addition, it should be emphasised that the special rule may be applied where payments are made to suppliers who, by virtue of the legislation of the Member State in which they are established, are not subject there to a tax on income or are subject there, in respect of the relevant income, to a ‘tax regime which is appreciably more advantageous than the applicable regime in Belgium’.* As the Belgian Government acknowledges, in the absence of a statutory definition, or administrative instructions as to what is to be understood by ‘a tax regime which is appreciably more advantageous than the applicable regime in Belgium’, the assessment concerning the applicability of the special rule is carried out on a case-by-case basis by the tax authority, under the supervision of the national courts. In those circumstances, the scope of that special rule is not delimited with sufficient precision at the outset and, in a situation where the service provider is established in a Member State other than the Kingdom of Belgium and is subject there to a tax regime which is more advantageous than the applicable regime in Belgium, there is uncertainty as to whether the foreign regime will be considered to be a ‘regime which is appreciably more advantageous’ and whether, as a result, the special rule will apply.”

<sup>813</sup> Notably, the Advocate General in his opinion to the case rejected the justification of the balanced allocation of taxing rights. See Opinion of Advocate General Cruz Villalón, delivered on 20 September 2011, case C-318/10, *SIAT*. He observed that “*the simple exercise by Belgian taxpayers of the passive freedom to provide services cannot be assimilated with conduct which is capable of jeopardising Belgium’s right to exercise its powers of taxation: otherwise, that freedom would be divested of all substance*” and instead “*the primary aim of Article 54 of the 1992 Income Tax Code is to combat tax evasion, avoidance or abuse and, more specifically, to protect the Belgian State against the practice of deducting business expenses which are not genuine, proper and normal*” (paras 51-54).

<sup>814</sup> *Id.*, para 48. In particular, see paras 41-42: “*In the present case, Article 54 of the 1992 Income Tax Code is intended to prevent conduct which consists in reducing the taxable amount applicable to resident taxpayers by paying for services which were never actually provided, with the sole aim of escaping the tax normally*

The Court echoed the conditions set out in the Thin Cap GLO judgment for a national anti-abuse measure to be deemed proportionate, namely the assessment of objective and verifiable elements, the opportunity for the taxpayer to give evidence of commercial justifications for the transaction and the consequence of a finding of abuse confined to the part that exceeds the arm's length<sup>815</sup>. Looking at the case of the main proceedings, the Court recognised that in the abstract, where such conditions were met, the fact that the proof of the genuine nature of the transaction and of the normal value of the expenditure incurred laid upon the taxpayer was not *per se* disproportionate<sup>816</sup>. However, Article 54 CIR applies to payments made to providers who are established in States where they are not subject to income taxation or are subject to an appreciably more advantageous tax regime than the one applicable to the relevant income in Belgium. This is, in the view taken by the EUCJ, a too general and indefinite scope, and it is susceptible to having a direct impact on the burden of proof that concretely rests upon the taxpayer. The paragraphs where the Court explains such reasoning are worth being reported (paras 54 to 58):

*“ (...) as the Advocate General noted in point 71 of his Opinion, the special rule requires the Belgian taxpayer to provide, as a matter of course, proof that all the services are genuine and proper and that all related payments are normal, without the tax authority being required to provide even prima facie evidence of tax evasion or avoidance.*

*The special rule can be brought to bear without any objective criterion, verifiable by a third party, being applied to test for the existence of a wholly artificial arrangement which does not reflect economic reality and which has been made with the aim of escaping the tax normally due on the profits generated by activities carried out in the national territory,*

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*due on the profits generated by activities carried out on the national territory. By providing that payments made to non-resident providers are not to be regarded as business expenses unless the taxpayer demonstrates that they relate to genuine and proper transactions and do not exceed the normal limits, the legislation at issue in the main proceedings facilitates the objective of preventing tax evasion and avoidance, for which that legislation was adopted”. See para 43: “Secondly, it should be noted that the legislation at issue in the main proceedings can be justified by the need to ensure the effectiveness of fiscal supervision. That legislation does not absolutely exclude the deduction, as business expenses, of payments made to providers who, by virtue of the legislation of the Member State in which they are established, are not subject there to tax on income or are subject there, in respect of the relevant income, to a tax regime which is appreciably more advantageous than the applicable regime in Belgium; rather, it allows the resident taxpayers to provide proof that the transactions carried out were genuine and proper and that the expenses incurred were normal”. Finally, see para 47: “(...) since the legislation at issue in the main proceedings impedes fraudulent conduct of the kind described in paragraph 41 above and thus enables the État Belge to exercise its tax jurisdiction in relation to the activities carried out in its territory, that legislation is such as to facilitate the protection of the balanced allocation between Member States of the power to impose taxes”.*

<sup>815</sup> Id., para 50.

<sup>816</sup> Id., para 53.

*since account is taken only of the level of tax imposed on the service provider in the Member State in which that provider is established.*

*It must be stated that, as has been noted in paragraph 27 above, a rule framed in such terms does not make it possible, at the outset, to determine its scope with sufficient precision and its applicability remains a matter of uncertainty.*

*Such a rule does not, therefore, meet the requirements of the principle of legal certainty, in accordance with which rules of law must be clear, precise and predictable as regards their effects, in particular where they may have unfavourable consequences for individuals and undertakings (...).*

*As it is, a rule which does not meet the requirements of the principle of legal certainty cannot be considered to be proportionate to the objectives pursued.”*

### **5.1 ... and impact on the division of the burden of proof**

Within the tax literature, the SIAT decision has been looked at with criticism. In particular, the major doubts concern the circumstance that the Court rejects the ‘appreciably more advantageous foreign regime test’, arguing that it is contrary to legal certainty, but it does not clarify on this point, for instance by requesting further objective elements such as a qualified relation between the parties involved. This is in fact not fully in line with the previous decisions (e.g. Cadbury Schweppes) where the more favourable tax regime existent in the foreign State has been deemed as indicative of abuse. Moreover, whereas in several judgments analysed so far the EU CJ promoted a case-by-case examination of the concrete situation, in SIAT precisely the circumstance that the ‘appreciably more advantageous foreign regime test’ may be determined on a case-by-case basis has been deemed in contrast with the principle of legal certainty<sup>817</sup>. On the other hand, it has been

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<sup>817</sup> D. Weber, *Abuse of Law in European Tax Law: An overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ – Part 2*, cited above, in particular at p. 316 to 318. The Author disagrees under several aspects with the view taken by the Court in SIAT. First, he observes that the circumstance that a taxpayer makes use of an ‘appreciably more advantageous tax regime’ represents an initial proof that abuse is present and thus the burden shifts to the taxpayer to prove the contrary. Second, he believes that the more advantageous tax regime test is an ‘objective criterion’, as it implies a comparison between the foreign tax burden and the Belgian one. Plus, the fact that the Belgian rule requires an *appreciably* more advantageous tax regime confines the applicability of that rule to exceptional situations, rather than every situation. Third, he observes that the fact that such formula cannot be sufficiently determined beforehand because it encompasses a case-by-case evaluation, does not render it contrary to the principle of legal certainty. As a matter of fact, “[n]ot being able to determine the scope of a term such as “tax avoidance” is simply inherent to this term and the “appreciably more advantageous foreign regime” test is an integral part of this given the Court itself established that “escaping the tax normally due on the profits” is a condition for the existence of tax avoidance”. He concludes that “In SIAT, the ECJ appeared to rule that a presumption of abuse based on an “appreciably more advantageous tax regime” test as such is contrary to the principle of legal certainty because it cannot be determined in advance and can only be given substance on a case-by-

observed that the EUCJ has accepted the Belgian legislation at issue in SGI because, unlike in SIAT, the ‘initial burden of proof’ (as regards the abnormal advantages) was upon tax authorities, as it would have been disproportionate to request the taxpayer to prove “the usualness of all transactions the tax administration wishes to challenge”<sup>818</sup>.

The foregoing observations are mostly shareable and have the merit of outlining a slight evolution of the EUCJ’s line of reasoning as regards legal presumptions included in anti-avoidance provisions. However, the SIAT decision has to be contextualized by paying particular attention to the national measure examined by the Court and with the attempt to reconcile such judgment with the previous case-law.

From the conclusion of the Advocate General, it results that the provision was not unanimously classified as a presumption of non-deductibility of business expenses, which was the view taken by the referring court and the EUCJ as well. The Belgian Government defined it as a ‘presumption of simulation’, while the appellant (SIAT) as a ‘general presumption of tax evasion’. None of these labels seems fully correct. The provision lays down a rebuttable presumption of law. Looking at the object of the contrary proof, the presumed fact seems to be the abusive character of the transaction put in place by the resident taxpayer, while the non-deductibility of the payment appears more to be the effect. Saying this, speaking of the ‘initial burden of proof’ or ‘*prima facie* proof’ as the EUCJ does by referring to the wording of the Advocate General, might be misleading. When there is a reversal of the burden of proof as a consequence of a legal presumption, tax authorities are relieved from giving evidence of the unknown fact (e.g. the abusive practice), but when they rely on the relevant provision they are always requested to give evidence of the known fact on which the presumptive inference is based. In a national context, one would add that the known fact must have a demonstrative character, meaning that it has to be construed so as to indicate, based on a rule of experience, the existence of the unknown fact. In this regard, Article 54 does provide, similarly to other anti-avoidance measures, a known fact which must be proved by tax authorities when they rely on it. It is

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*case basis. (...) It is hoped that, in future decisions, the Court will rule that an “appreciably more advantageous foreign regime” test, in itself, is allowed, but only if applied in regard to an anti-abuse measure to which other requirements also apply. (...) This would establish a more proportionate anti-abuse provision that would be based on a more specific legal presumption”. See M. Hilling, *Assessment of National Rules for the Prevention of Tax Avoidance*, Intertax, 2013, particularly at p. 303 et seq.*

<sup>818</sup> B.J.M. Terra, P.J. Wattel, *European Tax Law*, cited above, 736-738. The Authors, though, add that this does not imply that in all transfer pricing cases (they refer in particular to the judgment SGI) in which national restrictive legislation applies only to cross-border situations the initial burden of proof rests always on tax authorities. It depends on several factors, amongst which there are the sort of legislation, of transaction and so on.

up to them, indeed, to give evidence of the inexistence or more favourable taxation of the income concerned in the foreign State, which implies a comparison between different tax regimes. In Chapter II, Section II, the excessive general character of the basis of such presumption has been underlined, precisely arguing from the weak demonstrative character of the reference to a more favourable foreign tax regime. Indeed, Article 54 operates irrespective of inquiries or checks carried out by tax authorities, and this puts taxpayers willing to claim for deduction of payments made to foreign persons in a tough situation, as they do not have any certain guidelines on which States may be deemed as having a ‘considerably more favourable tax regime’<sup>819</sup>.

At EU level, the Court looks at the provision from the perspective of the specificity of the situation envisaged in the norm. Under this perspective, the reference to the ‘appreciably more advantageous foreign regime’ is a too general and indefinite criterion, which implies that it is not targeted at ‘wholly artificial arrangements’, but rather it may also cover genuine transactions. The need for specificity is not new in the case-law of the EUCJ, which in older cases handed down outside the area of taxation (and referred to above) has constantly reiterated that the exercise of a fundamental freedom may not give rise to a general presumption of tax avoidance, evasion, or abuse. What might appear in part new in the SIAT case is that the opportunity for the taxpayer to give proof to the contrary is not sufficient, in the view taken by the Court, to compensate for the general character of the inference. Above all, the importance assigned in the decision to the principle of legal certainty deserves to be emphasized, though such principle does not appear to be completely autonomous from the principle of proportionality, being still a parameter for the ascertainment of the latter.

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<sup>819</sup> This aspect was taken into consideration by the Advocate general in its Opinion to the case, where it stated that “*The situation of the Belgian taxpayer is further complicated by the fact that he does not have any information on which Member States have tax regimes which are appreciably more advantageous than the Belgian regime. He is thus compelled, if he intends to use the services of a person established in another Member State, to carry out his own assessment as to whether taxation in that Member State is appreciably more advantageous than in Belgium, in order to determine which of the Belgian tax arrangements governing deduction of business expenses will fall to be applied in his case, which places him in a situation of legal uncertainty. In addition, it is particularly difficult to identify precisely the situations which the adverb ‘appreciably’ is intended to cover. Of course, the difficulty created by this legal uncertainty could be dispelled if the Belgian tax authorities were able to draw up a list of tax regimes which are appreciably more advantageous than the ordinary Belgian regime and which are liable to be covered by Article 54 of the 1992 Income Tax Code. However, that is not the practice. Furthermore, and whatever the case may be, it seems particularly difficult to foresee all possible applications of such a provision*” (para 73). In his view, which does not differ from the one followed by the Court, the main problems posed by Article 54 was “*its lack of specificity or, in other words, the universality of its scope*”, as it relieves the Belgian tax authorities of any obligation to provide even prima facie evidence of tax evasion, avoidance or abuse and establishes a general suspicion of tax evasion and a general presumption of tax fraud, avoidance or abusive practices” (paras 70 and 71).

Looking now closely at the case of the main proceedings, Article 54 made the deductibility of business expenditure incurred in relation to transactions with persons established in low tax jurisdictions conditional to the proof of the genuineness of the transaction and the normal nature of the amount paid. This was without requesting the existence of a qualified relationship between the resident and the non-resident taxpayer, which normally justifies a presumption of abusive practices intended to shift the taxable base towards low tax States. As such, the provision is vague<sup>820</sup> and is not based on ‘objective and verifiable elements’ which are necessary for the purpose of confining the restriction on a fundamental freedom to artificial arrangements. It is true that in previous judgments, like *Cadbury Schweppes*, the EUCJ has found the low level of taxation in the foreign country as being an objective element for detecting abusive schemes, but it was accompanied by further objective elements, such as the group relationships.

Such vagueness has a direct impact on the burden of proof that is placed upon the resident taxpayer, who is called upon to demonstrate that “*all the services are genuine and proper and that all related payments are normal, without the tax authority being required to provide even prima facie evidence of tax evasion or avoidance*”. Even if the reference to the *prima facie* proof may be questionable, one cannot deny that the probative burden put upon the resident taxpayer is quite heavy and implies compliance costs. Plus, it does not satisfy the rule established by the Court as regards the opportunity for the taxpayer to give evidence of the commercial justification of the transaction carried on: it must be recognised ‘without being subject to undue administrative constraints’.

Finally, it is more difficult to reconcile the circumstance that in the *SIAT* case the Court finds a case-by-case application of the national measure in contrast with the principle of legal certainty with the previous judgments where such approach was instead requested to satisfy the proportionality test. The key may be represented by the fact that a case-by-case approach entails an examination of the circumstances of the concrete case (which may happen through the recognition of the contrary proof) and a judicial review, but it cannot flow into the arbitrary. Article 54 leaves too much room for administrative discretion and may give rise to arbitrary decisions of the tax administration, which render unattractive and uncertain the exercise of the freedom to provide services.

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<sup>820</sup> Cf. B. Peeters, *European Supervision on the Use of Vague and Undetermined Concepts in Tax Laws*, Editorial, *EC Tax Review*, 2013, 112. According to the Author, “*the use as such of the undetermined (evaluative) phrasing in Article 54 ITC is not so much problematic, than the absence of statutory provisions and or administrative instructions, which give more directives to the tax authority for the application of this provision*” (see p. 114).



Notably, the judgment concerning the Portuguese thin capitalization, which was handed down after the SIAT decision, contains similar indications in the sense of the need for more legal certainty in the construction of legal presumptions included in anti-abuse rules. Yet, doubts remain in this regard, as, among other things, one cannot disregard that even the arm's length test might herald a certain degree of uncertainty.

## **6. Conclusion**

The examination of the EUCJ more significant judgments concerning legal presumptions in the domain of direct taxation shows a number of settled rules along with a certain evolution which permits to foresee future developments.

Firstly, the Court tends to reject national procedural measures, either construed as presumptions or similar notions having the same effects, which discriminate against cross-border situations based on the higher difficulties in carrying out inspections, controls or in collecting the tax due. From the *Talotta* and *Vestergaard* cases it is possible to infer a certain disfavour for national measures that lay down stricter conditions or place a heavier probative burden upon resident/national or non-resident/non-national taxpayers exercising a fundamental freedom on the grounds of the 'need to secure the effectiveness of fiscal supervision'. This is a confirmation of how the national procedural autonomy finds a limitation in the principle of effectiveness and equivalence as well as in the principle of proportionality. There are, in fact, more proportionate measures that enable the tax authorities to equally carry out controls and inquiries and at the same time are less detrimental to the Treaty freedoms. Tax authorities may rely on administrative cooperation instruments and they are not prevented from asking to the taxpayer concerned the information they necessitate.

It is not completely clear if the tax administration is requested to have recourse to such directives prior to asking the taxpayer for the necessary information and to what extent the latter may be asked information or documentation without this turning out to be in fact a full reversal of the burden of proof. In the *Persche* case, the Court has not recognised a right of the taxpayer to oblige the tax administration to make use of the mutual assistance tools. Though, this does not necessarily imply that tax authorities may always automatically refer to the taxpayer for the information they necessitate. Presumably, a factor which has to be taken into consideration is who is best placed to produce the relevant information or documentation.

In this regard, it must be noted that when the need to prevent or combat tax avoidance, evasion or abuse, rather than merely administrative difficulties, is at issue, the Court tends to allow the reversal of the burden of proof upon taxpayers, though with some limits. From *Cadbury Schweppes* and *Thin Cap GLO* it results that legal presumptions included in anti-abuse national legislation, like CFC rules and thin capitalization rules, are accepted provided that three conditions are met: a) the provision has to be targeted at ‘wholly artificial arrangements’; b) the taxpayer must be given the opportunity to give proof to the contrary ‘without being subject to undue administrative burdens’; c) the consequence of the finding of the abuse must be proportionate. Therefore, the ECJ approves such regimes in principle, but then it goes further to check their proportionality with the aim sought, with a view to the conditions that are less detrimental as possible for the effective application of the fundamental freedom at issue.

This implies that irrebuttable presumptions of law are in principle not approved, as they determine a definite, and, as such, *per se* disproportionate violation of Treaty rights.

Rebuttable presumptions of law may be introduced by Member States in the context of their anti-avoidance legislations, insofar as the taxpayer is effectively put in condition to rebut the presumptions. The Court, in particular, by employing a teleological interpretation of the fundamental freedoms, requests that he has to be given the opportunity to show the genuineness of the settlement abroad, of the transaction carried out etc. He must be able to demonstrate ‘any commercial reasons’ that justify the arrangement. When cross-border transactions between related parties are at issue, in particular, this amounts to something different from the proof that the agreement was at arm’s length. Indeed, the arm’s length criterion is deemed by the ECJ to be an objective criterion which Member States may refer to in order to detect abusive practices, but it seems that the contrary proof in the hands of the taxpayer has to have a wider scope. This is in line also with the rulings of the ECJ concerning the national anti-abuse measures implementing anti-abuse clauses included in direct tax directives. Member States are allowed to deny the benefits envisaged in the Merger Directive by presuming the existence of tax avoidance or abuse based on the absence of valid commercial reasons.

There are, though, some points which are unclear and that it is hoped the Court will have soon occasions to clarify. They concern, in particular, the design of the objective circumstances on which a presumption of tax avoidance may be based in the light of the

principle of legal certainty and the related question of the distribution of the burden of proof.

The SGI case on the Belgian transfer pricing shows a slightly more flexible approach of the EUCJ with regard to the level of specificity requested for the presumptive measure to be approved, as a result of the combination of the justifications of the ‘need to combat tax avoidance’ and the ‘need to secure the balanced allocation of Member States’ taxing power’. In this case, it seems to have been decisive the distribution of the burden of proof in the way it was presented by the Belgian Government. It argued that tax authorities could make the profit’s adjustments where they proved the existence of gratuitous advantages granted to companies resident in low-tax States, and at this stage it was up to the taxpayer to prove that the transaction was genuine and it had been concluded at arm’s length. As underlined, this decision does not fully match with Cadbury Schweppes and Thin Cap GLO. In fact, the Court emphasizes the circumstance that the *prima facie* proof rests upon the tax administration. But this is not exceptional and it does not mean that the burden of proof is not shifted upon the taxpayer. The operating of a presumptive measure does imply, when it presupposes the acting of the tax administration, the burden of motivation or proof as to the facts on which the presumptive inference is based. Plus, the object of the contrary proof requested by the provision seems to necessarily imply, for the purpose of avoiding the profit’s adjustments, the demonstration that the transactions were agreed upon at arm’s length, being not sufficient the proof of commercial reasons that are to be proved in addition.

Perhaps the reference to the *prima facie* proof resting upon tax authorities may be read as a certain preference of the Court for procedural presumptive measures, which concern the powers of assessment of tax administration, in respect to those presumptions that affect directly the position of the taxpayer.

A presumption of the last kind was examined by the Court in the SIAT case, concerning the Belgian limitation to the deductibility of costs incurred by resident taxpayers with taxpayers located in low-tax States. This judgment, read in conjunction with the very recent decision concerning the Portuguese thin capitalization legislation, shows the increasing importance that the principle of legal certainty has acquired in the context of the test of proportionality of legal presumptions included in anti-avoidance measures. In this way, the Court gives further indications as to how a legal presumption should be construed so as to avoid any overkill and undue restrictions on the Treaty rights. A generical

reference to the lower level of taxation of the Member State where payments are addressed or to the relationships between the parties of a cross-border transaction in order respectively to deny the deduction of the expenditure or to re-classify the interest as dividend, goes beyond what is necessary to attain the objective of combating tax avoidance. From this one can infer that the Court may not dislike black-lists or white-lists of States in view of legal certainty. Furthermore, it seems that the reference to the case-by-case approach, which the Court has in several decisions referred to with regard to the way of detecting abusive practices, does not imply administrative discretion. Apparently, it is to be interpreted as mainly referring to the opportunity of contrary proof and judicial review.

## **CONCLUSION**

The aim of this third Chapter was to construe the approach of EU law to tax law presumptions, with a view to exploring whether and to what extent a common analytical scheme can be traced and thus some general criteria or standards guiding the evaluation of compatibility of tax law presumptions with EU law can be drawn.

To this end, the issue of tax law presumptions in the context of EU law has been addressed by setting the stage with the analysis of the legal framework and by examining the EUCJ case-law in some of the fundamental domains of taxation. In particular, the special consideration of customs duties, VAT, and direct taxation has been guided by the fact that they embody three different ways in which the EU law impacts on national legal orders.

The examination has revealed that the way in which tax law presumptions are approached reflects a common core scheme.

Generally speaking, they are seen as possible limitations to the enforcement of a certain EU rule or to the enjoyment of a certain EU right. In fact, the case-law shows a common analytical scrutiny of the legal presumption, with a view to avoiding it being detrimental to the actual enforcement of EU law. Under this perspective, the principle of effectiveness, in combination with the principle of proportionality, embodies a general limitation to the adoption of legal presumptions by Member States and, at the same time, a criterion of control of consistency of such presumptions with EU law.

Yet, the EUCJ case-law and more in general the EU legislation and soft-law show that Member States are not prevented from introducing in their legal orders presumptive provisions aimed at simplifying the assessment and levy of the tax or combating certain

forms of tax avoidance or evasion. This can be asserted with regard to each sector of tax law. On the other hand, some of the tasks that Member States pursue by means of legal presumptions are shared at EU level. For instance, the VAT Directive allows Member States to introduce or to maintain, under certain conditions, measures derogating from the Directive in order to simplify the levy of the tax and preventing tax avoidance or evasion. The Direct Tax Directives include anti-abuse clauses. The Merger Directive, in particular, entitles Member States to presume the existence of abuse on the basis of the absence of valid commercial reasons. Again, similar needs for simplification and rapid recovery of the tax seem to have inspired the presumptions included in the Customs legislation, like the presumption of territorial competence to collect the tax in case of irregularities and the presumption of representativeness of the samples.

Therefore, the question is shifted on the conditions of compatibility of tax law presumptions with EU law. In this regard, a set of general criteria may be inferred from the general principles of EU law and from the EUCJ case-law, which hold true with regard to each area of tax law. In fact, irrebuttable presumptions of law that generally and automatically presume the existence of certain elements of (or ancillary to) taxation in contrast with the relevant EU rule, the absence of the conditions to benefit from a certain tax treatment or the abusive exercise of a certain EU right or freedoms are, in principle, not in line with EU law. The EUCJ is inclined to make the consistency of a presumption of law conditional to the opportunity for the taxpayer to rebut the presumption, and to a case-by-case examination of his situation.

More detailed criteria may be inferred looking at the single sector of tax law and to certain types of provisions or regimes.

Thus, when it comes to Customs law, where the integration between EU law and national rules is far-reaching, the Court is quite strict in evaluating national presumptions that may affect the primacy and the uniform application of the Customs legislation. This may certainly happen when irrebuttable presumptions of law are at issue, whereas for rebuttable presumptions of law the evaluation depends on the interests in play and the room left for national provisions.

In the area of VAT, Member States are permitted to have recourse to tax law presumptions for simplifying the levy and preventing tax avoidance or evasion, as long as the conditions set by the VAT Directive and stemming from the general principles of EU law are observed. In this area, the opportunity for the taxpayer to rebut the presumption appears to

be in principle essential in order to accept the limitation to a certain right or principle. This may not be sufficient to overcome the proportionality test, though. The Court requests the presumption to be formulated in such a way that does not render impossible or excessively difficult for the taxable person the opportunity to rebut the presumption. However, the case-law is at times controversial and it appears to be influenced by the concrete case and above all by the rationale surrounding the national measure. So that, in one case the Court rejects a national provision that limits the right to deduct certain expenditure on the grounds of a presumption of (the risk of) abuse; whereas a similar limitation, albeit confined to a certain percentage, is accepted on the grounds of the need for simplification. In this case, no contrary proof is requested, as it would undermine the objective of the measure.

Rebuttable presumptions of law are not *per se* consistent with EU law, and this is evident when examining the case-law on the repayment of taxes levied in breach of EU law. When the contrary proof concerns a negative fact, which is impossible to demonstrate, then the presumption ends up to impede the exercise of the right conferred to the undertaking by EU law.

Finally, the case-law in the area of direct taxation manifestly reveals the importance of the rationale on which the single presumptive regime or provision is based. The EUCJ is inclined to reject those presumptive measures that are justified in the light of the need to secure the effectiveness of fiscal supervision. By contrast, in the recent case-law it tends to accept the reversal of the burden of proof on the taxpayer, who is best placed for collecting the necessary information and proofs, on condition that the presumption is specific and the contrary proof is recognised. However, this is not always the case. As it has been broadly argued in Section II of this chapter, the more recent case-law leaves several questions open, in particular as regards the test of specificity and the division of the burden of proof. The Court seems to accept general presumptive provision (i.e. non specifically targeted at wholly artificial arrangement) where the need to combat tax avoidance is invoked in combination with the need to secure the balanced allocation of taxing powers. This, provided that the *prima facie* proof rests upon tax authorities and the taxpayer can give proof to the contrary. By contrast, a presumption of tax avoidance with regard to the deductibility of costs incurred with taxpayers established in low-tax jurisdictions is deemed to be in contrast with the proportionality principle under the aspect of legal certainty. This, on the grounds that the vague and indefinite scope of the provision renders the effects of its

application non-predictable by individuals or undertakings; as such, it impacts even on the concrete opportunity to give proof to the contrary on the side of the taxpayer, upon which the burden of proof is completely shifted.

In conclusion, the EU approach to tax law presumptions reflects a common analytical framework. Nonetheless, the solutions in terms of consistency and conditions of consistency may differ, even within the same sector, depending on several factors. Amongst these, there is certainly the rationale of the national provision (as invoked by the Member State involved), its being in line or not with the interest deemed worthy of protection at EU level, appropriate and necessary to attain it. Likewise, the scope of the provision, the distribution of the burden of proof, the design of the contrary proof, the existence of further procedural guarantees (in the trial and earlier in the context of the tax audit prior to the issuing of a tax assessment) are relevant for the findings of the Court.





## **Summary and Conclusions**

The purpose of this study was to investigate the concept of legal presumption under a twofold comparative perspective. After having provided a general overview of the common core concept of presumption in the European context, an insight in the national approach to legal presumptions was given by examining two different national experiences, namely the Italian and Belgian tax systems. At this stage, the Constitutional framework and some of the most interesting presumptive measures were explored, with a view to underlining possible divergences and common grounds. The concept of (national) legal presumption was then investigated in the context of EU law, with the attempt to systematize under a uniform perspective a matter which has been traditionally dealt with either from the merely national point of view or, at EU level, through a fragmented form. In this instance, the EU law relevant framework and the most significant EUCJ case-law, in particular in the field of customs duties, VAT, on the issue of the repayment of taxes levied in breach of EU law and in the area of direct taxation, were examined so as to construe the overall EU approach to national legal presumptions. This was done with the finality of determining if and to what extent a common analytical framework may be identified, from which were extracted certain criteria governing the compatibility of national legal presumptions with EU law.

Below, a brief overview of the study and general conclusions will be developed by confronting the EU approach to legal presumptions with the national one. Finally, the potential impact of EU law on national legal orders and on the protection of the taxpayer will be checked by testing some of the presumptive measures illustrated in Chapter II with the set of rules and principles that may be extracted from the examination of the EU law context carried out in Chapter III.

### **1. Identifying a common concept of legal presumption in the European experience**

When comparing the approaches of different legal orders as regards a general concept, the first step to be taken is to set a common ground in respect of the meaning and relevance of that concept. To this end, in Chapter I an insight into the civil law provisions, in which the

roots of the notion may be found, and the legal theory, was offered. In addition, a common law system was considered in order to check if relevant divergences could be traced.

At this stage, the study has revealed the existence of a shared European understanding of the notion of presumptions, both *hominis* and legal. The former are logical inferences drawn by the judge of a concrete litigation. The latter are commonly deemed as being inferences that are developed by the law in order to alleviate the burden of proof of a certain party and/or in view of the preference for a certain rule on the matter concerned. In addition, legal presumptions are generally distinguished between irrebuttable and rebuttable presumptions depending on the possibility or not to give the proof to the contrary. Though provided in the law, they are likewise requested to be based on a rule of experience and to be rational.

## **2. Tax law presumptions in the Italian and Belgian tax systems**

Based on the existence of a common juridical background concerning the notion of legal presumption, the same concept was examined in the area of tax law, wherein it shows some peculiarities with respect to the general theory which justify a separate, albeit interrelated, discussion. In particular, the study concentrated on the manner in which tax law presumptions are dealt with in two significant Member States, with a view to gather possible differences in approaching them and with an eye to the subsequent discussion of the EU law context. To this end, the examination of the Constitutional framework has been carried out alongside the illustration of some of the most interesting presumptions in force.

This overview has shown that there are some divergences, either in terms of the line of thought adopted by the respective Constitutional Court or in terms of discussion on the nature of single tax law presumptions and on the distinction with similar notions. Notwithstanding such (natural) divergences, under both tax systems legal presumptions are deemed as indispensable means to secure collective interests, which justify different rules (as the alteration of the ordinary burden of proof to the detriment of the taxpayer is) for the tax obligation in respect to a civil law obligation. Given the difficulties met by the tax authorities in ascertaining the fiscal facts realized by the taxpayer, all the more so when cross-border situations are at issue, legal presumptions are essential for the purpose of simplifying the assessment or collection of the tax concerned and the prevention of tax evasion or avoidance. Yet, legal presumptions cannot be arbitrary. In fact, in both legal systems the control as to their rationality and proportionality is entrusted with the

Constitutional Court, which is called upon to check if the inference is logical and based on the normal course of events, so that the sacrifice of the taxpayer's interest may be deemed as being justified in view of the collective interest.

### **3. Tax law presumptions in the context of EU law**

The core of this study was represented by the attempt to construe the EU approach to tax law presumptions, with an eye to the national experiences. To this end, the European law framework and the EUCJ case-law were examined, with particular regard to the domains of customs duties, VAT, to the issue of the repayment of taxes levied in breach of EU law and to the area of direct taxation.

The analysis carried out has revealed that there is a common analytical scheme employed by the EUCJ when confronted with national legal presumptions. In the extent to which they affect the EU rules on a certain matter, or limit a right which the taxpayer is conferred by EU law, or restrict on a Treaty freedom, tax law presumptions are looked at with suspicion and checked in the light of the relevant EU rule and the overarching principles of effectiveness and proportionality. However, the examination of the case-law has also revealed that the findings concerning the consistency of legal presumptions may slightly differ depending on several factors, and even within the same field of tax law. As a result, it has been certainly possible to isolate some general criteria which appear to apply when tax law presumptions are under the EU scrutiny and that embody minimum standards to be taken into consideration by national legislators. Yet, there remain controversial issues related to legal presumptions, concerning the way in which the scope of the provision should be construed, the possibility to skip the specificity test or the provision of the contrary proof facing certain interests (e.g. need for simplification in the VAT areas, the balanced allocation of the Member States' taxing powers in the area of direct taxes), and above all the extent to which the ordinary division of the burden of proof may be altered.

#### **3.1 The EU approach to tax law presumptions with respect to the national approach: common concept...**

In principle, legal presumptions belong to the 'formal' tax law or, said otherwise, to procedural matters, which fall within the competence of Member States. This statement must be mitigated when considering customs law, as the Community Customs Code regulates several procedural issues. Besides that, Member States' procedural autonomy is

limited by the principles of equality and effectiveness, which request that national procedural rules governing the exercise of rights derived from EU law are not less favourable than those regulating the exercise of similar domestic rights and they do not render impossible or excessively difficult the exercise of such rights. Finally, the ambiguous nature of legal presumptions, which might end up having substantive effects, entails that they might affect directly, and not only indirectly, the effective enforcement of an EU principle, objective, right or fundamental freedom.

On the other hand, when ruling on national legal presumptions, the EUCJ does not refer to a notion other than the one which results from the common juridical tradition of Member States. It shares with national legal orders the idea that legal presumptions relate to the ascertainment of a certain (unknown) fact (e.g. the artificial arrangement) from another (known) fact and above all the distinction between irrebuttable and rebuttable presumptions based on the opportunity of counterproof. This is, however, for general lines, as the Court at times uses the concept a-technically and does not seem to appreciate the difference between irrebuttable presumptions and similar notions (like fictions of law) or the procedural rather than substantive nature of the presumptive measure concerned.

The above considerations render evident how, as confirmed by the conclusion reached in Chapter III, dealing with legal presumptions in EU law does not entail the comparison between two different models of (or for) legal presumptions, but rather tests the compatibility of the national presumptive measures with the relevant EU rule. That is, depending on the sector, with the Regulation of customs duties, or with the provisions and the principles of the VAT Directive or the Excise duties Directive, or with the Treaty freedoms and general principles of EU law for non-harmonized taxes.

It is in the light of the foregoing that the EU approach to tax law presumptions and its impact on national legal orders were read in this study.

### **3.1.1... different perspective**

In Chapter III it has been argued that the rulings of the EUCJ on tax law presumptions appear at times controversial and some clarifications on certain issues are hoped for. Nonetheless, a common analytical framework may be certainly identified for general lines. Indeed, in each area of tax law explored, the national presumption of law is generally looked at as a possible obstacle to the effective enjoyment and application of, respectively, EU rights/freedoms and principles, so as to request a scrutiny as to whether such possible

conflict may be reconciled. This may be done under certain conditions, either when the measure satisfies interests worthy of protection (also at EU level) or the effective application of the EU provision concerned is not (disproportionately) threatened. To this end, the ECJ employs a teleological interpretation of the national presumptive measure and focuses on the effects that such measure may have on the actual enforcement of the EU principle/freedom/right concerned. In fact, the Court extracts the *ratio* from that measure, based on the arguments invoked by the Member State involved. Such *ratio* is then confronted both with the national aim pursued (e.g. simplification of the application of the tax, prevention of tax avoidance or evasion) and above all with the purpose of the EU relevant rule (included in the Treaty, in the Customs Code Regulation, in the VAT Directive, or in a Direct tax Directive), in order to check the appropriateness and necessity of the means used (proportionality test). In this instance, the Court verifies whether the outcome of the presumptive mechanism conflicts with the EU relevant rule in such a way that the exercise of the EU right or freedom is rendered impossible or excessively difficult. Even when the Court does not refer explicitly to the principle of effectiveness (intended in a broad sense), the latter is the main criterion that guides the evaluation of legal presumptions at EU level.

In the light of this, the finding of the Court is inevitably different when facing irrebuttable presumptions of law rather than rebuttable ones. Both of them are approached in a similar way, in the sense that the Court looks at the probative implications. In other words, it considers the difficulties in discharging the burden of proof and the means offered by the national provision concerned in this regard. Such difficulties are evaluated in respect to the EU principle, objective or right concerned, and thereby in view of a parameter which is external to the presumption itself. In this way, the Court seems to engage an evaluation *of fact*, taking into consideration the conditions (e.g. timing, administrative requirements) that, by hindering the reversal of the burden of proof, undermine the effective exercise of the EU right.

As a result, irrebuttable presumptions of law are generally looked upon with disfavour because of the absence of contrary proof, which implies that they ‘automatically’ limit or restrict on the EU right or freedom concerned. By contrast, when a rebuttable presumption of law is at issue, the question is whether the means of proof (and in general, the procedural guarantees) offered by the national jurisdiction for the purpose of rebutting it are appropriate and do not prevent the exercise of the EU right concerned. The case-law

shows that the Court does consider the scope of the national presumptive measure, but precisely in view of the prohibition of any overkill and of the possible difficulties of proof (and of compliance) that a general construction of the norm would determine.

From this perspective, the only distinction that seems to be relevant at EU level is the one between presumptions which may be rebutted and presumptions which do not envisage any proof in rebuttal. By contrast, the Court tends to disregard the substantive or procedural nature of the provision concerned, i.e. the fact that it concerns the definition of (one or more component of) the tax (taxable event, amount, subjects) or rather the application of the tax (assessment, recovery). In this regard, it is remarkable that it deals with national provisions which are construed under a form different from an irrebuttable presumption of law (e.g. fictions of law, legal definitions, etc.) as if they were presumptions. Member States are indeed inclined to design certain provisions limiting EU rights or freedoms as legal definitions or similar concepts, which govern a certain matter rather than the ascertainment of a certain fact. This is evident, for instance, with regard to some national provisions that limit the right of deduction to a certain amount, or extend the range of persons liable to pay the tax given certain circumstances, or fix a *minimum* amount of profits for cross-border taxpayers. Precisely in view of the fact that the Court considers the ‘effect of irrebuttable presumption’ on the exercise of the right concerned, it scrutinizes them under the sole aspect of the opportunity of proof to the contrary and judicial review.

### **3.2 The general standards developed by the EUCJ**

After having drawn some general conclusions on the way in which tax law presumptions are approached at EU level, some lines need to be fixed concerning the general criteria of (in)consistency stemming from the EUCJ case-law examined in Chapter III.

National presumptions of law may clash with EU (*tax*) law, either with the substantive rules of a tax which is uniform or harmonized at EU level, or with the ‘formal’ rules of such tax (i.e. concerning the application). In the former case, because they cause an effect which is in contrast with the design given by a Regulation or a Directive to the matter concerned; in the second case, because they render excessively difficult or impossible the exercise of a certain right conferred to the taxpayer by EU law, or more proportionate means are conceivable that are less detrimental to such right.

In fact, the case-law in the field of customs duties shows that the EUCJ is quite strict where a national tax provision, for instance a presumption as to the commercial character of the

importation of certain goods, is (even solely) potentially able to jeopardize the uniform rules established by the relevant Customs legislation. It follows that irrebuttable presumptions of law or similar concepts having the same effects, which end up affecting the customs duty in a way that diverges from the relevant Customs legislation, are rejected. This may not be asserted for certain as regards rebuttable presumptions of law. Though the Court has manifested a preference for non-binding rules when the need for simplification and rapid collection of the customs duty are at issue, the case may be that a rebuttable presumption of law covering a non-harmonized (procedural) aspect or ancillary aspects in respect to the design of the customs duty, is deemed as not undermining the uniform application of the Community Customs Code.

In the area of VAT, tax law presumptions enacted on the basis of the VAT Directive's clauses allowing derogations in view of simplification and prevention of tax avoidance or evasion are requested to be proportionate to the aim sought; since they impact on fundamental elements of the VAT system, such as the person liable to pay, the taxable amount or the right of deduction, any overkill is censured. Likewise, even though procedural rules in principle fall within the competence of Member States, the latter may not make the exercise of rights conferred by the Directive to undertakings conditional to further requirements, for instance by presuming the existence of the conditions for suspending the refund of the tax credit without providing procedural guarantees. Should such conditions be merely provisional, they nonetheless affect the effective exercise of a right conferred to the undertaking by the VAT Directive in such a way that is disproportionate. Thus, the EUCJ tends to reject irrebuttable presumptions of law, even when they are concealed behind different ways of construing the national measure concerned, because they are disproportionate means to attain the aim sought. By contrast, rebuttable presumptions of law are not deemed to be *per se* disproportionate, but they are likewise enabled to hinder, albeit not in a conclusive way, the exercise of a VAT Directive's right. As such, they may be introduced based on the conditions (authorization, need for simplification or to combat tax avoidance or evasion) laid down in the VAT Directive for possible derogations from the latter, which are strictly interpreted by the Court, and provided that the exercise of the relevant right is not rendered impossible or excessively difficult.

That the difficulties of (contrary) proof are taken into great consideration by the Court, which consequently rejects even rebuttable presumptions of law, is evident from the case-

law concerning national presumptions of the passing on of indirect taxes levied in contravention of EU law. Where the taxpayer is *de facto* unable to rebut the presumption, the effective exercise of the EU right is indirectly undermined. In these decisions the Court seems to consider the (absence of) rationality of the presumptive provision, but with the sole view of affirming the infringement of the right to the repayment of an indirect tax which the Member State has unduly collected. In the view taken by the Court, charging the taxpayer challenging the reimbursement of such tax with the proof of a negative fact means rendering impossible the exercise of the right of reimbursement. As such, it is inconsistent with EU law, even if the presumption concerned provides the evidence in rebuttal.

Turning to national presumptions of law covering non-harmonized taxes, like direct taxes, they may conflict with EU law where cross-border situations are at issue and they restrict on a Treaty freedom. In some of these hypotheses, they discriminate against non-residents/non-nationals basically by presuming the inexistence of the conditions for benefiting from certain tax treatments and by shifting onto the taxpayer the burden of proving that such conditions occur. This amounts to a difference in treatment that is not accepted on the grounds of the mere difficulties met by tax authorities in the assessment or recovery of transnational situations/elements, insofar as there are less detrimental means. National tax authorities may in fact rely upon the administrative cooperation tools and/or ask the necessary information from the taxpayer involved. In most recent case-law, the exercise of a fundamental freedom is assumed (*per se* or in combination with further objective criteria) by national provisions to be the basis of a legal presumption of tax avoidance, tax evasion or abusive practice. On the grounds of certain justifications (the need to prevent tax evasion or avoidance, the balanced allocation of Member States' taxing rights), such a restriction may be accepted, but on condition that it is proportionate and thereby as least detrimental as possible to the freedom concerned. Accordingly, the EUCJ is inclined to reject a national provision which automatically presumes the existence of abusive practices based on purely general criteria, such as the transnational nature of the situation and the more advantageous foreign tax regime. The scope of legal presumptions included in anti-abuse measures has to be targeted at purely artificial schemes identified by means of 'objective and verifiable criteria'. Such specificity is requested also in view of the actual opportunity for the taxpayer concerned to rebut the presumption, so as to avoid the application of the restrictive national measure.



### 3.3 The impact of EU law on tax law presumptions and on the protection of the European taxpayer

The examination of the European law framework carried out in Chapter III reveals that the EU law is having an increasing influence on (apparently merely) procedural issues<sup>821</sup>, amongst which are tax law presumptions.

Such influence is primarily the result of the EUCJ judgments finding a certain presumptive measure to infringe the relevant EU rule, which obliges the Member State involved to amend it accordingly. On the other hand, as is well known, the EUCJ judgments influence the national legislation-making, even beyond the single Member State involved in a case of infringement of EU law.

In other words, since the EUCJ decisions rule on the interpretation to be given to the EU provision concerned, they have often the effect of prompting the amendment or the repeal of provisions suspected to be in contrast with EU law. This is evident, for instance, looking at Article 59, para 1, of the Belgian VAT Code, which was abrogated shortly after Halifax; another self-evident example is Article 166, para 3, of the Italian Income tax legislation governing exit taxes for companies, which, in order to comply with the indications given by the Court in *National Grid Indus*, has been amended so as to include explicitly the reference to such decision.

It may happen, though, that the fear for conflicts with EU law based on discrimination grounds, leads some Member States to extend their anti-abuse provisions intended to combat the tax base erosion even to domestic situations. This was the case, for instance, after the EUCJ decision in *Lankhorst-Hohorst* concerning the German thin capitalization, which brought several Member States to amend their thin cap rules so as to render them applicable to domestic situations as well. These results are undesired, as highlighted by the Advocate General in the case *Thin Cap GLO*, because regimes of that kind do not make much sense in merely internal situations. Again, the extension to domestic situations of the national provision found inconsistent with EU law was the solution adopted by the Belgian Government after the *Talotta* case. The assessment based on minimum taxable proceeds (Article 342, para 3, CIR), originally provided solely for non-resident taxpayers holding an activity in Belgium, were extended to domestic situations.

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<sup>821</sup> The most topical issues of procedural tax law are dealt with by A. van Eijdsden and J. van Dam, *The impact of European Law on Domestic Procedural Tax Law: Wrongfully Underestimated?*, EC Tax Review, 2010, 199. Based on the EUCJ case-law, the Authors distinguish three directions in order to identify the influence on domestic procedural law: the Treaty freedoms, the principles of equivalence and effectiveness and ultimately the European legal principles and fundamental rights.

Additionally, precisely the soft-law acts issued by the European Commission, as well as the starting of an infringement procedure, may have a role in the Member States' compliance with the *minimum* standards that legal presumptions should have to be in line with EU law. Under the first aspect, the Communication of the European Commission on anti-abuse measures in the area of direct taxation summarizes the criteria that anti-abuse national rules (possibly including legal presumptions) should meet, based on the most relevant and recent rulings of the EUCJ. Under the second aspect, it may be recalled, for example, that precisely following an infringement procedure initiated by the European Commission, the Italian legislator decided to repeal a presumption inserted in Article 54 of the Italian VAT legislation dealing with the assessment. The provision entitled the tax administration to infer the existence of non-declared VAT operations or the inaccurate indication of the operations giving rise to the right of deduction, from the divergence between the consideration resulting from the accounting records and the invoice, on the one hand, and the normal value of a certain immovable property on the other hand<sup>822</sup>.

### **3.3.1 Testing some of the Italian and Belgian presumptive measures against EU law**

Given the high level of integration between customs legislation laid down at EU level and national implementing measures, which leaves little room for the possible introduction of legal presumptions in that field, in Chapter II the attention was concentrated upon a number of presumptive provisions concerning VAT and cross-border (direct taxation) situations. Dealing with them, and also with similar regimes in Chapter III, references were made as to the existence of doubts of inconsistency with EU law and possible solutions to reconcile with the latter. On the other hand, the examination of the case-law has revealed how a number of Italian and Belgian provisions have been ruled on by the EUCJ, which found them to be in contrast with EU law, save for the Belgian transfer pricing.

In conclusion to this study, it is thus suggested to test those provisions that might give rise to frictions with EU law, in the light of the conclusions reached.

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<sup>822</sup> See Chapter III, Section I, Part II, footnote 658. The Commission argued that it was “*a non-proportionate provision as it shifts the onus of proof on the person liable to tax in the absence of any other proof of tax fraud*”.

### 3.3.1.1 Legal presumptions in the field of VAT: persons liable to pay the tax

Both the Italian and Belgian tax systems include in their VAT legislation a number of presumptions intended to simplify the assessment (of tax evasion) and to secure the recovery of the tax due.

With regard to the latter, a brief mention must be made of the joint and several liability of persons other than the taxable subject, which Member States are permitted to introduce under the conditions laid down by the VAT Directive and in accordance with the general principle of EU law. In the *Vlaamse Oliemaatschappij NV* case, following the FTI judgment, the Court found Article 51-*bis*, para 3, of the Belgian VAT Code, to conflict with the principle of proportionality, on the grounds that it extended the liability to pay to a third person (the warehouse keeper) without allowing the latter to prove that he took all the precautions not to get involved in a tax fraud. As said when dealing with this case, provisions of this kind are often construed by Member States under forms other than presumptions (for instance, typification of a situation, legal definition, assimilation etc.). By contrast, the Court is inclined to consider them as irrebuttable presumptions of law (of non-compliance with the duties of diligence), which are disproportionate to the aim sought insofar as they do not envisage the proof in rebuttal (or more exactly, the proof in exoneration). Following the *Vlaamse Oliemaatschappij NV* decision, Article 51-*bis*, para 3, was amended by inserting the possibility for the third person to demonstrate his good faith, the absence of fault or negligence, for the purpose of avoiding the application of the joint and several liability to pay.

In the light of this, Article 60-*bis*, of the Italian VAT legislation, which has been incidentally referred to when dealing with the Belgian article cited above, does not seem to create evident problems of inconsistency with EU law. Though, the rationale of the provision is more complex and the way in which the contrary proof (or escape) is designed might be too narrow. It provides, with regard to the goods that are to be identified in a ministerial decree, that when the supplier does not pay the VAT on goods sold at a price lower than the normal value, the transferee is jointly and severally liable to pay such VAT (para 2). The latter is allowed (para 3) to prove (by means of documents) that the lower price is due to objective and detectable circumstances, or to specific provisions of law and that in any event it is not related to the non-payment of the VAT debt. Thus, this provision assumes the normal value as a criterion on which the joint and several liability is made

conditional to, and confines the escape from such liability to the demonstration that the lower price the parties agreed upon was not related to the non-payment of the tax<sup>823</sup>.

#### **3.3.1.1.1 ... taxable operations and chargeability**

Some doubts of consistency with the rules of the Directive may arise from the legal presumption established by Article 51, para 1, No 2 and 7 of the Italian VAT legislation, to the advantage of tax authorities carrying on an assessment based on banking transactions. Basically, as explained in Chapter II, the tax administration is entitled to presume the existence of non-declared taxable operations based on the withdrawals and deposits which are recorded in the banking account and not even in the books of the taxable person. The Italian Constitutional Court has deemed the provision to be consistent with the principle of reasonableness, the ability to pay principle and the right of defence. This occurs based on the fact that the presumptive inference grounds on objective elements and the possibility to submit documents and information during the tax audit is envisaged.

It is true that such presumption may be rebutted by proving that the banking data in the hands of the tax administration have been taken into consideration in the tax return, or that they do not refer to taxable operations for VAT purposes. Moreover, the same article provides that he is permitted to produce documents or any information before the tax authorities, prior to the issuing of a notice of assessment and a possible trial. Nonetheless, the known fact upon which the inference is based appears a weak index of existence of VAT taxable operations, and the hearing of the taxpayer during the administrative procedure has been deemed by the Italian Supreme Court to be non-compulsory. Therefore, even though such legal presumption envisages the contrary proof and in general procedural guarantees, one cannot exclude its inconsistency with the VAT Directive. Indeed, the fact that certain banking transactions do not result from the books of the taxable person does not appear sufficiently to demonstrate the evasion. Thus, the case may be that the VAT is unduly recovered. Furthermore, the vagueness of the inference affects the object of the contrary proof, which may be difficult to give, for instance when the same bank account is used also for transactions which are not related to the economic activity.

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<sup>823</sup> Moreover, with Article 1, para 164, Law 24 December 2007, No 244, a further paragraph (3-*bis*) has been inserted. It stipulates that when the amount of consideration indicated in a contract for the transfer of an immovable property and in the related invoice is different from the real one, the transferee (even if he does not operate in the quality of economic operator) is jointly liable to pay together with the supplier for the difference between the real amount and the amount declared as well as for the fine.

By contrast, there are no evident doubts of inconsistency with regard to the legal presumptions of transfer and purchase in the field of VAT provided for by the Italian legislation (Presidential decree No 441/97). Basically, the tax administration is entitled to presume that the goods which are purchased, imported or produced and are not situated where the taxpayer carries out his operations, have been supplied; similarly, it may presume that the goods that are in one of the places where the taxpayer conducts his activity are presumed to have been purchased. The proof to the contrary which may be given by a taxpayer challenging a notice of assessment motivated on the grounds of one of those presumptions is confined to certain facts established by the law (e.g. the goods have been lost, used for the production, delivered to third parties etc.) and to certain means of (documentary) proof. Notwithstanding this, the facts envisaged in the legislation end up covering almost all the possible justifications; moreover, the national case-law tends to give a broad interpretation of the object of the contrary proof.

For these reasons, such type of presumption does not seem in principle to be inconsistent with the EU framework. In fact, it is based on the material ascertainment as to the absence or existence of the merchandise in the place where the activity is carried out. If certain goods that have been purchased are not located in the place where the undertaking conducts his activity, then it is reasonable to infer that they have been sold and a VAT evasion (selling without issuing the invoice) occurred. The practice shows that, at times, such presumption is used by the tax administration to motivate a notice of assessment without a material inspection conducted in the place where the activity is carried out. This is, however, in contrast with the formula of the legislation.

The legal presumptions provided in Article 64 of the Belgian VAT Code have to be framed under a similar perspective. In particular, the last paragraph of such article (para 5, in force since the 1st of January 2013) states that the supply of a certain good is presumed to have occurred at the time when it is not in any place which is in at availability of the supplier in Belgium, save for the counterproof. As such, it seems to imply a material ascertainment conducted by the tax administration at the place where the activity is carried out. In the light of this, and of the opportunity for the taxpayer to give proof to the contrary, similarly to the presumption of supply cited above, it does not seem to create particular problems of inconsistency with the VAT Directive.

By contrast, more uncertainties arise from the other paragraphs included in the same article, in the extent to which the known fact is designed in a general and vague way. Amongst

them, para 1 provides that all persons who purchase or produce certain goods in view of the selling are presumed to have supplied them under the condition for the VAT chargeability, save for the counterproof (e.g. they have been destroyed)<sup>824</sup>. From the national practice and case-law, it results that a material ascertainment by the tax administration is not requested, and that at times the existence of non-declared purchases (upon which the legal presumption is based) results from the books of the purchaser. Again, several doubts for similar reasons arise as regards para 4 of the same provision, which presumes, save for the counterproof, the existence of supply of services behind the selling of a new building by a taxable person, and entitles the tax administration to require from the taxpayer the payment of the VAT calculated on the normal value of those services.

### 3.3.1.2 Anti-abuse measures in cross-border situations

Similarly to most of the EU Member States, the Italian and Belgian tax systems include several (semi)general and specific anti-abuse provisions, aimed at avoiding the circumvention of the national legislation for the purpose of obtaining undue tax advantages and/or at combating the erosion of the taxable base put in place by shifting income towards low-tax States<sup>825</sup>.

Amongst these, there are certain provisions which implement the anti-abuse clause included in the Merger Directive, which allows Member States to presume that a certain operation has tax evasion or avoidance as its principal objective (or one of its principal objectives) where it is not carried out for valid commercial reasons. Such clause is interpreted quite strictly by the EUCJ: general provisions that exclude automatically entire categories of transactions by adding further requirements to those provided by the Merger Directive are rejected<sup>826</sup>. In this regard, the Belgian and Italian legislations are in line with the EU framework. Article 183-*bis* of the Belgian Income tax legislation, which required the operation (e.g. merger, exchange of assets, etc.) to fulfil a 'legitimate need of a

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<sup>824</sup> Para 2, Article 64 provides the same presumption for the supply of services. Article 65 CTVA entitles the tax administration to presume that a purchase has taken place where a taxpayer who has received certain goods is not able to justify on the basis of which title are at his availability.

<sup>825</sup> See K.-D. Drüen and D., Drissen, *Burden of proof and anti-abuse provisions*, in *The Burden of Proof in Tax Law*, (ed.) G. Meussen, Amsterdam, EATLP International Tax Series, Volume 10, 27 et seq.

<sup>826</sup> According to G. Meussen, *Burden of proof and European Tax Law*, in *The Burden of Proof in Tax Law*, (ed.) G. Meussen, Amsterdam, in EATLP International Tax Series, Vol. 10, 35, from the Leur-Bloem case it results as follows: "*Member States are not allowed to have provisions in their national tax laws that deem certain situation to have occurred primarily as the result of tax evasion or tax avoidance, while at the same time allowing the taxpayer to provide proof to the contrary. This reversal of the burden of proof to the detriment of the taxpayer violates EC law. Transactions having the primary aim of tax avoidance or tax evasion have to be proven by the tax administration on a case-by-case basis*".

financial or economic nature', was replaced by a formula that is identical to the one included in the Directive. Article 37-*bis* of the Italian Presidential decree No 600/73, which is a (semi)general anti-abuse provision, might preclude the fruition of the Merger Directive's benefits (and of the Interest and Royalties Directive's benefits as well<sup>827</sup>), under certain conditions that seem in line with the rules set at EU level on the division of the burden of proof. Article 37-*bis* applies solely to the transactions listed in para 3, amongst which the kind of operations envisaged in the Merger Directive are included. It entitles the tax authorities to disregard single or connected acts, facts or transactions which are carried out without valid economic reasons and are intended to circumvent obligations and limitations provided under tax law in order to obtain tax savings or refunds otherwise undue. The burden of proof as to the existence of an abusive scheme lies upon the tax administration, which is called upon to prove the constituting elements of the abuse (abnormal transaction in respect of a 'standard' one, aim of achieving an undue tax benefit). At any rate, the taxpayer has the opportunity to demonstrate that the transaction carried out is justified in view of sound business reasons and he must be guaranteed the possibility to be heard by the tax administration prior to the issuing of the notice of assessment.

Speaking of anti-abuse rules that entitle the tax authorities to disregard certain acts or operations, Article 344, para 1, of the Belgian Income tax Code, should be mentioned. As said when dealing with it in Chapter II, it is currently very much debated amongst the Belgian scholars and the Belgian Constitutional Court has had occasion to rule on it. Given the existence of various anti-abuse rules targeted at cross-border situations, it is hard to see its application to the latter, but still possible. At any rate, the burden of proof as to the existence of the abuse seems to rest upon the tax administration, so that no evident clash with EU law may be seen<sup>828</sup>.

The objective of preventing the transfer of profits towards low-tax jurisdictions, has led both Italy and Belgium to introduce provisions that limit the deduction of certain expenditure related to payment made to persons established therein. The normative technique used generally consists of making the enjoyment of the deduction of such costs

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<sup>827</sup> Article 37-*bis*, para 3, let. f-ter), includes the payments of interests or royalties to EU recipients controlled directly or indirectly by one or more non-EU residents.

<sup>828</sup> See on this issue C. Huylebrouck, *Mise en perspective de la notion de "résidence" en droit fiscal international*, in *Fiscalité internationale en Belgique, Tendances récentes*, (eds.) E. Traversa and I. Richelle, Bruxelles, Larcier, 2013, at p. 57. In the Author's view, when at issue is a non-merely-domestic operation, Article 344 CIR may apply only if the abuse concern also EU law. Cf. D. Garabedian, *La nouvelle règle générale anti-abus et l' "objectif" des dispositions fiscales: portée, arbre de décision, cas pratiques*, T.F.R. 2012, 753.

conditional to the proof that the transactions carried out or the establishment abroad are genuine, or that such transaction is at arm's length. In other words, these kind of provisions establish a presumption of non-genuineness of costs incurred for transactions with persons established in low-tax States and shift the burden of proving the existence of sound business reasons upon the resident taxpayer. Article 54 of the Belgian Income tax Code, which reflects this scheme, was found inconsistent with the freedom to provide services, basically due to the general and vague (thus, disproportionate) scope and the related heavy burden of proof placed upon the taxpayer. A similar scheme may be traced in Article 110, para 10 and 11 of the Italian Income tax legislation, which limits the deduction of costs incurred with enterprises located in black-listed States<sup>829</sup>. However, unlike Article 54 cited above, it does not apply to transactions involving EU Member States. Thus, if ever, a question of compatibility could arise only with regard to the free movement of capital with third countries. Though, under these conditions the approach of the EUCJ appears to be more flexible, also depending on the availability of administrative cooperation tools.

### **3.3.1.2.1 CFC-prone rules**

The Italian CFC rule included in Article 167, para 8-bis, of the Income tax legislation, and the Belgian specific anti-abuse clause provided for by Article 344, para 2, of the Income tax Code, do not appear to be fully in line with the EU framework and set of rules stemming from the case *Cadbury Schweppes*.

#### **3.3.1.2.1.1 The Italian CFC rule and the presumption of tax residence for foreign incorporated companies**

Paragraph 8-*bis* was introduced in Article 167, dealing with CFC rules, by the Law decree No 78/09, with the effect of extending the imputation of profits on the domestic parent company to the case of the holding of a controlled company in a non black-listed State (i.e. also EU), provided that two conditions are met. It is indeed requested that a) the foreign subsidiary is subject to an actual taxation which is more than 50 per cent lower than the tax that would have been levied if it were resident in Italy; b) the proceeds of the subsidiary consist of more than 50% of passive income or income from services supplied to controlled or controlling persons (i.e. intra-group services). The resident taxpayer has the possibility

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<sup>829</sup> The same holds true as regards the CFC rules applicable when black-listed Member States are involved (Article 167 TUIR), as well as to the presumption (of tax evasion origin) on non-declared investments held by Italian resident individuals in tax heavens (Article 12, Law decree No 78/2009).



to avoid the application of the CFC rule by giving evidence, through a (compulsory) advance ruling, that ‘the settlement abroad does not represent an artificial arrangement aiming at achieving an undue tax advantage’.

The use of a formula that echoes the EUCJ case-law for drawing the object of the contrary proof, might have led the Italian legislator to feel on the safe side. In fact, in accordance with the indications emerging from Cadbury Schweppes, the safe harbour clause does not merely refer to the intention of reducing the tax burden in the State of residence. It allows the taxpayer to demonstrate that the localization abroad does not embody an artificial scheme aimed at obtaining undue tax advantages. However, from that EUCJ judgments it follows that the establishment of a subsidiary in a low-tax jurisdiction may not *per se* be deemed as abusive, provided that the foreign settlement is real and so are the transactions carried out. Accordingly, the scope of the CFC rule must be confined to ‘wholly artificial arrangements which do not reflect economic reality, with a view of escaping the tax normally due on the profits generated by activities carried out on national territory’.

Looking at the conditions of application for the CFC rule provided by the Italian legislation, they do not appear to be targeted at wholly artificial arrangements<sup>830</sup>. They concentrate on the level of taxation applicable in the host State and the nature of such income. These may surely be indices of a tax saving, but they are not *per se* indices of an artificial arrangement. The case may be, for instance, that a subsidiary is established in a Member State where it is charged with a levy lower than 50 per cent of the tax that would be applied in Italy, and that it carries out for the most part financial or insurance services, but these circumstances do not mean that it is an artificial arrangement, like a letter-box would be. Moreover, there is not symmetry between the circumstances that ground the rebuttable presumption of avoidance and the object of the contrary proof. The former refer to objective elements: when they occur, a presumption that the arrangement has been carried out for abusive purposes operates, which causes the imputation on the parent company of the subsidiary’s profits. By contrast, the proof to the contrary which is requested from the resident taxpayer combines objective and subjective elements. The taxpayer has to demonstrate that the arrangement is not artificial, so that it embodies a genuine exercise of the freedom of establishment. One can wonder what the taxpayer may prove, if the legislator assumes that the 50 per cent lower taxation in the host state and the 50 per cent passive income indicate

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<sup>830</sup> Contra, i.e. in the sense that the Italian CFC rule for non black-listed State is in line with EU law, P. Scarioni and S. Muni, *The New Italian CFC Rules; EU Holding Companies Challenge the ‘Artificial Arrangement’ Assessment*, Intertax, 2010, 527, in particular at p. 531.

a non-genuine arrangement. In many cases, thus, the core of the contrary proof is represented by the (economic) reasons for which the arrangement have been put into place. Besides that, from Cadbury Schweppes it results that the fact that the intention to obtain tax relief prompted the establishment of the subsidiary abroad, does not suffice to conclude that there is a wholly artificial arrangement. To this end, the existence of objective elements are required. As a consequence, the taxpayer should be allowed to discharge the burden of proof by giving evidence that one of these elements (either the objective or the subjective) fails. Finally, the compliance costs that Article 167 places upon the resident parent company may be deemed as disproportionate. In fact, the latter has to yearly (and for each subsidiary) verify if the circumstances envisaged by the CFC rule apply. That is, it has to compare the level of taxation to which the foreign subsidiary is subject in the host State with the one that would have applied in Italy and reckon the amount of passive income. If the conditions established by the law occur, it has to apply to the tax authorities for an advance ruling for the purpose of avoiding the application of the CFC regime. From a literal interpretation of the Article 167, para 8-ter and 5, the request for a ruling seems to be compulsory, so that a taxpayer failing to fill such ruling would be prevented from giving evidence later, in the context of the administrative proceedings or the trial. This would render the provision surely disproportionate and in conflict with the principle of effectiveness. However, tax authorities (in a Circular letter) have supported the interpretation that the taxpayer can evidence of the genuineness of the arrangement even beyond the advance ruling.

It should be noted that a similar counterproof is envisaged against the presumption of residence for foreign companies or other entities laid down by Article 73, para 5-bis, of the Italian income tax legislation. It basically presumes that the administrative seat of non-resident companies and entities holding direct controlling participations of resident companies and commercial entities is in Italy if they are alternatively a) controlled, even indirectly, by a person resident in Italy or b) administered by a board of directors who are for the most part resident in Italy. Thus, the provision alleviates the burden of proof of tax authorities as to the place where the administrative seat is actually established, which is relevant for the purpose of determining the place of residence and the applicable national tax treatment.

One can discuss the reasonableness of such inference, but it does not appear to be in contrast with EU law<sup>831</sup>. This is the case, provided that, as clarified by the Italian tax authorities following a request of information of the European Commission, the provision is intended to alleviate the burden of proof on the side of the tax administration when it has to determine the real residence of a certain company, but it does not relieve it from proving the fictitious character of the foreign company. In this view, para 5-*bis*<sup>832</sup> is part of a broader investigation aimed at ascertaining the intensity of the relationship between the foreign entity and the foreign country on the one hand, and between such entity and Italy on the other hand.

### 3.3.1.2.1.2 Article 344, para 2 of the Belgian CIR

Turning to Article 344, para 2, of the Belgian Income tax Code (CIR), it entitles the tax administration to disregard the transfer of a number of listed assets to a non-resident taxpayer who is not subject to income taxation or is subject to a remarkably more favourable taxation for the income generated by those assets with respect to the Belgian legislation. Consequently, the income generated by such assets are attributed to the transferring taxpayer, unless he proves that a) the operation is justified by legitimate financial and economic needs or b) he has received a consideration for the transfer which generates income that is subject to a normal tax burden with respect to that which would have applied failing the operation.

As said in Chapter II, such a semi(general) anti-abuse rule has been deemed as a sort of CFC rule, basically because it likewise aims at combating the transfer of taxable base towards low-tax jurisdictions. Irrespective of this comparison, which is based on a broad

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<sup>831</sup> See on this issue, M. Greggi, *Recenti sviluppi e questioni di compatibilità comunitaria delle disposizioni di contrasto al fenomeno della cosiddetta "esterovestizione" societaria*, *Rass. Trib.*, 2009, 105, in particular at p. 114 and 126. The Author underlined how the evaluation of compatibility with EU law depended in part on the interpretation and application by administrative and judicial authorities, especially under the perspective of the division of the burden of proof. Cf. E.M. Bagarotto, *"La residenza delle società nelle imposte dirette alla luce della presunzione di "esterovestizione"*, *Riv. Dir. Trib.* 2008, in particular at 1183. According to A. Ballancin, *The Burden of Proof in Tax Law - Italy*, (ed.) G. Meussen, in *EATLP International Tax Series*, Vol. 10, 2011, 182, the companies' tax residence presumption may be incompatible with the proportionality standards set by the EUCJ, because "the control does not produce, as a mean of common experience, the effect of locating the place of management at the parent's residence". C. Bardini, *The Fine Line between Anti-Abuse Measures and the Delimitation of a Member State's Tax Jurisdiction: The Italian Case*, *European Taxation*, 2010, 374, suggests to classify the deemed tax residence rules among anti-abuse measures and under this perspective evaluate their restrictive effects on fundamental freedoms.

<sup>832</sup> Similar considerations may be developed with regard to para 5-*quater*, which extend the rebuttable presumption to the case of companies or entities that have invested more than 50 per cent of their assets in an Italian closed real estate fund and are controller directly or indirectly by Italian residents.

degree of approximation, it has to be recognised that Article 344, para 2 gives rise to questions similar to those analysed as regards the Italian CFC rule.

In fact, it has only apparently a specific scope. It applies to the operations listed in the norm, but the inclusion of the transfer of cash contributes to broaden the range of transactions potentially covered. Moreover, unlike a CFC rule, it does not request any qualified relationship between the resident person (individual or corporation) and the non-resident person. It follows that the main index of abuse is represented by the lower level of taxation to which the non-resident transferee is subject.

As such, the provision is not in line with the case-law of the EUCJ that requests anti-abuse provisions to be targeted at ‘wholly artificial arrangements aimed at achieving an undue tax advantage’. Furthermore, even though the provision is construed as a procedural rule, which similarly to Article 344, para 1, entitles the tax administration to disregard certain acts for tax purposes, it in fact relieves the tax authorities from proving the elements of the abuse. In other words, the provision establishes a rebuttable presumption of (international) tax avoidance and shifts onto the taxpayer the proof that the transaction is justified by economic reasons or that it has not caused a loss revenue for the Belgian Treasury. The tax administration is merely requested to ascertain that one of the operations listed occurred and that the non-resident taxpayer is not taxed or is subject to a remarkably more favourable tax regime. Finally, similarly to Article 54 of the Belgian Income tax Code, which has been found to be inconsistent with EU law in the SIAT case, Article 344, para 2, generically refers to States where the non-resident is not subject to taxation or is subject to a taxation remarkably lower than the one applicable in Belgium. Under this aspect, it might create uncertainties.

In the light of the foregoing, Article 344, para 2, does not seem in line with the EU law, and in particular with the free movement of capital or with the freedom of establishment (if one of the parties involved holds a controlling participation). If the Court was questioned about its consistency with EU law, it would have several reasons to find it disproportionate to the aim sought<sup>833</sup>.

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<sup>833</sup> See L. De Broe, *International tax planning and prevention of abuse. A study under domestic tax law, tax treaties and EC law in relation to conduit and base companies*, cited above, 990. Cf. A. Nolle, *L'article 344, §2, du C.I.R. 1992: essai de contrôle de "constitutionnalité" et de "conventionnalité" d'une disposition légale belge "anti-abus"*, cited above, 514, underlines that the ‘need to secure the balanced allocation of Member States’ taxing rights may represent, together with the need to combat tax avoidance, a justification for Article 344, para 2, as for Article 26 CIR. However, it can be objected that Article 344, para 2, does not embody a transfer pricing rule, and in fact it does not request the tax authorities to re-determine the price according to the arm’s length principle, but it is rather entitled to disregard the transaction.

### **3.3.1.2.2 Thin capitalization rules**

The Italian tax system does not include anymore a thin capitalization rule, whereas in Belgium it has been recently amended for the purpose of rendering it more efficient. The rule is included in Article 198 of the Belgian Income tax Code, which provides for a list of costs that are not considered as business expenditure, and thereby non-deductible, or deductible under certain conditions. As illustrated in Chapter II, that article contains a number of legal presumptions, some of which are applicable to cross-border situations. For instance, the deduction is disallowed where payments are made towards low-tax States and either they have not been properly declared or the genuineness of the transaction and of the foreign addressee have not been proved. Similarly to the limitation of the deduction of costs provided for by Article 110, para 10 of the Italian income tax legislation, such provision applies only when payments are directed to certain low-tax States that do not include any EU Member States, so that the possible questions of compatibility with EU law are confined to the free movement of capital with third countries.

The thin capitalization rule is laid down in Article 198, para 1, No 11. The deduction is disallowed of the interest on loans which are granted to a) a real beneficiary that is not subject to income tax or is, with respect to the interest, subject to a tax treatment that is considerably more favourable than the Belgian general tax regime; or b) a real beneficiary that belongs to the same group as the borrower. This occurs where, at any time during the taxable period, the amount of the debt exceeds five times the equity.

Therefore, the new Belgian thin cap rule assumes that the 5:1 ratio and, alternatively, the more favourable tax regime in the State of the interest's beneficiary or the intra-group relationship between the beneficiary and the borrower, are indices of an abusive scheme consisting of reducing the taxable base of the company subject to a higher level of taxation. As such, it is manifestly not confined to cross-border situations, but it rather applies also to domestic situations.

In the EUCJ judgment *Lemmens and Van Cleef*, Article 18, para 2, No 3, of the Belgian Income tax Code, automatically denying the deductibility of interest paid by a Belgian subsidiary to its non-resident parent company/director on the basis of a 1:1 ratio, was found in contrast with the freedom of establishment. Thus, the Belgian legislator may have thought that the inclusion of merely internal situations is able to exclude any suspicion of discrimination. Yet, the condition of application of the regime when cross-border situations are at issue is different from the one that provided for domestic situations. In the former

case, a very general criterion is envisaged, which is the usual lower tax regime applicable in the foreign State where the beneficiary is established. In the second case, a more precise criterion is provided, that is an intra-group relationship, as defined in the Belgian Civil Code. From this, one can infer that the rationale of the provision is twofold, because in the first case the measure is aimed at avoiding the shifting of the taxable base towards low-tax jurisdictions, whereas in the latter it aims at facing the undercapitalization of companies. Besides that, the provision does not envisage any opportunity of contrary proof, which in the light of the ECUCJ case-law on thin cap rules is essential for the purpose of considering the measure proportionate to the aim sought. From the case cited above, the Thin Cap GLO case and the more recent Itelcar case, it may be inferred that the Court dislikes criteria (such as a fixed ratio) that operate automatically and without allowing the taxpayer to demonstrate the existence of any commercial reasons for the arrangement carried out.

In the light of the foregoing, the compatibility of the new Belgian thin cap rule with the free movement of capital or, in *casu*, the freedom of establishment, may not be excluded solely on the grounds that it applies to domestic situations as well. The provision is construed in such a way that it seems to include two different regimes, for domestic and for transnational loans. Concerning the latter, the circumstance that the interest is paid to a beneficiary resident in a low-tax State, even if combined with the 5:1 *ratio*, is not *per se* an index of 'wholly artificial arrangement'. On the other hand, it should surely be considered, in support of the proportionate character of the measure, that the ratio 5: 1 is quite high and able to guarantee the companies the possibility to obtain loans.

### **3.3.1.2.3 Transfer pricing adjustments rules**

Currently, another difficult issue is the extent to which Member States are allowed to have recourse to transfer pricing rules targeted at cross-border situations. In fact, the EUCJ judgment in the case SGI concerning the Belgian provision (Article 26 of the Belgian Income tax Code) which provided the profits' adjustment upon the resident taxpayer granting gratuitous or abnormal advantages to a foreign related taxpayer, has left several questions open. Such provision does not merely aim at guaranteeing that transactions between related parties are agreed upon at arm's length, but it has also an anti-avoidance rationale, which consists of combating the transfer of taxable base abroad. This permitted the Court to deem the measure as justified in the light of both the need to secure the

balanced allocation of Member States' taxing power and the need to combat tax avoidance. The procedural guarantees, then, were essential for passing the proportionality test.

One can wonder if the Court would rule in the same way facing the other hypothesis envisaged in Article 26, that is the gratuitous or abnormal advantages granted to a foreign taxpayer or establishment that are not subject to income tax or are subject to a more favourable tax regime in respect to the one applicable to the Belgian enterprise. In this case, the anti-avoidance rationale seems to prevail and the reference to the lower level of taxation in the foreign State is designed in a very general way. However, the fact that the application of the provision implies, according to the observations submitted by the Belgian government in the SGI case, that the tax administration must prove the unusual advantages and that the taxpayer is given procedural guarantees, may be considered to be sufficient for compliance with the proportionality test.

Notably, the Italian transfer pricing rule does not seem to be construed as a presumption of avoidance, and the question arises as to whether and to what extent the different rationale compared to the Belgian rule cited above would be relevant in a possible case before the EU CJ. Article 110, para 7 of the Italian Income tax legislation, states that the items of income that derive from transactions carried out with non-resident associated companies are evaluated on the basis of the goods and services concerned, that is the value that would apply under fair market conditions. At national level, as illustrated in Chapter II, there is not a settled case-law on the interpretation to be given to that provision, particularly under the aspect of the division of the burden of proof. Yet, recently the national courts seem inclined to interpret such rule as establishing the legal criterion to be adopted for the determination of the prices where cross-border transactions with related parties are at issue. In this view, the tax administration is not requested to prove that tax avoidance occurs, (e.g. abnormality of the prices, transactions with a person located in a low-tax State, tax advantage), and the taxpayer is not allowed to prove that the transaction, albeit not in line with the arm's length criterion, is nonetheless justified by commercial reasons. The dispute is basically played on the determination of the market value<sup>834</sup>.

The fact that the provision does not refer to the level of taxation applicable in the foreign State where the related taxpayer is established, may support the idea that the provision is not classifiable as an anti-avoidance rule. But even the Belgian rule in SGI did not

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<sup>834</sup> See P. Valente, *Italy: An Outlook on the Supreme Court's Transfer Pricing Decisions*, Intertax, 2013, 256; P. Valente, *Transfer Pricing Audits: Position of the Italian Courts*, Intertax, 2013, 42; P. Mastellone, *The Shift in the Burden of Proof in regard to Transfer Pricing*, European Taxation, 2011, 211.

envisage such an element. The main difference is that the Belgian provision was construed as a procedural rule and implied the proof by the tax administration that the advantages granted were unusual; whereas the Italian rule is designed to impose the market value facing certain transactions. This may not be enough for the Court to exclude the anti-avoidance rationale, which would entail that the taxpayer must be given the opportunity to prove any commercial reasons justifying the non-observance of the arm's length principle. On the other hand, even if the EUCJ accepted that the (possible) restriction on the freedom of establishment is justified by the sole need to secure the balanced allocation of Member States' taxing power, then the limited room left to the taxpayer for escaping the transfer pricing rule may create problems under the proportionality test.

#### **4. Current stage and future developments**

At first glance, one could think that the influence of EU law on legal presumptions, which are generally perceived as part of procedural issues and as such falling within the competence of Member States, be minimal. This study has revealed how the impact of EU law on national presumptive provisions, which can be traced from the older EUCJ judgments, is currently increasing. Since the first decisions that were handed down in the field of customs duties, VAT, the right of reimbursement and direct taxation, the EUCJ has realized that the recognition of rights or freedoms could be threatened by national measures that, even when governing the 'formal' tax law (assessment, recovery), were nonetheless able to hinder the enforcement of the relevant EU law.

The very recent amendments to the administrative cooperation tools, among the other things, indicate that procedural aspects are increasingly catching the attention of the European Institutions, which implicitly acknowledge the difficulties met by tax authorities when facing situations with cross-border elements. Likewise, in its Communication on anti-abuse rules in direct taxation, the European Commission appears to see legal presumptions of tax avoidance as proportionate means for attaining the aim of combating the erosion of the taxable base, provided that they are sufficiently specific and rebuttable. On the other hand, the EUCJ has in several occasions held that Member States are in principle allowed to introduce in their legal systems provisions aimed at avoiding the circumvention of their legislations and interests or the simplification of the assessment and recovery of the levy. Yet, generally speaking, they have to comply with the principles of effectiveness and proportionality.



In this framework, and to a different extent depending on the sector concerned, legal presumptions are generally looked upon as possible limitations to the uniform application of the rules set at EU level, or to the full enjoyment of a certain right or freedom that the individual or legal person derives from EU law. Under this perspective, the fact that Member States have to confront the standards set at EU level concerning legal presumptions, has contributed to increase the protection of the European taxpayer's position, to the disadvantage of the national tax authorities. It is significant, in this regard, that certain provisions (e.g. Italian legislation on refund of tax levied in breach of EU law) deemed as being consistent with the constitutional framework by the national Constitutional Court, were found in breach of EU law. On the other hand, the examination of the Italian and Belgian legislation shows how, even in non-harmonized sectors, the national legislator tends to construe provisions or regimes by taking into consideration the indications stemming from the EUCJ case-law. This often encompasses the recognition of procedural guarantees to the taxpayer, not least the opportunity to give the contrary proof. Precisely the fact that the EUCJ focuses on the 'effect of (irrebuttable) presumption', implies that at times the contrary proof is requested at EU level in cases (one for all, the joint and several liability to pay VAT) that at national level would be checked only under the perspective of the reasonableness. In the light of this, cases of reverse discrimination may not be excluded.

Finally, it has to be observed that the evaluation of the legal presumptions' consistency with EU law entails a sort of 'ascertainment of fact'. Indeed, the way in which the burden of proof is concretely divided between tax authorities and taxpayer, the compliance costs met by the latter, the circumstances that he is allowed to prove and so on, are relevant for the purpose of determining the EU compatibility of the single legal presumption. In this regard, the role that the judge of the main proceedings plays, and will presumably increasingly play, is essential. The EUCJ on several occasions has left to the referring court the ascertainment as to whether in the concrete case the national presumptive provision was in contrast with EU law. To this end, the EUCJ does provide the judge of the main proceedings with the necessary 'tools' and univocal criteria.

In the most recent case-law, on the one side, there are some further indications in that direction; that is, in the sense of the relevance of the role assigned to the judge of the main proceedings in ascertaining if the legal presumption at issue is or not proportionate, or if it does or not allow the taxpayer to give the proof to the contrary without placing upon him

undue administrative burdens. Under this aspect, the reference included in numerous judgments of the EUCJ to the *case-by-case* ascertainment of the conditions for the operating of the legal presumption may be mentioned. It requires the evaluation of the circumstances of the concrete case, which includes the evaluation of the possible proof to the contrary, apparently both in the administrative stage and before the court. On the other side, from the case-law it also stems a greater need for legal certainty with regard to the way in which the legal presumption is construed; this implies that its application may not be left to the discretion of tax authorities, and it has rather to be clear and predictable for the taxpayers. In this perspective, the balance between the need for a case-by-case ascertainment as to the conditions for the application of a certain legal presumption affecting an EU right or freedom, on the one side, and the need for legal certainty on the other side, embodies the pivot of the evaluation of tax law presumptions' consistency with EU law.

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