Tax Administration REVIEW

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EDITORIAL POLICY

The Technical Cooperation Agreement signed by CIAT and the State Secretariat of Finance, the State Agency of Tax Administration (AEAT) and the Institute of Fiscal Studies (IEF) of Spain, provided for the commitment of editing a review that would serve to disseminat the different tax approaches in force in Latin America and Europe.

An Editorial Board formed by CIAT officials (the Executive Secretary, the Director of Tax Studies and Research, the Director of Training & Human Talent Development and Head of the Spanish Mission) is responsible for determining the topics and selecting the articles for each edition of the Review.

The articles are selected, through a public announcement made by the CIAT Executive Secretariat for each edition of the review. It is open to all officials of the Tax, Customs Administrations and/or Ministries of Economy and Finance of the CIAT member countries and associate member countries. Likewise, those members of the MyCiat Community not belonging to any of the aforementioned entities may also participate, following evaluation by the Editorial Council.

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Content

Editorial

Dear Readers,

We are pleased to present to all the tax administrations officials of the members and associates member countries of our organization and, in general, to the entire international tax community, the Tax Administration Review that is published as part of the Technical Cooperation Agreement that CIAT maintains with the State Secretary of Finance, the Institute of Fiscal Studies (IEF) and the State Agency for Tax Administration (AEAT) of Spain.

This edition presents (10) articles: Theory of proof in tax assumptions; Tax policy vs. Cadastral policy, new role play; Comments on action 12 of BEPS and its inclusion in Mexico; A vision on the relationships of tax crime and money laundering Spanish model of institutional collaboration between the financial intelligence unit and the tax administration; Analysis tools for the fight against corruption; Customs valuation and transfer pricing documentation; BEPS action plan and its impact on Ecuador; Brazilian tax burden in historical perspective statistics reviewed; 2013 - 2016 Estimate of sales tax (ST) evasion in Honduras; Electronic contracting in the State Agency of Tax Administration after the new public-sector contract law. In addition to these articles, a new section of reviews of other publications of interest is included in this issue in relation to the book "*Hacienda Pública y Gobernanza Fiscal en España: Desafíos 2020"*. In recognition of the professional career in the public sector of Mr. Juan Antonio Garde Roca".

We appreciate the great reception given to the call to submit contributions for this edition of the Tax Administration Review.

We reaffirm our commitment to disseminate information of interest that contributes to learning and stimulates the transfer of useful knowledge for the international tax community.

Márcio Ferreira Verdi
Director of the Review

THEORY OF PROOF

in Tax Assumptions

Mariano J. **Curio**

SYNOPSIS

The purpose of this paper is to unravel the legal structure of the assumptions that are used in the procedural field of tax law.

The aim will be to provide tools to identify the presence of an assumption, and in that case judge its appropriateness in line with the tax and general principles of law; all this in the area of proof of the taxable event deployed by tax administrations in the exercise of their powers of control.

The characteristics of each element that comprises this, the type of reasoning involved and the nature of the evidence obtained by result will be identified, to finally enter into the analysis of the particularities that this type of evidence has concerning the taxable event and the role that the tax base plays.

CONTENT

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INTRODUCTION

The theory of proof of assumptions does not have a purely dogmatic interest but will allow to accurately identify the presence of an assumption, which sometimes is a bit confusing[1], as well as provide tools that allow judging the proper configuration of these phenomena under the principle of reasonableness. In addition, this knowledge will allow to identify the presence of chains of assumptions and when this type of phenomena invalidates the proof that is tested.

While the theory of assumptions is common to all classifications, the work will be more useful in understanding the structure of simple, hominis or human assumptions, while its construction is under the public official who serves as administrative judge, and its eventual revision under the judge. This authority in the Argentine law is included in article 18 of the law 11.683.

Notwithstanding the foregoing, the examination that will be carried out will have a practical interest on the relative legal assumptions or iuris tantum assumptions contained in that legal provision, given that it is not uncommon for these to be complemented by simple assumption.

To do this, I will take as basis the positions of two great authors. On the one hand, the teachings of Francesco Carnelutti who is considered one of the mentors in the study of the theory of proof in our country. And on the other hand, a more modern vision of the subject as it is done by Enrique Falcón.

In this order of ideas, it will first be necessary to make a brief approach on the classification of the different sources of evidence presented to our assessment; I would further dare complement the classification proposed by maestro Carnelutti to adapt it to the most modern conception.

Then, I will analyze each of the components of the phenomenon, as well as the type of logical reasoning to which the act of assuming belongs.

I will study the degree of conviction involved in the presumed event, the characteristics that the indications must possess and the questions that revolve around their proof, such as the complex indirect proof and the complex source of evidence.

I will devote more time to the study of the link between the indications and the presumed fact, highlighting the fundamental role that exceptions play. Along this line, I will define what is meant by rules of experience and by the norms of sound criticism, even offering a classification of the former.

Inevitably, I will analyze the particularities that this technique possesses when the presumed fact is represented by an event considered as a incidence theory of the tax obligation, emphasizing the role played by the tax base.

First Definitions

Assumption can be defined as the logical process that is performed by inferring from one or more known facts the existence of another. From that simple definition, it is clear that such an act consists of three elements or parts, with one or more indications, the logical process and the fact to be proven.

1 It is often disputed whether the challenge of deductions and tax credits by the State Treasury, questioning vouchers as fake, turns out to be a assumption. About this case in particular, I will address at the end of this work. The lack of clarity of that dividing line is represented in the words of Gorphe when he said that the proof by assumptions or circumstance covers everything that is not covered by any other evidence. Falcón Enrique, M, (2003), Treaty of the proof, Buenos Aires, Argentina, Astrea, Volume II, p.452, note 27.

This type of phenomenon is usually classified according to whether the legislator left it to the judge[2] to carry out that logical process, or that process was carried out by himself when inserting in the positive text the legal implications that would result from ascertaining the facts taken by evidence.

The first are simple or hominis assumptions, and the second are called legal assumptions which in turn are classified in relative or iuris tantum when they admit evidence to the contrary, and in absolute or iuris et de iure when they do not admit it.

The legal assumptions, both relative and absolute, are included in a general and abstract manner. It is the legislator who, based on a rule of experience, infers the existence of a fact in the face of the occurrence of another fact. These assumptions are usually included in normative texts for heterodox reasons, in general to facilitate the collection or control task of the tax administration, rather than the invariability of the rule of experience involved. Therefore, the prevalence of those reasons on the reliability of the experience rule will have an effect when one wishes to connect a second assumption.

In the area of taxation, the presumptive technique is used in order to consider the existence of a specific taxable event fait accompli, either in an integral form, or one of its aspects (material, subjective, time-based and spatial) or the tax base.

It is usually analyzed whether the assumptions belong to the field of procedural law or if they are institutions of substantial law or tax material, the most widespread conception being that it places them in the procedural field by their tendency to influence the evidentiary burden of the presumed fact. However, absolute assumptions are also usually classified as material norms when operating on the elements comprising taxes.

In this sense Litvak and Laspina[3] have said that "few assumptions have as their only function to develop in the area of a procedure. That would be the case of some of the assumptions contained in art. 18 of Law 11,683... Their effect (referring to relative assumptions) is reflected only on the burden of proof and, in a certain sense, helps the judge for his reasoning or the Administration in its collection management. But it will be enough to prove the opposite fact to that inferred so that it yields. In these cases, the procedural nature of the axiom that we affirmed in previous paragraphs is clearly established. On the other hand, regarding the absolute assumption, there is a greater force of the inference, because it does not admit contrary evidence", concluding "Therefore, we understand, because of the mechanics that identifies them, that the absolute assumptions have ceased to be procedural tools to become a substantial law institution".

The truth is that the relative simple and legal assumptions provided in art. 18 of Law 11,683 are instruments intended for exclusive use by the Tax Administration, with its eventual judicial review, and to be implemented following the self-assessment made by the taxpayer. On the other hand, those absolute and relative assumptions included in the respective material tax norms are intended, in general, for taxpayers to consider them when externalizing their situation regarding each tax, in keeping with their impact on the configuration of the elements comprising the tax obligation.

The assumptions provided in art. 18 of Law 11,683 are intended to facilitate the burden of proof of the State Treasury in those cases where it is impossible to accurately assess the taxable events that occurred, and consequently the magnitude of the tax obligation.

2 In the tax sphere, the judge shall be in the best of cases, a public official performing his duties as representative of the entity in charge of tax collection, without prejudice to its eventual review at the judicial level.

3 Litvak José, D. y Laspina Esteban, A., (2007), *La imposición sobre base presunta*, Buenos Aires, Argentina, La Ley, pág. 121 y sigs.

That is, they are mainly tools granted to the Collecting Agency to combat evasion resulting from concealment behaviors, whether from resistance to inspection or provide relevant documentation or from simple inexistence or inaccuracy of this[4].

Those assumptions are not intended to create obligations, but to try those that exist but were not reported to the State Treasury. That is, those facts of an economic nature revealing tax capacity probably occurred, the material rules of each tax being the legal basis of the obligation.

Therefore, the assumptions included in that regulation could not be objected from the viewpoint of the tax capacity when they were consistent with another implicit principle, that of reasonableness[5].

The case of those assumptions that make up the configuration of taxes is different, in which one discusses whether they affect that principle of contributory capacity by assigning in practice legal effects to facts that do not reveal the existence of such quality, that is, giving rise to a tax obligation with the occurrence of a third event, the indication provided in the norm, and not with the fact established as an incidence theory[6].

Next, I will begin with the development of the central theme of this paper, which is the theory of proof of presumptions. This, as previously advanced, will be of special practical application in the conformation of the simple presumptions of art. 18 of Law 11,683 produced in the context of ex officio determinations launched by the National Treasury, as well as in the relative assumptions provided there, which are very often combined with simple assumptions.

1. PRELIMINARY ASPECTS. SOURCES AND MEANS OF PROOF

According to Enrique Falcón[7], the proof can be defined in a general way as "the demonstration in judgment of the occurrence of an event", assimilating the term events to facts[8]. Now, where do we get the knowledge of the existence or non-existence of an event to achieve its demonstration in court, and also how do we obtain it?

One of the forerunners in these studies has been Francesco Carnelutti[9], whose works have been used as the basis by most national doctrine experts to, from there, deepen the studies on the structure of the proof[10].

4 On the other hand, the use of absolute legal presumptions and fictions of law can be justified on several reasons. "The use of this tool is usually justified by the need to ensure income to the State and limit or mitigate the phenomenon of evasion in its different modalities... In some cases, they are inspired by reasons of justice in the allocation of tax burdens, barring the control difficulties..., in other cases they constitute an imperative necessity, given the impossibility to determine what really happened and, in others, finally, they are the result of mere simplifications of legislative work." Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos Aires, Argentina, La Ley, p. 1 and point VI chapter III.

5 Navarrine and Asorey have said that: "We consider that if this principle is accepted as an independent constitutional guarantee, it can limit both the application and judicial assessment of hominis, legal and fictional assumptions, as well as the legislative formulation of it." Navarrine Susana, C. and Asorey Rubén, O., (2006), Assumptions and Fictions in Tax Law, Buenos Aires, Argentina, Lexis Nexis, p. 34.

6 This subject is analyzed extensively by José D. Litvak and Esteban A. Laspina in his work "Taxation on presumptive basis," offered as a possible solution to the problem called "the restorative norm."

7 Enrique, M. (2003). Tratado de la prueba. Buenos Aires, Argentina, Astrea, Tomo 1, p.25

8 For the purposes of this work, the different discussions about the exact definition of the concept of proof does not matter, nor does the old discussion about whether the object of the proof are the facts or the affirmations about the facts, nor whether the proof is the knowledge, or the procedure used to arrive at this. For its study I refer to the doctrine specialized in the subject. For the purposes of this work, the difference between the formal truth and the material truth of the occurrence of an event does not matter either.

9 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 53 and following.

10 In this sense, it could be said that the differentiation of the concepts of source of evidence and means of proof developed by Carnelutti, who is recognized as the father of these terms, has been accepted unanimously and even adopted by the positive law. However, until today there is no unanimity regarding the exact definition of these concepts, especially in relation to the former.

The differences in the concept of source of evidence are in relation to the place where we focus, so for Carnelutti source is what is put to the perception of the judge (or assistant) that is: a document, the testimony of a person, or another object that he calls "unrepresentative" (a fingerprint on a weapon, a bloodstain, etc.). On the other hand, for Falcon, a source of evidence is the record that remains in something, that is: the text on paper[11], the memory of a person, a fingerprint on a weapon, a blood stain, etc.

Regarding the means of proof, Carnelutti defines them as the perceptive and deductive activity of the judge (or assistant), exercised over the sources of evidence[12]. On the other hand, for Falcon, means are the instruments or elements through which we extract knowledge from sources, the document itself that transmits a message, the same testimony.

Although the distinction between source and means of proof is subtle, and varies according to the author we address[12], we could say that they all share the idea that the concept of source involves an object (material or immaterial) that is put to the valuation of the judge and which has a piece of information, without any activity for the judge up to this point.

In addition, it could be said that the means involve an activity of the judge (or assistant) to get that data.

Therefore, it could be said that the source is the answer to where we obtain knowledge about the existence or non-existence of an event, and the means to how we obtain it; in this sense a document by itself will not transmit its message if it is not read and valued, nor will the testimony if it is not heard[14].

For the purposes of this work, and to describe the nature of judicial assumptions, I consider that it is enough to know these general ideas about the concepts of source and means of proof. In summary, that the source is possessing a data, a knowledge, and that the means are applied on the sources to be made of that knowledge. To deepen the study of these concepts, I refer to the doctrine specialized in the subject.

2. THE DEGREE OF CONVICTION OF ASSUMPTIONS

One might think that the end of the proof is the truth, but as Enrique Falcón[15] says, truth is a possibility but not an inevitable hope. The absolute truth is normally unattainable. On the contrary, most of the doctrine expert assert that the end of the proof is the subjective certainty of the judge, that is, the purpose of the proof is to produce conviction in the judge, or the official who acts as an administrative judge in the case of an assessment ex officio process.

11 Although it defines the source of proof as the modification produced on an object, when defining the document from the viewpoint of the sources as those objects in which a record has been left, the object itself is considered as a source, thus coinciding with the view of Carnelutti. Falcón Enrique, M, (2003), Treaty of the proof, Buenos Aires, Argentina, Astrea, Volume I, p.836.

12 According to the Carneluttian classification of direct and indirect proof, the means of proof are exercised directly on the object of the proof in the first case, and on the sources of proof in the second case.

13 Each author usually makes or proposes a different classification about the sources and means of proof, but that classifying task is only a different way of grouping certain elements without having a creative function. In this sense Carrió explains that the value of the classifications does not point to the nature of the institutions, but has a practical, useful sense. In this sense, the different classifications that may be proposed may not be compatible or may complement each other. Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 627.

14 In this sense the words of Falcón are illustrative when he says if the source of evidence can externalize a knowledge by itself (I add: through its perception and evaluation of the judge), that same source will count as a means of proof. Otherwise, when the source is not externalized in a comprehensible way, it will be necessary to extract the knowledge of said source by means of (another) means of proof. In the same way it is enlightening when he says that the documentary source may require a documentary means to bring knowledge to the process, but it may also require a means of reporting, an expert report, a declaration. Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 618 and 837.

15 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 146.

Now, that conviction can be achieved through evidence, certainty or probability.

The evidence is "the idea or perception absolutely clear and manifest of an idea or a thing, which no one can doubt rationally". It can come by means of a fact when we are before a necessary and unique cause, it is the case of the DNA that indicates the paternity of an individual. It can also come through logic, that is, I am Carlos' son, so I am younger than him. Also, evidence can be obtained through experience, that is, it is seen more in light than in darkness. Finally, it can also come by means of accepted scientific principles, that is, the earth spins around the sun[16]. In the last three cases the evidence will exclude the need for proof because it is abundant. In the first case the evidence will come from a means of proof.

While the evidence is as close as we can get to the truth, the presentation of the evidence in achieving the conviction of the judge is not common.

The substitute for truth in a file is certainty, hence it is said that the sentence is an act of certainty and not truth. Certainty according to the second conception of the Royal Spanish Academy is the firm adherence of the mind to something knowable, without fear of erring. As Mittermaier[17] points out, "conviction takes the name of certainty from the moment it victoriously rejects all contrary motives, or since these cannot destroy the imposing set of affirmative motives".

This certainty can be found through the scientific method, the historical method, the probability-based method or a combination of all. The first is the use of the tools provided by science, the second is the recreation of events, and the third is the determination of the degree of certainty in which an event may occur.

That is, conviction-forming certainty can rest on a probability. The probability that generates certainty must be of a very high possibility of occurrence, which is characterized by no known exceptions. However, one cannot rule out the possible appearance of some exception simply by not having observed all the elements of the universe in question. This very high probability must provide an easily conceivable result.

This probability can be scientific-experimental, this indicates a percentage of favorable results on the totality. But it can also come from experience, that is from the common observation of what usually happens and that falls under the general purview of the judge. This is linked to what later will be called simple rules of experience.

However, if it is impossible to obtain certainty, we must resort to other tools of positive law to decide one way or the other, within which we find assumptions[18].

If it is impossible to obtain certainty, what remains is to settle for a probability, and obviously this will be of a lesser degree than that certainty generator that we saw in preceding paragraphs.

In Titles IV and V, we will see that the reason why an assumption constitutes a probability resides in its nature of deductive syllogism, but only in those whose major premise is obtained by induction.

We can now affirm that what assumptions carry are probabilities, and not certainties, however these

16 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 109, 110 y 139.

17 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 152.

18 Within these tools, in addition to assumptions, we find those rules that set the guidelines to rule in a certain way in case of doubt, as is the burden of proof. The assumptions may be complementary to other means of proof, linking or corroborating their results, or convincing the judge by themselves.

probabilities cannot fail to produce conviction in the judge. Litvak and Laspina have said, making reference to Esverri Martinez, that "Two characteristics are common to all types of assumptions, whatever their class: on the one hand, the logical structure of the judgment on which they are based; on the other, and as a consequence, the fact that they are not judgments oriented toward certainty, but simply probalistic reasonings[19]".

Here we must differentiate what happens in legal assumptions and in simple or human assumptions. In the former the probability is contained in the norm, it was the legislator himself who considered, before the occurrence of a certain event, the probability, generating conviction, of the occurrence or existence of another fact. Therefore, the rule of experience is contained in the norm, unlike fictions where we do not find an experience rule and that therefore ignores that probability.

On the other hand, human assumptions constitute a subjective reasoning of the judge, the conviction must be detached from the set of evidence and from the rule of experience selected by him/her[20].

I said earlier that the probabilities that are linked to certainty are experimental or experiential-scientific type probabilities. On the other hand, the probability that assumptions carry is based on experience (to be more precise in what later will be defined as complex rules of experience), that is, the second premise comprising syllogism will constitute a rule based on general experience. I will later address the structure of syllogism of assumptions as well as the rules of experience.

It should be clarified that the conception of assumptions as probabilities is not unanimous. Generally, these contrary positions are based on semantic differences between conviction and certainty, and especially in the consideration of all deductive syllogism as assumption. This is Carnelutti's thinking when saying "if by certainty one understands the conscience of the absolute truth, it should be noted that no means of proof or assumption has it. On the other hand, if the judge's satisfaction regarding the degree of likelihood is designated as certainty, it cannot be denied that it is obtained even with the sources of assumption...", exemplifying later "when the rule of experience chosen to relate the unknown fact to the known fact is an inflexible natural rule: who will dare say, for example, that there is only a probability that Titius might be younger than Gaius, when the result can be inferred, not from the testimony, but from the fact that Titius is the son of Gaius[21]?"

Continuing with the ideas of Carnelutti, and delving further into his thinking, the position of the author is a natural consequence of the narrow structure of proof proposed by him. That is, the facts can be known (proved) by direct observation of them (direct evidence), or through a third event (indirect evidence), which in turn can be an object/fact that constitutes the representation of this (document and testimony) or one that does not constitute its representation, considering this last source of assumption.

Therefore, Carnelutti makes a broad conceptualization of the phenomenon of assumption, even considering scientific, logical or experiential relationships (rules) producing evidence or certainty within these.

19 Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 55.

20 "Assumptions not established by law shall constitute proof when they are based on real and proven facts and when by their number, precision, seriousness and concordance, they produce belief according to the nature of the proceeding, in accordance with the rules of sound criticism" (art. 163, section 5, CPCCN).

21 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 96 and 97.

Also, contrary to this probabilistic conception of assumptions is the doctrine held by Fernando Sainz de Bujanda, which was collected by abundant case law of the Nation's Tax Court, which indicates "...the presumptive or circumstantial assessment of the tax base is not a procedure designed to measure this base but other magnitudes that replace it. The indicative elements do not measure the actual net profit that the norms have erected on a tax base. What they pursue is simply to measure an alternative basis...[22]".

The probable feature of the presumed fact, also allows to differentiate this phenomenon from legal fictions. In this sense Navarrine and Asorey[23] affirm that *"The difference between them is marked, because in the legal presumption the presumed fact would have a high degree of probability of existing in the phenomenal world, regardless of the assumption itself, while in fiction the presumed fact is very unlikely. The probability of existence of the presumed fact or the improbability or falsity of it originates in the lack of natural relationship between the facts used within the legislative technique that we analyze[24]".*

3. THE CRUX OF ASSUMPTIONS

Carnelutti argued that knowledge of a fact could only be achieved through perception (of the judge). But what was subjected to a judge's perception could be the very fact to be proved (namely, a request was made for the neighbor's tree to be torn down after overstepping the property line, the judge can perceive via his senses the intrusion of the tree) or a different fact based on which one can infer the existence of another fact with the help of experience.

He classified the former as "direct evidence" and the latter as "indirect evidence". He also acknowledged the limitation of direct evidence on knowing present or temporary events that might unfold before the presence of the judge.

Carnelutti claimed that in the indirect proof the intermediate fact that was submitted to the judge's perception constituted what he called "source of evidence" (as we have already seen). He in turn classified as sources of evidence in the strict sense and sources of assumption.

The former is constituted by facts that represent the fact to be proved, namely the case of the testimony and the document.

The latter are constituted by facts that do not represent the fact to prove, that is, they are independent facts, they are the indications.

Carnelutti stressed that the structure of the proof is identical whether it involves representative fact or an independent fact, since in all the fact to be proved is not directly perceived, but a different one, from which the former is construed.

22 Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. XII.

23 Navarrine Susana, C. and Asorey Rubén, O., (2006), *Presumptions and Fictions in Tax Law*, Buenos Aires, Argentina, Lexis Nexis, p. 6 and following pages.

24 Usually, absolute presumptions are confused with legal fictions, while the former do not admit evidence to the contrary and consequently produce identical legal effects. In this sense Litvak and Laspina understand that "It would seem then that the setting of boundaries between both axioms is of little practical interest, because, in any case, they share the characteristic of establishing an ineluctable consequence from certain facts, by rule of law. Certainly, from this perspective, they have a similar structure in their effects, which is a normative antecedent (legal fact) and a normative consequent (the established "legal truth") that neglect the "reality of things" or "legal reality." However, we consider its delimitation key because its different theoretical structure has practical implications at the time of the application of the norm. On the other hand, alluding to the absolute assumptions, these authors express "The former deal with questions of fact and have their logical endorsement in rules of experience. The inadmissibility of evidence to the contrary would be a resource of the legislator to strengthen its effect. In fiction, however... the connection between the events enacted by the legislator ignores all parallelism with reality...". Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 122 and 206.

In this sense, Carnelutti argued that there was only one difference of degree in the reasoning that the deduction entailed (logically the sources of evidence in the strict sense should more readily facilitate that reasoning). That is, this difference in degree is an effect of the different nature of the intermediate facts (whether representative or non-representative).

Carnelutti's tripartite classification of sources of evidence is the "crux" in the Carnelutian scheme to be able to identify when we are faced with an assumption.

I repeat, the intermediate fact subjected to the judge's perception (source of evidence) may be a fact that represents the fact to be proved. These include documents (an invoice, a contract, a photograph, etc.) and testimonies. In this sense, Carnelutti said, "a photograph or account of the witnesses, has no independent existence with respect to the fact to be proved... the photograph and the narration are intended to represent signs or words, the photographed or narrated event[25]".

On the other hand, the intermediate facts that do not represent the fact to be proved are the indications of the assumptions, which in turn must be fixed through direct perception, the perception of representative facts or through new unrepresentative facts. I will return to this topic later in this paper.

Going a step further, Carnelutti argued that although the indications are independent of the fact to be proved, they are linked to the latter thanks to the existence of a logical relationship[26] between them.

In conclusion, the independent facts have an existence of their own and the relationship they can have with another fact is external to them, that is, they exist without the need to establish any link with another fact, although the existence of this fact is decisive to turn them into indications. In the words of Carnelutti, "a fact is not an indication in itself, but becomes one when a rule of experience checks it against the fact in a logical relationship, which allows one to deduce the existence or non-existence of it". In contrast to this, facts representing another event are not independent facts, they do not have an independent existence since they only exist in order to represent another fact; this is the case of the testimony and the document.

This distinction made by Carnelutti between representative and non-representative facts grouped into three sources of evidence is, in general terms, adopted by the whole doctrine.

For his part, Enrique Falcón makes a deeper analysis. He indicates that the facts themselves cannot be perceived, but what is within the reach of perception is the modification that produces an event on a given object, that is, we do not appreciate facts but modified objects. In this sense, he says that there are two types of objects, material (for instance, modifications in the human body) and mental (the impression left on someone's mind).

In this way Falcón classifies the facts into real when they are printed (modified) on an object, and personal when they are printed on the mind as a memory. These impressions/modifications, the author says, are the sources of evidence as we have already explained, and

25 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 90.

26 This logical relationship has its origin in the broad concept of the rules of experience that the author advocates. These questions will be developed later in this paper.

in this line, he classifies them as real and personal[27], unlike Carnelutti, who classified (grouped) them into representative and independent.

Now, Falcon argues that if a source of evidence alone does not allow us to understand the rules of sound criticism, we will be before an indication. This is the "crux" in the scheme of this author to decipher the nature of assumptions, that is, if based on the rules of sound criticism a certain source of evidence reaches corroboration[28].

In summary, for Carnelutti the existence of an assumption will be determined by the type of source, if it is an independent fact in contrast to representative facts. However, according to Falcón, it will not matter before what type of sources we are (he does not follow Carnelutti's classification of sources, but he proposes a more general one whose items may contain representative and independent facts). In Falcón's view the rules of sound criticism will determine if we are facing an assumption.

Following this line of reasoning, for Carnelutti a non-representative fact will always be an indication; however, for Falcón this will not be the case, since it could produce on its own the necessary belief if the rules of sound criticism so indicate.

As can be seen, determining the existence of an assumption will depend on where the focus is on the nature of the evidence or on the outcome of the reasoning process. However, as will be seen in title V.d. both positions can complement each other.

These positions can be reconciled if we add one more category to Carnelutti's tripartite classification. In this sense, we would subclassify the independent facts of Carnelutti into:

- Independent facts whose logical relationship with another fact allows by itself to corroborate the other event.

- And independent facts whose logical relation to another fact does not allow, on its own, to corroborate the existence of the latter.

4. THE ASSUMPTION

It is accepted that the mental operation that takes place when presuming one fact from another, is equivalent to the construction of a syllogism, which in turn constitutes a deductive reasoning.

In this sense Carnelutti says: "The judge constructs a syllogism, in which the minor premise is created by the position of the perceived fact different from the fact to be proved, and the conclusion by the affirmation of the truth or not (existence or nonexistence) of the fact to prove, while a norm serves as major premise, which the judge considers applicable to the fact perceived[29]".

Now, within logic, two forms of reasoning stand out: deduction and induction.

In the deduction one goes from the general to the most specific, from the abstract to the concrete. Therefore, it allows one to go from statements of a general nature and known premises to particular facts.

If there are no errors in the premises, the conclusion will be true, that is why it is said that the conclusion

27 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 85 f., And 615 f. The author also emphasizes that this impression on objects can be accidental or intentional, thus giving rise to circumstantial or pre-constituted sources of evidence (page 618 cited work).

28 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 455 and 463.

29 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 62 and following pages.

of a deductive reasoning derives necessarily from the premises.

For example: Minor Premise: Socrates is a man
Major premise (rule): All men are mortal
Conclusion: Socrates is mortal

In the above example, the major premise is constituted by an obvious rule.

On the other hand, induction is the inverse path, going from the specific to the general, from the concrete to the abstract. It represents obtaining affirmations of general character from the results obtained from observations or experiments of particular cases, in other words it is the generalization of the results to the totality of the phenomena of the same type.

Here the conclusions have a probable character, probably follow the premises.

For example: I take the gold, I heat it and it expands.
I take the iron, I heat it and it expands.
I take the silver, heat it and it expands.
Etc.
Conclusion: heat is likely to dilate all metals.

Here, the rule obtained is a probability generator by the simple fact that it was impossible to observe the behavior of all metals.

The syllogisms are deductive type reasonings, formulated for the first time by Aristotle in his logical work compiled as The Organon. For his part, Aristotle himself attributed immense importance to the induction in the process of knowledge of the premises of deductive reasoning.

In the syllogism that shapes the structure of assumptions, the rule that constitutes the main premise is obtained through inductive reasoning, that is why the conclusion obtained will follow the probable character of the standard used.

Regarding this subject, Falcón[30] speaks of inductive syllogisms, differentiating them from deductive syllogisms. However, this author argues that the assumption is obtained through inductive reasoning in itself[31], and not as I have just argued that it is a deductive reasoning whose major premise is obtained through induction.

I believe that the view of Falcón is not correct, since the induction allows reaching general conclusions from particular cases; however, the application of these conclusions to particular cases is a deduction process, and as I will explain later it is what is done when we submit a series of indications to an experience rule

5. THE LINK BETWEEN INDICATIONS AND THE PRESUMED FACT. THE RULES OF SOUND CRITICISM

5.a The Rules of Experience

It has been said that assumptions are inference from a known fact of the existence of another fact. It has also been argued that assumption is the deduction from one or more indications of the existence or non-existence of the fact to be proved[32]. But, what kind of inference

30 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume II, p. 615 and following pages.

31 In the same sense, Litvak and Laspina argue: "It is, then, an induction, based on the union of a singular or particular (inferential) fact with another fact that is also singular or particular (inferred) by means of a conjecture of reality, based on in the regularity of the course of nature." Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 56.

32 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 89 and following pages.

or deduction is it? Can it have support in science, in experience, in an indisputable logical rule or even in the imagination? Can this inference or deduction be made from a single indication?

Then I said, in the previous point, that this inference must constitute a logical reasoning equivalent to the formation of a syllogism, so that reasoning will be deductive, but will use as one of its premises a rule obtained from an inductive type reasoning.

Now, that deductive reasoning by using inductive reasoning as one of its premises is checking the indications against a "rule", and the rules coming from the inductive reasoning can be simple experience or scientific study reasoning. In legal terms it is argued that they will come from a rule of experience or a rule of science.

Therefore, as a first definition we can say that every deductive reasoning that uses as a major premise a reasoning that is not inductive, that does not use a rule of experience or science, will not be an assumption.

Consequently, deductions based on logical, religious, imaginative rules, etc., will not be categorized as assumptions in the legal sense. Moreover, deductions based on logical rules will bring about evidence capable of convincing the judge, on the contrary, religious or imaginative deductions will not be directly considered in the formation of the belief of the judge[33].

Now, the structure of the deductive reasoning of assumptions will use as one of its premises an inductive reasoning derived from experience, in other words, the evidence will be checked against a rule of experience.

This is so, since to use an inductive reasoning provided by some science, rule of science, and especially if these are accepted by the generality of the scientific and social community, their conclusions will carry high probabilities of occurrence. So as section II pointed out, their results will be generators of certainty rather than probability.

In this sense, facing a known element with a rule of science, will surely convince the judge with respect to the conclusion, without the need to have to resort to other elements, and according Falcon's view we would not be here before an assumption.

Let's see three examples in which a third fact is inferred using diverse types of rules. In the first and the last example, we will be faced with an assumption, but not in the second case. For its part, in the first case, a rule obtained from experience will be used, which, as will be seen later, will be called a simple experience rule; in the second case a science rule will be used, and in the third case, an experience rule that I will call complex will be addressed.

a. If the experience tells me that at 20 degrees of ambient temperature an apple goes bad between 4 and 5 days out of the refrigerator, at 25 degrees it goes bad between 3 and 4 days, and at 30 degrees it goes bad between 2 and 3 days, and the same goes for pear, orange, tangerine, plum, banana and grapefruit. All have in common that they are fruits, so I could say from my experience that the higher the temperature the faster the fruits spoil outside the refrigerator. Then, when I am faced with a peach, by applying that rule of experience I

33 In the same sense but from a different point of view, Marín-Barnuevo Fabo Diego, who is mentioned by Litvak and Laspina, says: "He points out that another of the identity notes of this presumed assertion is that it must be completely different from the basic affirmation, which implies not only that it is different, but also that it cannot be considered as included in the complex structure of the reality from which it is inferred." Picture your idea with the following example: "Using as a basis that Juan is a graduate in law, we can conclude that Juan has approved Roman Law; now, although in this case two different statements are related, and the proof of the first serves to consider the second as proven, we cannot therefore consider that we are faced with an assumption, since the second affirmation necessarily filled the first statement with much more complex content;" c) the last component involves the link or logical link existing between the basic and the presumed statement, which is the reasoning that allows to confirm the second element based on the former. It is the "constant tendency toward repeating the same phenomena," the principle of normality, different from the principles of causality of physical laws." Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 59.

can assume that if I leave it outside of the refrigerator, it will go bad the higher the ambient temperature.

Here it can be clearly seen that assumption consists of a rule of experience obtained from inductive reasoning. On the other hand, since the observation of all the fruits has not been covered, it cannot be assumed that all will behave in the same way.

Another characteristic of this assumption is the presence of a single indication, the peach.

b. So also, if science tells me that microorganisms are the main cause of fruits going bad, the degree of damage is exponential to the time they remain subject to favorable conditions of temperature and humidity. I can infer in the presence of a peach, that if it is left outside the refrigerator, it will go bad faster the higher the temperature and the humidity of the environment. This inference will be made without fear of being mistaken in knowing that those questions have been studied by science and of which no exceptions are known.

Here, according to the adopted view, we are not facing an assumption.

c. Finally, if the financial statements of an individual include a liability, for which despite having supporting documentation in order (a contract dated in the terms of the civil and commercial code), it is known that its term has not expired, that no pledges were set, that the creditor has a financial status incompatible with the loan and the debtor alleges that the money has been received in cash, the judge will deal with this liability using the one-rule principle. He will surely use as determining factors the behavioral patterns of the people comprising the company, his experience as judge of all the times where he has encountered similar situations, the assessment of case law to assess the qualified experience gathered by third parties on the common behavior of people (this should not be confused with the application of certain lines of case law to case under study to determine the leaning of the decision, as mentioned above). He might conclude in the nonexistence of that debt, and by deduction (not induction), through a logical accounting rule, in an unjustified increase in assets.

Here, as in the first case, a rule of experience obtained from inductive reasoning is used. However, as opposed to inductive reasoning, this has not come from the deliberate study of an object, but -- as was said -- from the experience of living in society and observing similar situations by the judge himself or by a third party and relayed to the judge.

Another difference in relation to the first example resides in the presence of a sum of indications.

We can say then that the major premise of the deductive syllogism comprising the structure of assumptions consists of a “rule of experience”.

Let’s see better what is meant by “rules of experience”:

The concept of “rules of experience” has its origin in the German doctrine, in which it is given broader influence than that generally recognized in the Argentine doctrine. In this sense, its original notion includes “all the rules to deduce an unknown fact from a known fact[34]”. In this way, and in line with Carnelutti, the rules of experience would cover knowledge in all fields: technical knowledge or common knowledge, the natural or moral sciences, psychology or economy.

However, in national doctrine, the concept of rules of experience generally has a more limited notion when differentiated from the rules of science.

34 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 65 and 66.

Enrique Falcón[35] defines the rules of experience as the "knowledge of laws and generic leanings of a social group, established by somewhat similar facts and their consequences. They are registered in books, publications, or in common knowledge".

They represent elements that help the judge reach a decision, so they do not constitute an object of proof (they should not be proved).

It can be said that the rules of experience are the conception, of a certain social group and in a certain time, of the way in which the facts normally evolve or of the way in which people behave. This is what will later be called a complex experience rule.

This conception can be acquired by the repeated observation of similar cases of social life or by what is relayed to us by third parties by word of mouth or written papers. From another point of view, this conception can be acquired by simple coexistence in society, the result of a specific task performed or the deliberate study of a subject.

Many times, the inductive reasoning comprising the rule is carried out unconsciously, that is, this conception about the way people act acts as knowledge acquired involuntarily. It is known that there is a high probability that the events have occurred in a certain way, but the specific origin of that wisdom cannot be identified. This is what happens with the knowledge about the common and normal way of the conduct of events so that if held otherwise it would have to be proved (for instance, experience indicates that people do not they fly[36]). The important thing is that this wisdom, that is, the conception of how the facts could have developed, is shared by the social group in which it is immersed.

The rules of experience should not be confused with case law. A sentence or a set of sentences on similar facts may contribute to incline the judge's decision in a particular case. On the other hand, case law is also a source of rules of experience, which is not the same thing. The vast observation of existing case law contributes to the formation of that general view about the common normal behavior of men of a determined social group, since in case law, the rules of experience used in each case prevail.

The rules of experience are not only focused on case law, but also on standards. In this sense, and adapting the words of Carnelutti[37], if the private document is not authentic to third parties, unlike the public document, this happens because the legislation assumes the rule of experience that interest drives to falsely document the facts. This is obvious, since rules are generally dictated precisely to direct behavior in a certain sense, and if it were not necessary to direct behavior in a sense since there is no experience of behaviors otherwise, there would be no need for rule.

They should not should be confused with notorious facts either, although both are not subject to proof and both cover knowing a particular social group, the former constitute specific facts that make up the issue at hand, while the latter do not constitute a fact in particular. Rather, they represent general knowledge that will allow the judge to form his opinion.

On the other hand, it is not necessary for the judge to know this beforehand, but he/she can learn about it through the private study of a certain subject.

Unlike the rules of experience, the rules of science constitute the knowledge provided by the different

35 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p. 12.

36 The example is an extreme case that serves illustrative purposes. However, this constitutes an obvious rule, there is no room for exceptions, so the facts inferred from it are not presumed but evident.

37 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 194.

branches of science (physics, mathematics, biology, psychology, etc.). As examples we can mention the principle of the extensibility of bodies by heat and the principle of gravity.

5.b The impact of exceptions

I have already said that the probability that generates certainty is characterized by having no exceptions, or they are minimal and known; these probabilities not having the nature of assumption.

But I also said that in addition to the evidence and certainty, one could arrive at the opinion of the judge with lower probabilities than those generating certainty.

Now, in this last set of probabilities, which, as we saw, are those that the assumptions carry, convincing the judge (that is to say, reaching the degree of plausibility necessary to consider a fact proven) will depend on the exceptions admitted by the deductive reasoning employed, or rather that the judge admits the rule used.

In that sense Litvak and Laspina argue that "While the inference fact is true, the inferred fact is only probable, and to such a degree that its validity depends on the correctness and generality of the rule of experience that has been used". On the other hand, we can observe the central role of the rules of experience in the following words of these authors: "Human assumptions, in general, are worth what the rule of experience is based on...", and "...the so-called link between the facts that make up the presumptive reasoning fulfills a fundamental function, so that this component assumes the character of validity assumption[38]".

The more plausible the exceptions are, the lower will be the fact to prove. This is directly linked to the type of rule that is used. Let's see two examples.

Ex. 1: Of the excess amount of cash obtained from a cash audit made to a cash register, one may infer that they are the proceeds of sales made in the commercial premises. Although here one may present as an exception to the rule that the cashier put in his own money, due to the magnitude of the difference found, this in principle does not represent the degree of necessary probability to rule out the fact to prove. Furthermore, this does not represent an involuntary error of the cashier either.

Ex. 2: From the lack of guarantees in a loan, one may infer the nonexistence of such loan. Here the exceptions are innumerable (confidence in the creditor for its degree of compliance or the relationship they have, assuming the risk was decided, the amount does not meet the requirements of the internal regulations, etc., even that he forgot). Here the degree of probability and the number of exceptions would produce a greater satisfaction than that of the fact to be proved.

The result would be different if, to that indication, one adds that the loan was granted in cash, the creditor does not include the loan in its books and that there were no refunds.

From this one may conclude that assumptions will be found in a limited area between those reasonings generating few or no exceptions – as is the case in which rules of logic (evidence), scientific (evidence), experimental scientific (certainty) are used -- and those negative probabilities. Under the negative probabilities scheme, the exceptions are greater than the occurrence of conclusions.

Therefore, we can say then that assumptions are deductive reasonings, in which the main premise consists of an inductive reasoning obtained from experience, and the exceptions to the conclusion

38 Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 56 and 61.

obtained do not have the necessary probability to discard it.

5.c Classification of the Rules of Experience

At this point, it should already be clear that to be in the presence of an assumption, the indications should be dealt with using a rule of experience, since the structure of an assumption is equivalent to a deductive reasoning in which its major premise consists of an inductive reasoning obtained from experience.

Moving a little further in the analysis, two kinds of rules of experience could be differentiated:

The one whose inductive reasoning originates from the sum of observations of particular events, without becoming a scientific methodology.

And the one whose inductive reasoning (the rule/second premise) comes from the accumulated knowledge of human behavior, and not necessarily from the deliberate observation of particular facts.

In the latter is where we find the rules of experience of law, which we have defined *as the conception, of a certain social group and in a certain time, of the way in which the facts normally evolve or of the way in which people behave*.

In both cases we have a general rule, that is to say, there is a reasoning that goes from the particular, observation of particular facts or accumulated knowledge of human behavior, to the general, all similar facts behave the same or all people before those facts behave in the same manner.

Based on this, I dare to propose the following classification: the results of the first type of inductive reasonings should be called Simple Rules of Experience, and those of the second type should be called Complex Rules of Experience.

Simple rules of experience would have the following characteristics:

- Its origin consists of a set of facts that are part of the same group or have the same nature (for instance, apple, lemon, orange rot faster without refrigeration, they all have the nature of fruits -- certainty or probability --, it may also be the expression “one can see more in the light than in the darkness” --evidence--). Therefore, the effective application of this rule in a deductive reasoning (such as that done when assuming) will be used as a first premise (indications), a fact of the same nature also (for instance, tangerine -- is a fruit -- so it should also rot faster without refrigeration).

- The fact that is deduced, when applying the inductive rule in a deductive reasoning (assume), will share the nature of the premises (for instance, “the tangerine” shares the nature of “the tangerine rots faster without refrigeration”).

- The premises do not require the conclusion to be related to each other.

- Since the premise has the same nature as those used in the formation of the rule, many premises are not required to reach a conclusion.

On the other hand, the characteristics of complex experience rules (or rules of law experience) would be:

- Since it consists of **accumulated knowledge about human behavior**, the application of this class rule in a deductive reasoning (assume) will be on premises (indications) shaped by events of different nature.

- The fact that is deduced (for us the presumed facts) will not necessarily possess the same nature as that of its premises (indications).

- The premises are, in principle, isolated events, their only relationship being the one generated through

the conclusion. The premises, although they are isolated facts, are all part of a more complex fact (the conclusion), there being a sequential or belonging relationship to it.

- Many premises are required to reach a conclusion.

Let's see an example of the use of a complex experience rule: he arrived later from work, after work hours he was seen in a shopping center, the next day is his wedding anniversary. All the above facts taken in isolation have no relationship. However, by applying the accumulated knowledge about human behavior, one can deduce that they are all part of a greater fact, that he went to buy a gift for his wife.

From this classification the following conclusion can be drawn:

The deductive reasoning that uses a simple experience rule as a second premise, may consist of a premise represented by a single fact, since it will be of the same nature as those that are part of the rule.

However, simple rules of experience do not allow [the judge] to reach conclusions when facing human behaviors.

In this sense, inferring that a person will act in a determined way before a certain fact, since he has always acted in the same way before a similar event, will not allow the judge to make a convinced decision. The use of a simple experience rule will produce, based on that single fact, a range of exceptions that will not allow the judge to make a convinced decision.

On the other hand, if to that reasoning we added a third fact/indication that had a relationship of belonging or sequence with the conclusion, we would go from a simple rule to a complex rule of experience.

In this regard, when a complex experience rule is used as a second premise to obtain a certain conclusion of plausible occurrence, it will not cover a single isolated event. The only thing it has in common with this conclusion is a sequential or belonging relationship, in the same way it could have with another event different from the conclusion.

Therefore, assuming human behaviors will require a summation of events (numerous) that have a sequential or belonging relationship (accurate and consistent) with the conclusion whose exceptions do not have sufficient probability (serious).

In the proof of the existence of facts through assumptions, or in other words in assessing the acts of the people, one can only obtain sufficient probability with the use of complex experience rules, which invariably require many minor premises to occur, that is, of indications.

On the one hand, taking into account the aforementioned point, if that inference can convince the judge, it will be because a rule that does not admit exceptions has been used or these are minimal, that is, logical, scientific rules, and even a rule of experience that admits no exceptions --which I shall call obvious-- (for instance, in darkness one can see less than in clarity or all men are mortal).

Therefore, within the presumptions of law there is only room for the use of complex experience rules, which have as characteristic the need for many indications with a sequential or belonging relationship to the presumed fact.

We can say then that in the field of presumptions there is no place for assumptions made from a single fact (unless it was determined legally as in legal assumptions).

The amount of evidence needed will be in direct proportion to the relationship between the evidence and the main event. The narrower it is, the less evidence will be required for the rule of experience to operate.

For this, please see the examples listed in point V.b. In the first case we can see a closer relationship between the indications of "cash surplus" and "amount" with the presumed fact. Note also that in the first case a positive event is presumed, while in the second one a negative event is presumed.

Consistent with the above, the C.P.C.N., in its art. 163 paragraph 5°, requires that factual assumptions can convince [the judge] based on numerous, precise, serious and consistent indications, and all in accordance with the rules of sound criticism[39].

Although that norm at no time requires the use of a certain type of rule as a requirement, this arises implicitly by requiring numerous, precise, serious and consistent indications.

This is like this, since to make reasoning using logical, scientific or obvious rules, and even simple rules of experience, it would be unnecessary according to what I have been explaining, to have a summation of (numerous) facts that have a sequential or belonging relationship (accurate and consistent) with the conclusion whose exceptions do not have sufficient plausibility (serious).

Let's see an example:

It is inferred that the largest bank credits on declared sales are unreported sales. The exceptions to this inference could be that the difference comes from loans credited, transfers between own accounts, transactions of a third party linked to the subject or the account, refunds, intermediation operations, funds entered or re-entered with counterfeit origins, income not covered by the tax, etc.

On the contrary, if we add other facts to this single fact so that they are jointly submitted to **a complex experience rule** (accumulated knowledge about human behavior), the degree of plausibility of the exceptions will be reduced. The more facts we submit to the rule and/or the narrower the relationship with the conclusion, the greater the probability of the inferred result.

In this sense, if in addition to purging the bank account credits (of rejected checks, loans, time deposits, transfers between own accounts, etc.), it is known by other means that the subject usually collects his sales via banking means, that the existence of unregistered sales was learned, either due to customer complaints or audits made by the Treasury, or there is a large number of credits for cash deposits, since it is customary for sales to be paid in cash. In addition, the coefficient of utility of the subject is much lower than the average of his zonal activity and it was proved that there were purchases that were not registered. In this case, the number and probability of the exceptions is reduced to the point that the probability of occurrence of the result of the deduction goes from being negative to being positive.

By these requirements, in the year 2003 Law N° 25.795 incorporated as legal assumption in Law 11.683 (section g article 18) the assumption of omitted sales or net profits from the existence of purged bank deposits

39 Enrique Falcón defines these concepts as follows. Numerous indications as a quantity that "does not necessarily have to be massive quantities, but the quantity must be a sufficiently representative number that allows one to see by way of the following requirements the conclusion about its existence." Serious indications "that as a whole represent a high probability as to the possibility that a fact or a set of facts is manifested in a certain sense in accordance with the rules of science or experience." Precise indications "means exact, certain and determined insofar as they point to support the thesis that reveals the assumption; it is what in many cases is called univocal indications, as opposed to vague or ambiguous indications. Consistent indications "means that they have to be linked in a sequence whereby each one is the necessary antecedent of the next and supports it in the evolution of the induction carried out, that is, they must be convergent". Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume II, p. 457.

in excess of sales and/or declared income. This was the result of the issues the Treasury has had to uphold its assessments based on a simple assumption of the first paragraph of art. 18 of the tax procedure law, although in general terms case law had accepted that procedure[40].

Going back to the definition of presumption, I can now say that **assumptions are deductive reasoning, in which the main premise consists of a complex experience rule which constitutes an inductive reasoning obtained from experience, and the exceptions to the conclusion obtained do not have the necessary probability to discard it**.

5.d Position of Carnelutti. Reclassification proposed

For his part Carnelutti established a broader view of the term of assumption, which is a natural consequence of the narrow structure of the proof proposed by him.

As seen in point I Carnelutti argued that the facts can be known (proven) by direct observation of them (direct evidence), or through a third party (indirect evidence) from which one can deduce the existence of another fact naming these as sources of evidence.

This third fact could be an object/fact that constitutes the representation of this (document and testimony), which he subclassified as sources of evidence in the strict sense, or an independent fact, namely, that it does not constitute its representation, which he called sources of assumption.

Consequently, Carnelutti taught that whenever a fact could be inferred from an independent fact, it was an assumption and the independent fact was its indication.

Carnelutti made a broad conceptualization of the phenomenon of presumption, since he did not differentiate the type of reasoning that this inference should involve.

In this regard, he considered within assumptions those inferences that involved scientific, logical or experiential relations (rules), for which he aligned himself with the basic German conception of the concept of rules of experience.

Therefore, assumptions in the view of Carnelutti could be producers of probability, certainty or even evidence.

From this point of view, the field of assumptions could be gigantic, since whenever one agreed on the existence or nonexistence of a fact without perceiving such a fact or a testimony or document representing it, one would be faced with an assumption.

For Carnelutti, we are faced with an assumption when a fact is established by non-representative sources. It would only take a second fact from which to deduce the existence of the other.

In accordance with this, Carnelutti taught that that structure did not vary according to the quality of the deduction determined by the nature of the “rule of experience” used.

In this regard, he argued that the closer we get to a natural rule the easier (immediate) the deduction is and the greater the degree of likelihood (minor exceptions to the rule). In contrast, the more indications and more experience or technical knowledge the rule used involves, the lower the immediacy of the deduction and the greater the effort necessary to reach the degree of likelihood required to have the fact proven or not.

40 For example please see: “Roley de Delia M. Rodriguez de Grecca and Dora I. L. de Spinetta,” National Chamber of Appeals in Federal Litigations, Chamber IV, 06/08/1992; “Ledesma, Amalia,” C.N.F.C.Adm., Chamber I, 09/26/2000; “Giorgio, José V.”, Tax Court of the Nation, Chamber B, 06/25/2004; “Dadea, Marta Elisa”, chamber Cam. Adm. No. 4, 08/30/84; among others.

However, in both cases, certainty would have been reached (or should be reached), understanding this as the judge's satisfaction with the degree of likelihood of the fact to be proved, and clarifying that full certainty would be reached when there were no exceptions to the rule[41].

As can be seen, the difference between the position I am holding here (which is aligned with that of E. Falcón) and that of Carnelutti lies in reserving assumptions to the field of probabilities (more specific to the syllogisms whose rules constitute inductive reasoning generators of rules of experience) and in the impact of exceptions, which as seen in the previous titles is directly related to the type of rule used in the major premise of the deductive syllogism.

To adapt the concepts of Carnelutti to the ideas held here, I propose to introduce a subclassification to the group of non-representative sources offered by this author, reserving the characterization of assumption to the second classification introduced.

In this order of ideas, the classification of the sources of evidence would be as follows:

Direct proof

direct observation

Indirect proof

representative sources

- document
- testimony

non representative sources:

- without or minimal exceptions

(use of logical, scientific and obvious rules)

- with exceptions (presumption)

Taking into account what has already been seen, the rule used will determine that the inferred fact, from a non-representative source (independent fact), has or does not have exceptions.

5.e The Rules of Sound Criticism

As we saw above, the term "sound criticism" is mentioned by the paragraph 5 of art. 163 of the C.P.C.N., as the rule that must articulate the set of indications.

On the other hand, and in a more general sense, article 386 of the same regulations cites this term as the parameter or guide in the evaluation of the evidence[42].

Although that term is cited, there is no provision to clarify its meaning. On the other hand, the definitions of this concept that are offered in the doctrine and even in case law are not uniform either.

We did not find this term in the Dictionary of the Royal Spanish Academy of Language either. The closest thing that can be found here is the voice "healthy criticism", which is incorporated as a variant of the fifth meaning of healthy defined as "free of error or vice, straight, healthy morally or psychologically".

Enrique Falcón[43], referring to this concept says that "healthy criticism is not alone but has a series of rules ... these rules are included in science (experimental, such as physical; cultural, such as history); in the technique (as a necessary derivative of science in its application); in the rules of experience; logic... All these elements are subject to the legal framework, whose rules also comprise sound criticism".

41 Carnelutti was aware of the existence of a certain doctrine that excluded from the field of sources of assumption (indications) those facts from which another fact was derived from a natural or physical rule that produced full certainty. Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 97.

42 Art. 386, C.P.C.C.N.: Unless otherwise provided by law, the judges will reach their decision regarding the proof, in accordance with the rules of sound criticism. They will not have the duty to express in the judgment the assessment of all the evidence produced, but only those that were essential and decisive for the ruling of the case.

43 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p.572.

Along this same line, it has also been said that "the application of scientific methods and not just a specific science gives rise to sound criticism, where logic, science, experience and techniques converge[44]".

In the same sense, it has been said that "the evaluation of the proof according to the rules of sound criticism (Article 386, CPCCN) implies that it is advised by good sense, applied with correct criteria, drawn from logic, based on science, experience and observation of all the elements contributed to the process", or simply that "it is the application of logic, psychology and common experience[45]".

According to these definitions one could say that "the rules of sound criticism" are comprised by the rules of science, logic and experience. In this sense, that concept could become identified with the German concept, seen before, of the rules of experience.

From the combination of the two norms referenced, it could be said that the rules of sound criticism are a general system of observation of the proof. They are the tools that the judge uses to observe any fact brought to the process through the means of proof and draw -- in this way -- a conclusion free of vices.

From my point of view, the rules of sound criticism operate on two levels:

- That appreciation that is made about the facts in particular and as a whole. This is on the one hand the assessment of a particular proof, including -- this is of interest to us -- the deduction of an unknown fact from an indicative event, and on the other hand the joint assessment of all the facts put to consideration.
- On the other hand, in the regulation of the whole evidentiary process as a scientific method (for this please see Enrique M. Falcón, Treatise on the proof, Volume I, p572).

In this regard, the rules of the experience that we have been studying are part of a broader concept called The Rules of Sound Criticism, in which the other rules are also found (science, logic, experience without exceptions), and that represents the guidelines that the judge must use to make his/her decision from all and any kind of proof.

6. THE PRESUMED FACT IN THE ASSUMPTIONS OF ART. 18 OF LAW 11,683

As stated above, the assumptions provided in art. 18 of Law 11,683 are not intended to create obligations, but to prove those existing obligations not yet disclosed to the Treasury. Their purpose is to prove the existence of facts that occurred, which have the particularity of corresponding to the hypothesis of incidents described in the respective substantive rules.

Ataliba teaches "Any and all incidence theories, to be realized, happens in a certain time and space... Thus, the qualities that this theory has to hypothetically determine the subjects of the tax obligation, as well as its substantial content, place and time of birth are aspects of the incidence theory. Hence, we designate the basic aspects of the incidence theory as: a) personal aspect; b) material aspect; c) time aspect and d) spatial aspect[46]".

44 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea. Volume I, p.560 (quotes the CFedSegSocial, Chamber II, 17/9/93, JA, 1994-III-42).

45 Falcón Enrique, M, (2003), *Treaty of the proof*, Buenos Aires, Argentina, Astrea, Volume I, p.570 (quotes the CNEspCivCom, Chamber II, 25/6/76, JA, 1977-I-536; CPenal Santa Fe, Chamber II, 13/3/85, Juris, 77-84, among others).

46 Ataliba Geraldo, (1977), *Tax incidence hypothesis*, Montevideo, Uruguay, University Culture Foundation, p. 82.

In this sense, it may be that only some aspects of a certain event are unknown, while others are known for sure. For example, the actual happening of an event is known but the place or time in which it occurred is unknown. Therefore, the presumptive technique may be aimed at determining the occurrence of a particular taxable event and its tax base, or some of its elements (material, subjective, time and spatial). In the latter case the other elements play the role of indications.

Within the tax system we find, for example, the absolute presumption included in the second paragraph of the article incorporated after article 25 of the individual property tax law[47], where the taxable event element that is presumed is subjective (the goods belong indirectly to individuals). On the other hand, the objective element (ownership of the described assets), the spatial element (those assets are in the country), and the time element (ownership is held as of December 31), as well as the tax base, are not subject of assumption.

Thus, we can also see the absolute presumption foreseen in the first paragraph of art. 9 of the income tax[48], where the elements that are presumed are material, territorial and the tax base (obtaining net earnings from Argentina source in the expected percentage); however, the subject and the period in which earnings were obtained will arise directly from the facts involving reality.

The simple and relative assumptions provided for in art. 18 of law 11.683 are intended to presume the "integral" occurrence of a taxable event, that is, all the elements of these occurred. The taxable base must be measured using the mechanism provided in that standard, or in its absence by the methodology that is most reasonable as appropriate.

Jarach[49] says "The feature of the tax is, therefore, the close relationship between the taxable event and the unit of measure to which the obligation rate applies. The basis on which the tax is measured is a magnitude applied directly to the same material object of the taxable event".

Now, since the tax base is a measurement, usually in money, of the taxable event objective element, and when the latter is presumed, the taxable base will inevitably have to be quantified from the facts taken as evidence. Otherwise, one would fall into a fiction (unlikely occurrence and the tax obligation would not have any relation to the taxable event and could thus affect the principle of contributory capacity and reasonableness). In this regard, Litvak and Laspina[50] argue, commenting on the work of Pérez de Ayala, "In this sense he considers that the inconsistency between the definition of taxable event and its taxable base constitutes a fiction, since the former also has an extra-tax nature, which for the latter means a certain "element of natural valuation". Consequently, if this does not match the legal tax concept, a fiction will have occurred".

The taxable base is a feature of the material aspect of the incidence theory[51], it is central to the fact in question. So, it must be obtained, or rather measured, for the

47 "For the purposes set forth in the preceding paragraph, it is presumed ipso jure - without admitting evidence to the contrary - that the shares and/or participations in the capital of the companies governed by Law 19,550, whose owners are companies, any other type of legal entity, companies, stable establishments, financial assets or holdings, domiciled, located or situated abroad, indirectly belong to domiciled individuals or undivided successions therein."

48 "It is presumed, without admitting evidence to the contrary, that companies not incorporated in the country, which are engaged in the transport business between the Republic and foreign countries, obtain net profits from Argentine source, equal to 10% (ten) percent) of the gross amount of freight for tickets and cargo corresponding to those transports.

49 Jarach Dino, (2004), *The Taxable Event*, Buenos Aires, Argentina, Abeledo-Perrot.

50 Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 116.

51 Ataliba says: "Legally, the tax base is a material aspect of the incidence theory, in some measurable way: it is the weight, the volume, the length, the height, the value, the price, the perimeter, the capacity, the depth, the surface, the width or any other feature of measurable size or dimension in the material aspect of the incidence theory"; "The central position of the taxable base in relation to the incidence theory is thus clear, because it is impossible that a tax, without losing its essence, has as a taxable base a dimension that is not within the incidence theory." Ataliba Geraldo, (1977), *Hypothesis of tax incidence*, Montevideo, Uruguay, University Culture Foundation.

event itself, and if it could only be determined by means of indications, the tax base must be measured from the latter. This process is classified as a complex source of evidence, which I will refer to later, considering that it does not point to one of the essential aspects of the taxable event, but to a feature of one of them.

In addition, it should be pointed out that events recorded as taxes are events of an economic nature to which the legislator attributed certain tax capacity, so an incorrect or unreasonable assessment of that material element will conflict with this principle.

The provisions of the first title of this paper should be highlighted in the sense of saying that, unlike assumptions that make up the legislation of taxes, the tools provided in art. 18 of the tax procedure law would not find objection from the standpoint of tax capacity when consistent with another implicit principle, reasonableness. This is because they are not intended to create obligations, but to prove that economic facts occurred (probably) in the phenomenal world revealing contributory capacity provided as incidence theory in the material provisions of each tax. In other words, the effects of these norms are determinative, not constitutive.

The valuation of that alleged material element may be obtained through any of the following methods:

- Directly from the valuation of one of the facts taken for indication.

- From the application of a reasonable methodology based on those indications.

- From a presumed value of those indications.

An example of the first case may be the presumption of sales omitted from an excess of bank credits in relation to sales (the magnitude of the indication is transferred as a tax base). The second case could be the presumption of reporting of rentals from three rental quotes, the judge having to determine which is the most appropriate valuation methodology (a specific quote or the average of the three).

In the third place, I could cite proving an unjustified capital increase, an indication of the relative presumption foreseen in paragraph f) of art. 18 of the law 11,683, by checking the construction of a property in a certain period, not reported. There would be no doubt about the existence of the construction erected in that period, which means that there is no doubt about the existence of an unjustified capital increase in that period. And therefore, there is no doubt on the application of the commented provision, the existence of net gains or omitted sales.

Eventually, the valuation of the work carried out during the period involved will be obtained by presumptive means, generally technical reports based on real events, business standards and market prices. In this manner, the net profits or presumptive sales omitted will be valued based on a presumed value of the indication provided by law.

7. THE PROOF OF THE PIECE OF EVIDENCE

7.a Indirect Complex Proof

The indication, the minor premise of syllogism, is usually characterized as a true fact or a known fact. In this regard, the first paragraph of article 18 of the tax procedure law refers to them as known facts and circumstances.

For a fact to be known, it must first be submitted to the judge's assessment as a source of evidence.

Once this has been done, we can say that the indication is on the one hand source of evidence (in the broad sense) because it serves to deduce another fact.

But on the other hand, it is also subject to proof[52], so following the classification of Carnelutti complemented in this work, the indication may be subject to direct evidence (direct perception of the judge) or object of indirect evidence (testimonial, documentary or non-representative source - no exceptions or with exceptions/ assumption).

Considering that in tax disputes it is difficult to find direct evidence[53], in general the indication will come to be known by the judge through indirect evidence.

This sequence of indirect tests is called by Carnelutti a complex indirect test.

Carnelutti teaches that the more indirect proof steps there are, the greater the likelihood of deduction errors, hence very remote sources of evidence are not recommended[54].

In other words, the closer we find the direct evidence, be it the direct perception of the document or the testimony, or the fact comprising the evidence, the greater the security of the assumption used.

This is nothing other than assessing the entire proof according to the rules of sound criticism, and thus respecting the principle of reasonableness that should cover the entire process.

In relation to this theme, Litvak and Laspina have said "… we must specify the possibility of forming second-degree assumptions… However, it should be noted that the mechanism described will be valid as long as, in both cases, the evidence is admitted to the contrary. It may happen that this link between several assumptions truthfully reflects the fact being checked or that its use further dilutes its certainty, in which case they must be broken. This, notwithstanding the generic reasonableness limit that should govern the use of this evidence[55]".

However, the features of belief (evidence, certainty or probability) to consider a fact taken as evidence certain or known (such as that of any other source of evidence) may be provided in positive law; otherwise, it will be up to the judge to determine whether the degree of likelihood that pleases him has been achieved by the general norms for the valuation of evidence (conviction).

From the simple reading of articles 16 and 18 of the tax procedure law there are no restrictions on the formation of belief about the existence of the evidence.

In this regard, those rules refer to the indication as "known" elements, facts or circumstances, and it should be understood that such knowledge may come to the judge through any type of evidence[56].

From another point of view, the Law. 11,683 would seem to establish a differentiation in the degree of conviction required for the determination of the facts directly and the indications used as basis by the ex officio estimate.

52 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 194 and 195.

53 Within the controversies that arise in the field of tax material law, there would be no place for direct evidence in relation to the taxable event (fact to be proven), since no element of it can be directly perceived (with his own senses) by the administrative judge, as these are at the time of the assessment transient and past events, that is, events that occurred in the respective fiscal period(s). However, I cannot rule out that certain events that serve as indications could be submitted to direct evidence.

54 Carnelutti Francesco, (1982), *The Civil Proof*, Buenos Aires, Argentina, Depalma, p. 202 to 204.

55 Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 56.

56 When the first paragraph of article 18 of Law No. 11,683 says "…due to its normal link or connection with the provisions of the law as a taxable event, they may induce the existence and measurement of the same in the particular case," it is referring to the rule of experience of the case.

Along this line of thinking, art. 16 of that law defines direct determination[57] as that in which "certain knowledge of said matter is possessed", which, as opposed to the estimative route, may be obtained through all sources of indirect evidence other than the presumptive one, that is, the testimonial, documentary or through non-representative sources without exceptions.

As one can see, the aforementioned regulations do not address direct facts in the same manner as they address indications. The former are referred to as facts known in a certain way, and the latter only as known facts, that is, regulations do address indications as facts known in a certain way.

In conclusion, in the tax procedure law there are no restrictions on what Carnelutti calls complex indirect evidence, so neither on the evidence of the indications.

Then, the important thing is for the judge to reach a determination on the existence of the taxable matter, not being restricted to a certain type or number of sources. In other words, the restriction is becoming convinced rather than arbitrary acts, the adequacy of the principle of reasonableness.

That convincing must be taken together, and not only on each particular source. There can be no convincing the judge under the complex indirect proof, if due care is not taken in the application of the rules of sound criticism in each link as in its joint articulation.

Based on the above, the phenomenon called "assumption of presumption" or "chain of assumptions" would not be prohibited per se by the legal provisions. This would be only one of the aspects of the complex indirect proof.

However, the greatest risk in using a chain of assumptions is found in the legal assumptions, because the link between the indication and the unknown taxable matter is provided generically by the legislator, and as stated, with a primary purpose of influencing the evidentiary burden, in order to facilitate the collecting agency's task of controlling, rather than the consistency of the rule of experience adopted[58].

In this context, if a limited analysis of the proof links is limited, leaving aside the global approach to the chain, we are likely to arrive at unreasonable results.

While it is true that from a certain doctrine and case law a general prohibition could stem from the use of assumption chains, the use of assumption chains is more frequent and necessary than is usually believed.

On the other hand, Litvak and Laspina[59], based on the wording of art. 163 of the Civil and Commercial Procedural Code of the Nation[60], maintain that the use of assumptions of presumptions is forbidden in human assumptions, admitting only their use in legal, relative or absolute assumptions.

57 Do not confuse direct determination with direct evidence (direct perception of the judge), or indirect determination with indirect evidence which forms the testimonial and documentary evidence.
It should be clarified that, in general, the tax doctrine identifies the indirect evidence exclusively via the use of assumptions. This confusion is mainly due to the terminology used by the tax procedure law itself in its articles 16 and 18, since it reserves the term "indirect determination" to the "ex officio estimate" when comparing it (the first paragraph of art. 16) to the latter with what it calls direct determination.

58 In this regard, in the case "Acería Bragado S.A.", 12/27/1996, chamber C of the TFN, ruled that: "The legal assumptions are by definition consequences that the legislator imposes to draw from a known fact. In other words, when applied, the judge goes back from the known fact to the unknown, according to a rule of experience that is not his own but is indicated by the legislator, who, when formulating the rule in such a way, links certain effects to the existence of certain assumptions. This leads to the inadmissibility of the formation of chains of assumptions since otherwise the objective of finding a result that is more likely to correspond with reality would be jeopardized, aim of approximate reconstruction the method addresses." Navarrine Susana, C. and Asorey Rubén, O., (2006), *Assumptions and Fictions in Tax Law*, Buenos Aires, Argentina, Lexis Nexis, p. 125.

59 Litvak José, D. and Laspina Esteban, A., (2007), *Taxation on presumed basis*, Buenos. Aires, Argentina, The Law, p. 61.

60 Art. 163: "… The assumptions not established by law shall constitute proof when they are based on real and proven facts and when by their number, precision, seriousness and consistency, they can convince the judge according to the nature of the trial, in accordance with the rules of the sound criticism…".

On the other hand, we find a true limit to the use of the legal assumptions of article 18 of the tax procedure law in the penultimate paragraph[61] of that provision. This restriction does nothing but avoid the unreasonable use of the established assumptions, that is to say, it tries to avoid that through two different assumptions one arrives at the same taxable matter and in this way double the tax to be claimed.

In conclusion, in my opinion the true and only limit to the use of the assumptions under study is reasonableness[62], which can only be reached with proper use of the rules of experience and in a joint assessment with the rules of sound criticism.

7.b Complex Proof Source

The facts that constitute a source of evidence, which as we saw may be a testimony, a document or a non-representative source (without exceptions or with exceptions/assumption), despite being convinced of its existence, may have nuances affecting its evidentiary effectiveness.

Carnelutti teaches that there are sources of evidence that, due to their complexity, require additional tests to make them effective, calling this type of feature a complex source of evidence.

The complexity of the fact that is a source of evidence should not be confused with the subordination or sequence of sources of evidence that characterizes the complex indirect evidence.

In this regard, Carnelutti illustrates that the indirect complex proof is related to the existence (deduction) of a proof source, instead a complex proof source is linked to the quality of a particular proof source.

Thus, the evidence required to determine the validity of a testimony or the authenticity of a document does not make the existence of the testimony or the document but its evidentiary efficacy as a source of evidence.

Along this line of thinking, the existence of a document or a testimony (sources of evidence) may be perceived directly by the judge (direct evidence); however, for the effectiveness of those (the document has been issued by the person represented on it, complies with the legal provisions to provide as supporting documentation, the identity of the person who issued the testimony or his impartiality in the case, etc.) indirect evidence (other documents, testimonies or even evidence) may be necessary.

A case of a complex source of evidence is made up by evidence that determines the magnitude of the material aspect of the taxable event, that is, the taxable base. In this regard, it can happen that the existence of a certain taxable event has been possible to assess presumptively, or another way, but no attribute making such taxable event effective in probative terms, its value, is unknown.

In this regard, as stated in Title VI, the tax base as a feature of the material aspect of the incidence theory, in case the taxable event could only be determined by means of indications, its taxable base must be measured using indications. One can obtain the taxable event directly from the valuation of one of the facts taken as evidence, from the application of a reasonable methodology based on those indications, and even from a presumed value of those.

61 Antepenultimate paragraph, art. 18 of Law No. 11.683: "The assumptions established in the different paragraphs of the preceding section may not be applied jointly for the same tax for the same fiscal period."

62 The recognition of reasonableness as an unnamed constitutional guarantee of taxation is generally accepted.

Examples of this situation can be seen in the case commented above concerning the omission noted, among others commented there, and in the third case described in the following title. In the first, the presumed value of the indication is taken as the tax base. In the second, a reasonable selection methodology is established for the case based on the existing evidence.

This process does not point to one of the basic aspects of the taxable event, but to an quality of one of them.

8. CONCLUSIONS

From the above, it can be concluded that the presence of an assumption will be determined by the result of a reasoning process, and not by the nature of the facts that make indications. That is, if many facts are needed to convince the judge since individually these facts do not allow one to become convinced of the fact to be proven, this is strictly related to the type of reasoning connecting it. And if they do it is because they will be in the presence of a logical, scientific or simple experience rule.

In other words, the presence of an experience rule will determine the existence of an assumption.

Assumptions are tools that allow the judge to reach a decision when he is unable to do so through the evidence obtained, through certainty or proof.

In that regard, we have seen that through assumptions one obtains the knowledge of facts of probable occurrence, and although such probability will not generate certainty like that produced by experimental science, it will ultimately end up convincing the judge.

Also, and in a more specific tone, we have seen that assumptions constitute logical structures equivalent to that of a syllogism. Within that structure, the major premise is represented by a type of rule called experience rules. On the other hand, the minor premise is constituted by the indications which are independent (non-representative) facts, whose logical relationship with another fact does not allow one by himself to corroborate the existence of the latter.

We have also seen that those rules of experience constitute inductive reasoning. The rule obtained from inductive reasoning is generating probability. So, the deductive syllogism of the assumptions will follow that probable character.

These inductive reasonings will come from the experience gained from living in society, from the way in which events normally develop or how people behave because of living in society (what I have called complex experience rules). In more concrete terms, that experience is acquired by the repeated observation of similar facts or by experience transmitted to us by third parties, this happening by simple coexistence in society, by a specific task performed or by the deliberate study of a subject such as be the study of third-party works and case law. Many times, that experience is even acquired unconsciously.

In addition, we have also said that those rules of experience are part of a broader concept called rules of sound criticism which also includes other rules (science, logic, experience without exceptions), and that constitute the guideline that the judge must use to reach a determination based on all and any kind of evidence.

On the other hand, we have seen that the inferences that are made based on rules of science, logic, evidence, religion, etc., which will produce evidence, certainty or will simply be discarded, will not constitute assumptions. On the contrary, only when the inference made from the indications constitutes a rule of experience, we will be facing an assumption.

From that, we concluded that assumptions will be in a limited area between reasonings generating few or no exceptions -- the case in which rules of logic (evidence), scientific (evidence), experimental scientific (certainty) are used -- and those negative probabilities. In other words, cases where the exceptions are greater than the occurrence of the conclusions.

Likewise, we have seen that in the act of presuming human behaviors one can only obtain sufficient credibility with the use of complex experience rules or rules of legal experience (which corresponds to the conception of a certain time and a particular social group, in the way in which the facts normally develop and how people behave), which invariably require many minor premises to occur, that is to say, indications. Therefore, to assume human behaviors, a sum of (numerous) facts that have a sequential or belonging relationship (precise and consistent) with the conclusion whose exceptions do not possess sufficient likelihood (serious) will be necessary.

Along this line of thinking, we said that in the field of assumptions there would be no place for deductions made from a single fact, unless it was legally determined as in the legal assumptions.

In that regard, we could see that the amount of evidence needed will be in direct proportion to the relationship between the evidence and the main event. The narrower it is, the less number of indications will be required for the experience rule to operate.

On the other hand, we have seen that the simple and relative assumptions provided for in art. 18 of law 11.683 are intended to presume the “integral” occurrence of a taxable event, that is, all the elements of these. The taxable base must then be measured using the mechanism provided in this standard, or in its absence by the methodology that is most reasonable as appropriate.

In this sense, we have seen that since the tax base is a feature of the material aspect of the incidence theory, which is part of the fact in question, that must be obtained, or rather measured, from the event itself. In the case that this could only be determined by means of indications, the tax base should be measured from the latter.

Consequently, we said that the valuation of that presumed material element could be obtained directly from the valuation of one of the facts taken as evidence, from the application of a reasonable methodology based on those indications, and even from a presumed value of those. This proof is what we call a complex proof source.

Likewise, and in relation to the evidence, we have seen that these are also subject to proof, the most frequent being the use of indirect evidence (testimonial, documentary or non-representative sources without exceptions or exceptions), thus giving rise to what Carnelutti called complex indirect evidence, the chain of assumptions being one of its variants.

Along this line of thinking, we said that there are no absolute restrictions on a certain type or number of sources, but what matters is convincing the judge far from any arbitrary acts, which can only be reached with adequate employment of the rules of experience in each particular source and in a joint assessment of all sources according to the rules of sound criticism. This involves nothing more than adapting the proof to the principle of reasonableness.

From that reasoning, and from the study of articles 16 and 18 of Law 11,683, it could be concluded that the phenomenon of the chain of assumptions is not prohibited in assessing the taxable matter, as long as it fits the principle of reasonableness.

On the other hand, the complex indirect proof was distinguished from the complex proof source, with Carnelutti calling the latter sources of evidence that, due to their complexity, require additional evidence, not to determine their existence but only to make them effective. The evidence to determine the magnitude of the material aspect of the taxable event, the taxable base, is a typical case of these.

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TAX POLICY vs CADASTRAL POLICY,

new role play

Diego Alfonso **Erba**

SYNOPSIS

The low collection of property tax derives from technical, political, administrative and legal factors.

This paper critically discusses the responsibilities of tax and cadastral policies in the face of the inequitable and still insignificant property tax in Latin America. It analyzes historical failures of the current cadastral policy, presents alternatives to overcome this obstacle and describes advanced methods and strategies for the collection of market data and the massive valuation of properties for tax purposes.

It concludes that part of the improvement in the collection of the property tax depends on the correct definition of cadastral policies without being conditioned to tax policies.

CONTENT

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INTRODUCTION

In a politically, socially and economically tense world, the term "versus" is often used to mean "against". We are in a context of blacks and whites, good and bad that hinders the development of objective analysis of reality. The Royal Spanish Academy gives another meaning to the word when placed between two positions: one "in front of" the other. It is this sense of non-opposite that this article flows or runs, seeking to identify why the property tax is so overdue and so unequal in most Latin American jurisdictions, particularly when significant investments have been made to improve it.

Empirical data collected by qualified officials who have been involved in cadastral processes in various countries show that during the first two decades of the present century Latin America and the Caribbean (LAC) are investing about USD 2 billion in plans, programs and cadastral projects of varied sizes. International, national and local financing institutions have supported initiatives that governments at various levels carried out with conviction. The objectives of practically all these ventures have been: to improve collection, integrate cadastre with property registries to preserve private property and, in some cases, collect data for planning purposes. The first two became slogans in advertising campaigns of the projects and these past paradigms are still present despite the evidence of ineptitude in the approach. Lübeck (2016) made sound statements about it: "The issues related to land ownership and rights of use are very relevant in the 2030 United Nations Global Agenda. Some 50% of the Sustainable Development Goals are related to land, and in a very approximate estimate, achieving them through traditional approaches to cadastral data acquisition would take about 500 years of work".

We are in a region full of informality in land occupation and irregularity in the construction of buildings (construction by squatters without any permits). Prioritizing the registration of "the formal" leaves out of the databases and cadastral maps an important part of the territory and of citizens considered non-taxpayers. The cadastral and tax segregation is such that in some jurisdictions there is talk of "property tax" instead of "real estate tax". The latter terms are much more appropriate for our heterogeneous cities where people's relationships with the land are varied. Limiting the cadastre and taxes only to owners is proof of the deficiency generated by an evident inequality in the region.

This paper aims to critically discuss the roles of tax and cadastral policies in the face of the inequitable and still insignificant property tax in Latin America. It analyzes some historical shortcomings of the cadastral policy still in force, presents alternatives to overcome this obstacle and describes some of the most advanced methods and strategies for the massive valuation of property related to the real estate market. It also evaluates the most widespread tax policy for the administration of property tax at the current juncture and its consequences.

The text closes with a vision of the future and concludes by affirming that definitely the increase in collection with equity is achieved by articulating the cadastral and tax policies, leaving aside the historical submission of the decisions of the "cadastre officials" to the determinations of the "tax law professionals". This is a wake-up call for public managers: much of the improvement in the collection of property includes the correct definition of cadastral policies without being conditioned to tax policies.

1. TAX POLICY AND CADASTRAL POLICY: OUTSTANDING RESPONSIBILITIES

In her report called "Improving the performance of the property tax in Latin America", De Cesare (2015) reflects on the many and varied challenges of the public power to establish a successful and sustainable property tax in the countries of the region. According

to the author, public officials responsible for the tax administration frequently face political pressures since this tax is universal and highly visible. An equitable property tax depends on several factors, including operational efficiency, technical knowledge, available data, administrative capacity and an appropriate level of political determination.

In that context, in terms of initial recommendations, outstanding responsibilities could be summarized as follows:

- **Tax policies.** It should improve the clarity of the legislation by adopting the basic principles of equity, payment capacity, universality, legality and certainty, effective administration and transparency. Tax policies that benefit slow payers and limit the universality of the tax should be ruled out because they create inequities and inefficiencies in the system. The definition of the rates (also called charges) of the property tax should be one of the main parameters of the definition of the tax policy. Issuance and collection management must be done through geographic information systems (GIS), preferably GIS in the cloud, which allow spatial analysis of multidata to understand the behavior of taxpayers, public policy impacts in general and tax policy in particular.

- **Cadastral Policies.** The multipurpose model must be chosen, crucial for the sustainability of the data in general and of the values of the properties in particular. Valuation levels and the level of precision of mass valuations should be determined. Appraisals should be referenced to the real estate market with horizontal and vertical uniformity. Publicity campaigns on cadastral procedures should also clarify the extra-fiscal use that will be given to the data. This promotes confidence in the cadastral institution as it separates it from collection institutions.

2. THE CADASTRAL POLICY: INCOMPETENCE DESPITE THE EVIDENCE

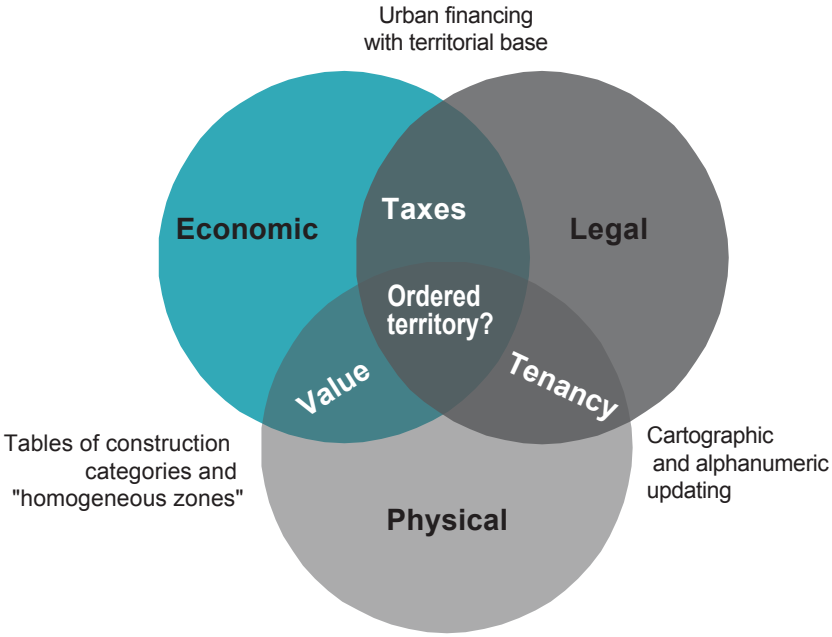
The cadastre enjoys basically two opposing images in the region, each of which is intimately linked to the cadastral model adopted.

When the cadastre is structured under the orthodox model: economic-physical-legal, inequities occur due to the asymmetry of the data (Figure 1). In that model, the cadastre is seen as the villain, since it is credited with the responsibility of “raising taxes” which, in part, is an “untruth” since in practice the cadastre simply generates data for the payment of the tax.[1] The truthful part of the statement is based on the (inappropriate) way in which values are determined and the widespread strategy of annual “correction” for inflation rates, as if the real estate market had the same dynamics as the financial market.

We are in the golden age of the map, a period marked by the growing use of cartography and GPS through free, global and free access applications. Citizens, even with basic knowledge of cartography, use it with considerable expertise without realizing that there is a unique reference system that relates to each and every one of the points represented. In the cadastral area it is precisely the georeferencing that allows structuring databases with the location, shape and dimensions of each plot, giving continuity to the territorial information.

1 According to the Dictionary of Non-existent Words, an “untruth” is not a lie. It is something that is not in itself true, that in no way can be considered as true, but that does not mean that it is in itself false. Available in http://satirometrico.blogspot.com/2010/11/la-envenenada-lluvia-de-desinformacion.html.

Figure 1 – Orthodox model of economic-physical-legal cadastre



Source: Erba & Piumetto (2016)

In the area of economic cadastre, the same does not hold true, the data is not comparable due to lack of standardization and a single reference. The values are managed with decency, are opaque and inequitable due to the politicization to which they are repeatedly submitted by the requirement of being approved by the legislative powers (local, regional or national). This tax policy provision ends up misrepresenting the objective work of the appraisers. The inequities are exacerbated from the handling of technique, subjectivity and sectoral interests, all of which ends up placing the cadastre in an awkward position and with a bad image.

To get out of these traps it is necessary to establish a clear and objective cadastral policy, which references all property values to a single system which, undoubtedly, should be the real estate market. In addition, modern, scientifically based valuation methods should be adopted, as an alternative to the outdated table-based systems with dozens of unnecessary, oversized, hard to survey, impossible to maintain records and unrelated to market preferences.

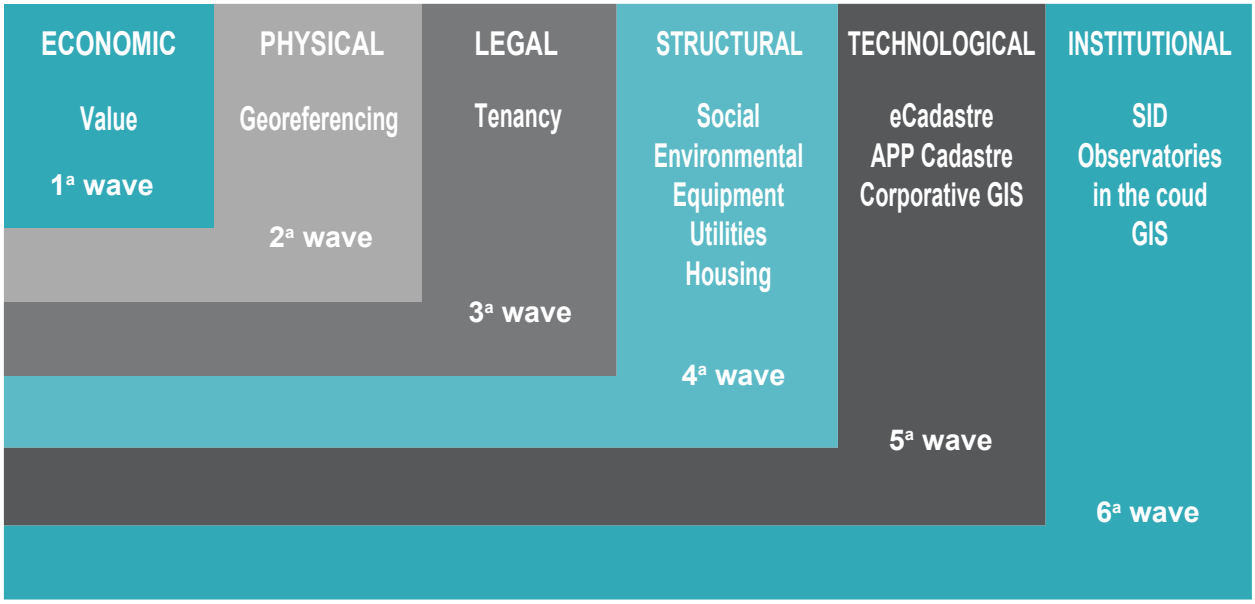
Now, if the economic reference of the cadastre becomes the real estate market: how many and what are the determining variables of the variation in the value of real estate?

The effective response can be found in newspaper notices or on the most current real estate websites. They publish what effectively conditions the market and, with some peculiarities, the most present characteristics are basically: price, area, number of rooms, bathrooms and garages (Figure 4).

These last paragraphs show the imperfection in the decision of the conservative cadastral policy to maintain extensive records with variables that do not allow one to reach the valuation equity and, consequently, the tax equity.

The alternative to the orthodox model is the heterodox model of multipurpose cadastre that broadens thematic aspects and encourages the development of new cadastral and tax policies (Figure 2).

Figure 2. Multipurpose Cadastre model



The implementation of this model advances in LAC from a greater understanding on the part of the academy and public managers.

If the infrastructure impacts the value of urban land, it is necessary to have a public services network cadastre. If the tax policy takes into account the ability to pay, it is necessary to have a social cadastre.

If environmental restrictions affect the disposition of the property, and consequently affect the value of the land, it is necessary to have an environmental cadastre.

More and more jurisdictions in LAC are adopting the multipurpose model because it requires minimal investments and because it supports urban planning and financing policies efficiently. Several factors make the current environment appropriate for the adoption of this model, from the evidence of extensive conceptual knowledge and technical skills among managers and technicians, to the political will demonstrated throughout the region and the availability of free geotechnologies to support the structuring process.

Advances in computing through the opening of free GIS and the decrease in the costs of commercial applications, the popularization of sophisticated tools such as unmanned aerial vehicles (UAV) for data collection, have created the possibility to modernize orthodox cadastres and develop thematic cadastres that make up the multipurpose model. A multipurpose cadastre replaces the e-cadastre[2] by incorporating cadastral data into a Spatial Data Infrastructure - IDE. The IDE are spaces where technologies, policies, institutional agreements and standardized procedures are articulated to make the geographic information of a jurisdiction accessible to the whole society[3]. The IDEs allow access to geospatial data, products and services, published on the Internet under defined standards and norms, ensuring their interoperability and use, as well as ownership of the information by the agencies that publish it and their responsibility for updating such information.[4]

2 Online cadastre consisting of a public information system run by a single institution.

3 Spatial Data Infrastructure of the Province of Córdoba - IDECOR, https://idecor.cba.gov.ar/que-es/

4 Spatial Data Infrastructure of the Argentine Republic - IDERA, https://www.idera.gob.ar/

Interoperability[5] implies establishing strategic alliances, formal partnerships, cooperation agreements, accords and/or joint efforts to share data, information, personnel, teams, work methods and anything else that administrators consider useful. The IDEs do not replace the GIS of each participating institution, but rather establish relationships between them to generate more complete, updated and detailed information about a city. By creating standard definitions for all this data, IDEs allow members to work independently, in their own fields of action, concurrently, using their own systems in parallel.

A more recent geotechnology that enhances interoperability more efficiently than IDE is the GIS in the cloud[6]. The structuring of the territorial cadastre under an IDE or a GIS in the cloud facilitates, in addition, the processes of citizen participation because it is through these platforms that people can exercise their rights to contribute to the planning of service networks and/or changes of use or density, as well as their obligations as taxpayers.

In this regard, one of the strategies that has been gaining momentum in Latin America for systematic surveys of market data is based on the creation of urban observatories with great advantages, particularly when they are structured in a GIS environment in the cloud.

2.1 The real estate market observatories

A territorial observatory is an administrative and technological structure that monitors the city through images and censuses. It can be structured by the institution that manages the territorial cadastre, by private, academic institutions, or through inter-institutional alliances that combine several organizations with a common interest in certain urban spaces and in specific themes. While the territorial observatories are structured with the purpose of defining public policies in general, the values observatories focus on the real estate market, and the results of the surveys are oriented to generate useful value maps to define the financing policies of cities through the equitable distribution of the property tax, the contribution for improvements and the recovery of capital gains.

A creative way with high potential to generate useful territorial data for the cadastre is the participation of volunteer collaborators in the development of geographic information (*Volunteered Geographic Information*). A very significant case is the *OpenStreetMap* global mapping collaborative construction platform. Launched in 2004, it already has more than 2,000,000 participants and its maps contain information with a surprising level of updating[7].

Real estate market data can also be collected from an open call and voluntary *crowdsourcing* participation. *Crowdsourcing* is an important concept, inherent in the philosophy of the multipurpose model. Using online

5 Interoperability has been defined since the last century as the ability of two or more systems to exchange information and use it (IEEE, 1997). More recently, the concept was extended and standardized in ISO 19119 on web services, defining interoperability as the ability to communicate, execute programs or transfer data between several functional units without the need for the user to know the characteristics of those units.

6 GIS in the cloud has opened the possibility of significantly improving the development of conventional GIS applications and providing visualization and analysis services of Geographic Information to a greater number of users worldwide. This is calling into question the traditional use of GIS, in view of the range of possibilities and better performance offered by this new paradigm. Adapted from definitions found in https://www.unigis.es/sig-en-la-nube-que-ventajas-nos-aportan/

7 http://wiki.openstreetmap.org

tools, volunteers can capture, maintain and share data related to their properties, their values and associated rights[8].

At the beginning of this decade, Haklay (2010) already stated that the emergence of cloud computing would impact geotechnologies, giving rise to the development of GIS platforms in the cloud (*GIS in the cloud*). This prediction was confirmed and strengthened, significantly facilitating the execution of geographic data *crowdsourcing* projects. This type of tools makes the implementation of market observatories economically and temporarily viable and provides an infrastructure that simplifies the work of volunteer collaborators, who begin working in a safer and more accurate manner, resulting in a higher quality of the data that is obtained.

In that same period, McLaren (2011) stated that *crowdsourcing* could help cadastral professionals and ordinary citizens form an alliance to solve global problems. Mobile phone and personal positioning technologies, satellite images, the use of open source data, web maps and wikis would converge to provide cadastral professionals with the "perfect storm of change" through *crowdsourcing* to reach their potential.

This type of public-private collaboration would facilitate better land management and could help improve security of land ownership and the equitable distribution of burdens throughout the world.

In the region the aforementioned predictions became realities and took different forms. In the context of this paper of particular importance is the "Land Values in Latin America" project structured with the objective of systematizing specific values of urban land in the region[9]. Based on a GIS cloud platform, the project started in 2016 under the following research question: is it possible to raise and systematize data from the land market in quantity and quality, in a short period, with a small budget, using *crowdsourcing* initiatives?

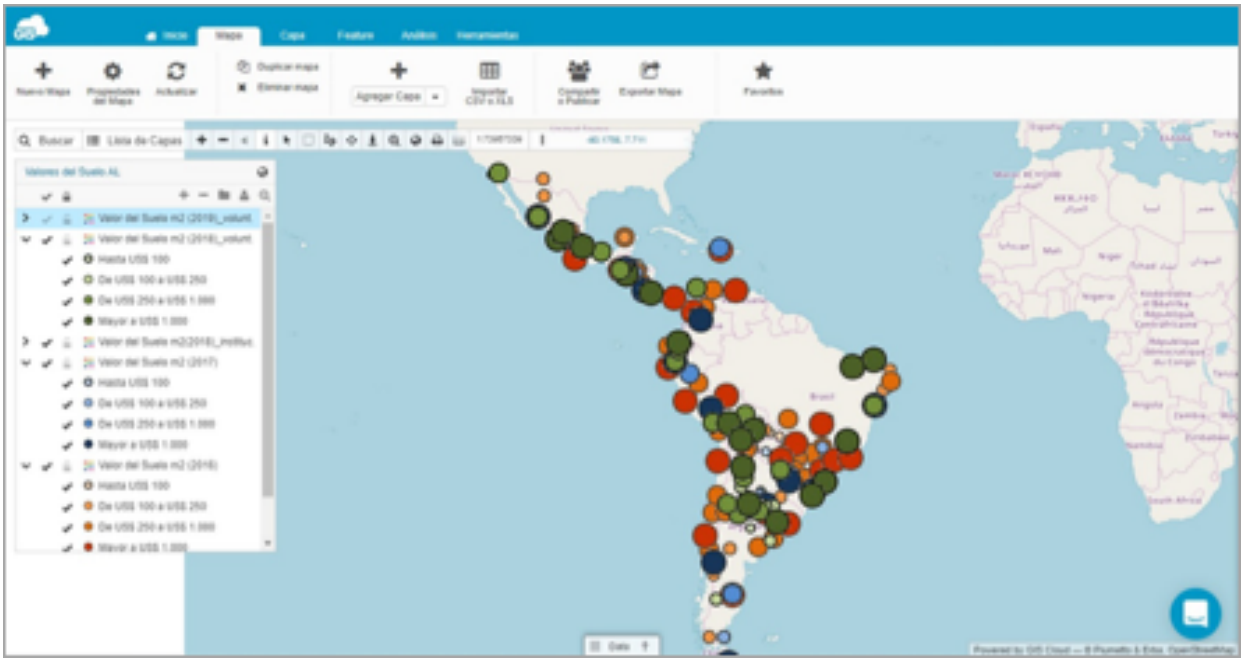
The positive response is evidenced in Figure 3, which shows that the challenge was overcome thanks to the large contributory capacity of employees from different countries.

The innumerable points placed by volunteers on the GIS Cloud platform present, in addition to their geographical position, the value of the m^2 of land and the year of data collection.

8 Crowdsourcing (from the English crowd - multitude and outsourcing - external resources) is an open collaboration or open outsourcing of tasks and consists of outsourcing tasks that traditionally were performed by employees or contractors, leaving them in charge of a large group of people or of a community, through a wide call. Adapted from https://es.wikipedia.org

9 https://valorsueloamericalatina.org/

Figure 3. Value of m² of land in Latin America in the years 2016, 2017 and 2018



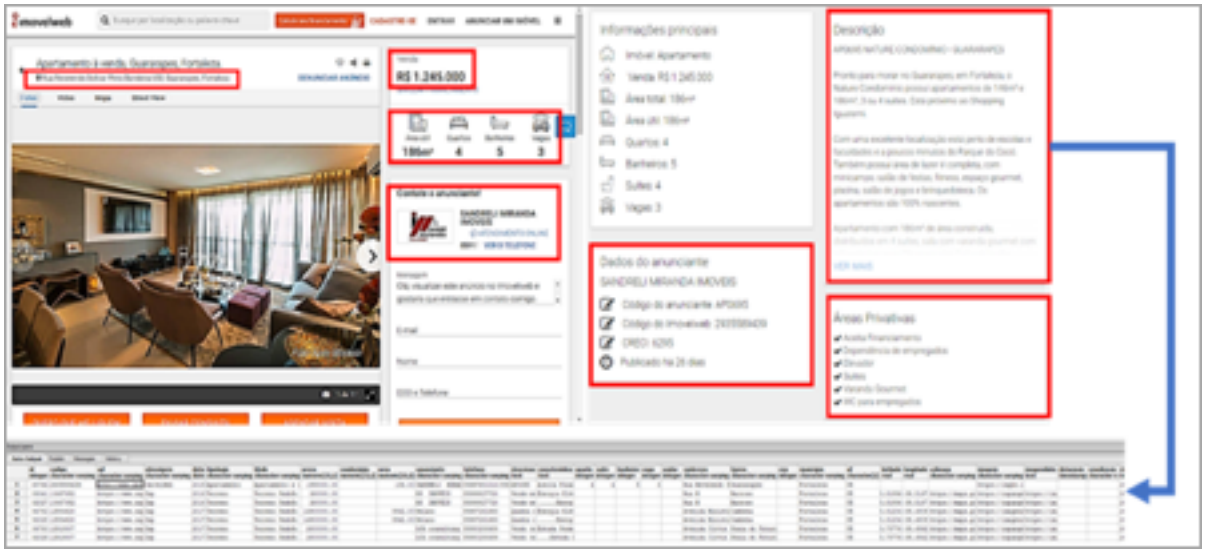
The space created by the *world wide* web has produced several changes in our lives and behaviors. On the web we can easily track information, copy and paste, while others can do the same with what we produce. As an alternative to this manual work, there are applications with algorithms that can do all that much faster than we human beings. They are called *web scrapers*. *Web scraping* (also known as *web harvesting*, *web data extraction and web data mining*) consists of "scratching the world wide web" to obtain unstructured data from web pages originally registered in HTML format and organize them into databases or spreadsheets. The *software* allows to build an agent *(bot* or *spider*) with the ability to download, process and organize data in an automated and organized way[10].

In the area of real estate market studies, its use dates back to private initiatives by companies seeking information on the web from different sources on properties for sale. With the data collected they detected if any property was priced below the average market in their area and evaluated the purchase to reform it or simply to sell it under better conditions, thereby obtaining a significant profit.

In the public area, particularly in the generation of real estate market databases, its application is incipient but growing. The Brazilian city of Fortaleza stores data obtained from web pages in databases that allow viewers to determine the value of the m2 of land at different times (Figure 4).

10 Some of the best known web scrapers focus on flights and hotels such http://www.trivago.com , http://www.despegar.com , http://www.volala.com.ar, among many others.

Figure 4. Highlight of variables identified and stored by web scraping



Source: Ferreira de Oliveira et al., 2018

Some legal experts question the legality of web scraping processes. According to the *Data Science Academy*, web scraping is not illegal, technically there is nothing that prevents one from crawling the web. The problem arises when someone else's site is scraped without having prior written permission, disregarding the Terms of Service or Use. In these cases, one puts oneself in a vulnerable position.

The data is necessary, but not sufficient. In addition to their good geographical distribution, quantity and quality, it is necessary to process them through appropriate methods and tools.

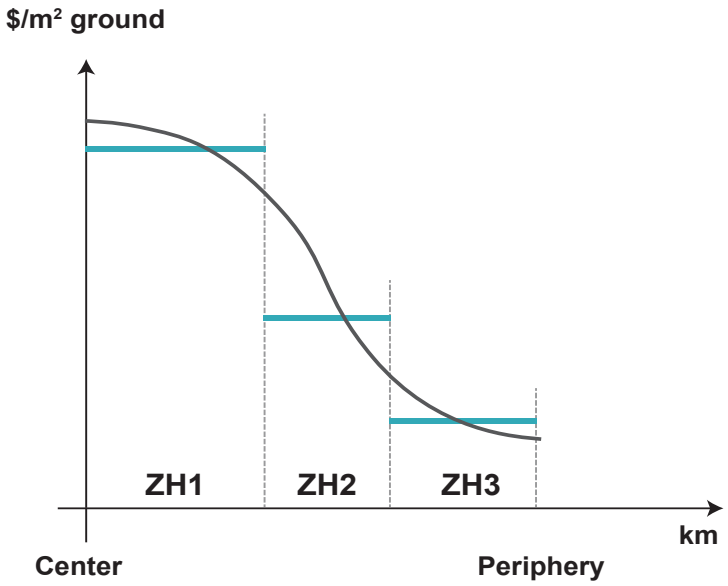
3. THE CATASTRAL POLICY: MASSIVE VALUATION WITH WISDOM

In the Latin American context of very diverse occupations and uses, the value of the m^2 of land varies in direction and intensity. Regardless of the speed of change in market values, the traditional cadastral policy of defining homogeneous areas stable in size and location over time, is obviously inappropriate. In this contradictory scenario, the question is: is it fair to individualize the value of land in large "homogeneous areas"?

To get the answer, let's think about the variation in the value of the m^2 in a monocentric city. As Figure 5 shows, the highest values are in the downtown area, with values decreasing towards the periphery. In slightly more complex cities, the market value of the m^2 of land "moves in waves", is a continuous movement throughout the urban space that changes according to the dynamism of the demand, the regulations, the expansion of the networks and other factors.

The adoption of homogeneous areas to define the value of land for tax purposes follows the steps that discretize a variability that is continuous, generating obvious injustices. As Figure 5 shows, within each zone there will be overvalued and undervalued properties. We are facing one of the greatest generators of iniquities produced by traditional cadastral policy.

Figure 5. Inequities in the value of land when adopting homogeneous areas



Land values can be determined more efficiently through scientific methods. Oliveira Duarte et al. (2018) affirm that Multicriteria Space Analysis is very effective in this process, since it allows to synthesize several criteria that influence real estate valuation.

The authors recommend carrying out analyzes with even more elaborate techniques, such as *Fuzzy* logic and Ordered Weighted Average to design scenarios with more factors. In all cases, the mapping serves as a technical and scientific basis to update the value maps making them more equal and reliable.

The possibility of having large volumes of market data from the observatories, and given the progress associated with computer science, opened new opportunities. Researchers from some agencies began using methods that transcend homogeneous areas, among which are geostatistics (*Kriging, Kriging Regression and Kriging Exteral Drift*), spatial econometrics (*Spatial Error Model, Spatial Lag Model and SARAR models*) and machine learning (*Random Forest, Boosting Regression Tree, Neural Networks and Supported Vector Machines*). Satisfactory results are also achieved with Hybrid methods that combine *Random Forest with Kriging, Boosted Regression Tree with Kriging*, Neural Networks with *Kriging*, among others.

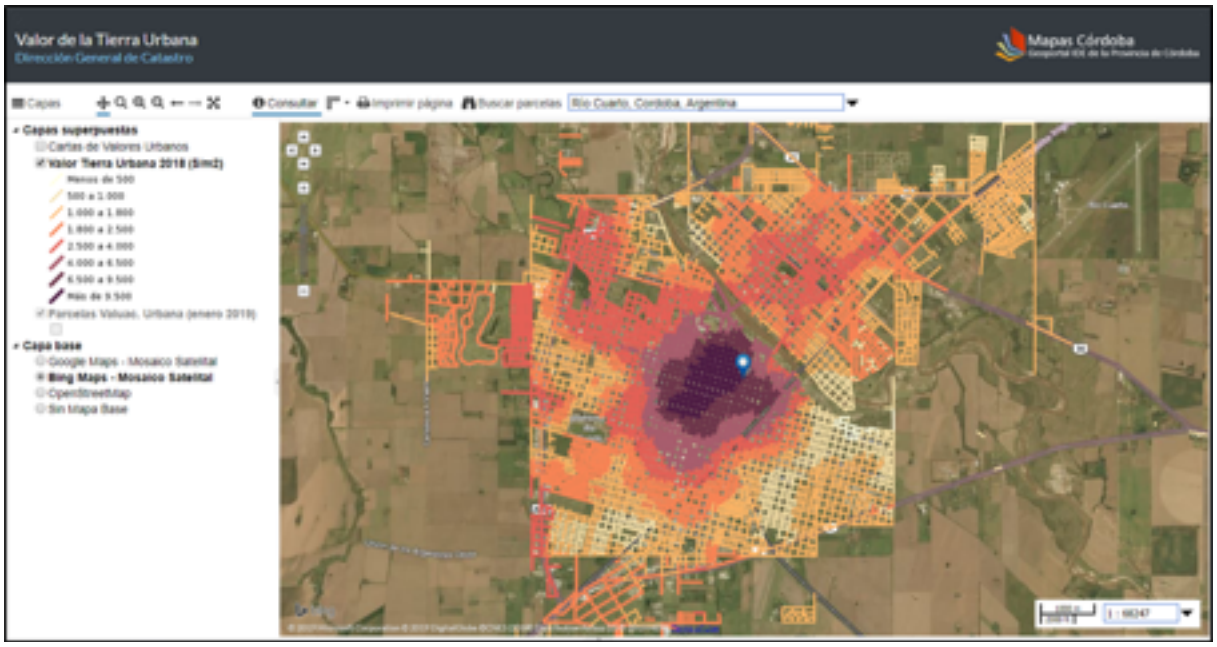
Monzani et. at (2018) used mere geostatistical techniques to generate the map of values of the Argentine city of Río Cuarto and concluded that this technique is sufficient to obtain an adequate estimate of the value of the m2 of land.

Carranza et. al (2018) evaluated the predictive capacity in the estimation of the urban land value by applying a *Random Forest* machine learning algorithmic technique, in combination with the ordinary *Kriging* geostatistical technique for the treatment of waste. The graphic results obtained can be seen in Figure 6. The analytical results are framed within the quality parameters established by the *International Association of Assessing Officers* - IAAO[11], having obtained a relative error of 19%. In this context, researchers concluded that the use of

11 https://www.iaao.org/

automatic learning methods drastically reduce the time involved in a massive valuation, simplifying the process of updating the value of the land against the constant structural changes that affect the prices of all parcels.

Figure 6. Map of value of m² of land in Río Cuarto, Córdoba, Argentina



Source: IDECOR (https://gn-idecor.mapascordoba.gob.ar/maps/10/view)

Drawing a fourth way, Ferreira de Oliveira et. At (2018), applied the machine learning approach together with decision tree models for the massive valuation of urban real estate and modeling a map of generic land values for the Municipality of Fortaleza. They observed that the random forest algorithm had superior performance and precision than the traditional hedonic pricing model represented by the multiple linear regression with trend surface adjustment (with 3º degree polynomial), and also verified that there is no need to meet the assumptions of the method of ordinary least squares for the use of decision tree models.

The determination of these and other techniques must be taken by the cadastral policy makers as it would contribute significantly to the equity of the economic information system, supporting the definition of more efficient and equitable tax policies.

4. THE NEW CATASTRAL POLICY: *VIRTUAL VALUATION*

China is one of the few countries in the world that does not charge taxes on private residential properties. After the Communist Party established a socialist regime in 1949, the country adopted a public system of land ownership and, therefore, did not develop a real estate market until the time of reform. Since then, property sales, as well as the entire economy, have been booming. Top-tier cities, such as Shanghai and Beijing, now house some of the most expensive real estate in the world. The taxes are not applied annually to the owners but only at the time of the sale of the property. In that context, it may be surprising to know that China is at the forefront in the evolution of valuation technology, particularly in Shenzhen, the brand new and iconic southern city that

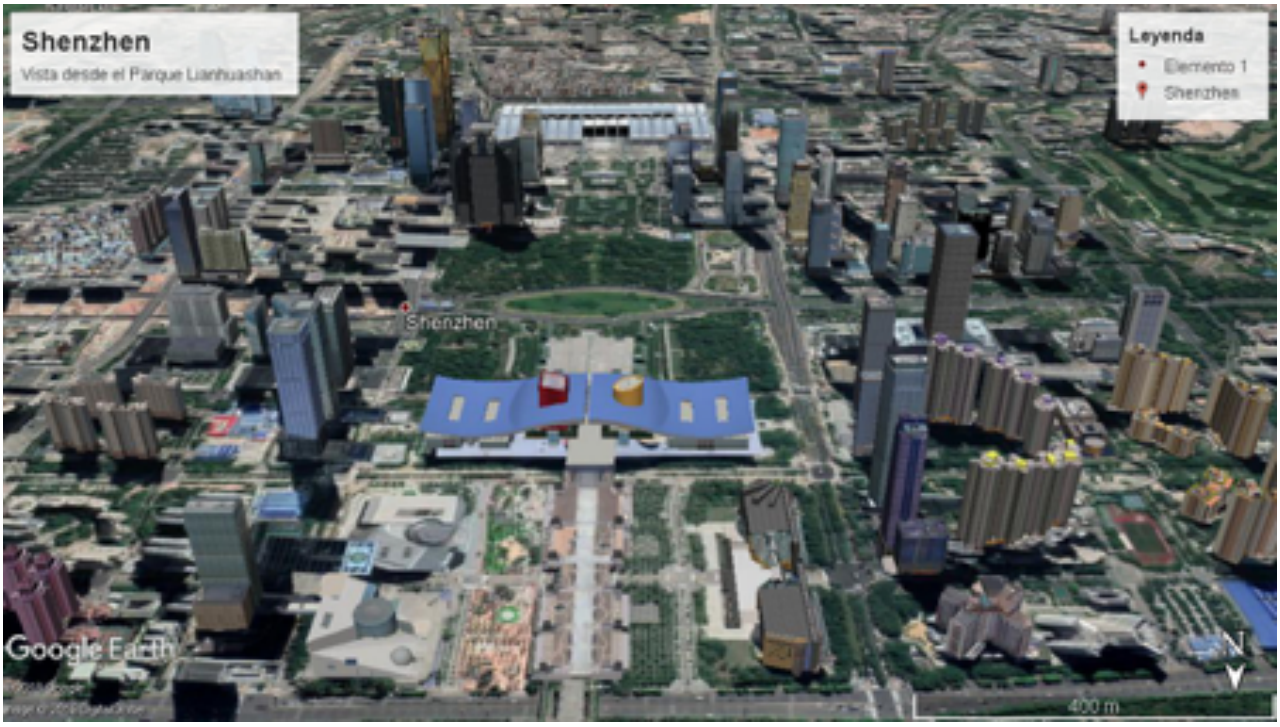
went from being a small town with 50,000 inhabitants in 1982 to a large City with 12 million today.

The Shenzhen Valuation Center, a municipal agency that was established to help collect taxes on real estate sales and transactions, has developed what is possibly the most advanced property valuation system in the world. It is a logical extension of the CAMA (English acronym, *computer-assisted mass appraisal*) system. CAMA is an international standard that has allowed the valuation of entire metropolitan areas from a desktop computer, however, CAMA is by nature a two-dimensional system. The Geographic Information System - GIS has evolved and allows us to represent and manage 3D data efficiently so that the future of property valuation lies in combining CAMA techniques with GIS tools (SIG) in a system known, of course, as “GAMA”.

The system uses GIS tools and builds 3D models of entire cities, with streets, buildings, infrastructure, landscape features, etc., with the aim of valuing all properties from a computer in the cadastre office.

The three-dimensional nature of the system exacerbates its functionality. Using vectors, it is possible to model the windows with privileged views of all the units of a building. From the desktop, the appraiser can determine if a resident has a panoramic view of the beautiful Lianhuashan Park (Figure 7), in the center of Shenzhen, or just the boring facade of a tall neighboring building. In addition, the system can trace the virtual sun’s path in the sky and estimate the amount of sunlight a department receives, and model the sound since a unit on a ground floor in front of an intersection with a lot of traffic is at a disadvantage compared with another that overlooks a quiet courtyard (Nunlist, 2017).

Figure 7. Lianhuashan Park , Shenzhen, China



Source: Google Earth

5. CONCLUSIONS

The enormous and accelerated evolution of the valuation methods and techniques of market data capture show that economic cadastres can transform very quickly, they can even change faster than the tax criteria that govern property taxes.

The results produced by the real estate market observatories structured by public initiatives, private projects, joint programs and/or academic plans prove that it is possible to generate economic information on urban land in a massive way from multiple sources.

Crowdsourcing and/or *web scraping* are key to generating large volumes of systematized and quality data. Keeping the observatories in operation will always require a multidisciplinary work that will generate a sustainable knowledge base over time: it is the economic cadastre in its fourth dimension - 4D.

Continuing to politicize the value maps, continuing to subject them to subjective decisions of urban tax law professionals or financiers, tends to maintain the status quo of iniquities and arbitrary actions that characterize the tax policy related to property tax in Latin America.

Continue to feed the dispute between the planning and financing institutions for the control of the cadastre is another pernicious controversy that does not build a new alternative but deepens the crack. The cadastre as an institution, must be independent of both, an agency with eminently technical characteristics that should not be subject to tax policies but rather put themselves to work alongside tax policies objectively. The need to balance the roles of cadastral and tax policies is evident through a conceptual evolution in managers and technology in cadastral officials.

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Comments on

ACTION 12 OF BEPS

and its inclusion in Mexico

Marco Antonio **Morales Mejía**
Miguel **Gaeta Rosales**

SYNOPSIS

The large companies with a presence in various tax jurisdictions face a great challenge with BEPS Action 12, which *require taxpayers to disclose their mechanisms of aggressive tax planning*. This action proposes as standard that taxpayers disclose their potentially aggressive mechanisms of tax planning: This article points out some reporting standards that countries like UK, US, Ireland, Portugal, Canada, South Africa and Mexico have implemented as mandatory declaration. New anti-avoidance rules are considered among them, which represent a clear example to combat tax evasion.

CONTENT

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INDEX

INTRODUCTION

Large companies with a presence in diverse tax jurisdictions are facing a great challenge with Action 12 of the BEPS, which *"require taxpayers to disclose their mechanisms of aggressive tax planning"*. This action proposes as standard that taxpayers disclose their mechanisms potentially aggressive of tax planning. The purpose of this measure is to provide the Tax Administration with early information regarding these corporate structures, in order to identify their promotors and users to dissuade them.

For all countries, including Mexico, the recommendations of this action have opened a great enigma. Although it was possible that some countries have already implemented several actions to follow these suggestions, they seek to find some mechanisms to fight better the aggressive tax planning, or even tax evasion, or adapt to their specific reality some actions already taken by other countries that already have a mechanism such as that suggested this action.

In this article, we present some regulations for the reporting that countries like UK, US, Ireland, Portugal, Canada and South Africa have implemented, when they introduced a rule of mandatory declaration, which includes the new anti-avoidance rules of this action, and certainly some of them represents a clear example to combat tax evasion.

To know who, how, when and what the companies have to declare is an important consideration in this action, since these suggestions identify certain important features to define these questions. There is no doubt that the experiences of countries like United States have opened a large area of opportunity for their application. Their example could highlight some of the successful actions, such as how much the promoters and taxpayers are required to declare, even if one of them has already declared, an example that we will develop in the article.

Both in principle and in comparing the initiatives of declaration, we can see that it seeks to encourage businesses and their advisers to provide information to the various tax administrations, this given that the objective of Action 12, is to provide the tax Administrations with early information on structures of aggressive tax planning. This way, they can respond more quickly and promptly to the risks of political and tax collection through operational, legislative or regulatory changes, an example shown by countries like the United Kingdom, which has achieved several significant progress with its implementation of its mandatory declaration.

In the specific case of Mexico, such recommendations somehow had been considered before Action 12, in the information that was required from the company when filing their **tax expert opinion**[1]. This is also required in the application of **non-binding criteria**, in the notices and authorizations as well as informative declarations, which were intended to know their fiscal behavior. Although this information did not approach specifically an aggressive tax planning structure, it could reveal what was happening, and that undoubtedly was a matter of putting special care in such conduct, or, where applicable, to practice a review to determine, and where appropriate, sanction such behavior.

It was evident that the Tax Administrations will seek the option to use early information that they consider relevant to know about some structure of tax planning, in order to have anticipated elements of a possible behavior of tax evasion, so the recommendations included in the Action 12 of BEPS become all the more relevant.

1 The "Dictamen fiscal", is a report by specialized third party, on the revision of the fiscal situation of the company, for the formulation of its financial statements regarding compliance with tax provisions.

1. SUMMARY OF THE MANDATORY INFORMATION DECLARATION

The main objective of this standard is that companies provide early information about their structures of potentially aggressive or abusive tax planning, identifying its promoters and users to dissuade them. To achieve these objectives, the mandatory declaration addresses basic design issues, so that to achieve their scope and application, we need to ask the following questions:

1. "Who has to declare?" It is required that both companies (users) and / or planners (developers or consultants) have to declare.

2. "What information must be declared?" This is displayed in two parts:
   - Countries have to define what is a structure subject to declaration and,
   - They must define what information about a structure must be subject to declaration.

3. "When does the information has to be reported?" It is left to each country's needs, considering that an early statement is crucial to achieve its objective.

4. "What other obligations (if any) should be imposed on developers and / or users of a structure?".
   - The users of the structures indicate a unique identification numbers in their statements and
   - The promoters must provide a list of their customers to the tax authorities.

5. "What are the consequences of failure?" In general, any breach leads to a penalty (fine).

6. "What are the consequences of the declaration?" It must be clarified that the report of a structure does not mean it is accepted or will not be questioned.

7. "How to use the information gathered?" The administration must fully use of the information gathered. By deepening each design question, we obtain the following details:

"Who has to declare?"

The subject being compelled to declare under the regime based on operations or promoter must be identified as follows:

a) "Both promoters and taxpayers are required to declare separately"

This option imposes the obligation to declare to both, the promoter and the user, a model that was adopted by Canada and the United States, with the following characteristics:

Canada

- The declaration of one party can satisfy both.

- Each transaction is subject to report: It compel taxpayers to declare data from structures that provide them tax advantages, and the promoters and advisers are entitled to receive remuneration for the transaction subject to declaration.

- The exact presentation of a model declaration by any of party implies that the rest has fulfilled.

United States

- Taxpayers and promoters must provide information on specific operations, regardless of whether the promoter or advisor has previously declared the operation.

- The taxpayer who has participated in an operation subject to declaration is required to submit detailed information about the operation and its tax advantages in another document to be presented in conjunction with his tax return.

- The promoters are the main subjects compelled to declare, the users do not have to present to tax authorities the details of the structures.

As an example, in the final OECD report (2015), highlights that in South Africa and the United Kingdom, the promoter must provide the participant or user with a reference number of the structure to be entered in his return. In South Africa, the obligation of the participant to declare disappears only when he receives written confirmation that the promoter or other participant has declared.

"United Kingdom, Portugal, Ireland and South Africa impose to the user the primary obligation to declare in the following circumstances":

- *When the promoter is not* a resident: because there is difficulty in ensuring compliance with the obligation to declare.

- *When no one who promotes the structure*, it must be declared by those who use it.

- *When the promoter uses the* concept of professional secrecy, which is recognized in the British and Irish legislation, the obligation lies with the user; as alternative, the promoter may waive his right to professional secrecy and then the obligation remains with the promoter.

The above-mentioned terms of promoter and advisor must be clarified since the existing regimes use various definitions, such as:

In the British and Irish laws:

"A **promoter** is defined as a person who, in the course of a business, is responsible for designing, marketing, organizing or managing a structure or making that structure available to another person for actually using it".

The US law define it as:

A **material adviser** is defined as the person providing any assistance, advice or material assistance regarding the organization, management, promotion, sale, implementation, assurance or execution of any transaction subject to declaration".

The Canadian law defines it as:

"A **consultant** is someone who provides to another person any contractual protection with respect to a transaction or series of transactions, or any assistance or advice regarding the creation, development, planning, organization or execution of the operation or series of operations. A **promoter** is a person who (a) promotes or sells a mechanism that includes or refers to an operation or series of operations. (b) or states that a mechanism could have a tax advantage to encourage the promotion or sale of the mechanism. Or (c) accepts a counterpart in exchange for a mechanism in accordance with paragraphs (a) or (b)".

The South African laws define it as:

"A **promoter** is defined as a person who is primarily responsible for organizing, designing, selling, financing or management of a mechanism subject to declaration".

Regardless of the definition of the promoter by the aforementioned countries, we have a clear trend that both promoters and/or taxpayers are required to declare at some point in the implementation of some tax planning structure, a fact important to consider in the proposals for tax reforms in the tax Administrations.

"What information must be declared?"

The final OECD report (2015) identifies two aspects of the information that must be declared, **the first** affect the substance of a system of mandatory reporting and focuses on identifying the structures or mechanisms on the tax administration wants information; **the second**

is proposed for operations subject to declaration and it refers to the specific information to be declared.

The system of compulsory declaration states that any operation that fits the definitions or features that it requests, must be declared. However, there are some laws that apply a minimum threshold or condition that the structure must meet before determining if it has distinctive features, such as the UK, Ireland and Canada who impose a minimum threshold or a precondition for the application of the system.

The threshold used to filter out irrelevant statements; it can also reduce the administrative burden and compliance regime focusing only on operations that obey to tax reasons, so says the OECD report (2015). It also notes that there are different postures regarding the advantages of this test in one or multiple steps or applying the threshold approach.

Adopting the one step approach could bring as an option that the national tax advantage does not have to be identified as tax avoidance or main benefit of the operation. A disadvantage may be that it may lead to a large number of declarations, which would increase costs both for taxpayers and tax administrations and could dilute the relevance of the information received. This is what happens in the United States, which adopted this approach, when using monetary filters for operational losses, and includes a monetary filter in the definition of material advisor. OECD (2015)

In the British, Irish, Canadian and Portuguese regimes that adopted the approach of several steps or threshold, it is required that all structures meet a threshold condition under their regime of mandatory declaration. The advantage lies in identifying independently the elements of a tax planning for each structure by reference to a common approach and assumes that the distinctive features can focus on particular categories of operations, such as financial leasing, without the need to identify and define separately each element of tax planning, as stated in the final report.

2. DISTINCTIVE FEATURES

They are instruments to identify the characteristics of aggressive tax planning structures and divides them into generic and specific, which have the following characteristics:

Generic features

They focus on features that are common in the promoted structures, such as the requirement of confidentiality or paying a very high commission; they have been used to detect new and innovative mechanisms of tax planning, and less frequently, they use the feature of “contractual protection” and “standardized tax product” that we will describe later:

Confidentiality

This structure binds the client to the promoter, seeking to protect the value of the structure designed by the promoter; when they find this clause, authorities may consider that the feature of confidentiality is not met if the mechanism is well known in the tax community.

The distinctive features of confidentiality are those that prevent the taxpayer to disclose the tax treatment, the tax structure of the transaction or the tax advantage; and those that protect the tax advisor strategies and allows the use of this structure in the future.

Very high or contingent commission

This type of structure is designed to attract the structures that have been sold based on tax advantages that accrue at the expense of them, these traits were adopted by the regimes in the UK, USA, Ireland and Canada. For example, in the British regulation a commission is defined as attributable largely to the tax advantage, or is conditioned on any measure to obtaining the tax advantage where the idea is to be paid an amount that is attributable both to the value of tax advice as to the fact that it is not available anywhere else.

The high commissions features are identified because they are those paid for the advantage that the taxpayer expects to receive from the structure or the amount thereof.

Contractual protection

This type of structure is used as a generic distinctive feature in Canada and Portugal with the following characteristics:

Canada

In Canada, the protection is any form of insurance as compensation that protects against the risk that the operation fails to generate a part of the advantage sought. Alternatively, it compensates or reimburses any costs, fees, taxes, interest, sanction or similar sum that may be incurred in the course of a dispute concerning a tax advantage derived from the operation.

Standard tax products

This feature aims at attracting "structures of extensive trading". It is used as a generic feature in the UK and Ireland. It is conceptualized as a mechanism made available to more than one person and uses documentation not adapted to any client, easy to replicate, so it is not required that the taxpayer receive a significant professional advice or services.

Specific features

These reflect the actual or current concerns of tax authorities; they are also effective to gather information, are designed to focus on specific operations, and are frequently used in mechanisms of tax avoidance such as the use of losses, financial leases and structures of transformation of income. Here are some examples used by existing systems:

- Structure of losses
- Leasing (UK)
- Employment-related structures (Ireland)
- Revenue transformation structure (Ireland, Portugal)
- Structures in which non-resident entities are involved (Portugal)
- Mechanisms in which hybrid instruments are used (South Africa)
- Operations with significant differences in tax-accounting valuation (United States)
- Cataloged operations (United States)
- Interest operations (United States)
- Model of features for operations losses.
- Recommendations on distinctive features
- Procedural issues / tax administration

Powers to request additional information

The OECD notes that tax administrations, after receiving the initial statement, very likely have to require supplementary information, so we should examine to what extent new or additional powers are required to enable them:

- Questioning the reasons why a developer or a user has not declared a structure.
- Require an intermediary that identifies the person who has provided information on the structure.
- Require more information when not complete.
- Request more information after an initial statement.

The risk assessment occurs when a team of the tax administration is dedicated to the analysis of the statements, performing an initial review mechanism to determine whether a legislative change action should be undertook. Changing the tax legislation more quickly is one of the way by which the tax authorities may proceed when detecting early information on some tax avoidance structure.

The OECD recommends the information to be included when imposing an obligation to declare a structure to promoters or taxpayers as follows:

- Identification of promoters and users;
- Details of the arrangements under which they are subject to declare;
- Description of the mechanism and the name that is known (if any);
- Description of the tax advantages, benefits and amount;
- Client list (for the developer only) - if the law allows it.

Likewise, it recommends that the provisions of the mandatory report must be supported by the power to request the information to enable them to:

- "Investigate why the obligation to declare has not been fulfilled;
- Ascertain the identity of the promoters or intermediaries;
- Request more information following a statement, to track the case".

Finally, it recommends that, in order to use effectively the information collected, to establish a unit to assess the risks of the statements received and coordinate actions between the different tax authorities.

The main objective of the mandatory report regime is to provide information as soon as possible on the structures of avoidance and its users and deter their use. However, in the regimes of UK, Ireland and Portugal, the deadlines to submit the declaration differ between these countries: for the UK and Ireland, a promoter has a period of five working days to declare a structure, starting from the moment he makes such a structure available to another person for its implementation. In Portugal the reporting period is slightly longer, as tax promoters should make the declaration within 20 days after the end of the month following the month in which have facilitated this structure.

In the United States, instead of linking directly to the reporting period when the structure available to users gets, the obligation to declare arises when the consultant becomes a material advisor.

The South African regime, where a mechanism subject to declaration must be declared within 45 days following the date on which, for the first time, the taxpayer perceives, accrued, paid or owes an amount under that mechanism; the obligation to declare arises from the moment that there is a receipt or payment of money.

In the case of Canada, a transaction subject to declaration must be declared before the June 30 of the calendar year following the year in which the operation has become a transaction subject to declaration, defining the latter as an operation of avoidance if it includes at least two of the distinctive features of the Canadian regime.

3. WHAT OTHER OBLIGATIONS SHOULD BE IMPOSED ON DEVELOPERS AND USERS?

To identify a structure by reference number, the tax authorities issue the reference number at the time that the structure is declared and provide it to the reporting person. The same happens when the reference number is provided to the structure promoter, who has to make it available to users of the structures within a specified period. (For the UK within 30 days, and 60 business days in the US); finally it occurs also when the user is the person forced to declare the structure, in this case the tax authorities assign a reference number of the structure directly to the user. In this sense, the user must include it on his return each year until the advantage stops existing. Assigning a reference number to the structure does not indicate that the tax authorities accept the effectiveness of the declared structure and completeness of the declaration. Both the US and UK are explicit in this regard, as neither regimes accepts a declaration as an endorsement of a structure.

Consequences of compliance and non-compliance

The fact that a transaction is subject to declaration does not necessarily mean that it may lead to tax avoidance,

nor does it imply acceptance of the validity or the tax treatment of the transaction by the tax authority. Several countries have expressed concern about establishing the obligation to declare, i.e., the concern is that taxpayers could believe that any declaration to the tax authorities results in the implicit agreement that the structure is valid, if no negative response is received from those authorities. To avoid this, the tax authorities should be clear in explaining that the report of operations subject to the regime has nothing to do with the effectiveness of these operations. So provide the existing schemes in the UK, US, Ireland, Canada and even the Portuguese regime, making clear that the declaration of a structure is irrelevant to allow, or not, the tax advantage.

The usual sanction of noncompliance is the imposition of a fine, adding that to impose it, each country must analyze whether it should be monetary or non-monetary, taking into account the provisions of existing regimes.

Monetary sanctions

- For not declaring a structure
- For not maintaining or not providing the list of clients
- Failing to provide a reference number of a structure
- Failing to declare a reference number of a structure

System of penalties for non-compliance

Sanctions can be set depending on whether the breach is negligent or deliberate, or could be linked to the level of commissions or tax benefits, but especially should be set at a level that encourages compliance and maximize its deterrent value without being burdensome and disproportionate.

Daily penalties, used in the UK and Ireland, underscore the importance of presenting the declaration on time. They are effective to encourage the promoter and the taxpayer to comply with the obligation to declare, as they may keep imposing daily penalties for the duration of the breach.

In the British system, there are two types of sanctions, initial and secondary, the initial is determined by a court and can be calculated based on a daily maximum amount £600 GBP per day, and the secondary can be applied by the tax administration and may impose a higher penalty of up to 1 million GBP. In the case of the US regime, any material advisor who does not keep a list and does not provide it to the IRS prior written request, shall pay a penalty of 10 000 USD for each day of default to run from the twentieth day. So provides the final OECD 2015 report.

The sanction is proportional to the tax saving or to the commission of the promoter, in the sanctioning system UK and Ireland, since they can take into account the amount of the tax benefit or the commission received. In United States and Canada, the level of the penalty is directly based on the amount of the tax advantage obtained by the taxpayer or the commission paid to the adviser.

In Canada, the failure to declare a structure suspends its effectiveness and taxpayers can be denied any tax advantage resulting therefrom. In the United States, the omission of the statement extends the limitation period in respect of the scheduled operations.

4. INTERNATIONAL TAX STRUCTURES

Definition of the structure subject to declaration

“International structures tend to generate multiple tax benefits for different parts in different jurisdictions and the tax advantages resulting at national level from an international structure could be imperceptible when viewed in isolation from the rest of the mechanism as a whole”.

"The international tax planning structures are often incorporated into broader commercial transactions such as acquisitions, refinancing and restructurings".

"Usually, specific features will be the most effective method, by focusing on cross-border structures that pose political risk or tax revenue risk in the jurisdiction where they are declared".

While the OECD does not define what a structure subject to declaration is, existing regimes can identify that in a structure subject to declaration, national and international structures with tax advantages can be identified, the main objective of this Action.

The final OECD report (2015) points out that "One of the challenges of designing a specific trait is to formulate a definition that is broad enough to encompass a number of technical tax planning and sufficiently restrictive to avoid an excess of tax returns". However, to address this issue it indicates that we must focus on the types of BEPS results instead of pointing to the techniques used to achieve them.

The final report OECD (2015) designs the following elements to improve how a regime of mandatory declaration addresses the international planning:

- Remove the requirement of threshold for cross-border structures;
- Develop distinctive features that focus on the BEPS risks
- Further define the structure subject to declaration
- Avoid imposing undue burdens
- Require that all the relevant information on structures must be reported
- Imposing to the national taxpayer, at the time of holding a significant transaction with a member of the group, the obligation to:
    - o Investigate whether the mechanism incorporates a transboundary result.
    - o notify the tax authority if:
        - The group member does not provide information on the mechanism
        - The information about the mechanism is inadequate or incomplete
        - There is undue delay in providing information

The combination of generic and specific elements allows tax administrations to focus on international tax planning mechanisms that pose greater challenges for policy and tax collection while keeping capturing new or innovative mechanisms.

Information exchange

We should not forget the importance of information exchange as the OECD notes that: "The framework of transparency made by the Forum on Harmful Tax Practices in the context of the work carried out on Action 5 requires a spontaneous and mandatory exchange of information regarding queries that they can generate. The absence of such exchange would generate concern regarding BEPS".

The Collaboration and Joint Information Center on International Tax Shelter is an international platform, that tax administrations can freely join, providing the opportunity to enhance relations in order to foster cooperation and bilateral and multilateral cooperation based on the legal instruments in force, which offers the following advantages:

- It gives tax authorities the opportunity to benefit from the experience, resources and expertise of other tax administrations.

- When a country joins, it is assigned a single point of contact that serves to facilitate interactions and data exchange process.

- It offers the opportunity to determine what type of information sharing practices are more effective and promote them as best practices.

- A secure website provides administrative support and a single point of contact, with reports and regular updates on the Center's activities.

5. IMPLEMENTATION OF THE RECOMMENDATION IN MEXICO

Since Mexico[2] has joined the OECD, it has taken advantage of the experiences of other countries and has improved its economy, serving as a communication bridge between industrialized countries and the countries of Latin America.

The commitment is such that year after year, Mexico has included in its law the regulatory and legislative changes that lead to release information to the tax authorities; among them, we can highlight the following:

Regarding the tax expert opinion. In 2007, the questionnaire "General Data" of the Statement presentation system (SIPRED) added the question: "Does the taxpayer applied criteria contrary to those published in the Official Journal of the Federation[3] as non- binding criteria, as described in the following section, of the tax and customs provisions?" The question that was included year after year, until that, in 2014, the obligation to present the tax expert opinion (*Dictamen*) was restricted. (Polanco et al. sf, p. 499)

Regarding the non-binding criteria. So called because they "do not compel behavior" and aim at identifying tax practices incurred by taxpayers that, although they are not forbidden under current legislation, the tax authority considers them improper. (Polanco et al. sf, p. 499).

Some of the following criteria could be considered transactions subject to declaration under the Action 12:

- Permanent establishment through an independent agent.

- Royalties for intangible assets originated in Mexico, paid to related parties residing abroad.

- Application of articles of the treaties to avoid double taxation that Mexico has in force concerning the taxation of branches.

- Provision of services in national territory via a commercial broker. Polanco et al. (Sf, p. 499)

Regarding notices and authorizations. In addition to expert opinions and non-binding criteria, other requirements for disclosure of information have existed in our country, such as obtaining authorization or give notice in respect of certain transactions that the authorities regard as sensitive. For example, in the case of international restructurings of companies belonging a group, the Income tax law in force, in Article 161, paragraph 17, requires previous authorization from the tax authorities for the deferral of payment of tax on profits derived from the sale of shares within that group.

Another example is the requirement to submit notice in the event of a merger[4], and to obtain authorization in the event of a merger to occur within the next five years after another merger or demerger.

2 On May 18, 1994, Mexico became the 25th member of the OECD; its enactment decree was published in the Official Journal of the Federation on 05 July of the same year.

3 The order follows the Tax Code of the Federation in Article 52.

4 Article 14-B, section I, paragraph a) of the Tax Code Federation.

Regarding information statements. In addition to the above information, taxpayers are required to file in February of the following tax year, multiple informative statement (DIM), which report on transactions with related parties, wages and salaries, among others, and finally the new information on transfer pricing as are 1) the Master file 2) Local File and 3) Country–by- country Statement.

Sanctions for the advisors. While Article 89 of the **Tax Code of the Federation** imposes fines to tax advisors who provide advisory services to taxpayers but omit full or partial payment of a contribution, the fine is waived if the consultants have informed in writing that their criteria may be different or contrary to what the tax authorities say and interpret.

At this point, we find that the tax expert opinion, the nonbinding criteria, notices and authorizations, information statements and sanctions to advisers have marked an important point in our country. The tax authorities are now aware of the operations of taxpayers, if not in advance, sufficiently to know what they have already done, information that although it did not allow knowing in advance the structures of aggressive tax planning, has created an obligation of taxpayers to provide information regarding certain operations that certainly have implicit tax implications. Through this type of information, the authority has detected tax planning, which has served as a prelude to what Action 12 is now demanding.

The incorporation in 2013[5] of Article 31-A of the **Tax Code of the Federation** is the materialization of the implementation of the action 12 in Mexico. It establishes the obligation for companies to present an informative statement on "Information of relevant operations"[6] and this must take place no later than the last day of the months of April, July, October and January of the following year.

Taxpayers other than those that make up the financial system in terms of the provisions of Article 7, third paragraph of the Income Tax Law will be relieved of reporting the transactions whose accumulated amount in the period is less than $ 60 million of pesos.

Unconstitutionality of the declaration

Following the publication of the requirement to submit "information on relevant transactions" concern arises that such requirement would promote the indirect protection **Amparo**, judgement that state essentially the following:

- The motive of the birth of the reporting obligation in respect of the relevant operations is eliminating the requirement to submit an expert opinion summary formulated by a Registered Public Accountant RPA;

- The unconstitutionality was derived for errors of law, and not challenged by vices in the content itself.

Later in the appeal in the Supreme Court of Justice (hereinafter SCJN, from its acronym in Spanish), the following analysis points are set out in the **Amparo** protection review 432/2016. Some points of interest for this article have been transcribed from this review where the argument of the plaintiff is supported by the fact that at no time the *mentioned Article mention* the type of information to be provided to the tax authorities[7]. It points out that the preamble to the addition of this article to the Tax Code of the Federation of 9 December two thousand thirteen is insufficient to accept as true

5 According to what was published in the Parliamentary Gazette No. 3857-C, Year XVI, of 8 September 2013.

6 Rule I.2.8.1.14 Fifth Amendments Resolution of the Tax Resolution of October 16, 2014.

7 "There is no element that allows taxpayers to know the basis on which the taxing authority will define what information may be required and to what operations it can relate.
...
the use of partiality relevant transactions generates a state of uncertainty Disregarding what that information that the taxing authority deemed relevant at a certain time to verify compliance with tax obligations, whether that term of significant transactions referred only in the exhibition grounds but not in the text of Article 31-a of the Tax Code of the Federation, which speaks only of information operations " (Amparo under review 432/2016)

what clearly is a discretional power that the authority granted. It was granted through this article and its extension in the rules of the Omnibus Tax Resolutions and their regulations that modify what was already regulated. It considers insufficient the fact that in this preamble, such information is deemed relevant, but at the time of the enactment, this addition simply does not specify the name of relevant information, nor say what is considered as such.

Derived from the above, I consider that the arguments used by the reporting Minister are valid as long as the contested article notes an enabling clause in its first paragraph. However, that in no way this will result in a discretionary power, because the rules issued in the omnibus resolution go beyond what the regulated legislation itself provides, a situation that breaks the hierarchy of laws, whereas a regulation, rule, decree, etc., should not go beyond what the legislation itself provides.

Following the decision

Now, let us move to the point that in our consideration is one of the most important in this issue: the dissenting opinion of Minister José Fernando Franco González Salas, who makes an appeal to logic and common sense argument as follows:

- Before that addition of the precept studied, what information had to be certified by the RPA?
- With the addition to that provision, what happened to that information?
- Did the change that took place modified only the form of the presentation?
- These questions being raised, did the type of information that should be presented change, issued either by the RPA or through an internet portal?

The above questions arise from reading that particular vote, because as rightly points out by the Minister:

"…it can be said that the relevant information to be sent in terms of these standards is concerning the accounting that was previously reported by a public accountant through the official form 76 (seventy-six) on the website of Service Tax Administration and is considered necessary for the authority to exercise its powers of verification"... (individual opinion formulated by the Minister José Fernando Franco González Salas review in **amparo** 844/2016, decided by the Second Chamber of the Supreme Court of Justice in session November 30, 2016).

That is, if the explanatory memorandum shows that what is intended is an administrative simplification, that the information that was presented through public accountant now is to be filed by the taxpayer himself on a portal internet. It is indisputable that there never was a change in the type of information that must be reported to the Authority, but only the mode of presentation changed, since each taxpayer knows what type of information was showed through RPA so that in each case the type of operations rule was known.

In addition, the Minister mentioned in that format 76 there is an Annex I, which lists the operations that must be sent via the Internet on financial transactions set out in Articles 20 and 21 of the Law on Income Tax as follows:

> ***ANNEX I. FINANCIAL OPERATIONS SET FORTH IN ARTICLES 20 AND 21 OF THE LAW OF CURRENT INCOME TAX.***
>
> *1. Payment initial amounts by financial transactions that have shown more than 20% of the base value.*
>
> *2. Financial Operations compound and / or structured.*
>
> *3. Financial Transactions for commercial coverage*
>
> *4. Financial Transactions for trading purposes.*

5. Financial Transactions where the principal, interest and accessories come from the segregation of a debt or any financial instrument.

6. Separate alienation of the main value title related to bonds or any financial instrument.

7. Separate alienation from interest coupons related to bonds or any financial instrument

8. Early termination of financial transactions

9. Financial transactions in which the option has not been exercised

ANNEX II. TRANSACTIONS WITH RELATED PARTIES.

ANNEX III. EQUITY AND TAX RESIDENCE.

ANNEX IV. REORGANIZATION AND RESTRUCTURINGS.

ANNEX V. OTHER SIGNIFICANT TRANSACTIONS.

Article 20. In the case of derivative financial transactions, the cumulative deductible gain or loss is determined, as follows:

I. When a transaction is paid in cash. . .

II. When a transaction is settled in kind with the delivery of goods, securities or currencies. . .

III. When the rights or obligations contained in the securities or contracts stating a financial transaction derived are disposed of before the expiry of the operation. . .

IV. When the rights or obligations contained in the securities or contracts stating a financial transaction derived not exercised at maturity or during the period of its validity. . .

V. When what is purchased is the right or obligation to make a derivative financial transaction. . .

VI. If the holder of the right granted in the operation exercises the right and the subject under obligation delivers shares that have not been subscribed, treasury shares.

VII. On derivative financial transactions in which differences are settled during their validity period.

VIII. The cumulative gain or deductible loss derivative financial instruments relating to currency exchange.

X. In the case of derivative financial instruments by means of which a party to deliver liquid assets to another and the latter, in turn, ensure accountability to reacquire the goods, securities or shares, referred to in the transaction, for an amount equal to the delivered the first part plus a proportional charge. . .

Article 21. Income received from financial transactions related to an underlying that is not listed on a recognized market according to the provisions of Article 16-C of the Tax Code of the Federation, including initial amounts to be levied, will accumulate at the moment they become due or when the option is exercised, whichever comes first. The disbursed amounts directly related to this transaction may only be deducted to know the net result of the operation at the time of liquidation or expiration, regardless if the rights or obligations set forth in the contracts for the purposes of this type are not exercised..."

Thus, the argument on the merits of the Minister has legal rationale, since at no time the legislator states that the information that the taxpayer must now submit has changed. It replaces the form of presentation of this information but leaves untouched its content. This situation on the one hand was set aside by the ministers who voted for the bill of the rapporteur Minister, and on the other, the legislature omitted in its wording, which clearly had an impact when the court decided on the appeal.

6. CONCLUSIONS

The Action 12 has a very significant effect for all countries, highlighting the importance of disclosing the tax avoidance structures for the OECD member countries. In the present article, we highlight its importance for Mexico, especially for large companies. These companies have a structure that involve in many ways operations with other tax jurisdictions and, through the simple implementation of this action, they must submit additional information. This regards the significant transactions that in a few or many cases may involve operations with corporate or financial regulation, not limited to the one referred to this action, but that they need to submit in order to comply.

Clearly, the message brought by this action, trying to detect structures that could lead to tax evasion, is that if we truly want to combat this tax evasion in our country, we need to apply the recommendations in force in the countries that are meeting the standard. We must take into account the new anti-avoidance rules, such as implemented in the UK, US, Ireland, Portugal, Canada and South Africa. We must take in consideration the most important and those that under our legislation do not have an impact violating the constitutional rights of our compatriots.

Given the recommendations of this action, a great opportunity opens for our country to find some mechanism to help combat aggressive tax evasion. We could consider taking some of the actions implemented by countries that already have a mechanism like the one suggested in this action, which as an option we propose to advance in the following points:

- First, suggesting that tax administrations allocate a specific area to study sector by sector the already identified the potentially aggressive tax avoidance.
- Once identified, working at first instance in a single sector, to know its mechanism that could bring an aggressive tax planning.
- Once the sector is selected, to define the mechanisms for information that reveal their structure and / or mechanism, and their promoters and / or users.
- That the required information must be truly relevant to serve to identify the potentially aggressive tax planning and not requiring information that saturates the tax administrations.
- Once the above points are attended, establish a rapprochement with taxpayers and / or promoters of these structures to discourage them from using them.

This action contemplates some examples on who, how, when and what the companies have to declare regarding their relevant information. This is an important aspect to consider in the implementation in our country, because as we know, applying Action 12 triggered arguments of unconstitutionality, by not defining what is meant by relevant information. The examples that the action gave us made clear what should be understood by relevant information. We may consider this type of information so that in a not distant future, our national legislation could incorporate some more concrete and accurate definition to what actually they would get from taxpayers without risking being unconstitutional.

While this action has the clear objective to encourage taxpayers and their advisers to provide information to the tax authorities, it is also that tax administrations should respond in the same way to taxpayers. They must truly focus on structures that have a fiscal impact, i.e. that taxpayers know that the information

reported is used responsibly by the authority, to generate mutual trust and develop a closer and more responsible relationship taxpayer-authority.

No doubt, this kind of action brings about an area of international relations that now our country must incorporate. Therefore must assume both the benefits and risks that that this standard implies. Yes, it has been a major challenge for the tax administration to count on timely information. Now it is intended that taxpayers report in advance of any planning that may have a tinge of evasion. This a big challenge to take on and to achieve, because certainly promoters would like to maintain the confidentiality of their structure to other promoters or before the tax authorities.

The fact is that in our country the obligation has existed for a long time to inform the authority by tax report presented by the Public Accountants dictating the financial statements of taxpayers to inform the on implementation, including the non-binding criteria issued by the authority. They had to inform through notices and authorizations, and information returns, all information and documentation that sometimes the authority itself requested, and impose a penalty on those who advise on some unfair tax practices. This had a significant impact, because the authority knew transactions that taxpayers performed regarding a possible misconduct, not sufficiently early, but as they say these methods somehow entailed the authority to have knowledge of practices with possible tax implications.

To comply with the recommendation of the OECD in particular for Action 12, Mexico promotes the presentation of the statement of “information relevant transactions”. As noted in this article, although stated in its preamble that authority needs to know the relevant information, the specific details were not included in the text that defined the obligation. Leaving these aspects to the consideration of the taxpayers was considered a transgression of the constitutional principles of legality and legal certainty.

Unconstitutional means that they would not be required to remit, under that regulation, the relevant operations until the regulation is reformed, showing clearly that if the authority exercising its powers of verification requires some kind of data, reports or documents, taxpayers are obliged under the same tax provisions to supply them.

As a personal consideration, we believe it is time that both the tax administration as the large business groups should find the possibility of implementing a structure of clear, effective, flexible and dynamic disclosure of information. This would ensure that the information collected is used reliably, to be prepared and maintain an optimal level of competence and tax burden internationally and that benefits our country.

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A vision on the relationships

OF TAX CRIME AND MONEY LAUNDERING

Spanish model of institutional collaboration between the financial intelligence unit and the tax administration.

Rocío **Gamo Yagüe**
Ignacio **Pérez-Hickman Tiedtke**

SYNOPSIS

This article aims to provide a global vision of the relations between the crime of money laundering and tax-related crimes, both from the point of view of one of them as a precedent of the other, and of their coexistence on equal footing, through the case law of the Spanish Supreme Court. The vision is completed with a brief description of the actions of the Spanish State Tax Administration Agency in the prevention and prosecution of money laundering.

CONTENT

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INTRODUCTION

Money laundering includes all those activities or transactions carried out with the ultimate purpose of incorporating the product, benefit or proceeds from a criminal activity into the legal economic movement. The Spanish Supreme Court, in Ruling 265/2015, of April 29, defines money laundering as *"the process by which assets of criminal origin are integrated into the legal economic system with the appearance of having been acquired in a lawful manner, so the crime tends to get the subject to obtain a legal title, apparently legal, on goods from a previous criminal activity".*

This sentence has a special importance, as it is one of the first in which what has since been called the "*doctrine of the purpose of the act*" is included, which greatly helps to interpret the most complex cases of punishment of the crime of money laundering. From it, many other sentences with the same origin have proliferated.

Regarding this work, one of the first issues that must be clarified is to determine what previous criminal activities may be those that, from a criminal point of view, originate the profits susceptible to the crime of money laundering. Historically, the international configuration of the crime of money laundering has followed a very marked evolution regarding which illegal figures could be configured as antecedents. Thus, and following the decisions made by different international institutions (United Nations, European Union, FATF,...), it has evolved from laundering derived exclusively from drug trafficking offenses to being separated from the commission of a specific crime. Thus, becoming involved in a criminal activity, which does not need to be individualized, would be sufficient.

The Spanish legal system has followed the steps of the international legislation, the normative evolution in the criminalization of this criminal offense being evident. The crime of money laundering was introduced in the Spanish Criminal Code in 1988, limited to cases of drug trafficking offenses. Although in 1992 the possibility of reckless offense commission is introduced, the real leap in its configuration occurred in 1995, through a new Criminal Code that allowed the commission of money laundering with respect to any good or gain from a serious crime, that is, among others, imprisonment or disqualification for more than three years[1].

The next major change in the criminalization of this offense occurred in 2003, extending its scope to consider any crime as a precedent, expanding in 2010 to cover *any criminal activity*[2].

At present, the offense of money laundering is regulated in the Criminal Code, Title XIII (crimes against property and against the socioeconomic order), Chapter XIV (taking proceeds of and money laundering), articles 301-304.

Article 301 regulates the basic type of crime, describing four behaviors:

- Acquire, possess, use, convert or transmit assets, knowing that they have their origin in a criminal activity, committed by him or by a third party (art. 301.1. 1st paragraph).

- Perform any other act to hide or cover up the illicit origin of the preceding assets (art. 301.1. 1st paragraph).

1 Currently, that time has been increased to five years.

2 It is necessary that the laundered goods come from a criminal activity. It is not necessary to have a prior conviction for said crime or previous offenses (STS 198/2003, STS 449/2006, STS 338/2007, etc.), or even the identification of a specific criminal act (e.g., among many others, STS 189/2010).

- Perform any other act to help the person who has participated in the preceding offense or violation to circumvent the legal consequences of their acts (art. 301.1. 1st paragraph).

- Hide or cover up the true nature, origin, location, destination, movement or rights over the assets or property thereof, knowing that they come from any of the previous behaviors or from an act of participation in them (art. 301.2).

Despite the differentiation of the four behaviors, it can be concluded that the **typical conduct of the crime of money laundering** is the performance of acts of acquisition, possession, use, conversion or transfer of goods, or any other act, to hide or cover up their Illicit origin or help those participating in the crime avoid the legal consequences of their acts, knowing that these assets have their origin in a crime committed by him or by a third person.

In light of the aforementioned "doctrine of the purpose of the act", it can be concluded that we are really facing a single act of money laundering, in the sense that what is punished is every action that, with the ultimate goal of enjoyment under lawful appearance, tries to hide or cover up property or help the person responsible for the criminal action. Thus, the purpose must be present in every act of laundering, thus overcoming the doctrine of neutral acts. Also, this "doctrine of the purpose of the act" is extremely useful to distinguish when we are faced with a case of "self-laundering" punished criminally (expressly included in our Criminal Code) from other figures, such as criminal absorption, etc.

Delving into the content of this paper, the relationship between the tax offense and the crime of money laundering can be of a very diverse nature. In this article we will simply limit ourselves to the following ideas, which we consider may be sufficient to show the wide spectrum of situations that may arise in this area:

- Tax offense as a precedent for money laundering: the profit obtained from a tax offense is likely to generate money laundering behaviors by trying to incorporate them into economic movement by hiding their illicit origin.

- Crime of money laundering as a precedent for the tax offense: the question arises as to whether capital increases resulting from money laundering should be declared or, if not, may result in the commission of a tax offense.

- Tax offense and, at the same time, money laundering or other crime.

- The crime of laundering of subjects whose sole activity is to help others commit tax offenses.

Finally, in the last section of this paper the institutional framework existing in Spain will be described very briefly in relation to the subject matter discussed in this article.

1. THE CRIME OF MONEY LAUNDERING DERIVED FROM THE TAX CRIME

In this section we focus on the possibility that a tax offense is a precedent for a crime of money laundering.

In the first place, we must affirm that, although this possibility is clearly established in the regulations, both national and international, the same does not happen with case law and doctrine, whose hesitations arise from the classification difficulties generated by the assumptions of "self-laundering".

At a regulatory level, Law 10/2010, of April 28 on prevention of money laundering and terrorist financing, points out in article 1.2):

"(…) For the purposes of this Law, assets from a criminal activity shall be understood as all types of assets whose acquisition or possession originates in a crime, both material and immaterial, movable or immovable, tangible or intangible, as well as legal documents or instruments regardless of their form, including electronic or digital, that prove ownership of said assets or a right thereon, including the tax defrauded in the case of crimes against the Public Treasury (…)".

While it is true that this principle shows its impact on the field of prevention of money laundering, it is no less than clearly a powerful interpreting or harmonizing element for all our legal system on such a controversial issue.

At the international level, the text or version of the FATF 2012 recommendations, in the glossary attached to them, specifies that among the possible previous or underlying crimes of money laundering is the tax offense. For its part, the 4th Money Laundering Directive (Directive (EU) 2015/849 of the European Parliament and of the Council) expressly states (art. 3) that tax offenses are among those that may perfectly be underlying money laundering.

On a practical level, these provisions have very relevant effects, among them:

- The subjects bound by the regulations for the prevention of money laundering must be vigilant to all types of illegal activity (including tax-related offenses) as a posible source of earnings that can be laundered. At the early stages of the regulations for the prevention of money laundering, this was not the case, which caused few distortions of the system.

- At the international level, and certainly at the community level, in the prevention area the possibility that a Member State may claim non-collaboration or exchange of information on the basis that its legislation does not provide for tax crime as possible precedent for money laundering is reduced.

- Although in Spanish criminal law all these legislations in support of the possibility of tax crime as a precursor to money laundering was certainly not necessary or essential, it can be considered appropriate, especially in order to dispel the opposed interpretations that, with fewer and fewer arguments, a part of the doctrine has been holding.

Based on the above, we can begin with the clear argument that the crime of laundering in its option of "self-laundering" enjoys full recognition in the legislation and that we are facing a crime with total autonomy with respect to the preceding crime, protecting a different legal good.

In fact, the main characteristic of money laundering is not the mere enjoyment of illicitly obtained profits, but the real goal is the return of these illicit gains to the normal economic cycle once that criminal origin has been hidden or concealed. The aim is to protect the "socioeconomic order", preventing illicit money from contaminating or distorting, first the financial/economic dimension of society, followed by healthy competition and proper functioning of markets and resource allocation systems. Ultimately, the aim is to prevent that illicit money from corrupting the institutions and the proper functioning of the State. For all these reasons, the sanction of the preceding offense may not reach the totality of the behaviors that are displayed around the underlying behavior.

But the main discussion in the cases of "self-laundering" is the differentiation between the consummation or investigation of the preceding crime and the generation of a new criminal behavior, since a double punishment can lead to a grievance of the *"non bis in idem"* principle. The STS 884/2012 tells us that *"it is essential to operate with a restrictive criterion, in order not to identify, always*

and in any case, the investigation of the main crime with the commission of a new crime for the fact of acquiring, owning, using, converting or transmitting assets from this preceding criminal activity".

The crime includes four phases: planning, execution, consummation and investigation, so performing acts in any of these four phases does not allow an independent sanction of the crime at hand. The acts after the criminal act to ensure or realize the benefits intended with it, may not, under any circumstances, be subject to another criminal reproach, since they are already absorbed by the originating crime.

However, when the individual's behavior includes activities that go beyond the previous four phases, carrying out acts of concealment or coverup of the illicit origin of his/her own activities, there is indeed a coincidence of perpetrators in generation and laundering activities and, therefore, a real involvement causing both behaviors to generate independent criminal relevance, with legal assets of different nature affected.

With this more enforceable interpretation, due to the necessary concurrence of acts aimed at concealing or covering up property, abuses such as criminal penalty for money laundering are avoided by the mere use for ordinary expenses of the money corresponding to the defrauded tax.

In short, in this case, again the aforementioned "doctrine of the purpose of the act" serves perfectly to interpret when the perpetrator of a crime from which profits have been obtained, in turn, can be punished for laundering those same gains. In this way, if a scenario can be perceived in which acts to enjoy or "launder" that criminal origin can be clearly observed, we can perfectly invoke the existence of a "self-laundering" behavior, subject to our Criminal Code provisions.

In Spain, there was no pronouncement of Spanish courts on the possibility of considering the tax offense as a prior crime of money laundering until the Supreme Court Ruling 974/2012, of December 5, with the so-called White Whale case.

Both crimes, the tax offense and money laundering, protect differentiated legal assets. The crime of money laundering is a multi-offensive crime that threatens the socioeconomic order. For its part, the tax offense protects the Public Treasury, from its perspective of State interest, against attacks on the maintenance of public services and charges. Therefore, we are facing two crimes of different nature, with well-differentiated protected legal assets, so none of the behaviors encompasses the total illegality of the fact.

The historical origin of money laundering is in drug trafficking, always considering that the good being laundered is different from the good being trafficked. Well, the Judgment of the White Whale case tells us that *"it cannot be allowed that this logical differentiation between the object of drug trafficking and the object of money laundering be extrapolated to give impunity to money laundering from a previous crime with an asset-laundering aim".* The assets subject to laundering are the gains obtained in the preceding activity that constitute the proceeds of the preceding offense, and which can be assets of any nature.

In a tax offense, the typical behavior is tax avoidance, that is, non-payment of the tax that generates a tax obligation. The perpetrator does not incorporate a monetary amount into his equity, since it is already in it, but avoids its exit, generating the corresponding gain. **Thus, the object of laundering, regarding gain of the preceding offense, will be the gain of the tax offense, that is, the tax defrauded.** In no case will the proceeds or tax base that has motivated said tax be subject to money laundering.

Ultimately, the defrauded tax constitutes also a loss to the Public Treasury and a benefit to the tax evader, and, in addition, it represents an economic benefit derived from the crime that could be considered suitable for the crime of money laundering. Logically, the mere

possession (without more) of the defrauded tax amount cannot be considered a crime of money laundering. However, all those acts involving the defrauded tax amount that fall under the mentioned "doctrine of the purpose of the act" will be considered a crime of money laundering.

If this is so clear, where is the problem? Why are there so few decisions in the Spanish legal system condemning both behaviors? Well, as the Decision of the White Whale case tells us, *"the problem is not so much the origin or the criminal origin of the assets, but the difficulty of specifying them and individualizing them in the taxpayer's assets, since in principle the theory that all taxpayer assets are contaminated would not be admissible".*

Thus, once the defrauded tax is determined, the assets that comprise it will have to be differentiated, because if the tax quota cannot be individualized in an individual's equity, the determining the crime of laundering will be difficult, since there is no material object. Money laundering requires the materialization of a specific object or many assets equally established that come from a criminal activity, which is not easy when it comes to money, being a fungible good. Therefore, to specify that a tax offense can act as a precedent for a money laundering offense, an important investigation activity is necessary to identify the part of the assets of the tax evader's assets that comprise the tax.

Thus, sometimes, the typical action of laundering can fall on a part of the tax evader's equity that necessarily include all or part of the tax. On other occasions, there will be a crime of laundering if the entire tax base is transferred, because a part is contaminated, or an amount of money that necessarily includes a part of the tax amount.

In conclusion, it can be unquestionably said the tax offense can become a precedent crime of money laundering, in which case, the proceeds of money laundering will be the defrauded tax amount. The big problem we face to be able to convict for both crimes will be the individualization or recognition of that amount defrauded under the money laundering behavior.

2. OFFENSE OF MONEY LAUNDERING AS PRECEDENT OF TAX CRIME: TAXATION OF ILLEGAL INCOME

Through the commission of distinctive money laundering behaviors, profits can be obtained, differentiated from the primary object of the crime. A typical example would be as follows: a person who is engaged in money laundering activities can perfectly profit because of that activity; in this case, we should ask, must this gain obtained illegally be taxed, or if considered as originating from an illicit act, will it not be subject to tax scrutiny? If it is not taxed correctly, could a tax offense be committed? We are faced with the controversial dilemma that has come to be called as **taxation of illegal income.**

The doctrinal positions in this case have been (and remain) very different:

- There are authors who defend the total taxation of illegal income, based on principles of equality and contributory capacity. Whoever obtains a capital increase through the commission of an illicit act, places himself in a position of equal economic capacity to whoever who made such a profit legally. To further elaborate, for tax purposes a subject whose increases in equity come in all or part from a criminal activity cannot be of better condition than those who have obtained such profit lawfully.

- On the other hand, there are many authors who hold the opposite position: in no case should these taxes be taxed, since taxing such illegal income

would be tantamount to accepting, or in some way legitimizing, by law, the commission of the wrongful act.

- And as in these cases, we find intermediate positions. Thus, the profits obtained by the commission of a criminal offense must have a specific route of action, represented by the confiscation of the assets from such a gain. However, if the judicial bodies do not determine said confiscation, there would be no obstacle to upholding the taxation of said income.

This issue on the taxation of illegal income can be perfectly analyzed through case law evolution with three important Supreme Court Decisions, which can be considered as key: the 1996 Nécora Case, the 1998 Roldan Case and the 2001 Urralburu Case.

2.1 Decision of the Supreme Court 649/1996, Nécora Case

In the preceding sentence, some people were convicted of money laundering and also of tax crimes resulting from the non-taxation of the profits obtained from such activities.

In this decision, the Spanish Supreme Court ruled on the possible taxation, and therefore the commission of a tax offense, of the capital gains obtained by a third party that laundered the proceeds of drug trafficking activities committed by other people.

Although the Supreme Court in this case finally confirmed the acquittal for the crime of money laundering, however, it maintained the punishment for tax offense. In this Decision, pioneer in Spain in the configuration of the taxation of illegal income, the first lines to substantiate the above are delineated: Basically, two great arguments in favor of this thesis are outlined:

- The Spanish legal system does not contain any provision to the contrary. There is no rule prohibiting such taxation. Moreover, if not admitted, we would have the amazing effect mentioned above of improving the tax status of criminals vis-à-vis ordinary taxpayers.

- The income obtained, although it has an illegal origin, has been transformed into an income of his property, and is being used to finance himself, so it must be considered an income to be taxed.

2.2 Decision of the Supreme Court 75/1998, Roldán Case

The Roldán Case reached the Supreme Court after a conviction for the crimes of embezzlement, bribery, scam and tax offenses issued by the Provincial Court of Madrid.

The tax offense was based simply on the existence of unjustified increases in assets that had escaped taxation. As in the previous case, the Supreme Court accepted the possibility that income whose origin is not lawful, with certain qualifications, may be subject to taxation, and, consequently, breach of this tax obligation may lead to the commission of a tax offense.

In this case, the Supreme Court, largely following the legal argument presented in the Nécora Case, explained the basis on which its decision was made:

- The legal system cannot give a worse treatment to those who violate the norm than to those who comply legal provisions. Therefore, excluding these capital increases from the tax system would violate the principle of equality. In addition, it is a form of financing for the offender, so non-taxation would also violate the principles of justice and contributory capacity.

- As in the Nécora Case Decision, the Court again exposed the idea of taxation as there is no rule that exempts such taxation from illegal income.

- Taxation must fall exclusively on the benefit of the transaction, so the income obtained will be the taxable income, regardless of the criminal consequence of the activity it generated.

The Court also mentioned that, in these cases, tax fraud has a complex basis. The alleged tax offense may have a varied composition: lawful income, illegal income and the benefits generated by the investment of these illegal income (so-called indirectly illegal income). Their differentiation is not so easy in many cases.

2.3 Supreme Court Decision 20/2001, Urralburu Case

The so-called Urralburu Decision has finally laid the foundations of the taxation of illegal income in Spanish case law.

The case tried in the first instance presented great similarities with the Roldan Case. In fact, before the Supreme Court Decision for the Urralburu Case came out, a result very similar to the previous one was expected.

However, here the Supreme Court understood that there was no place for criminal association between the tax offense and the other offenses prosecuted there, but there was only an association of rules (with the effect that the penalty for the preceding offense subsumes that for the tax offense). The main idea underlying this decision is that if there is a conviction for a crime that involves the confiscation of the assets or the incomes obtained illegally, it will not be necessary to impose a conviction for the commission of the tax offense derived from the non-taxation of such profits.

This decision clarifies very clearly the events that must occur to differentiate when we are before an association of norms versus before an association of crimes. Thus, in case of a previous occurrence of a criminal activity with a possible tax offense derived from the profits obtained from that criminal activity, the application of an association of norms (and not crimes) will proceed when, at the same time, the following variables occur:

- That the income subject to tax fraud derives directly, immediately and exclusively from the previous offense.

- That the initial crime, from which the capital increase is derived, is effectively convicted.

- That the sentence imposed on the crime that generates the illegal gain includes the confiscation of said gain or its return as civil liability.

When these three circumstances do not occur concurrently, it may be possible to speak of an association of crimes, and, consequently, the penalties for the preceding offenses and for the tax offense corresponding to the income from or derived from such prior crimes will be accumulated. Thus, in this case, income from a crime that has not been declared to the Public Treasury may result in the commission of a tax offense.

As we have seen, in many cases tax fraud is a combination derived from concealment of lawful income, illegal income and indirectly illegal income from the State Treasury.

In this case, case law only excludes the possibility of penalizing a tax offense, when the corresponding income comes directly or immediately from the source crime, and, in addition, the remaining elements mentioned above occur concurrently.

If we think in practical terms, the truth is that it is difficult for the occurrence of the necessary conditions to not penalize a tax offense, so, in a high number of crimes that generate income/assets, the most common thing will be to find scenarios in which the criminal association may be invoked with the tax offense.

3. TAX CRIME AND AT THE SAME TIME LAUNDERING OF CAPITALS OR OTHER ILLICIT ACTIONS

In modern economic crime it is increasingly common that the same structure or operations is used simultaneously for the consummation of several different criminal activities. Similarly, it is not all strange that, along with the above, fully lawful activities are performed. All these events significantly complicate the detection of what is happening and the subsequent investigation and implementation of actions to be taken on each illicit and lawful activities that have occurred.

Although case-based reasoning is very extensive, to shed light on what we want to express, we are going to expose some of the possibilities of criminal simultaneity (tax fraud and at the same time money laundering) that open up in typical organizations usually present in intra-community trade of merchandise, and whose purpose is to defraud VAT through its various modalities. These organizations are also referred to as "VAT Schemes".

We are talking about the well-known "VAT Carousels" and other similar structures. However, what is going to be exposed can perfectly arise from any other type of tax fraud with similar characteristics (high organization; international dimension; high number of roles and intervenors; high turnover in the movement of funds; etc.).

We will follow the ensuing descriptive scheme:

- General considerations on "VAT Schemes".
- Simultaneous use of a "VAT Scheme" for the consummation of a crime against the State Treasury and another offense of money laundering.

3.1 General considerations on "VAT Schemes"

It is convenient to remember or briefly highlight the characteristics that define, and the way in which these Schemes operate. To do this, we will briefly reflect on:

- how the "VAT Schemes" originated in intra-community trade;
- what characteristics their participants have and how they are organized;
- what type of banking operations they develop.

This reminder is essential, as we will see that these same characteristics and operations make these organizations equally suitable for simultaneously mobilizing or legitimizing funds from another criminal source or consummating other crimes at the same time.

In any case, it should be noted that the "VAT Schemes" have been modernized over time to become increasingly undetectable and immune to Tax Administrations. However, given that this falls outside of the purview to be addressed herein, here we are basically going to reflect on a "VAT Scheme" under a general pattern, or say "classic" pattern, which anyway inspires the rest of the modalities that have emerged and that, at the same time, also serve to reflect on the aim of this section.

Well, focusing on the Spanish case (similar to any EU country), from the full entry of Spain into the single European market, certain sectors, especially, at the beginning, the marketing of computer/electronic components, saw that a way to sell products at a lower price was to take advantage of the way in which the

so-called intra-community merchandise transactions (deliveries and acquisitions) are taxed[3].

In this regard, it should be noted that, in this type of sector, many times, one of the most relevant strategic variables to penetrate the market is precisely to achieve the lowest possible sales prices, so that the benefits obtained do not come from the commercial margin (which is quite small), but from the high turnover of the stocks.

Thus, between a supplier located in another EU Member State and the Spanish Distributor (Wholesaler/ Retailer), a series of companies used at the beginning to provoke and channel an artificial price drop was positioned. In this way, one of the modalities of fraud of VAT Schemes (known as "sale at losses") emerged. The way to achieve this artificial price drop is very simple: it is enough for the businessman who made the intra-community purchase to invoice that same merchandise to the next internal market businessman at a lower price than the cost, in addition to not paying to the Public Treasury the corresponding VAT. This is where the price advantage that benefits the Scheme takes place, not only because of the fact of "winning the market" but also because of not paying the VAT amounts passed to the next link in the chain.

We will later see that the "VAT Schemes" are also organized to consummate another typical and especially harmful form of VAT fraud (known as "Carousel").

In summary, the roles assumed by the different participants in the "VAT Schemes" are as follows:

- **Role of *"Trout"*** (in Anglo-Saxon terminology it is called *"missing trader"*): It is the role assumed by the businessman who made the intra-community purchase and sold that same merchandise in the internal market. In the "sale at a loss" modality, the *"Trout"* will invoice the next link by applying the aforementioned artificial price reduction mechanism.

- **Role of *"Front"*** (in Anglo-Saxon terminology is called *"buffer"*): It is the role assumed by those first businessmen who purchase the merchandise from the *"Trout"*. These companies do declare VAT, which on the other hand does not imply income, since the added value they invoice to the next level is very small. The *"Front"* companies that purchase the *"Trout"* merchandise, in turn, usually sell the merchandise to other companies, also *"Fronts"*, which also simply limit themselves to buying and selling the merchandise almost immediately and without added value. Their role in this scheme is to put distance between the *"Trout"* and the end *"Distributor"*. The more levels of *"Fronts"* there are, the more difficult it will be for the authorities to realize that everything really responds to the same tax fraud maneuver.

- **Role of *"Distributor"*:** Are those businessmen who either deliver the merchandise to the final customers; or, they sell that merchandise, within the scope of the EU itself (intra-community deliveries) or abroad (exports):

  - In the first case (sale to "Final Customers"), the merchandise is sold to them at a price significantly lower than its cost, thanks to the aforementioned price drop artificially obtained by the first businessman who purchased it (role of *"Trout"*). In this case, the "VAT Scheme" modality of "sale at a loss" occurred;

  - In the second case, the *"Distributor"* gets the refund of some VAT payments he has received through the chain of *"Trouts"* - *"Fronts"*, simply by faking intra-community deliveries or exports for that same merchandise. In the most obvious

3 For the businessman who makes the intra-community delivery, there is a "full" VAT exemption. The businessman who purchases that merchandise in the Member State of destination includes in his VAT self-assessments, an accrued fee and simultaneously a supported fee, so that for practical purposes the goods enter the Destination State without Tax.

cases, we are only facing a mere billing circuit and false transport of merchandise. This modality is what is usually referred to as "Carousel".

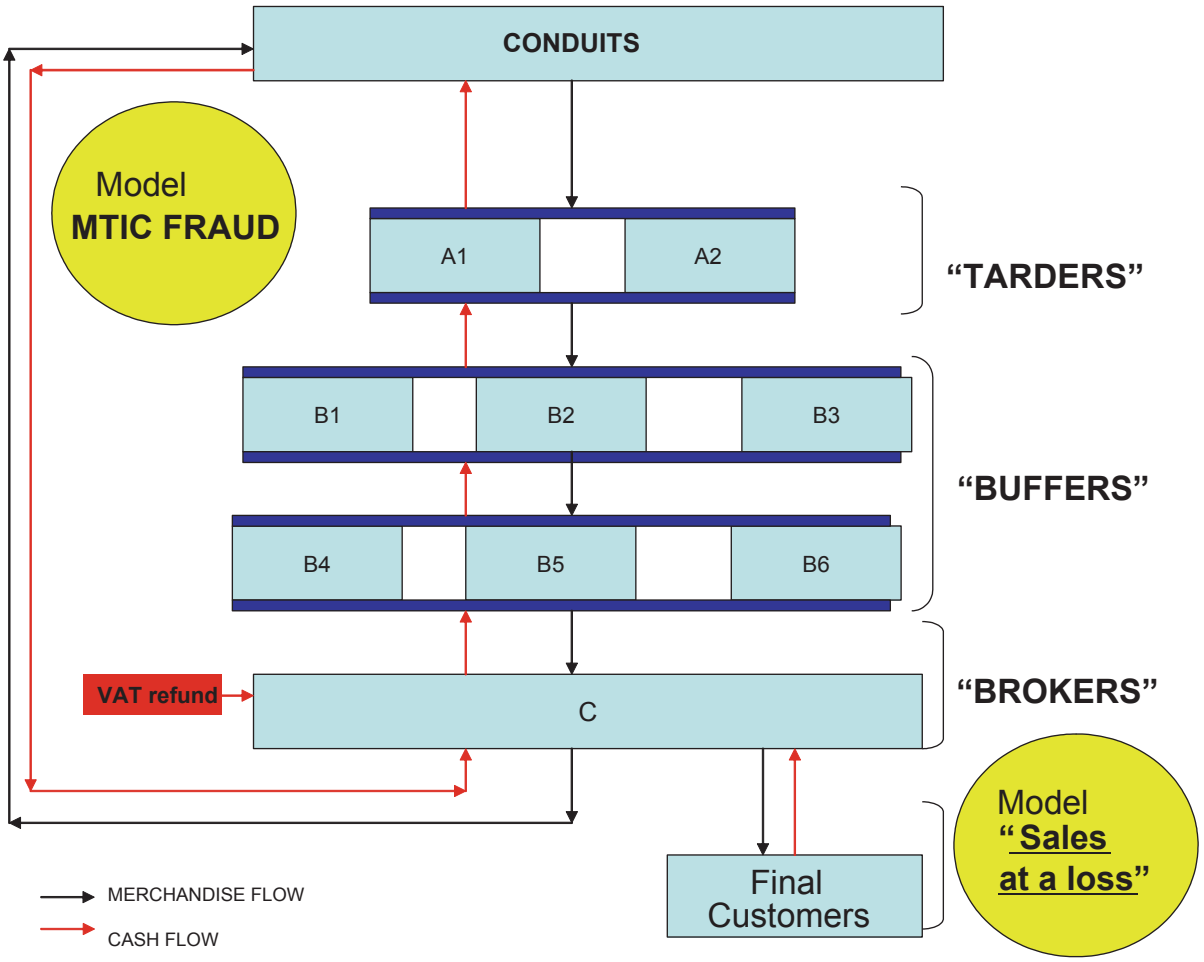
Both modalities ("sale at a loss" and "Carousel") in the end are very similar, because, in short, they take advantage of the existence of VAT payments that really, and seeing the scheme as a whole, have never been paid to the State Treasury, precisely because of the members of the Schemes that started their sale in Spain (the "Trouts") and who previously purchased it from other Member States.

The fraud committed by the "VAT Schemes" in those early years was a scourge that quickly spread to the entire sector, to the point, that, soon after, it was not surprising that a distributor who purchased the merchandise directly abroad and behaved honestly would immediately go out of the market, because he could not offer the products at a price as advantageous as that of other competitors who did use these organized fraud schemes. Logically, the success achieved in the IT/electronic components sector meant that the same "VAT Schemes" structures moved very quickly to other sectors; first to those similar sectors in which the "price" variable was decisive, but then to any other.

In this way, the use of this type of networks was extending considerably, while the VAT Schemes grew in specialization and level of complexity.

As a result of the above, a typical and classic structure of the "VAT Scheme" to which we refer could be roughly represented as follows:

MTIC FRAUD (Missing Trader Intracomunity Fraud)



As *universal characteristics* of this type of scheme, the following can be mentioned:

- They are commonplace in the sector. Once these Schemes are used for a given merchandise, it spreads to the rest of the sector with great speed.
- Global and transnational problem.
- Complex organization and high specialization: considerable number of participants and distribution and assumption of various roles.
- Multitude of systems to implement *"firewalls"* for the detection and reconstruction of the schemes.
- If each participant is analyzed in isolation, most of those who mastermind the scheme (the *"Fronts"* and *"Distributors"*) do not raise attention excessively.
- Huge dynamism: great speed in the transfer of funds, disappearance of participants and emergence of others who occupy their role; etc.

After briefly explaining how tax fraud occurs in a typical "VAT Scheme", below, and for companies established in Spain, we describe the characteristics and mechanics or *"modus operandi"* that usually define and carry out each of the roles assumed by scheme members:

***I) Role of "TROUT":**

Features:

- They are usually companies that take the form of a limited liability company, with minimum share capital. They are also usually fairly new or recently-established companies.
- On occasion they are under the *"companies by catalog"* category, which are purchased from companies dedicated to this type of activity.
- They do not have any kind of business infrastructure. The business address they provide frequently corresponds to that of their individual agent, with addresses being mere *"mailing addresses"* (where multiple companies are located) or are even non-existent. In any case, the general trend is that every visit to such business addresses proves unsuccessful.
- They do not have workers. They do not present annual accounts.
- The administrators or proxies have a profile that is not in line with the functions they oversee: retirees, students, housewives, immigrants without qualifications, or even petty criminals. On several occasions they have submitted documentation that has subsequently been shown to be false.
- They have a very short life span. It is observed that in a few months they disappear to give rise to new companies that take their place. Sometimes the first-level *"Front"* companies vary their activity until they become *"Trout"* companies and subsequently disappear permanently.
- It is common for first-level *"Trout"* and *"Front"* networks to be controlled "de facto" by the same people. Those responsible for the *"Front"* companies sometimes act as liaisons with the creditors of the *"Trout"* companies.

Operative Scheme:

- Since they manage to open an account they begin to move funds with unusual speed and volume.
- Their banking operation is limited to receiving funds from Spanish companies (with the *"Front"* profile or less frequently from *"Distributor"*) to immediately (on the same day, or the next day) issue wire transfers to companies in other countries.

- Wire transfers abroad are made in a clearly separated way, so as not to exceed the thresholds established by the regulations to inform the authorities of these cash flows.

- They are very reluctant to provide the credit institution with information or documentation that justifies their operation.

- Sometimes they are presented to credit institutions by the people who control the *"Front"* companies that are going to be their clients.

- It is common that the *"Trout"* and *"Screen"* companies they equip, operate at the same time in the same banks and even branches. It is also frequent that these companies open accounts in these banks at the same time, which is indicative of an orchestrated way of acting. On other occasions, it is preferred that *"Trout"* and *"Screen"* companies operate from different credit institutions in order not to attract excessive attention to each of them.

- Sometimes the *"Trout"* companies *"at their own initiative"* decide to stop operating with a certain credit institution and change to another so that the huge volume of funds they manage does not attract excessive attention.

- Many companies abroad receiving funds sent by *"Trout"* companies can be observed. Sometimes, in the most classic forms of "VAT Schemes", these recipients of funds are recognized international distributors of the merchandise in question; other times, in the more sophisticated "VAT Schemes" (where "splittings" of *"Trouts"* occur to mislead and hinder the action of the authorities), they are foreign companies with a profile very similar to the national *"Trout"* companies. In more complex designs, it is also common for companies abroad to open accounts in countries other than their own.

- Until now, funds mobilization instruments that guarantee maximum speed and irrevocability of payment orders are preferred, even at the cost of paying higher commissions. For the rest, they are usually quite immune to the high fees charged by credit entities.

- When the credit institution decides to cancel positions, which is generally due to the lack of operational justification, they do not raise complaints.

- They usually have a very poor relationship with the bank. They are practically limited to managing an account and little else (they do not request loans, or other financial products).

- Banking operations are often carried out through different "remote banking" systems. Sometimes, when it is face-to-face, the account signatories are accompanied by people who give them instructions, or else it is clearly observed that they follow the instructions of others.

- If payment orders made through "remote banking" are "geolocated", it is common to observe highly suspicious elements; for example, that from the same terminal, banking operations of several different companies are being carried out at the same time and without apparent linkage to each other (e.g., from the same terminal, operations of several *"Front"* and *"Trout"* companies can be channeled at the same time, which have no connection in terms of partners/administrators/ proxies).

- As stated, *"Trout"* companies have a very short period of activity within a Scheme.

- There is a total absence of customary operating expenses in normal business activity: electricity bills, telephone, social security, taxes, etc.

- The points of contact with the banking entity (contacts that are very sporadic) lack management experience or knowledge in the sector in which they operate. Sometimes they are accompanied in visits by people (who do not identify themselves) who are the ones leading the conversations with the bank entity.

II) Role of "FRONT":

Features:

- They also tend to have a limited company format with minimum share capital. Unlike the *"Trout"* companies, they can last several months, or even years, in the sector.

- Although there are many *"Front"* companies (especially first-level) that do not generally have a business address, *"Front"* companies of subsequent levels may have some type of minimum business infrastructure. Sometimes companies with real commercial activity in that or other sectors are used. These companies may be used as "Front" companies, as they may confront difficulties or for other reasons, which allows them to confuse the authorities.

- Like the *"Trout"* companies, first-level *"Front"* companies do not have employees under their responsibility.

Operative Scheme:

- They tend to be less reluctant to provide explanations to credit institutions, the most reluctant being first-level *"Front"* companies. The rest of the *"Front"* companies even display collaboration in sending the documentation requested to the bank. Thus, they often provide the bank with a copy of the VAT returns they file (although, as stated, they practically do not make any payments to the State Treasury, since the added value they generate in the merchandise sold is very small).

- Regarding their operational profile, the characteristics of the *"Front"* companies are very similar to those of *"Trout"* companies: absence of regular expenses, expediency in receiving and sending funds, preference for remote banking systems, use of systems that guarantee maximum speed, etc. The main distinction is that, in this case, the funds that come in and come out basically have their origin or destination in companies in Spain.

- It is common that the owners/representatives of the *"Front"* companies are really those who are behind the companies that operate as *"Trout"* companies, although formally the latter externally employ frontmen.

- They receive funds from Spanish companies ("Front" or *"Distributor"* companies) to send them immediately, either to *"Trout"* companies, or to other *"Front"* companies from previous levels.

- In general, the difference between the amounts received and wired is very small; sometimes, one can observe that such difference is a fixed percentage.

- Especially in *"Front"* companies closest to the *"Distributor"*, one can observe that they operate simultaneously in several credit institutions, being able to perform a transaction in each of them, thus building a *"firewall"* to preclude any investigation of the entire scheme.

III) Role of "DISTRIBUTOR":

Features:

The role of *"Distributor"* in a "VAT Scheme" refers to both:

- consolidated companies, what they do is use the network both to sell below cost (mainly as wholesalers, but also as retailers), as well as to unduly obtain benefits from paid VATs (which have never been paid by the *"Trout"* company) when making intra-community deliveries or exports.

- those other companies where their only mission is to obtain a fraudulent compensation (even refund) of the VAT amounts paid through the Scheme (which, as we say, have never been paid for by the *"Trout"* companies); compensations/refunds that occur because of the sales by the Distributor of those same goods abroad. In this case, many times the goods do not exist or are waste, etc. It is also common to simulate the documentation that tries to show the export or intra-community delivery of the merchandise; on other occasions, these companies go as far as to hire real containers and means of transport, which are, of course, empty.

  To distinguish them, we will henceforth call the first *"own Distributor"* and the second *"improper Distributor".*

  The features of the *"Improper Distributor"* closely resemble those that are present in the *"Front"* company of the last levels.

  Regarding the *"own Distributor"*, they are large operators in the real sales sector, with several years of activity, who have facilities -- often important -- where there is a significant transfer of merchandise. They have workers and have normal characteristics of any important company.

  Another difference between an *"own Distributor"* and an *"improper Distributor"*, apart from the characteristics described above, is that the *"Improper Distributor"* often only records payment of funds from non-resident companies and their remittance to *"Front"* companies or *"own" Distributors*, while the *"own Distributor"* conducts a much more diversified banking movement, an obvious consequence of its real business activity.

  It goes without saying that while the number of *"own Distributors"* remains pretty much stable over time (although it depends on the type of merchandise, many times they are not more than a few dozen), there is a proliferation of *"improper Distributors"*.

Operative Scheme:

- The *"own Distributor"* has a high fidelity with the credit institution. Together with a typical "VAT Scheme" operation (expediency of collections and payments, etc.), payments of receipts, payrolls, taxes, etc. can be observed. Multiple banking products are contracted, and in short, a banking operation is carried out in accordance with its size and activity.

- Depending on the purpose of the VAT tax fraud that it pursues, either it receives funds from companies or individuals to which it sells ("sale at a loss" modality), or it receives funds from companies abroad (sometimes they coincide with those that have started the circuit ("Carousel" mode).

- It is also relatively common that part of the customers of the *"own Distributors"* are the *"improper Distributors"*.

- The *"Improper Distributor"* limited himself to maintaining a few accounts with the banking entity, in which it receives funds from abroad and wires them quickly to *"Front"* companies, or to *"Own Distributors"*.

- The most complex cases occur when at the end of the chain there is a company in the *"Distributor"* role with a consolidated background abroad. In such schemes, one can observe that a part of the "VAT Scheme" serves to consummate the "sale at a loss" modality and another to consummate the "Carousel" modality.

IV) Other aspects to highlight:

- It should be remembered that in the "VAT Schemes", the "Distributors" and *"Front"* companies always try to ensure that, both documentary and financially, there is similarity with the commercial activity allegedly carried out.

- In this way, and in isolation, most of the participants in a "VAT Scheme", without other additional inquiries, do not produce in principle aspects that call attention to the fact that their behavior is really illegal.

3.2 Simultaneous use of a "VAT Scheme" for the consummation of a crime against the State Treasury and money laundering offense

The "VAT Schemes" mobilize massive amounts of money. For example, in the early 2000s, it was not surprising that a single company in the role of *"Trout"* mobilized hundreds of thousands of euros in just a month or two.

As we say, the enormous volume of funds mobilized by the "VAT Schemes" joins the enormous speed of its transfer, the high number of members, and the continuous disappearance of companies with the emergence of others that assume the same role (especially in the levels next to the *"Trout"* company level).

If we add to this the fact that the tax fraud involving the "VAT Schemes" is based, precisely, in trying always that the financial flow always keeps a correspondence with the chain of purchases and sales that they try to present, we are facing a flow that, in itself, becomes a true legitimator of the flow of funds mobilized.

Along these lines, along with the other considerations set forth, it is very easy to understand how these schemes are extraordinarily suitable for mobilizing funds of criminal origin camouflaged between the huge volumes that are managed. In these cases, the part of the "Schemes" that channel these other funds of criminal origin will be consummating or participating, both in the commission of a tax fraud, and in the commission of a crime of money laundering.

Normally, there are some clues that warn about the aforementioned possible criminal coexistence, for example:

- Cash income of a certain volume in companies that occupy the role of *"Trout"* or *"Screen"* companies. This element is especially striking, because logically, this operational level is not at all consistent with a retail sale that could explain its origin... On other occasions the clue provided by the cash is more complicated (for example, in the case of cash handled by Retailers); however, it is not surprising that by their own rhythm or other aspects (for example, incoherent face value of the bills used) such indications can also suggest a money laundering scenario.

- Existence of beneficiaries of funds abroad located in countries in principle not consistent with the merchandise supplied, or with the mechanism of a typical "VAT Scheme".

- Companies that strive in a remarkable way to try to go under the radar of the authorities and banking entities, through behaviors that are above the typical standards existing in the "VAT Schemes" themselves.

- "Schemes" companies that out of the ordinary, and/or sporadically, use means of payment or financial operators far from what is usually typical of these schemes.

- "Scheme" companies that promptly receive funds from abroad from intervenors not related to the trade of the merchandise in question, and/or from high-risk jurisdictions.

- Etc.

As real as it may seem that a "VAT Scheme" takes place concurrently with the commission of a tax fraud and an act of money laundering as described above, case-based arguments can grow complicated to unspeakable levels. Let us simply present three small examples to show the wide range of possibilities of criminal simultaneity that open up:

a) let us think of a Scheme that uses cash of criminal origin to cover a false billing scheme. In this case, we would also be facing money laundering and at the same time a crime against the State Treasury, with the aggravating fact that it is the money from the other criminal activity (for example, drug trafficking, scams, corruption) which serves to prepare and cover up the tax fraud.

b) let us think of a "VAT Scheme" in the "Carousel" mode, in which one gets a VAT refund. If other participants appear to mobilize this money illegally obtained to conceal it and finally enjoy it without attracting attention, we could face money laundering from a tax offense.

c) finally, let's imagine a "VAT Scheme" in the "Carousel" mode, in which the illegally obtained VAT refund will be used to finance terrorist activities; in this case, we would be facing a tax fraud, a probable money laundering, and a financing of terrorist activities.

4. LAUNDERING OF CAPITALS COMMITTED BY PEOPLE WHO ARE ENGAGED IN TAX FRAUD

In the previous sections, several possible "schemes" of tax crime and money laundering have been exposed.

Now we are going to briefly expose another possibility, which largely shows how at present the tax crime and the crime of money laundering can, and usually, coexist in the same scenario.

Fortunately, in this case there is a recent and very interesting Spanish Supreme Court Decision that will serve as a guide for what we are trying to show. We are talking about STS 444/2018, dated October 9, 2018, which, coincidentally, comes from a case investigated by the *Customs Surveillance Service* of the State Agency for Tax Administration (hereinafter also AEAT), and that confirms a previous ruling issued by the Provincial Court of Murcia.

It is a very curious sentence. Although it is not easy, we will try to summarize its content below:

- A person (hereinafter Mr. A) has worked for years to provide tax evaders with a whole structure designed to provide them with false invoices (with which they reduce, fraudulently, their Corporation Tax fees and also deduct some VAT fees that, logically, have never been paid to the State Treasury). To further elaborate, some of these businessmen and Mr. A himself have been convicted of prior crimes against the State Treasury.

- As a result of these activities, Mr. A over the years has amassed a considerable number of assets, through various maneuvers and with the help of other people, enabling him to distance himself from the assets' criminal origin, and Mr. A has enjoyed those proceeds without raising suspicion.

- The origin of these assets can only be derived from such illegal activities. Furthermore, there have been no licit activities on the part of Mr. A to explain the origin of those assets.

- Mr. A and the people who participated in the legitimization of that equity, are condemned as perpetrators of a crime of money laundering. In this case, the assets laundered come from the profits that Mr. A obtained by helping and providing coverage to other tax evaders.

5. INSTITUTIONAL FRAMEWORK FOR THE FIGHT AGAINST LAUNDERING OF CAPITALS AND TAX FRAUD. SPANISH COLLABORATION MODEL

In Spain, the entity responsible for ensuring the correct application of the state and customs tax system is the State Tax Administration Agency (AEAT), integrated into the Ministry of Finance and Public Function. This is provided for in article 106 of Law 31/1990, its founding norm.

However, given the successive changes in the socioeconomic order and the need that states have to fight against those behaviors that seek to undermine it, the AEAT has been adapting its role, and getting involved in the fight and prevention of money laundering, but without never losing the perspective of their legal competence, that is, contributing a tax point of view. Thus, it performs both active tasks of prevention and repression of this type of behavior, as well as participation tasks within the main Spanish control institutions.

In Spain, the prevention of money laundering is governed by two fundamental rules:

- Law 10/2010, of April 28, on the prevention of money laundering and the financing of terrorism.

- Royal Decree 304/2014, of May 5, which approves the Regulation of Law 10/2010, of April 28, on the prevention of money laundering and the financing of terrorism.

In the area of repression, as explained at the beginning of this article, the crime of money laundering is established in articles 301 to 304, both inclusive, of the Criminal Code (Basic Law 10/1995, of November 23).

The AEAT collaborates in the activity of prevention and repression of money laundering in various areas or fields of action:

- Participation in institutions for the prevention of money laundering.

- Collaboration through information exchange.

- Actions to repress money laundering.

5.1 Participation in institutions for the prevention of money laundering

A) Commission for the Prevention of Money Laundering of Monetary Offenses.

The Law 10/2010 aims to protect the integrity of the financial system and other sectors of economic activity by establishing obligations to prevent money laundering and terrorist financing.

Chapter VII of this standard contains the provisions regarding the institutional organization of the prevention of money laundering.

Thus, the highest body that integrates the measures of prevention of money laundering and terrorist financing is the **Commission for the Prevention of Money Laundering and Monetary Offenses**, to is responsible, among other functions, for directing and promoting prevention activities of the use of the financial system or

other sectors of economic activity for money laundering or terrorist financing, as well as the prevention of administrative violations of the regulations on economic transactions abroad.

The Commission for the Prevention of Money Laundering and Monetary Offenses falls under the Ministry of Economy, under the Ministry of Economy, and is chaired by the Secretary of State for the Economy. Regarding its composition, it is represented by the Public Prosecutor, the Ministries and institutions with competences in tax-related matters, the supervisory bodies of the financial entities, as well as the Autonomous Communities with powers for the protection of persons and property and for the maintenance of citizen security.

Specifically, **on behalf of the AEAT, two General Directors participate in the Plenary of the Commission for the Prevention of Money Laundering and Monetary Offenses:**

- The Director of the Department of Customs and Special Taxes of the State Tax Administration Agency (AEAT).

- The Director of the Department of Financial and Tax Inspection of the State Tax Administration Agency (AEAT).

B) Support bodies for the Commission for the Prevention of Money Laundering and Monetary Offenses.

Standing Committee

The **Standing Committee of the Commission**, among other functions, guides the performance of the Executive Service of the Commission (SEPBLAC), approves its organizational structure and operating guidelines, and approves the annual Inspection Plan of the taxpayers. It is chaired by the Secretary General of the Treasury and Financial Policy under the Ministry of Economy.

This body includes representatives from the Bank of Spain, the National Securities Market Commission, the State Security Forces and Corps, the Anti-Drug Prosecutor's Office, and the Spanish Tax Administration:

- A representative of the Customs and Excise Department of the State Administration Agency (AEAT).

- A representative of the Department of Financial and Tax Inspection of the State Tax Administration Agency (AEAT).

Financial Intelligence Committee

The Financial Intelligence Committee was established with the main responsibility of promoting the financial analysis and intelligence activity of the Executive Service of the Commission and will be responsible for the analysis of national risk in the area of money laundering and the financing of terrorism.

As in the previous case, this body includes representatives from the Bank of Spain, the National Commission of the Stock Market, the State Security Forces and Corps, the Anti-Drug Prosecutor's Office, the Special Prosecutor's Office Against Corruption and Organized Crime and the National Intelligence Center, and the Spanish Tax Administration:

- A representative of the Customs and Excise Department of the State Tax Administration Agency (AEAT).

- A representative of the Department of Financial and Tax Inspection of the State Tax Administration Agency (AEAT).

This Committee also has an operational analysis and support body called the *Financial Intelligence Operating Group* (GOIF) in which two officials from the above AEAT Departments also participate.

Executive Service of the Commission (SEPBLAC)

The Executive Service of the Commission (hereinafter also SEPBLAC) is the Spanish Financial Intelligence Unit, being unique throughout the national territory.

The Executive Service of the Commission is also the supervisory authority on the prevention of money laundering and the financing of terrorism and the execution of the financial sanctions and countermeasures referred to in Law 10/2010, on the prevention of money laundering and terrorist financing.

By the provisions outlined in the regulations for the prevention of money laundering and the financing of terrorism, and in order to collaborate in the development of the financial analysis and intelligence functions attributed to said Service, the following units are attached to SEPBLAC:

- The Central Financial Intelligence Brigade of the National Police Corps.
- The Civil Guard Investigation Unit.
- A Unit of the State Tax Administration Agency (AEAT).

All these attached units, although they have a basic dependence on their respective Ministries, are under the total *functional dependence* of the Director of the SEPBLAC regarding the work performed there.

5.2 Collaboration through the exchange of information

The AEAT and the SEPBLAC have established an effective mechanism for exchanging information protected by the regulations that govern both organizations.

Article 94.4 of the General Tax Law determines the obligation of the SEPBLAC to inform the AEAT of all those matters that it learns with possible tax significance:

> ***Article 94.4 of the General Tax Law***
>
> *4. The Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offenses and the Commission for the Surveillance of Terrorist Financing Activities, as well as the Secretariat of both commissions, will provide the Tax Administration with any data with tax significance obtained in the exercise of its functions, ex officio, in general or by individualized requirement in the terms established by regulation.*

Under Law 10/2010, the information and documentation available to the Executive Service of the Commission and the financial intelligence reports that are transferred to the AEAT will be confidential, and every authority or official having access to its content shall have to keep it confidential. These financial intelligence reports will not have probative value and cannot be incorporated directly into administrative proceedings.

On the other hand, articles 48 and 49.2 of Law 10/2010, of April 28, on the Prevention of Money Laundering and the Financing of Terrorism impose the obligation of the AEAT to communicate to the SEPBLAC those issues suspected of money laundering that it learns in the exercise of their functions.

5.3 Actions to repress money laundering

Article 103. One.6 of Law 31/1990 establishes, in general, for the AEAT a singular duty of collaboration with the judicial bodies and with the Public Prosecutor in the prosecution of crimes within its own powers:

Article 103. One.6 of Law 31/1990

"…it is the responsibility of the State Tax Administration Agency to assist Courts and Tribunals and the Public Prosecutor in the investigation, prosecution and repression of public crimes within the powers attributed to it by the legal system. To this end, within the framework of the corresponding collaboration agreements, the State Tax Administration Agency shall establish human and material means for the exercise of said supporting function".

Therefore, the AEAT will collaborate, assisting judges, courts and prosecutors, in the investigation, prosecution and repression of crimes, within the limits of their functional competence, that is, tax-related and smuggling crimes.

However, since they are crimes that may entail a preceding offense of possibly money laundering, their collaboration also extends to the latter type of crime. In conclusion, the AEAT collaborates with the judicial process in the prosecution of money laundering crimes, but if the preceding offense is a tax-related or smuggling crime.

There is a peculiarity to highlight in relation to the *Customs Surveillance Service* (body under the Customs Department of the AEAT). In effect, the *Customs Surveillance Service* is entrusted by law with the investigation and prosecution of smuggling, of the underground economy, and of crimes related to the preceding criminal manifestations, including the crime of money laundering with these origins. In the exercise of these activities, the *Customs Surveillance Service* has the status of Judicial Police.

6. CONCLUSIONS

Tax crime is a criminal activity that undoubtedly generates illicit profits. Like such illicit gains, their beneficiaries will try to enjoy them by concealing them or disguising their criminal origin; to that end, they will have to carry out actions that directly fall under the criminal classification of the crime of money laundering.

This being very clear, the truth is that although neither legally nor technically there are reasons that make the tax offense a "preferred" crime than the rest to be classified as underlying in a money laundering process, this possibility has been -- and continues to be -- broadly much discussed by a part of the doctrine. Fortunately, the normative approaches of an international nature, together with the correct functioning of the different organizations involved in the matter (Financial Intelligence Units, Judicial Branch, Tax Administration, etc.) are increasingly clearing the doubts that have existed on this issue.

But it is not that only the tax offense can be underlying a money laundering crime, but the relationships that can occur between one crime and the other are of a wide range, as in fact, few doubts would exist if we were talking about other crimes generating illicit profits. The latter would include tax-related crimes, drug trafficking, scams, corruption-related offenses, etc.

This standardized vision of the broad connection that tax crime and money laundering can have on each other also contributes to recognizing the severe damage that each one causes to the States in the area where they occur, and to encourage the different institutions to deepen collaboration and take this reality into account in their policies and actions.

Analysis tools for the

FIGHT AGAINST CORRUPTION

Laura María
García Carrizosa

SYNOPSIS

This document outlines the main causes, effects and impact of corruption in the tax administration, as well as different strategies aimed at combating it using technology, information analysis and big data. Similarly, this article describes a statistical analysis that was carried out, which allows identifying the main variables that affect the perception of corruption in Latin American countries, finding that higher GDP per capita values, more access to public information, higher health spending and lower levels of violence, are determining factors for citizens to perceive lower corruption levels in the country.

CONTENT

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INTRODUCTION

Corruption is a concern worldwide, due to the increasing number of cases that have occurred in recent years. This evil brings with it various consequences that negatively affect the economic, political, social and cultural environment of a country. Corruption weakens the ability of a government to collect tax revenues, hinders the efficient allocation of public spending, impairs growth and economic stability, discourages investment, generates distrust in public institutions, and produces production losses due to poor allocation of resources, among many other factors. According to De Michele (2018), 2% of world GDP is lost in the payment of bribes and investments are reduced by 5%. Likewise, it is estimated that an improvement in corruption indicators could increase per capita income by approximately US$3,000 in Latin America.

According to Pellicer (2018), the cost of corruption in the European Union totals nearly 900,000 million euros, a figure with which basic education could be provided in 46 countries, help eliminate malaria, expand health in countries with low income, reduce hunger problems in the poorest nations, among many other critical difficulties facing the population today.

Specifically, public corruption, understood as the use of public office to obtain private benefits, is one of the great problems of today's society. This type of action implies a high economic cost, which directly subtracts resources from the public sector[1].

The tax administration has the mission of ensuring tax revenue collection by taxpayers, so its management is key to avoid putting the government's objectives and plans at risk. In this way, corruption in the tax administration has implications of great magnitude, since these types of practices generate serious lack of credibility in the institution and governance problems.

Hence the interest in addressing the issue of corruption in the tax administration, focusing on how modern technologies and big data can help combat this phenomenon and what are the variables, at the country level, that have some influence on the explanation of the perception of corruption.

According to IBM figures, in one day more than 2.5 trillion bytes of information is generated in the world and 90% of the existing data has been produced in the last two years. This boom in the volume of information creates important challenges for organizations, who must be able to transform that data into valuable and useful knowledge, for proper decision making.

As stated by Tomar, Guicheney, Kyarisiima, & Zimani (2016), in recent times, many innovations have been made towards the expansion of technological capacity to generate, store and analyze data from various sources and with a multitude of purposes. Success focuses on managing information in a reliable and real-time manner, in a way that generates added value to entities. It is at this point that the use of big data and its contribution to the fight against corruption becomes relevant, since it is through the study of trends, correlations and statistics that it is possible to prevent or detect suspicious or illegal activities.

Specifically, the tax data that are currently being used are characterized by greater availability, quantity and immediacy. Therefore, the challenges faced by the tax administration are focused on more automation, efficiency and detection of irregularities, using advanced data analysis systems, which allow to select taxpayer samples, create tax risk profiles, carry out checks more quickly and accurately, among other things.

Even when an important effort has been made to incorporate big data in the management of organizations in the public sector, there is still a long way to go to reduce

1 For example, the European Union estimates that around 120 billion euros are lost per year, that is, 1% of GDP.

fraud and corruption scenarios and capitalize on new technological opportunities in significant contributions for the operation of the entities. (Cadillon, 2015).

In addition to showing the relevance of analyzing large volumes of information to close spaces of fraud and corruption in tax administrations, a statistical analysis is carried out in this document, which specifies the factors that have an impact so that citizens and institutions internationals perceive elevated levels of corruption in Latin American countries. On this point, we found that greater GDP per capita, more access to public information (transparency), greater investment in health and lower levels of violence in the country, significantly affect perception so that corruption is lower.

This article is structured as follows: the definition of corruption in the tax administration, its causes, effects and the importance of addressing this issue will be presented in the first part. In the second section, we will explain how big data contributes to the detection and/or prevention of acts of corruption in the tax administration. Subsequently, a statistical analysis will be carried out, to recognize the variables that affect the perception of corruption in Latin American countries. Finally, the conclusions and recommendations derived from the investigation will be presented.

1. CORRUPTION IN THE TAX ADMINISTRATION

In general terms, corruption can be defined as a practice that intentionally abuses the power, functions or means to obtain an economic or other benefit, that is to achieve an illegitimate advantage with the objective of obtaining personal benefit or aiding a group of related people.

The type of corruption this document will focus on is known as administrative corruption in the public sector, understood as an action contrary to legal regulations and ethics established in State agencies, in which the official, in the exercise of his functions, commits actions contrary to the law for personal or third-party interests. Deception, bribery, influence peddling and embezzlement[2] are the most common forms of corruption in the exercise of public office. In this sense, it is evident that corruption occurs when one abuses public office for private benefit, without thinking about collective well-being.

In this way, it can be said that corruption is a moral problem, caused by the absence of values, lack of social awareness and culture of commitment, as well as the low level of education and ethical training. Similarly, other causes for emergence of corruption cases are the lack of control entities or their ineffectiveness, impunity and low citizen participation, so that the public sector can become more vulnerable to this type of behaviors than the private sector.

As Martínez & Ramírez (2010) put it in their article on corruption in the public administration, this is a problem of motives and opportunities; the reasons associated, for example, with low salaries and lack of incentives and opportunities, due to excessive discretionary power, lack of controls and ambiguity in the information. Therefore, technological development is key to achieving environments interconnected with citizens, in which people have knowledge about the decisions and actions of the entities, seeking constant monitoring to promote the transparency of the State.

Because of the above, it can be said that corruption is an economic, administrative, management, legal and cultural problem. It is an economic problem because of the low salaries that are generally paid to public employees and, therefore, are an incentive to corrupt practices. It is an administrative problem because of the difficulties in the processes that prevent

2 Embezzlement occurs when a public official illegally seizes money or State property.

a fluid relationship between the State and the citizen or taxpayer, which promotes the presence of illegal alternative mechanisms to overcome these obstacles. It is a management problem because there are inefficient systems, lack of controls or low supervision to prevent undue actions. It is a legal problem due to the lack of laws or weak legislation, which does not allow illegal behaviors to be sanctioned properly. Discretion in tax and customs matters encourages corruption. Finally, it is a cultural problem, because a vision that shows the possibility of using public office for private gain has been encouraged.

For this reason, it is essential that the issue of corruption be addressed from a preventive approach, through controls and information monitoring; as well as a corrective approach, based on complaints, material resources and professional experience.

It is important to mention that corruption in a tax administration can occur from two areas: first, corruption related as part of the operation of the entity in which the officials are directly involved and secondly, corruption in which taxpayers are specifically involved and mainly reflected in evasion activities, whether with the complicity or not of public servants.

According to Rains & Febres (1998), there are several factors that motivate acts of corruption. In countries that have low salary levels and high unemployment rates, taxpayers will lack incentives to comply with the payment of taxes and, on the contrary, will try to reduce their obligations; while in the case of tax administration officials, they will be interested in obtaining additional income. The lack of training and education in strengthening ethical and moral values also leads to an increase in the likelihood of corruption. Likewise, the technological factor is decisive in the context of a tax administration, since a high number of manual procedures increases the opportunities for acts of corruption to occur; that is, weaknesses in computer processes, low automation of processes and failures in information systems to carry out collection activities (for example, the management of current accounts - financial obligation, control, collection and portfolio, among others), induce the emergence of room for fraud and corruption to occur. The above, coupled with the lack of information security and deliberate access to applications and sensitive data, also generates a possibility of incurring this type of undue behavior.

Another important aspect to consider involves the fact that distrust of the efficiency and transparency of the tax administration encourages corruption, both of civil servants and of citizens in general. If taxpayers have a corrupt view of public servants, they will be less willing to comply with their tax obligations; while a tax administration that offers ethics and transparency, will achieve voluntary compliance by taxpayers.

Therefore, if taxpayers observe that the people employed by the tax administration are honest and judicious, the voluntary system becomes efficient. In accordance with the statements made by Lozano & Tamayo (2016) in the document “Ethics management in the Colombian tax administration”, a study was carried out with a panel of experts[3] on the main causes of tax evasion in Colombia, in which 40 % said that corruption is the first reason, followed by the low risk of being perceived when evading, then the economic benefit itself and finally, the lack of education and weaknesses in the laws. The foregoing confirms the hypothesis that acts of corruption of public servants deteriorate the trust of the taxpayers and, therefore, negatively affect the expected collection of taxes.

3 The panel included five former directors of DIAN, private firm consultants, among others.

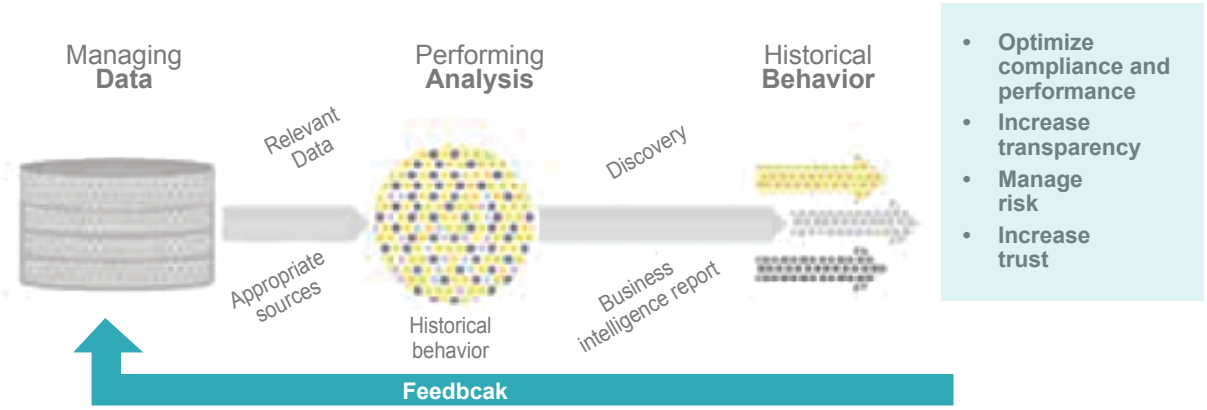
2. USE OF BIG DATA TO FIGHT CORRUPTION

As outlined in the previous section, corruption is a problem that undermines various aspects of society and, therefore, it is crucial to find a way to combat it or to define mechanisms to reduce it.

The proliferation of modern technologies, the intensive use of the internet and the creation of new devices and applications have led to an exponential growth in the volume of information handled. This generates an economic and social revolution that provides a lot of expectations and challenges, as it serves as a mechanism to face the difficulties of today's world, one of them, for example, the fight against corruption.

At present, different companies and organizations have been introducing big data into their strategy, but what does this phenomenon mean? In the first place, big data is characterized by databases of large volume of information, numerous sources and formats, and the speed at which they are produced. In this way, administering the large databases and carrying out an exhaustive and efficient analysis of the information extracted, becomes a challenge for the entities, in such a way that it impacts on a correct decision making for the benefit of the interested parties.

Graph 1. Process of data analysis



Source: Gutiérrez (2015). Obtained from https://docplayer.es/3497291-Panel-mineria-de-datos-para-la-administracion-tributaria.html

The wide variety of data sources currently available allows the integration of diverse easily accessible information such as surveys, public records, research and unstructured information (social networks, news, opinions), to carry out a complete and enriching analysis of the topic being worked on.

Specifically, in the case of tax administrations and their fight against corruption, they have begun to create strategies that use advanced data analysis techniques, design algorithms that process data to identify patterns and predict behaviors, develop technological applications that handle analytical systems against corruption, among other actions that seek to mitigate this evil that overwhelms today's society.

Next, a series of practical cases will be presented in which big data has been applied to generate mechanisms against corruption, both at the level of officials and taxpayers; this with the objective of having an overview of the scope, advantages and improvements that can be derived with the use of this technique of massive data analysis.

The Inter-American Center of Tax Administrations-CIAT (2003) described a model implemented in Cuba that seeks greater interaction with the taxpayer, including the compilation, statistics and summary of the main concerns expressed by citizens, as well as the process of processing, the deadlines for the response and the personnel responsible for it. The expectation of this initiative was that through this data it would be possible to detect vulnerabilities in administrative practices and reduce opportunities for corruption.

According to Delgado, Sánchez, & López (2018), in Spain an important effort has been made in electronic administration, process automation and the adequate reflection of all actions in computer systems, as well as a trend analysis and traceability of information, to reduce cases of corruption in the tax administration. Additionally, an effort is being made to apply the risk analysis system on the large volume of information provided by mandatory electronic invoicing, for the detection of unusual or suspicious transactions and transfers.

Another approach that is being studied in Spain, deals with the contribution of data analysis to classify fraudster profiles and the use of social media to know how the relationships are with each other. Likewise, data scientists are characterizing taxpayers according to numerous variables linked to the information recorded in tax returns, relationships between people and/or companies and the study of social media.

As detailed in the article How Does Big Data help reduce corruption in companies? (2016), the government institutions of Peru are focused on conducting audits quickly and optimized, having the ability to cross-check various sources of information against millions of records. Similarly, work is being done to cross-check multiple databases to understand the behavior of taxpayers, who may be incurring tax evasion, in addition to detecting anomalies and inconsistencies in the information.

As stated by Santiso & Roseth (2017), today there are several cell phone applications that seek to make public information more accessible to citizens and serve as an instrument to expose and denounce acts of corruption. Specifically, in India, the application “I paid a bribe” was launched (I paid a bribe), through which citizens report bribes and frauds that have occurred in the proceedings with public officials. In Brazil there is an observatory of public spending, which uses analytical systems to reveal fraud, for example, of people who were benefiting from a social program without complying with the requirements to access such program.

For González (2018), the new instrument for fraud control consists of the risk analysis of the social media of taxpayers. Tax administrations around the world are developing technologies that manage to locate companies that are highly related to each other and little to the outside, trying to identify doubtful behaviors, either because these companies have something to hide or because their business does not exist.

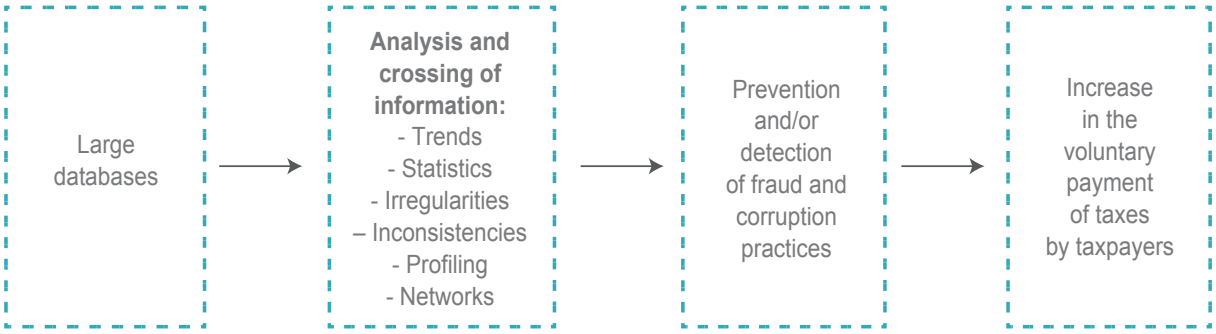
In the United States there is an entity called Treasury Inspector General for Tax Administration-TIGTA, which is responsible for auditing, investigating, inspecting and evaluating the national tax administration system of that country. The Office of Investigations of TIGTA has focused its attention on cybersecurity and through

the analysis of large volumes of information and data crossing, it was possible to find, for example, a case in which a group of people had unauthorized access to the information registered in the tax administration applications and used stolen identities to file more than 2900 false tax returns, seeking around $25 million in fraudulent returns (TIGTA, 2018).

The Agency of the Inspector General of Taxes, Income and Parafiscal Contributions-ITRC is the entity in Colombia in charge of investigating and sanctioning behaviors for very serious disciplinary offenses, as well as auditing the operational, technological and administrative processes of the main tax administrations of the country. In the last year, the institution has centered part of its attention on the analysis of large transactional bases, both tax and customs databases (refunds, portfolio, merchandise nationalization, inspection, among others), to identify the procedures that they are more susceptible to fraud and corruption and, therefore, should be subject to inspection. This would provide recommendations associated with promoting best practices in the nation's tax collection.

The examples mentioned above are a small sample of all the application cases that are currently being developed around the world, in which massive databases are analyzed to fight corruption in tax administrations. The idea is that these successful experiences are taken as guides or references and adapt to the specific situation facing each country. Clearly, there is still a long way to go and the challenges faced by tax administrations are very great, as it is necessary to get the most out of this current phenomenon such as the technological revolution and big data.

Graph 2. Relationship of massive data analysis and corruption in the tax administration



Source: Own preparation

Graph 2 details how through the analysis of large volumes of information and the implementation of big data, it is possible to identify acts of corruption that are taking place within the tax administration, in such a way that these spaces are reduced and transparency is fostered, which has a direct impact on the good image of the institution and therefore, the taxpayer's interest in making the timely payment of their obligations.

3. ANALYSIS OF THE PERCEPTION OF CORRUPTION IN LATIN AMERICA

Continuing with the development of the investigation, we decided to carry out a very general study that would allow us to determine if there is any relationship between the levels of perception of corruption in 20 Latin American countries and other economic variables such as: GDP per capita, investment in health, unemployment rate, level of transparency, investment in education and level of violence.

The data refer to the year 2015[4] for the following countries: Colombia, Mexico, Dominican Republic, El Salvador, Costa Rica, Chile, Peru, Uruguay, Bolivia, Honduras, Venezuela, Paraguay, Ecuador, Brazil, Nicaragua, Guatemala, Argentina, Panama, Haiti and Cuba.

For this study, a sample of 20 observations with 7 variables was obtained. Next, a brief explanation of each of the variables considered in the analysis, its measurement and the source of information will be made.

- **Corruption perception index-CPI:**

The CPI refers to the perception of corruption in the public sector in 168 countries around the world. Its score ranges from 0 to 100, where the minimum indicates a perception of important levels of corruption and 100 a perception of low levels of corruption.

This index was created in 1995 and in 2012 the last update of the measurement methodology was carried out, which includes four steps: select the data source, adjust the scale of the data sources, combine the data sources and, finally, determine a measure of uncertainty. For example, the following data sources were used to prepare the CPI for 2015: 1. 2014 Governance Ratings of the African Development Bank. 2. Indicators on Sustainable Governance for 2015 from the Bertelsmann Foundation. 3. 2016 Transformation Index of Bertelsmann Foundation. 4. 2014 Country Risk Ratings of the Economist Intelligence Unit. 5. 2015 Transition Nations of Freedom House. 6. 2014 Global Insight Country Risk Ratings. 7. IMD World Competitiveness Yearbook for 2015. 8. Political and Economic Risk Consultancy Asian Intelligence for 2015. 9. International Guide on 2014 Country Risk of Political Risk Services. 10. 2014 Institutional and National Policy Evaluation of the World Bank. 11. 2015 Executive Opinion Survey (EOE) of the World Economic Forum. 12. 2015 Rule of Law Index of World Justice Project.

It is important to mention that the measurement of corruption does not come from proven evidence of corrupt activities, but from perceptions of international institutions and expert opinion.

4 The year 2015 was taken as the study period, since it was the one that contained the information of all the variables to be analyzed.

The data is provided by the Transparency International - The Global Anti-Corruption Coalition organization.

- **GDP per capita:**

It is an economic indicator that relates the level of income or revenue of a country and its population. In this way, gross domestic product (GDP) can be obtained by dividing the total value of goods produced and services provided in a country by the number of inhabitants. It is commonly used to measure the wealth, welfare or economic stability of a nation, as well as to make comparisons and differences in terms of economic conditions between countries. The GDP is expressed in nominal terms, that is, the current prices of the goods and services produced in a specific period are used.

The data is provided by the World Bank and is measured in dollars at current prices.

- **Transparency (compliance with access to information):**

Católico, Suárez, & Velandia (2016) carried out a study whose purpose was to establish the degree of access to information published on the Internet in the tax administrations of Latin American countries, seeking to highlight the ability of each country to offer on-line access to information related to institutional characteristics, procedures, services, financial information, among others. This is relevant to exercise social control over the management carried out by the entities and, therefore, calculate the levels of transparency of each agency before society. The authors made the measurement by means of an instrument that qualified each country based on the following three categories: general information, procedures and services, and financial and management information. Once the scores for each aspect were obtained, the results were added and a score of 0% to 100% was obtained for each country, where the highest score reflects a high degree of compliance regarding access to information.

- **Health spending as % of GDP:**

Total health spending is measured as the sum of public and private health spending. Accordingly, the provision of health services (preventive and curative), family planning activities, nutrition and emergency assistance is considered. It is important to clarify that water supply and sanitary services are not considered.

The data is provided by the World Bank and is expressed in percentage terms.

- **Public spending on education as% of GDP:**

Public spending on education includes government spending on educational institutions (preschool, basic, middle and higher education), whether public or private, in the educational administration and in subsidies or transfers.

The data is provided by the World Bank and is expressed in percentage terms.

- **Unemployment rate:**

It is measured as the proportion of the working population that does not have work on the measurement date but is in search of it and therefore has the powers and availability to do it.

The data is provided by the World Bank and is expressed in percentage terms.

- **Global Peace Index:**

The global peace index is an indicator, prepared by the Institute for Economics and Peace, Center for Peace and Conflict Studies and other expert institutions, which measures the level of peace and absence of violence in a country. This considers 23 variables from each region related to violence, crime, military spending and the wars in which the country participates. Each of the variables are measured on a scale of 1 to 5. The higher the index, the higher levels of violence are evident in the region, while the countries considered more peaceful obtain a lower score. The data is provided by The Economist Intelligence Unit.

The summary of the main descriptive statistics for each of the previously described variables is detailed in the following table:

Table 1. Descriptive statistics of the variables under study

Statistics	Compliance access to information (%)	GDP per capita (US$ at current prices)	Health spending (% of GDP)	Public spending on education (% of GDP)	Unemployment Rate (%)	Global Peace Index	CPI
Average	49,02	7288,0	6,9	5,1	6,1	2,1	37,4
Standard Deviartion	19,4	4504,8	1,4	1,4	3,3	0,3	14,7
Minimum	12,50	814,50	3,16	3,00	2,50	1,56	17,00
Maximum	90	15524,8	9,22	7,29	14	2,72	74

Source: Own preparation.

Table 1 details that by 2015 the average corruption rate for Latin American countries is below 38 percentage points, that is, there is a perception of high corruption in the region. Compliance with access to public information is on average, the average health expenditure as a % of GDP is 7%, the average education expenditure as a % of GDP ranges around 5%, the average unemployment rate for Latin American countries is 6% and the average peace index is around 2.1.

According to the data, the countries with the lowest CPI (highest perception of corruption) are Venezuela and Haiti, and the highest CPI (lowest perception of corruption) is Uruguay. It also coincides that the lowest GDP per capita corresponds to Haiti and the highest to Uruguay.

Based on the information described, three different statistical analyzes were performed, as detailed below:

1. Correlation

In the first measure, a Pearson[5] correlation analysis was carried out between the CPI and each of the other variables, finding the following results:

5 Pearson's correlation coefficient is defined as a measure of the linear relationship that exists between two continuous variables. This measurement is not distorted by the scale of measurement of the variables. The coefficient is between -1 and 1, where the sign and the magnitude indicate the direction and strength of the relationship between the two variables. If the coefficient is 1, it is said that there is a perfect positive relationship, and if it is -1 perfect negative relationship.

Table 2. Correlation between the CPI and the rest of the variables

Correlations	
Variable	CPI
access_information	0,347***
GDP_per_capita	0,746*
spending_health	0,551**
spending_education	0,213
unemployment	-0,002
peace index	-0,581**

** The correlation is significant at the 0.01 level (bilateral)*
*** The correlation is significant at the 0.05 level (bilateral)*
**** The correlation is significant at the 0.15 level (bilateral)*

Source: Own preparation

The previous result reflects that there is a significant and directly proportional relationship between the CPI and the variables GDP per capita, transparency and health spending. That is, the higher the CPI rating (lower perception of the level of corruption), the higher the GDP per capita, compliance with access to public information and health spending. On the other hand, there is evidence of a significant and inversely proportional relationship between the CPI and the global peace index, that is, a higher rating in the CPI (lower perception in the level of corruption), a lower score is reflected in the index of peace (lower level of violence). Finally, there is no relationship between the CPI and education spending or the unemployment rate.

Everything previously mentioned can be evidenced through the following graphs, where it can be observed that the relationships between the CPI and the rest of the variables are indeed positive, except for the unemployment rate and the peace index. The graphs show a more pronounced trend between the CPI and the variables GDP per capita, health spending, transparency and peace index, as reflected in the calculation of the correlation coefficient.

Graph 3. Relationship between the CPI and the rest of the variables

Source: Own preparation.

6 The variable education spending as % of GDP only has information for 11 countries.

- **Linear regression model**

In the second instance, a linear regression model[7] was carried out, with the aim of recognizing whether it is possible to explain the level of corruption (dependent variable) based on the other independent variables, that is, the following model was estimated:

$$CPI = \beta_{o+}\beta_1 * GDPPerCapita + \beta_2 * transparency + \beta_3 * Healthspending + \beta_4 * Educationspending + \beta_5 * UnemploymentRate + \beta_6 * PeaceIndex + \varepsilon$$

In the first iteration, the variables education spending and unemployment rate were not significant, so we decided to estimate the model again without these two variables, obtaining the following result:

ANOVA

Model		Sum of squares	gl	Quadratic mean	F	Sig.
1	Regression	2937.887	4	734.472	15.105	,000[b]
	Remainder	632.113	13	48.624		
	Total	3570.000	17			

a. Dependent variable: CPI

b. Predictors: (Constant), Global_Peace_Index, access_information, health_spending, GDP_per_capita

Coefficients[a]

Model		Non-standardized coefficients		t	Sig.
		B	Standard error		
1	(Constant)	31.932	25.598	1.247	0.234
	access_information	0.383	0.101	3.770	0.002
	GDP_per_capita	0.001	0.000	2.969	0.011
	health_spending	2.925	1.769	1.653	0.122
	Global_Peace_Index	-21.269	8.763	-2.427	0.030

7 A linear regression model is a statistical-mathematical model used to determine if there is a linear relationship between a dependent variable and one or more independent variables.

8 Purchasing power parity (PPP) is the GDP converted to constant international dollars of 2011 using the PPP indices.

From the results, one can see that the model is globally significant, that is, that at least one of the independent variables is contributing to the CPI explanation. The coefficient of determination, R^2, is 83%, therefore, 83% of the CPI variability is being explained by the variables GDP per capita, compliance with access to information, health spending and peace index. When reviewing the estimated coefficients, one can see that all are significant, the first three have a positive sign, namely, there is a directly proportional relationship between each of these regression variables and the CPI, as previously stated; while, for the variable related to the levels of violence, the sign is negative, therefore, there is an inversely proportional relationship with the CPI.

Similarly, it is possible to affirm that an increase of one point in health spending as a % of GDP, increases the score obtained in the level of perception of corruption by 4.5 points (higher rating, lower perception of corruption). Likewise, an increase of one point in compliance with access to public information would increase the rating in the level of perception of corruption by 0.265 points. In addition, an increase of one unit in GDP per capita would have an impact of an increase of 0.002 points in the rating in the level of perception of corruption. Finally, an increase of a unit in the peace index would generate a decrease of 21.2 points in the rating in the level of perception of corruption.

These results allow us to corroborate the idea that a country that presents greater economic growth, more investment in health and transparency in government actions, influences citizens and international institutions to perceive lower levels of corruption. On the other hand, a higher indicator of violence implies that higher levels of corruption are perceived in the region.

The foregoing is consistent with what the statements by Ortiz (2012), who claimed that countries with higher levels of corruption spend less on health and education, which adversely affects the growth and development of the nation. Likewise, it is recognized that countries with elevated levels of corruption have a low GDP per capita. Similarly, Palacios (2014) pointed out that it is essential that society be aware of the actions of the State, to dismantle acts of corruption. Additionally, Transparency International (2015) stated that in countries where there is a low perception of corruption, citizens have free access to information on the state budget; while the countries in the last positions of the CPI ranking are characterized by inferior performance of public institutions and a context in which impunity and information concealment prevail. According to DatosMacro (2015), countries with lower levels of violence, have important levels of transparency and low levels of corruption, which is consistent with the results obtained in the regression model.

In order to evaluate the strength of the linear regression model, we decided to perform another analysis in which the independent GDP per capita variable was changed to the GDP variable for each person employed (to constant PPP[8] $ of 2011), that is, GDP divided by total employment in the country's economy[9]. In this case, a significant and directly proportional correlation (0.58) was found between this new variable and the CPI, confirming that the higher the CPI rating (lower perception in the level of corruption). A higher GDP is reflected for each person employed. In addition to this, the same linear regression model described previously was estimated with the difference that the GDP per capita variable was modified by the GDP variable for each person employed, obtaining very similar results (see Annex) and therefore, ratifying the fact that the

9 The data was supplied by the World Bank https://datos.bancomundial.org/indicador/SL.GDP.PCAP.EM.KD?end=2015&start=1991

significant factors to explain the perception in the level of corruption by country are: higher GDP values per person employed, high compliance with access to information, higher health spending and lower levels of violence.

- Cluster analysis

Finally, we decided to apply a classification method known as cluster analysis[10], which seeks to group countries into distinct categories, according to the similarity or closeness they present in each of the variables under study. It is important to clarify that only the variables that seem to have a greater incidence in the explanation of the levels of perception of corruption (GDP per capita, health spending, transparency and peace index) were considered. The estimate yielded three different groupings, which have the following characteristics:

Table 3. Center of the clusters

Variable	Cluster		
	1	2	3
CPI	29.0	54.0	35.2
GDP per capita	2858.5	13607.4	7137.3
Health spending	7.0	7.9	6.8
Transparency	41.3	45.0	62.9
Peace index	2.11	1.74	2.25

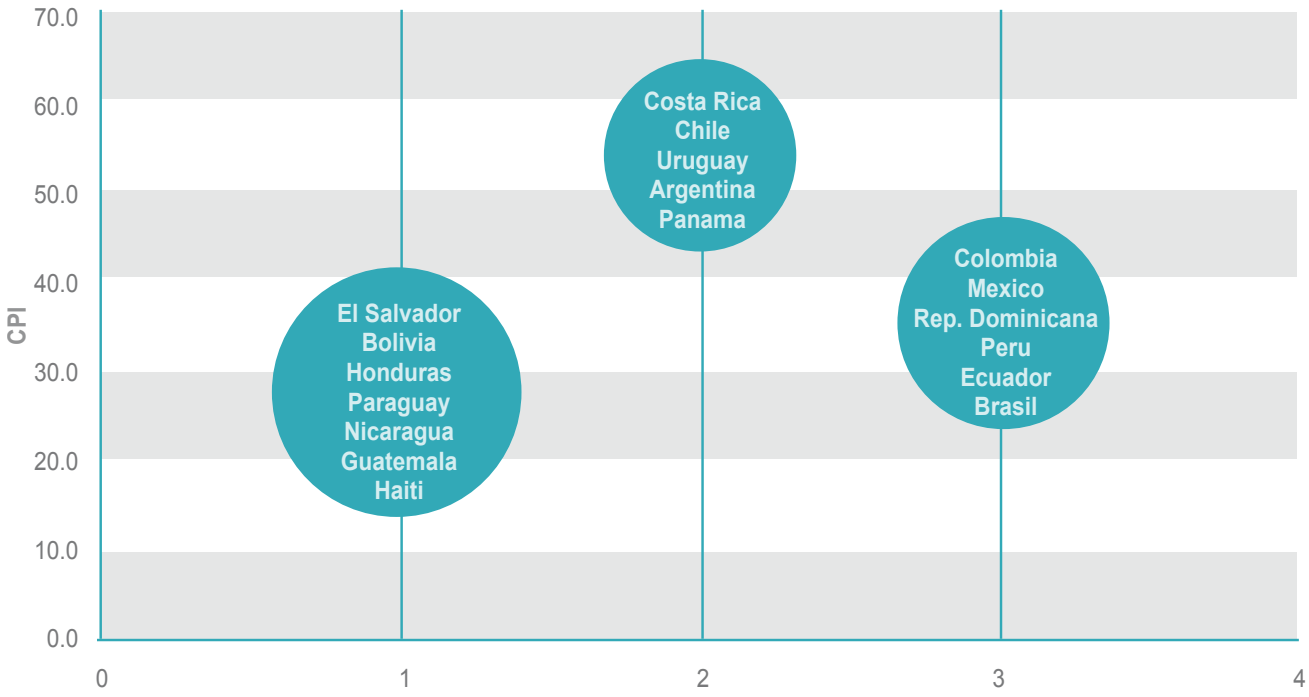
Source: Own preparation.

Table 3 shows the profile of the observations for each category. For example, it explains that cluster 2 presents, on average, the highest rating in the CPI, that is, the lowest level of perception of corruption, as well as the highest GDP per capita, the highest health spending and the lowest score regarding levels of violence. On the contrary, cluster 1 exhibits, on average, the lowest rating for CPI and consequently, the lowest GDP per capita and health spending; cluster 3 could be the average group, although it has the highest compliance values for access to public information.

Based on the above, we decided to draw the following graph, which reflects the countries that belong to each of the estimated categories.

10 Conglomerate or cluster analysis is a statistical technique whose objective is to divide a set of data into distinct groups, so that the observations belonging to each category have similar characteristics. For this case, the K-means technique was used, in which the set of observations is divided into k groups, where each observation belongs to the group whose average value is closest. We decided to take three groups, to categorize the perception of corruption at three levels: low, medium and high.

Graph 4. Classification of countries in groups



Source: Own preparation.

It should be pointed out that Cuba and Venezuela did not have complete information for all the variables, so it was not possible to classify them within a group.

According to Graph 4, the countries with the highest levels of perception of corruption, as well as GDP per capita and lowest health spending are El Salvador, Bolivia, Honduras, Paraguay, Nicaragua, Guatemala and Haiti, that is to say, they could be classified as the countries with the lowest economic growth in the region. On the other hand, nations with a low perception of corruption, higher values of GDP per capita and health spending and lower levels of violence are Costa Rica, Chile, Uruguay, Argentina and Panama. Finally, Colombia, Mexico, Dominican Republic, Peru, Ecuador and Brazil are in an average zone.

With the results obtained through the different statistical analyzes it is possible to ensure that, indeed, the growth and economic development of a country, the heath spending, the transparency reflected in the free access to public information and the level of violence, have a significant impact in the perception of corruption in a country. This allows us to provide an idea of the path that each government should adopt and what its efforts should focus on, to generate policies and actions that reduce the levels of corruption that society faces today.

4. CONCLUSIONS

Through the document it was possible to conclude that corruption is a problem of great worldwide incidence, which significantly affects the economic, social, political, legal and cultural environment of a society. The most common practices of this type of fraud are bribery, financial extortion, conflict of interest and illegal promises or offers. Among the most recognized causes for committing acts of corruption are the lack of ethical values, impunity or lack of legislation, economic inequality and the poor functioning of public institutions. The economic impact of corruption can be seen in poorly transparent negotiations, unfair competition, lower foreign investment, decrease in the quality of products and services, distrust in the country and, therefore, lower tax collection and investment savings.

Corruption in the tax administration can be generated by both taxpayers, looking for ways to avoid paying taxes, as well as by officials, who take an undue advantage, in violation of the law, for their own benefit, or from third parties.

In part, the success of a tax system depends on the public's perception of the transparency, reliability and integrity that the tax administration demonstrates, in such a way that it can convey confidence to taxpayers, show operational effectiveness and reflect coherence in their actions and the highest standards of ethics. This will result in a voluntary payment of taxes, reducing levels of evasion, avoidance and fraud. In this sense, it is essential to ensure that citizens perceive that the function of the institution is oriented towards the common good and that its management is transparent, fair and equitable.

In addition to the challenge that tax administrations face in establishing mechanisms to encourage compliance with obligations, another great challenge they face is that of transforming, in the shortest possible time, the large volume of data they handle into reliable and useful information, in such a way that it is possible to analyze trends and inconsistencies to warn of corruption cases.

The idea is that the analyst or inspector takes advantage of the resources at his disposal to find significant differences when cross-checking databases, detects anomalies using algorithms or recognizes patterns of suspicious actions. Thus, technology and big data become both valuable instruments for decision-making, and allies to help fight corruption.

The strategy for the prevention and detection of incidents of fraud and corruption should be geared toward the use of statistical techniques and tools that allow diagnostic analysis, increase the recording and monitoring of activities, as well as review the controls that help reduce risks tax administrations face. Likewise, it is essential that institutions venture into data mining methodologies and massive analysis of structured and unstructured information, train

their officials in this area and resort to different data sources (mails, disks, servers, financial information, map of relationships, interviews, among others).

In addition to this, other methods that must be taken into account by the tax administrations in their fight against corruption are: generate a systemic thinking, that is, a complete vision of the multiple elements that interact in the operation, formalize the protocol to fight against corruption, identify all the risks of fraud and corruption to which the institutions are exposed and verify the characteristics of the controls as to whether they are sufficient, understandable, economical, effective and timely.

Regarding the characteristics that affect the perception of corruption in Latin American countries, it was found that higher values of GDP per capita, more access by the public to public information, greater health spending and lower levels of violence, impact in a perception of less corruption in the region. This allows us to have a general idea of the strategies that the governments of each country could focus on and at what points they should focus their efforts to close the fraud and corruption gaps that greatly affect today's society.

The results obtained with the different statistical analyzes are consistent with numerous studies described in the literature, which shows that corruption acts as an obstacle to the increase in GDP, promotes levels of violence and increases the distrust of citizens towards public institutions.

Regarding the statistical analysis carried out in this document, for future research we propose to carry out a study in which there are more observations, either by increasing the number of years or the number of countries to be analyzed, to make comparisons between different regions of the world. Similarly, the possibility of increasing the variables to be considered is raised, with the aim of finding the main factors that contribute to the explanation of the levels of corruption today. The foregoing would make it possible to make more recommendations aimed at closing the spaces for fraud and corruption that appear today worldwide.

The research carried out allows us to show that corruption can be approached from different points of view, and that it is such a broad topic and with so many actors involved that it requires the intervention of various branches of science, to formulate strategies aimed at combating it.

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6. ANNEXES

Linear regression model with the GDP variable for each person employed:

ANOVA[a]

Model		Sum of squares	gl	Quadratic mean	F	Sig.
1	Regression	3222,268	4	805,567	14,732	,000[b]
	Remainder	765,522	14	54,680		
	Total	3987,789	18			

a. Dependent variable: CPI

b. Predictor: (Constant), GDP_employment, health_spending, access_information, Global_Peace_Index

COEFFICIENTS[a]

Model		Non-Standardized coefficients		t	Sig.
		B	Standard error		
1	(Constant)	37,389	26,800	1.395	0.185
	access_information	0,373	0.104	3.601	0.003
	health_spending	3,042	1.577	1.929	0.074
	Global_peace_index	-24,417	8.853	-2.758	0.015
	GDP_employment	0.0004	0.0001	2.636	0.020

a. Dependent variable: CPI

CUSTOMS VALUATION AND TRANSFER PRICING

Documentation

Leonardo **Macedo**

SYNOPSIS

Customs valuation and transfer pricing are vital topics in international trade taxation. Both methodologies pursue different objectives in assessing the value of goods traded between related parties. Nonetheless, in pursuit of tax certainty and revenue mobilisation, there is a growing need for better communication between these two international valuation systems. Therefore, the objective of this article is to bring customs valuation and transfer pricing together by commenting on the latest WCO/TCCV developments, namely case studies 14.1 (TNMM) and 14.2 (RPM) guiding Customs on the use of transfer pricing documentation to examine the circumstances of the sale in related party transactions. The article also addresses the key elements of transfer pricing documentation and the challenges ahead for both systems.

CONTENT

THE AUTHOR

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INTRODUCTION

Customs Valuation (CV) and Transfer Pricing (TP) are among the main topics for international trade taxation. The relationship between these two international valuation systems affects business, particularly in multinational enterprises (MNE)[1].

In pursuit of better communication between Customs and tax authorities, the Technical Committee on Customs Valuation (TCCV) approved Commentary 23.1 (WCO, 2018) which recognises that a transfer pricing documentation may be used as a basis for examining the circumstances of the sale (CoS) of related party transactions[2] [3].

> ***Commentary 23.1***
> *Examination of the expression "Circumstances surrounding the sale" under article 1.2 (A) in relation to the use of transfer pricing studies*
> *(…)*
>
> *8. On one hand, a transfer pricing study submitted by an importer may be a good source of information, if it contains relevant information about the circumstances surrounding the sale. On the other hand, a transfer pricing study - WCO Guide to Customs Valuation and Transfer Pricing might not be relevant or adequate in examining the circumstances surrounding the sale because of the substantial and significant differences which exist between the methods in the Agreement to determine the value of the imported goods and those of the OECD Transfer Pricing Guidelines.*
>
> *9. Accordingly, the use of a transfer pricing study as a possible basis for examining the circumstances of the sale should be considered on a case by case basis. As a conclusion, any relevant information and documents provided by an importer may be utilized for examining the circumstances of the sale. A transfer pricing study could be one source of such information*[4]*.*

Commentary 23.1 makes it clear that a TP study might or might not contain relevant information about the (CoS). As such, it should be "considered on a case by case basis".

1. THE LEGAL BASIS FOR TP STUDIES UNDER THE WTO CVA

The World Trade Organization (WTO) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, here referred as the Customs Valuation Agreement (CVA), is the legal basis for the examination of related party transactions for import trade tariffs.

The WTO CVA establishes the methodology for determining the customs value for goods subject to import *ad valorem* duty rates. As such, the WTO CVA details five methods and a fallback option to determine the customs value.

1 A MNE group establishes itself in a new market by incorporating or acquiring a local subsidiary or establishing a branch, the local subsidiary or branch generally engages in transactions with other members of the group.

2 The TCCV was established by the WTO CVA under Article 18.2. The TCCV functions under the auspices of the WCO and is the international body which has the competence to consider technical interpretation of customs valuation matters.

3 Related party transactions are transactions between parties whose relationship may allow them to influence the conditions of the transaction (commonly referred to as "related parties") - can involve the provision of property or services, the use of assets (including intangibles), and the provision of finance, all of which need to be priced.

4 The TCCV Commentary 23.1 is the first to mention the use of TP studies for examining the circumstances surrounding the sale (31st Session, October 2010).

- the transaction value of the goods with adjustments (Article 1 + Article 8);
- the transaction value of identical goods (Article 2);
- the transaction value of similar goods (Article 3);
- the deductive value method (Article 5);
- the computed value method (Article 6);
- fallback option (Article 7).

Within the WTO CVA methodology, the primary basis for CV is the transaction value of the imported goods with adjustments (Article 1 + Article 8)[5].

> *WTO CVA - General Introductory Commentary*
> *1. **The primary basis for Customs value under this Agreement is "transaction value" as defined in Article 1.** Article 1 is to be read together with Article 8 which provides, inter alia, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for Customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money. Articles 2 through 7 provide methods of determining the Customs value whenever it cannot be determined under the provisions of Article 1*[6].

The transaction value method might be subject to examination by Customs in cases evolving related party transactions, such as transactions between two entities of the same MNE group. The definition for related parties is in Article 15.4 of the WTO CVA[7].

Customs examination of related parties' transactions is to confirm whether the price and adjustments declared have been freely negotiated. It only takes place if there are doubts about the price. During the examination process, Customs seek additional information, before reaching a conclusion. The procedure is known as an examination to the CoS and it is detailed in Article 1.2.(a) of the WTO CVA[8].

> ***WTO CVA - Article 1***
> *2 (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case **the circumstances surrounding the sale shall be examined** and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be*

5 Many countries have reported that the transaction value is used in 90 – 95% of all importations.

6 WTO CVA: https://www.wto.org/english/docs_e/legal_e/legal_e.htm

7 WTO CVA
Article 15
4. For the purposes of this Agreement, persons shall be deemed to be related only if:
(a) they are officers or directors of one another's businesses;
(b) they are legally recognized partners in business;
(c) they are employer and employee;
(d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;
(e) one of them directly or indirectly controls the other;
(f) both of them are directly or indirectly controlled by a third person;
(g) together they directly or indirectly control a third person; or
(h) they are members of the same family.

8 The transaction value examination is comparable to a TP "arm´s length" testing conducted by tax authorities.

given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;

(ii) the customs value of identical or similar goods as determined under the provisions of Article 5;

(iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

As stated in Article 1.2.(b) of the WTO CVA, during the examination process, the importer needs to demonstrate that the transaction value closely approximates to the criteria under (i), (ii) and (iii). All three criteria require comparable prices of (i) unrelated buyers using transaction value; (ii) identical or similar deductive value or (iii) computed value for the imported goods. For TP professionals, the examination might be comparable to a TP "arm´s length" testing conducted by tax authorities[9].

As a rule, both importers and Customs face difficulties to obtain the so-called 'test' values, and the requirements under Article 1.2(b) are rarely met.

However, the interpretative note to Article 1.2 expands the importer´s possibilities declaring that Customs should be prepared to examine relevant aspects of the transaction.

WTO CVA Annex I: Interpretative Notes
Note to Article 1

Paragraph 23. (…) In this context, the Customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with

9 The arm's length is the condition or the fact that the parties to a transaction are independent and on an equal footing. Such a transaction is known as an "arm's-length transaction". The arm's length principle requires that the conditions (prices, profit margins etc.) in transactions between related parties should be the same as those that would have prevailed between independent parties in a similar transaction under similar conditions.

the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship. As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realized over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced[10].

So, when lacking the 'test' values, Customs should enlarge its analysis to examine the CoS. As such, it is generally accepted that TP studies provide relevant aspects of the transaction.

Therefore, the legal basis for Customs to examine TP studies is stated in the interpretative note to Article 1.2.(a)[11].

2. OECD TP METHODS – A PREFERENCE FOR PROFIT METHODS[12]

The OECD TP Guidelines (OECD, 2017) details five TP methods that may be used to establish whether the conditions imposed in the commercial or financial relations between associated enterprises are consistent with the arm's length principle:

- Comparable uncontrolled price method (CUP);
- Resale price method (RPM);
- Cost plus method (CPM);
- Transactional net margin method (TNMM); and
- Transactional profit split method (TPSM)

The first three TP methods are known as "transaction methods", while the last two are referred to as "profit methods". While for the WTO CVA the methods are in a rigid sequential order, for TP the choice of methods is of free choice.

In practice, the information necessary to produce TP studies using the "transactional methods" is difficult to obtain. Consequently, there is a large preference among TP professionals to produce studies based on "profit methods".

About the difficulties for TP professionals to produce studies based on "transactional methods", the WCO recognizes, for instance, the limits of information to produce CUP studies.

3.6.4 USE OF THE PROFITS BASED TRANSFER PRICING METHODS

In practice, the transactional information necessary to apply the CUP method, and reliable gross margin level information for applying the resale price method or cost-plus method can be scarce outside particular industries. Requirements that the information be in the public domain, and involve unrelated parties, and that the standard of comparability, taking into account the five comparability factors is met, substantially limit the pool of available information[13].

10 WTO CVA: https://www.wto.org/english/docs_e/legal_e/legal_e.htm

11 The WTO CVA states in Article 14 that the interpretative notes form an integral part of the Agreement.

12 As a historical note, both WCO and OECD grew out of the Organisation for European Economic Co-operation (OEEC), which was set up in 1948 with support from the United States and Canada to co-ordinate the Marshall Plan for the reconstruction of Europe after World War II. Thus, though separated, both international organizations keep a common agenda in relation to CV and TP. As such, it is logic that, as a reference for its discussions, the TCCV takes into consideration the TP methodologies resulting from the application of the OECD TP Guidelines.

13 WCO Guide to Customs Valuation and Transfer Pricing.

As a conclusion, most TP studies provided to Customs, are done using "profit methods". And within such a group, there is a preference to use the Transactional Net Margin Method (TNMM). Under the TNMM, TP studies use financial data that is mostly retrieved from official documentation of companies listed in stock exchange markets[14].

3. TCCV CASE STUDIES 14.1 AND 14.2

Building on Commentary 23.1, the TCCV developed further work and has approved, to the time of this writing, Case Studies 14.1 and 14.2.

- Case Study 14.1 "Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the agreement" (TCCV 42nd Session, April 2016); and

- Case Study 14.2 "Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the agreement" (TCCV 45th Session, October 2017); and

While Case Study 14.1 examines documentation produced using TP TNMM, Case Study 14.2 deals with documentation that uses TP RPM. The TNMM and the RPM are some of the most common used TP methods.

3.1 TCCV Case Study 14.1 - TNMM

TCCV Case Study 14.1 initiated by the United States (US) and is an example that illustrates a scenario where Customs considers TP documentation when verifying the Customs value. Following WTO CVA Article 1.2, the TP documentation is used to examine if the relationship between the buyer (importer) and the seller (exporter) influenced the price.

Case Study 14.1 is a good example to state that TP "profit methods" such as TNMM and transactional profit split method can be used to examine Article 1.2(a) of the WTO CVA.

The TP TNMM documentation presented compares the buyer (importer) operating profit margin with the operating profit margins of functionally comparable distributors of goods of the same class or kind, also located in the importing country, that conducted comparable uncontrolled transactions in the same period. The TNMM documentation follows the principles contained in the OECD TP Guidelines, and it shows that the operating profit margin used by the buyer(importer) is within the range accepted by the tax authorities as an arm's length range[15]. In other words, the buyer(importer) sets its domestic selling prices to earn an operating profit that meets the target arm's length range as specified in the transfer pricing study.

To support the Customs examination, the WTO CVA Interpretative Note to Article 1.2 provides that in examining the circumstances surrounding the sale, "the customs administrations should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and the seller organize their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price". Thus, Customs has grounds to accept the TP documentation for the examination.

14 Companies listed in stock exchange markets have several documentation obligations to disclose information.

15 Arm's length range: a range of figures that is acceptable for establishing whether the conditions of a controlled transaction are arm's length. Each of the figures in the range should be equally reliable.

Finally, as Case Study 14.1 outcome, Customs takes the TP TNMM documentation findings that the price between the seller(exporter) and the buyer(importer) are in a manner consistent with the normal pricing practices of the industry, which in this case is electronic parts “relays”.

3.2 TCCV Case Study 14.2 - RPM

TCCV Case Study 14.2 initiated by China and illustrates a scenario where the exporter and the importer are subsidiaries of the same owner entity. Exporter and importer of these goods, luxury bags, are related parties for Article 15.4 of the WTO CVA.

The importer declares the price for the imported bags using TP RPM. The TP RPM takes into consideration a gross target margin of 40%[16].

The TP RPM uses the formula: Import Price = Recommended Resale Price x (1 – Targeted Gross Margin) / (1 + Duty Rate).

To illustrate the formula in the calculation of the import price, assume the following example:

Recommended Resale Price USD100 / Target Gross Margin 40% / Duty Rate 30%.

So, Import Price =
100 x (1 – 0.4) / (1 + 0.3) = USD 46.15

From the formula, the importer´s price of each luxury bag is USD 46.15.

The exporter decides about the recommended resale price for the markets where it sells the luxury bags. It assumes all price and markets risks, being also responsible for sales strategy and inventory decisions. In other words, the Importer bears no other adjustable expenses to the price.

In 2012, due to favourable market conditions, the sales exceeded the exporter expectations. Consequently, the Importer´s gross margin achieved the level of 64%. The 64% was higher than the 40% gross margin estimated for the year.

Customs decides to audit the importer to check the CoS. During the audit, the importer, on the one hand, does not provide test values required for the application of Article 1.2 (b) and (c) of the WTO CVA, but on the other hand, submits a TP report that compares gross margins in their transactions with unrelated parties.

The TP report compares eight companies using functional analysis[17]. It indicates that the arm´s length range of gross margins earned by the selected comparable companies is between 35 %-46 %, with a median of 43 %. As a conclusion, the 64% gross margin exceeds the arm´s length range.

Notice that applying the import price formula for a 64% gross margin the result would be:

Import Price =
100 x (1 – 0.64) / (1 + 0.3) = USD 27.69

16 Gross margin synonyms are gross profit / net sales.

17 Functional analysis involves an analysis of functions performed, risks assumed and assets employed, may be considered as a cornerstone of the comparability analysis. When independent parties transact, the prices that they agree upon will generally reflect the functions performed by the respective parties, the risks they bear and the assets that they employ.

At this point, Case Study 14.2 enquires: Does the transfer pricing report, supplied in this case, provide information which enables Customs to conclude whether or not the price paid or payable for the imported goods is influenced by the relationship of the parties under Article 1 of the Agreement?

Finally, Case Study 14.2 concludes that:

> *"(…) the import price was not settled in a manner consistent with the normal pricing practices of the industry in question. The Customs value of goods imported in 2012 had been declared at a lower price and should be re-determined accordingly by application of the alternative methods of valuation in a sequential order".*

Therefore, the conclusion is that the relationship between the related parties influenced the price, and the customs value should be determined by application of the WTO CVA alternative valuation methods in sequential order.

4. CONCLUSION

Customs valuation and transfer pricing relationship continue to pose difficulties for tax authorities and MNE.

Since the approval of the WCO TCCV Commentary 23.1, Customs official are worldwide encouraged to use TP documentation as a basis for examining the circumstances of the sale (CoS) of related party transactions, by Art.1.2 of the WTO CVA.

The latest WCO/TCCV developments regarding this acceptance, namely case studies 14.1 (TNMM) and 14.2 (RPM) provide initial steps to guide Customs on the use of TP documentation.

On the one hand in Case Study 14.1 Customs examines TP documentation produced using the TNMM, which is one of the OECD TP Guidelines "profit methods". The TP documentation was useful for Customs to examine relevant aspects of the transaction, including how the buyer and the seller organise their commercial relations. In the end, Customs accepted the declared import prices.

On the other hand, in Case Study 14.2 Customs deals with TP documentation that uses RPM, a "transaction method". The gross margins calculated to the related parties indicated that the arm´s length conditions were not met. As the outcome, Customs did not accept the declared import prices.

Both TNMM and the RPM are some of the most used TP methods, and regardless the outcome, which is positive for the buyer (importer) in Case Study 14.1 (TNMM) and negative in Case Study 14.2, the Cases are successful examples of the benefits on sharing information that is initially produced to tax, but that can also serve Customs.

My view about using TP documentation for CV is about the need for both authorities to challenge the information provided by MNE. Are the TP documentation comparables solid? or are they cherry-picked from a TP database? Have the quartiles been properly selected? What are the MNE functions that matter for Customs? Can the imported declared transaction values be used to cross-check the TP documentation?

As the discussions about these two international valuation systems continue to advance, there is much room to improve the dialogue.

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BEPS ACTION PLAN

and its impact on Ecuador

Marlon **Manya Orellana**

SYNOPSIS

The control of taxable base erosion and profit shifting BEPS (Base Erosion and Profit Shifting) is a challenge for the Tax Administrations worldwide, even more so for those located in developing countries. This article analyzes how Ecuador has prepared and continues to prepare in order to implement the BEPS Action Plan, including its accession to the Global Forum, the Multilateral Convention on Mutual Administrative Assistance, and the tax reforms included in the Law.

CONTENT

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INTRODUCTION

The base erosion and profit shifting BEPS (Base Erosion and Profit Shifting) originated by the globalization of the economy, is a global problem that requires comprehensive solutions, and one of these is the application of international taxation rules. Vallejo y Gutiérrez[1], affirm that *"Globalization entails a scenario in which borders have been blurred almost to the point of disappearing, and in which countries have maintained their sovereignty to act on their territory since they helplessly observe an international economic development that has a life of its own and on which they can barely act."*

Given the current economic context, the BEPS Action Plan arises, where the countries comprising the Organization for Economic Cooperation and Development OECD and the economies of the G-20, have already made progress on this issue, adopting joint measures to rectify the weaknesses of the international tax system, which leaves the door to aggressive tax planning practices open.

In this regard, the vacuums, gaps or fiscal termites as Vito Tanzi[2] calls them, involve strategies of tax evasion that multinational groups take advantage of, regarding the rules and imbalances in local tax regulations, to artificially displace profits to preferential tax regimes or jurisdictions with no or less taxation. Consequently, it is likely that globalization has a considerable negative impact on the ability of countries to obtain income through their tax system.

If we add to this the estimated annual losses resulting from the undervaluation of income, between 100 to 240 billion dollars[3] according to OECD data, due to the erosion of the tax base and the shifting of profits, we have before us the enormous challenge which Governments and Tax Administrations from all over the world are facing. In percentage terms of tax revenues, it is estimated that the impact of these illicit behaviors is even greater in developing countries than in developed countries.

Along these lines, the OECD member countries and the G-20 economies, after meetings held since 2013, discussed ways to reestablish confidence in the international tax system, and ensure that the benefits are taxed in the jurisdiction where economic activities are carried out; consequently, where value is generated, they agreed and presented the BEPS Action Plan, subsequently approved by the G-20 leaders, on the occasion of the Summit held in Antalya (Turkey) on November 15 and 16, 2015.

The basic pillars of this BEPS Action Plan are: The coherence of the tax on companies at the international level, the realignment of taxation and the economic essence, transparency together with legal security; and it comprises 15 action lines that include measures ranging from the adoption of new minimum standards, to the revision of existing standards, and the development of common approaches and/or criteria that favor the convergence of national practices, and the formulation of guidelines on good practices. These 15 actions are detailed below:

1 José María Vallejo Chamorro and Manuel Gutiérrez Lousa "Agreements to avoid double taxation: Analysis of its advantages and disadvantages" Institute of Fiscal Studies Doc. No. 6/02

2 Vito Tanzi. "Globalization and the action of fiscal termites" Finance & Development Pag. 34-37 march 2001

3 OECD Work on Taxation 2018-19 Pag. 9

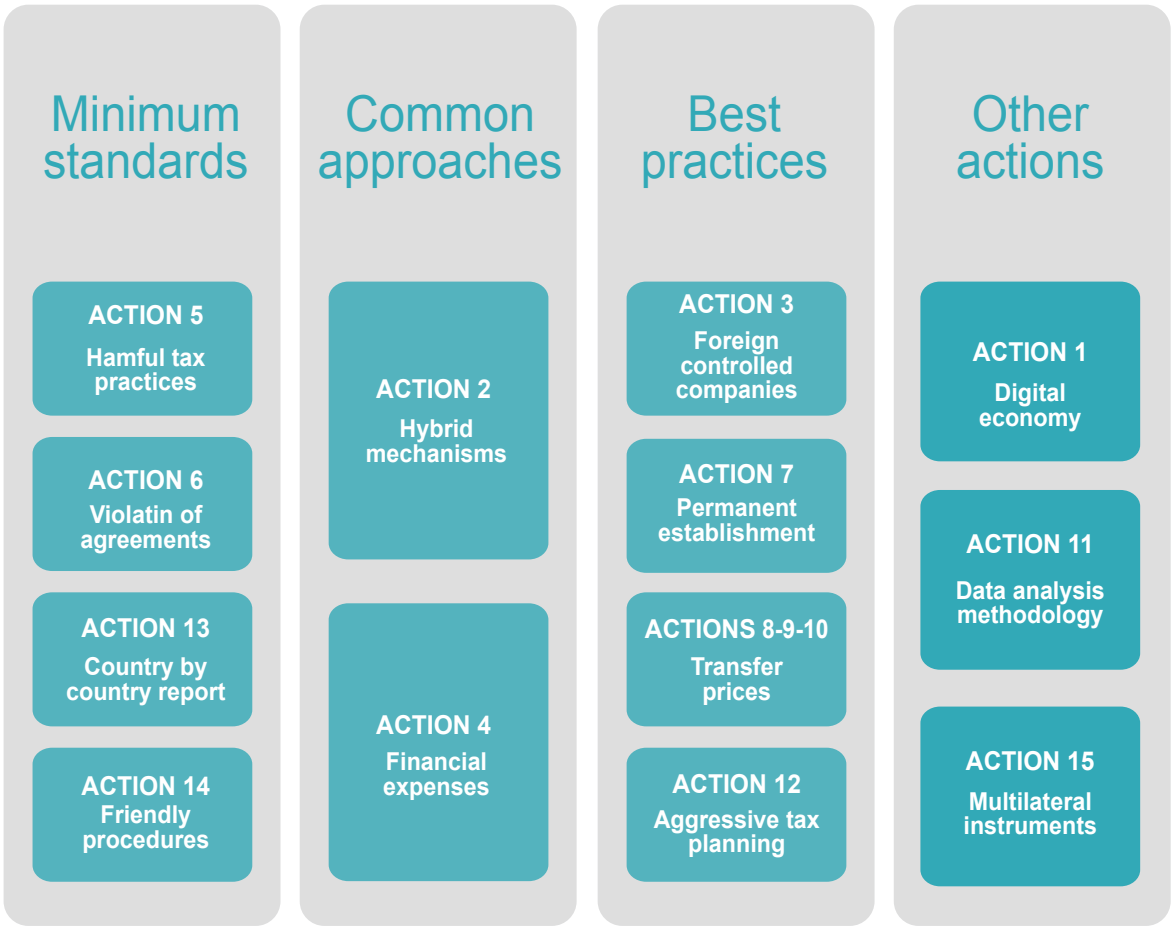
BEPS Action Plan

No.	Actions
1	Address the tax challenges of the digital economy
2	Neutralize the effects of hybrid instruments and mechanisms
3	Strengthening of controlled foreign company regulations
4	Limit the erosion of the tax base through deductions in interest and other financial payments
5	Combat harmful tax practices, taking into account transparency and substance
6	Prevent the abusive use of international agreements
7	Prevent the artificial circumvention of the permanent establishment
8	Aspects of transfer prices of intangibles
9	Aspects of transfer prices of risks and capital
10	Aspects of transfer prices of other high-risk transactions
11	Establish methodologies for the collection and analysis of data on the erosion of the tax base and the transfer of benefits and on the actions to face it
12	Require taxpayers to reveal their aggressive tax planning mechanisms
13	Examine the documentation on transfer prices
14	Make dispute resolution mechanisms more effective
15	Develop a multilateral instrument

Source: OECD

Not all the proposed actions require the same level of implementation commitment by the countries that join the BEPS Action Plan (inclusive framework) but are grouped into distinct categories based on that level of commitment. These categories are as follows:

BEPS Action Plan. Minimum standards and Others



Source: OECD

As a result of this initiative, major changes are foreseen in the internal tax regulations of the Latin American countries, among which Ecuador stands out. Ecuador maintains in its tax legislation the application of the transfer pricing methodology, has international agreements to avoid double taxation, and in late April 2017 it joined the Global Transparency and Information Exchange Forum. Additionally, in October of 2018 it joined the Multilateral Convention on Mutual Administrative Assistance (CAAM) on Tax Matters.

Consequently, when adopting the BEPS Action Plan, the country must align itself with and establish new and updated principles of international taxation and reporting and information obligations that guarantee that profits are taxed in the jurisdiction where the economic activities are indeed carried out.

In Ecuador's tax regulations, there are various tax changes that must still be incorporated, for example, the definition of the origin of the source of taxation, fiscal transparency through the exchange of information, control of transactions of related companies, unification of tax rates based on those already established internationally, the updating or modification of international agreements, the control in the application of derivative financial instruments and hedge accounting, the implementation of a minimum standard to guarantee the resolution of related conflicts under a tax treaty in a timely, effective and efficient manner, the exchange

of information upon request, the exchange of automatic information of financial accounts, among others.

However, the limitation of information about the economic impact for countries that are fiscally structured under the practices issued in BEPS such as Ecuador, in quantitative and qualitative terms, is one of the main gaps in the implementation of BEPS.

1. GENERAL DESCRIPTION OF THE BEPS ACTION LINES

1.1 Minimum standards

- **Action 5:** To fight harmful tax practices more effectively in keeping with the principle of transparency and the belief of significant activity, addressing the work on harmful tax practices and prioritizing the improvement of transparency, concretely articulating the natural exchange of relevant information about issues related to the application of preferential mandatory regimes, as well as the need for a significant activity that motivates the creation of a preferential regime.

- **Action 6:** The work to prevent the abusive use of tax agreements includes standard rules or model provisions related to the design of internal tax regulations that prevent the concession and/or recognition of the benefits of the agreement in undue circumstances.

- **Action 13:** Reexamines the documentation on transfer prices through revised standards related to transfer pricing documentation in order to improve transparency for the Tax Administration, taking into account the compliance costs that are derived for the companies. There are three levels for transfer pricing documentation, a master file that contains standardized information relevant to all members of a multinational group, a local file that refers specifically to important transactions of a local taxpayer; and a country-by-country report that contains certain information regarding the global allocation of the group's income and taxes, together with indicators of the location of the economic activity within the group (information contained in the country-by-country reports).

- The fiscal authority before which the country-by-country report is presented will exchange the country-by-country report with the fiscal authority of other jurisdictions in which the group has operations, through bilateral or multilateral tax treaties or tax information exchange agreements that allow the automatic exchange of information. This is subject to conditions, including those jurisdictions that have a legal framework that includes the country-by-country reports and that comply with the conditions of confidentiality, consistency and appropriate use of the information contained in the country-by-country reports.

- **Action 14:** Make dispute resolution mechanisms more effective by offering solutions to overcome obstacles that prevent different countries from resolving disputes or differences regarding the interpretation or application of an agreement signed in accordance with a friendly procedure mechanism, even in the absence of provisions of arbitration in most of the agreements and even when access to a friendly and/or arbitration procedure can be denied in certain cases.

1.2 Common approaches

- **Action 2:** The work on neutralizing the effects of hybrid mechanisms makes recommendations regarding the design of internal rules and the development of provisions included in the Agreement Model in order to neutralize the effects (including double non-taxation, double deduction or long-term deferral of taxes) either of structures or hybrid mechanisms.

- **Action 4:** Limits the erosion of the tax base through the deduction of interest and other financial payments,

makes recommendations in order to identify best practices in the design of norms that prevent the erosion of tax bases through the allocation of expenses for interest paid. This is done using, for example, intra-group debt and independent entities to generate excessive deductions for expenses incurred as interest payments or for generating income not subject to tax or deferred income taxes. They may also resort to the use of financial instruments to make payments that are economically equivalent to interest.

1.3 Best practices

- **Action 3:** Reinforces the rules of "Controlled Foreign Corporations" (CFC) formulating recommendations inherent to the design of the aforementioned CFC norms regarding international tax transparency.

- **Action 7:** Prevents the fraudulent exclusion of the status of permanent establishment (EP) by making changes in the definition of the concept of "permanent establishment" in order to avoid the use of certain strategies with elusive ends that are used to avoid the foreseen scope of the definition of EP through the articulation, for example, of commission contracts or by opting for specific exceptions limited to certain activities.

- **Actions 8 to 10:** They ensure that the results of the transfer prices are in line with the creation of value, including the development of standards that revolve around three key areas:

    - Transactions with intangible assets, to prevent the erosion of the tax base and the shifting of profits through the circulation or transfer of intangibles among members of a group.

    - Risks and capital, to avoid the erosion of the tax base and the shifting of benefits through the allocation of economic risks or the subsequent attribution of excessive income among the members of the group, respectively.

    - Other high-risk transactions, to prevent the erosion of the tax base and the shifting of profits through the execution of operations that would not be concluded between third parties

    .

- **Action 12:** Require taxpayers to disclose their aggressive tax planning mechanisms through the formulation of recommendations regarding the design of mandatory reporting rules for aggressive or abusive transactions or structures, taking into account administrative costs for tax administrations and companies and taking advantage of experiences of the growing number of countries that already have such standards in place.

1.4 Other actions

- **Action 1:** It addresses the fiscal challenges of the digital economy and identifies the main problems that the digital economy poses to the application of existing international tax regulations. The report proposes detailed solutions to address the aforementioned problems by adopting a comprehensive approach and from the perspective of both direct and indirect taxation.

- **Action 11:** It establishes methodologies for the collection and analysis of data on the erosion of the tax bases and the shifting of benefits and the corresponding anti-avoidance measures, formulating recommendations on the indicators of the magnitude and economic impact of the erosion of the tax bases and of the shifting of profits and ensuring that tools are available to quantify and control the effectiveness and economic impact of anti-avoidance measures adopted on a continuous basis.

- **Action 15:** Development of a multilateral instrument that modifies bilateral tax agreements, taking into account the analysis of some issues of Tax Law and Public International Law related to the drafting of a multilateral instrument that allows countries that so decide to implement the measures resulting from the work included in the BEPS Project and modify the bilateral tax agreements that they have signed.

2. INTERNATIONAL TRANSACTIONS WITH RISK OF TAX FRAUD IDENTIFIED BY THE TAX ADMINISTRATION IN ECUADOR

The Tax Administration in Ecuador has identified in certain cases violation of agreements and a limitation of benefits clause as an anti-abuse rule in the tax treaties concluded by Ecuador, where it is necessary to address what elements might constitute the utilization of the benefits of an agreement, as well as what are the potential solutions to the problem from a practical perspective.

This **first scheme** involves the use of a company in a country with an agreement to avoid double taxation.

Scheme 1. Expenses without economic support

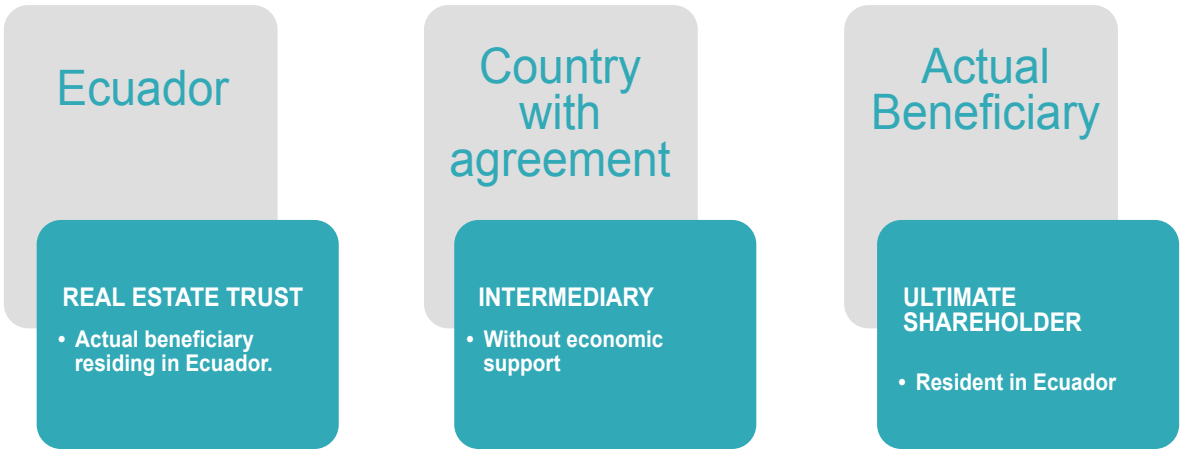
Source: SRI

The impact on this first scheme is due to the decrease in the payment of taxes due to:

- Decrease in the tax base of companies in Ecuador.
- Non-taxation of non-residents in Ecuador (application of the double taxation agreement CDI).
- Non-taxation of intermediaries in the country in the double taxation agreement CDI, for expenses registered with tax havens.

This **second scheme** involves the use of a company in a country with an agreement to avoid double taxation and a nominal shareholder.

Scheme 2. Concealment of Actual Beneficiary



Source: SRI

The impact under this second scheme is due to the decrease in the payment of taxes due to:

- Actual beneficiaries residing in Ecuador who do not pay for dividends.
- Non-taxation of capital gains in case of sale of shares.
- The Actual Beneficiary avoids the payment of the Currency Exit Tax.

This **third scheme** involves the use of a country with an agreement to avoid Double Taxation to divert operations.

Scheme 3. Treaty Shopping

Source: SRI

The impact under this third scheme is due to the decrease in the payment of taxes due to:

- Use of a country with an agreement to avoid Double Taxation to benefit unduly from it.
- Income of non-residents not subject to taxation in Ecuador.

3. TAX REFORMS IN ECUADOR AGAINST THE TAX BASE EROSION AND PROFIT SHIFTING

3.1 Global Forum on transparency and exchange of information for tax purposes

As a first point, Ecuador is a member of the Global Forum since April 26, 2017, which confirms its fight against harmful tax competition through tax havens, preferred tax regimes or jurisdictions with lower tax rates, as well as its fight against harmful tax competition practices with the purpose of discouraging taxpayers from using these practices.

There are 154 members in this Global Forum (G-20 countries, OECD, major financial centers, other developing countries). It is the multilateral agency that leads the world in the work on transparency and exchange of tax information, where the quick and effective implementation of standards on transparency and exchange of information is guaranteed.

As part of the commitments acquired after joining the Global Forum, strict standards must be implemented. These are aspects of a normative or practical nature, which must be present in a country so that effective exchange of information can take place. These include the exchange of Information under Order (IIP), and the exchange of Automatic Information (IIA) of financial accounts.

To carry out the evaluation on transparency and effective exchange of information among member countries, the Peer Review Group (PRG) was created within the framework of the Global Forum to perform the "Peer Review." It is a process by which the PRG submits a country/jurisdiction to peer review (Peer Review) to assess their implementation of the international standards of transparency and information exchange upon request (IIP).

It is carried out in two phases:

- **Phase 1:** Review of the legal and regulatory framework related to transparency and the exchange of information.

- **Phase 2:** Review of the actual implementation of the legal and regulatory framework related to transparency and the exchange of information.

The evaluation is carried out by checking the legal and regulatory framework on transparency and exchange of information, and the actual implementation thereof, against the international standards established for Transparency and the International Exchange of Information. With the recent incorporation, the Global Forum technical team will provide technical assistance to Ecuador to review the implementation of the standards upon request, and it has been estimated the "PR" peer review to evaluate implementation will last approximately 2 years.

3.2 Multilateral Convention on Mutual Administrative Assistance (CAAM) on Tax Matters

As a second point, Ecuador signed on October 29, 2018, the Multilateral Convention on Mutual Administrative Assistance (CAAM) on Tax Matters. This is a multilateral agreement that was designed with the objective of promoting and facilitating international cooperation for a better functioning of national tax laws, while respecting the fundamental rights of taxpayers.

By joining the CAAM, Ecuador will be able to exchange information in its different forms (request, unprompted and automatic) and to perform concurrent and foreign tax audits. Ecuador will also obtain assistance in the recovery of tax debts and the document notification service. This would lead to a more efficient fight against tax evasion and avoidance. It should be noted that 126 countries are part of the Convention, 103 of which have the automatic exchange of information (CRS) in place.

3.3 Automatic exchange of information

In the third place, the First General Provision, included in the Basic Law for the Reactivation of the Economy, strengthening of dollarization, and modernization of financial management, published in the Second Supplement of the Official Record No. 150 - December 29, 2017, states as follows:

"The Internal Revenue Service, the Superintendence of Banks and any other regulatory and/or control body, within the scope of their respective competences, will issue the necessary secondary regulations for the implementation of the actions or fulfillment of the requirements derived from Ecuador's incorporation into the "Global Forum on Transparency and Exchange of Information for Tax Purposes," especially regarding the application of rules and procedures for communication of information and due diligence, accepted internationally."

"Failure to comply with the duty to communicate information, regarding the financial accounts of non-residents and their respective investigations for international tax transparency, will be sanctioned with the maximum fine for breaches of information provided in the second paragraph of Article 106 of the Law of Internal Tax Regime; that is, with 250 unified basic worker salaries in general for each requirement. For the application of this Provision, the Tax Administration will issue the respective Resolution considering the technical guidelines issued by the Global Forum on Transparency and Exchange of Information for Tax Purposes."

Negotiations among Tax Administrations are expected to begin at the local level to implement the exchange of information of the CbC Reports, in compliance with the Action Plan Item No. 13.

3.4 Deduction of interest (subcapitalization)

As a fourth point, it is necessary to incorporate reforms to the current tax legislation, within which the following topics of interest can be mentioned:

Aligned to the Action Plan Item No. 4, involving the limitation of financial expenses, Article 10 of the Internal Tax Regime Law in its paragraph 2, states that:

"…In order for interest paid for external credits granted directly or indirectly by related parties to be deductible, the total amount of these may not be greater than 300% with respect to equity, in the case of companies".

In addition, the Law and Regulation of Incentives to the Production and Prevention of Tax Fraud, effective as of 2015, established additional restrictions of loans between related parties with respect to their consideration as an advance payment of dividends.

Article 37 of the Internal Tax Regime Law stipulates that:

"…When a company grants its partners, shareholders, participants or beneficiaries, loans of money, or any of its related parties non-commercial loans, this transaction will be considered as payment of anticipated dividends and, consequently, the company must make the corresponding withholding at the rate foreseen for companies on the amount of the transaction".

3.5 Fighting elusive and evasive tax practices

In alignment with the Action Plan Item No. 5, through the Law and Regulation of Incentives to the Production and Prevention of Tax Fraud, concepts such as "Actual Beneficiary" regarding dividends and greater restrictions to transactions with tax havens were established.

"..For tax purposes, an Actual Beneficiary will be construed as one who legally, economically or in fact has the power to control the allocation of income, profit or gain; as well as to use, enjoy or dispose of them".

The Basic Law for Production Development, Attraction of Investments, Employment Generation, Stability and Fiscal Equilibrium, published in the Official Gazette Supplement No. 309, on August 21, 2018, also incorporates reforms, emphasizing that the exemption for dividend concepts does not apply when the Actual

Beneficiary thereof is an individual residing in Ecuador. Therefore, when the beneficiary is a tax resident in Ecuador and the company that distributes the dividends or profits does not comply with the duty to report on its corporate configuration, the income tax on said dividends and profits will be withheld, without prejudice to the corresponding penalties.

As regards the payment of royalties, technical, administrative and consulting services with related parties, limits are established in accordance with the provisions of Article 28 of the Regulations for the Implementation of the Internal Tax Regime Law, as long as said expenses correspond to the generating activity carried out in the country. The totality of these expenses paid by companies domiciled or not in Ecuador to its related parties, will be deductible up to an amount equivalent to 20% of the tax base of the income tax plus the value of said expenses.

3.6 Abusive use of Agreements

In alignment with Action Plan Item No. 6, the agreements that Ecuador has signed must be updated, and must incorporate clauses that avoid the "Treaty shopping" notion and establish the concepts of Actual Beneficiary.

3.7 Transfer prices in line with the creation of value

As part of Action Plan Items No. 8-9-10, the actions concerning transfer pricing in Ecuador, under Resolution No. NAC-DGERCGC15-00000455 of May 29, 2015, established new criteria and requirements that must be included in comprehensive transfer pricing reports focused on the evaluation of the "economic support" of the transactions and their relation to the defined transfer price.

For this purpose, taxpayers obliged to pay Income Tax who have carried out transactions with related parties abroad (and/or establishments under certain conditions), within the same fiscal period, in an accrued amount exceeding three million dollars (USD 3,000,000) must submit to the Tax Administration, in accordance with the terms and means provided for this purpose, the Transactions with Related Parties Exhibit.

In addition, those taxpayers who have made transactions with related parties from abroad (and/or establishments under certain conditions), within the same fiscal period, in an accrued amount exceeding fifteen million dollars (USD 15,000,000) should submit, in addition to the exhibit, the comprehensive transfer pricing report.

The fifth Article of the second section of the Internal Tax Regime Law provides as follows:

Art. (...). - Taxpayers who carry out transactions with related parties will be exempt from the application of the transfer pricing regime when:

a. *They have a tax incurred exceeding three percent of their taxable income.*

b. *They do not carry out transactions with residents in tax havens or preferential tax regimes.*

c. *They do not have a contract with the State for the exploration and exploitation of non-renewable resources.*

Thus, the Regulation for the Implementation of the Law of Internal Tax Regime, provides as follows:

Art. 84.- *Presentation of information on transactions with related parties.- Taxpayers of Income Tax, who carry out transactions with related parties, and who are not exempt from the transfer pricing regime in accordance with article number five appended to article 15 of the Internal Tax Regime Law, in accordance with the article corresponding to the Internal Tax Regime Law, in addition to their annual Income Tax return, will present to the Internal Revenue Service the comprehensive transfer pricing report and the exhibits that the SRI establishes, through a General Resolution, regarding their transactions with these parties. This should be*

done within a period not exceeding two months from the date on which the income tax return is required, in accordance with the provisions of the corresponding article in this regulation.

Failure to deliver such report, as well as delivering it in an incomplete manner, inaccurate or providing false data will be sanctioned with fines of up to USD. 15,000, in accordance with the resolution issued for that purpose.

Art. 86.- Measures to avoid abuse of transfer prices.- The Internal Revenue Service, through a general resolution, may establish technical and methodological measures to avoid abuse of transfer prices, considering, among others: method to apply the arm's length principle; the existence of reference prices for tax purposes; the identification of sources of information on prices or margins; the availability of information about the contribution period; and, the use of intermediaries.

***Art. 89.**- Technical reference regarding transfer pricing.- As a technical reference for the provisions of this Chapter, the "Guidelines on transfer pricing for Multinational Companies and Tax Administrations," approved by the Board of the Organization for Economic Cooperation and Development (OECD) "effective as of January 1 of the corresponding fiscal period" will be used, insofar as they are consistent with the provisions of the Internal Tax Regime Law with the treaties concluded by Ecuador, the present regulation and the general resolutions that the Internal Revenue Service may issue for the implementation of the transfer pricing regime.*

3.8 Aggressive tax planning

As part of Action Plan Item No. 12, the tax regulations in Ecuador stipulate the following:

- The secrecy surrounding the information that helps identify the property and transactions of residents in Ecuador with third parties located in tax havens, as well as aggressive tax planning practices, is lifted.

Article 101 of the Internal Tax Regime Law stipulates that:

"..The information that contributes to identifying the property and transactions of residents in Ecuador with third parties located in tax havens, as well as aggressive tax planning practices, will not be subject to the secrecy established in this article.

- Report on the creation, use and ownership of companies located in tax havens or jurisdictions with lower taxation involving actual Ecuadorian beneficiaries.

Article 102 of the Internal Tax Regime Law stipulates that:

"The promoters, advisors, consultants and law firms are obliged to report under oath to the Tax Administration, in accordance with the forms and terms that by general resolution are issued for that purpose, any report on the creation, use and ownership of companies located in tax havens or lower taxation jurisdictions involving actual Ecuadorian beneficiaries. Each breach of this rule will be sanctioned with a fine of up to 10 basic nontaxed fractions of the income tax, without prejudice to any criminal liability that may arise".

4. CONCLUSIONS

- The BEPS Action Plan establishes the rules of the new scenario in which Tax Administrations, multinational groups and the rest of the taxpayers are subject to taxation in the most orderly manner possible. It is expected that its incidence and implementation mainly in developing countries will be increasing.

- Fundamental principles must prevail, above all the substance or economic essence over the legal form, which basically constitutes the qualification of the tax-generating event.

- Promote the tax coordination and necessary technical[4] assistance between Ecuador and the countries of Latin America in topics such as:

  - Standards and documentation of harmonized transfer prices.
  - Anti-avoidance rules with tax havens.
  - Evaluation and elimination of the Treaty shopping mechanism in the current Double Taxation Agreements.
  - Mechanism of fluid exchange of information.
  - Possibility of adjustments based on dispute resolution mechanisms.
  - Search for multilateral tax agreements.
  - Tax reforms in search of the application of the BEPS action plans.
  - Have an institutional platform equipped with adequate material resources and trained human resources dedicated to the BEPS issue.
  - Carry out sectorial economic studies that allow authorities to determine the way in which multinational groups operate, their profitability, and the accounting, financial and tax impact of these groups.

- As a result of this initiative, major changes are foreseen in the internal tax regulations of the Latin American countries, including Ecuador, who maintains in its tax legislation the application of the transfer pricing methodology and has international agreements to avoid double taxation. Ecuador also by the end of April 2017, was part of the Global Transparency and Information Exchange Forum, and in October 2018 it joined the Multilateral Convention on Mutual Administrative Assistance (CAAM) on Tax Matters.

- The strategies, policies and fiscal plans of the Ecuadorian companies should be reviewed with respect to their related parties and parent companies in order to prepare for the changes in the documentation that will be required by the Tax Administrations.

- Regarding the issue of transfer prices, it will have greater relevance, considering that the CbC Reports will reveal the functions, assets and risks not only of the local company but also of its related parties and parent companies.

- The source of “economic value creation” will have a greater impact on transfer pricing policies. It is expected companies will prioritize low value-added services, reclassification of operations, report of distribution agreements of costs and expenses, APA; definition, identification and valuation of intangibles and utility and applicability of the “profit split method” and sectoral analysis.

4 CIAT, in coordination with regional and international organizations (IDB, IMF, OECD, World Bank, UN, etc.), international initiatives (International Tax Compact-ITC, EUROsociAL) and civil society (Latindad and Tax Justice Network) has organized since 2014, activities aimed at disseminating the content of the BEPS Action Plan, its results and challenges with a view to its implementation in developing countries.

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in historical perspective

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SYNOPSIS

This article seeks to revise and consolidate the main historical statistics relating to the Brazilian tax burden according to the methodology followed by Varsano et al (1998) and Afonso, Soares and Castro (2013). In order to be a statistical reference for the Brazilian public finances researchers, we present these detailed information on the direct collection, available income, tax base and main taxes for further analysis. As support for data submission, the methodological aspects of the article are also presented.

CONTENT

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INTRODUCTION

Since the enactment of the Citizens' Constitution of 1988, the Brazilian government went through a process of growth, with a clear path of public expenditure expansion. Because of this trend, the performance of the tax burden became a topic of great interest in the country, being a decisive variable for the tax outcome.

More than a simple indicator to show in an aggregate way the level of taxation that a certain State imposes on its economy in each period, the tax burden has become an important source of information, revealing in detail the economic, social and political characteristics of a nation. In the brazilian case, for example, the tax burden is widely used to understand how the federative relations between the three levels of government evolved.

And it goes far beyond that. Much of the discussion of tax reform - currently in vogue in the political debate - is heavily based on the diagnosis provided by the study of the tax burden. The demand for a neutral, balanced, fair, simple tax system is almost unanimous among Brazilians and a change in that direction could provide a qualitative improvement of the tax policy on the revenue side. This change, however, should not be done based on assumptions, but with concrete facts and informed projections. This necessarily involves the study of the behavior of the tax burden. The notes provided by the detailed analysis of the overall tax burden in Brazil are undoubtedly good indicators for any tax reform proposal that perhaps may arise" (AFONSO E CASTRO, 2016, p. 2).

The analysis of the tax burden proposed here is independent and differs significantly from those official figures, estimated by the Federal Revenue Secretariat of Brazil (RFB) and the Brazilian Institute of Geography and Statistics (IBGE). This calculation is already being done for many years and was the subject of some publications. However, a review that consider the data in historical perspective had not yet been made. Even Afonso Soares e Castro (2013), presenting in detail the Brazilian tax system, tried to make a retrospective presentation of the tax burden data.

Considering the usual demand from academic colleagues, journalists and politicians on the tax burden data; these authors felt it would be a good contribution to publish this data in such a way that they could be more widely disseminated. These demands, which were previously attended informally, can now be supplied from this publication, which gives some degree of data reliability. To facilitate the receipt of data by readers, the tables will be prioritized at the expense of graphics, since we consider that the visual loss is more than compensated by the increase in transparency. The presentation of data in table format best details the information and provides the possibility that other researchers can extract and manipulate data in accordance with the objectives of their respective researches.

Considering all this, the aim of this article is purely informative. The idea is to consolidate the historical data of the tax burden, without dwelling on technical, methodological and statistical analysis discussions. However, some comments on the data are woven throughout the text in the opinion of the authors. We also intend to update (and publish) this article annually, so that the available data are as current as possible.

In addition to this introductory section, this article has five other sections. The second section presents a brief methodological debate, to update the reader on the calculation of burden used here and how it differs from official data. The third section presents data from direct tax collection by the three spheres of government, using

1 Only one graph is presented in the article. However, a table of data that originated the graphic is also presented.

a common presentation format in this type of computer. The fourth section shows how the composition of income from the three spheres of government is following the flows of intergovernmental transfers, which is called "available income". The fifth section gives space for statistics of the tax burden by tax base, important for discussions on the regressive character of the tax system; and finally, the sixth and final section presents some concluding remarks.

1. TAX BURDEN DETERMINATION METHODOLOGY: GOVERNMENT TAKE

The most common way to evaluate the performance of tax revenues of a country is to determine and analyze the tax burden indicator, which expresses the ratio between revenues and gross domestic product (GDP). Despite the relative simplicity of the concept, methodological differences in calculating what should or should not be counted as "revenue" may provide different results of the indicator for the same location in the same period.

In this article, the concept of tax burden used may be called "comprehensive approach" by starting from the basic premise that all what the State withdraws from the economy should be considered a tribute, based on any legislation, regardless of the legal conception of the tribute (taxes, contributions, fees, etc.). As highlighted by Afonso Soares e Castro (2013), this idea is adapted from the concept of *government take*, common to the literature on oil and gas.

As widely known, the tax burden is a simple relationship between all tax revenues in a given location in a given period and their production (GDP) in the same period. All the data used in the analysis of this relationship in this methodological proposal have as primary sources official periodical publications.

Brazil's GDP is the variable most easily accessible, the same for all official data: the calculation is performed by the IBGE, reported quarterly and annually in the scope of National Accounts (IBGE, 2016). The latest annual data available is 2017 - the year in which temporal cycles of indicators that will be presented in the article are concluded.

The information concerning taxation (revenue) are a bit more difficult to obtain and process. Two federal institutions provide reliable data on tax revenues of the central government: The National Treasury Secretariat (STN) and RFB. The differences between the information from these sources are purely methodological.

The RFB information is managerial, on gross revenue (without reducing refunds and compensations), on what was picked up from the taxpayer in a given period (although the resources are only received in the next period), and not always accurate (for example, judicial deposits). Another limiting factor in the RFB is the fact that only central government data are published. Other spheres of government do not have their data collection consolidated and reported regularly by the institution. The STN Data present the accounts of the Union and for the consolidation of the balance sheets of all government units in the country (i.e. they present statistics of the three spheres of government), so that these revenues are those used in the official accounts. In this case, the revenue is net and corresponds to what actually went into government's coffers.

To present a more complete information and based on the balance sheet - which is an international recommendation (IMF, 2014) - The STN has used the primary data of tax collection as a basic source. More specifically, three publications of this institution are the basis of this calculation of the tax burden: Balance General of the Union (BGU), Budget Execution of States

(EOE), and Finance of Municipalities (Finbra). In addition to data from the STN, two other data are necessary for calculating the burden: Guarantee Fund for Time of Service (FGTS) obtained in the Caixa Economica Federal (CEF) and the so-called "S System" (employers' training professional and social assistance institution), obtained through the independent computation of the RFB.

In this article, to calculate the tax burden in the "comprehensive approach", we consider as tributes the revenues that taxpayers must pay by law (taxes, social contributions, financial contributions and taxes) for the current period and prior periods (fines, default interest and surcharges), totaling the collection of each tax. This range is slightly higher than the official estimate adopted by the RFB, which does not account for *royalties* and special participation in the extraction of oil, minerals and electricity as if they were tax proceeds, with penalties and interest on arrears - all being accounted as income in the calculation presented in this article.

This methodological distinction is directly reflected in the size of the tax burden determined in each case: in 2016, the tax burden, measured by the broad approach adopted in this article, was 33.74% of GDP, while the same account from RFB was 32.42% of GDP (RFB, 2018). This difference, 1.31% of GDP between the two methodologies was even higher, reaching 1.40% of GDP four years earlier (2012) - explained by the sharp trajectory of falling oil royalties from movement 2013. Even in comparison with the official data of tax burden - produced by the IBGE based on National Accounts - the broad method offers slightly more important numbers: in 2014 (latest available tax burden calculated by IBGE), the tax burden determined using the method in this article was 32.87% of GDP, while by IBGE reached 32.75% of GDP.

Since not all information used by this methodology is available in a historical perspective, the tax burden presented to 1996 were extracted from Varsano et al (1998), which follows a consistent methodology, enabling the linking of data. The updates from subsequent years followed the methodological approach proposed.

2. DIRECT COLLECTION AND MAIN TAXES

2.1 Aggregate Tax Burden

The first historical record of the Brazilian tax burden dates back to the immediate post-World War II period: In 1947, this indicator pointed to a taxation of about 13.84% of GDP. From the postwar period to the present day, what was observed in the Brazilian tax burden was a clear path of expansion - although with uncertain and volatile movements at certain stages. In 2017, the tax burden reached 33.74% of GDP, almost 2.5 times that recorded at the beginning of the cycle. Table 1 presents the data of the tax burden year after year.

Table 1. Historical Evolution of the gross tax burden as% of GDP - 1947/2017

Year	Rate	Year	Rate	Year	Rate	Year	Rate	Year	Rate
1947	13,84	1962	15,76	1977	25,55	1992	25,01	2007	34,59
1948	14,03	1963	16,05	1978	25,70	1993	25,78	2008	34,76
1949	14,39	1964	17,02	1979	24,66	1994	29,75	2009	33,16
1950	14,42	1965	18,99	1980	24,52	1995	26,93	2010	33,23
1951	15,74	1966	20,95	1981	25,25	1996	26,85	2011	34,08
1952	15,41	1967	20,47	1982	26,34	1997	27,41	2012	34,02
1953	15,20	1968	23,29	1983	26,97	1998	27,67	2013	33,62
1954	15,82	1969	24,87	1984	24,34	1999	29,00	2014	32,87
1955	15,05	1970	25,98	1985	24,06	2000	30,56	2015	32,84
1956	16,42	1971	25,26	1986	26,19	2001	32,05	2016	33,33
1957	16,66	1972	26,01	1987	23,77	2002	33,28	2017	33,74
1958	18,70	1973	25,05	1988	22,43	2003	32,60		
1959	17,86	1974	25,05	1989	24,13	2004	33,62		
1960	17,41	1975	25,22	1990	28,78	2005	34,75		
1961	16,38	1976	25,14	1991	25,24	2006	34,43		

Created by authors. Primary sources: VarsYear et al (1998), STN, RFB, CEF e IBGE.

A more detailed explanation of the short-term fluctuation behavior of the tax burden can be seen in Afonso e Castro (2016). Either way, it is worth noting an important observation about the elasticity of taxation relative to the product, which showed reasonably mutable over time:

> "[...] in the past, tax revenues showed high elasticity in relation to the gross domestic product, that is, the tax burden increased when the economy was growing, especially when recorded high growth rates. At the turn of the century, the tax burden grew, and much, when the economy slowed and went on to present small annual rates compared to those obtained in the postwar period" (AFONSO E MEIRELLES, 2006, p. 67).

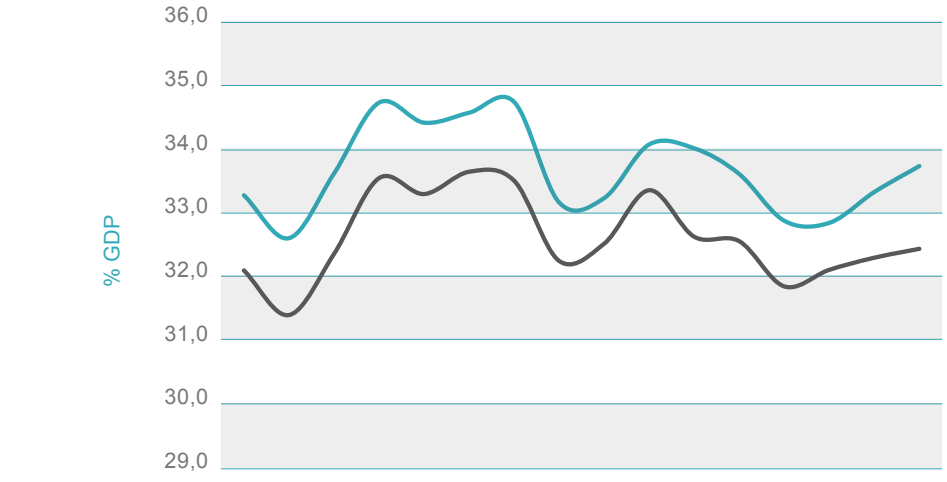
In other words, the data show an increase in the sensitivity of revenue because of GDP growth, reaching its peak from mid-1990s to the 2000s. Not coincidentally the indicator grew 7.9 percentage points of GDP between 1996 and 2005. Something similar happened during the 1960 with the burden, but with an expansion profile very different from that observed in the decades of 1990/2000. But recently - just after the international crisis of *subprime* (2008/2009) - Brazil"s tax burden gave new signs of change in its behavior in relation to economic activity. According to the econometric evaluation of Ribeiro (2016), the elasticity of tax revenue relative to GDP suffered a structural break from 2008, when this parameter became less than one unit, i.e., responding with growth below the growth of the product. From evidence in the trajectory of the tax burden, Afonso and Castro (2018) also identified the same rupture of elasticity.

2.2 Compared methods

RFB is the institution that generates the official estimate of the tax burden in Brazil. Its methodological distinction for the calculation presented in this paper is primarily on: i) the primary source of data used is the RFB itself (in the broad source, the method is the STN). ii) It does not include income from fines and default interest from taxes, and iii) does not include income from government participation (royalties and special participations) derived from operating activities of natural resources.

Despite the differences, the two methodologies for determining the tax burden capture the essence of the tax system, encompassing in their account most of the tax burden imposed on the Brazilian economy. The Chart 1 shows the recent history (since 2002) of the tax burden calculated using the two options.

Chart 1. Gross Tax Burden as% of GDP: Comparative Methods - 2002/2017



	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Government Take	33,3	32,6	33,6	34,7	34,4	34,6	34,8	33,2	33,2	34,1	34,0	33,6	32,9	32,8	33,3	33,7
RFB	32,1	31,4	32,4	33,5	33,3	33,6	33,5	32,2	32,5	33,4	32,6	32,6	31,8	32,1	32,3	32,4

Created by author. Primary Sources: STN, RFB, CEF, IBGE y RFB (2018).

It appears that the movements of expansion and contraction of the tax burden indicator in both methodologies (Government take and RFB) are nearly identical, differing more by the intensity of these variations. The two methods present, however, a difference quite apparent in Figure 1: the level of the tax burden of the method government take is, on average, 1 point of GDP higher than the RFB's tax burden - which is explained by the exclusion of items in the RFB calculation, as already noted. Because of this increased scope, the method of government take is also called, often "comprehensive approach".

2.3 Main Taxes

The breakdown of the tax burden by tax is only available from 1980. Thus, between 1980 and 2017 it is possible to observe some behavior patterns of the main taxes of the Brazilian tax system.

If we group the taxes into four groups - taxes, contributions, social security extended (social security contributions in general and Guarantee Fund for Time of Service [FGTS]) and other tributes - we can notice a divergent behavior from the average in one of those groups. The contributions (social and economic conditions, including royalties and special participations) showed a much sharper increase than the taxes and social security contributions, which grew more gradually and with a less volatile momentum. Table 2 shows the evolution of the main taxes in the tax burden in the period in question, making the previously proposed grouping.

Table 2. Main Taxes in the Gross tax burden as % of GDP - 1980/2017

Year	Taxes	IR	IPI	IOF	II	ITR	ICMS	ISS	IPTU	IPVA	Consump Taxes	Contributions	Cofins	IPMF/ CPMF	CSLL	PIS/ Pasep	PG Oil*	Amplied Prev.	Social Prev.	FGTS	Others
1980	12.94	3.01	2.19	0.94	0.70	0.02	4.87	0.26	0.25	-	0.70	1.02	-	-	-	1.02	-	5.96	4.66	1.30	4.60
1981	13.48	3.37	2.20	1.16	0.59	0.03	4.95	0.32	0.29	-	0.57	1.05	-	-	-	1.05	-	6.43	4.99	1.44	4.29
1982	13.40	3.46	2.20	1.14	0.49	0.03	5.08	0.14	0.29	-	0.56	1.28	0.27	-	-	1.00	-	7.57	6.05	1.52	4.09
1983	13.62	4.24	2.11	0.72	0.45	0.01	5.03	0.36	0.22	-	0.48	1.57	0.61	-	-	0.96	-	6.90	5.45	1.45	4.88
1984	13.67	4.76	1.40	0.86	0.41	0.01	5.29	0.29	0.20	-	0.45	1.38	0.57	-	-	0.80	-	6.11	4.91	1.20	3.18
1985	14.33	5.13	1.84	0.55	0.40	0.01	5.44	0.28	0.16	-	0.52	1.43	0.62	-	-	0.81	-	5.84	4.73	1.12	2.46
1986	15.81	5.01	2.17	0.67	0.48	0.01	6.35	0.32	0.17	0.14	0.50	1.76	0.71	-	-	1.05	-	6.60	5.18	1.41	2.03
1987	14.31	4.31	2.43	0.57	0.40	0.01	5.49	0.31	0.13	0.10	0.55	1.46	0.67	-	-	0.79	-	5.89	4.74	1.15	2.11
1988	14.04	4.67	2.17	0.35	0.43	0.01	5.34	0.33	0.14	0.06	0.54	1.36	0.77	-	-	0.59	-	5.29	4.40	0.89	1.74
1989	14.74	4.94	2.21	0.16	0.43	0.00	6.41	0.33	0.07	0.05	0.14	1.96	1.10	-	0.21	0.65	-	6.04	4.63	1.41	1.38
1990	17.17	5.13	2.40	1.30	0.39	0.00	7.24	0.43	0.18	0.09	0.02	3.23	1.54	-	0.54	1.14	-	6.56	5.11	1.46	1.82
1991	14.80	3.90	2.14	0.59	0.42	0.02	6.76	0.44	0.37	0.15	0.02	2.87	1.55	-	0.28	1.05	-	5.66	4.37	1.29	1.91
1992	14.70	4.18	2.32	0.62	0.40	0.00	6.42	0.41	0.22	0.13	0.00	2.82	1.00	-	0.73	1.08	-	5.69	4.41	1.28	1.80
1993	14.20	3.85	2.44	0.80	0.45	0.01	6.04	0.35	0.15	0.11	-	3.40	1.37	0.07	0.79	1.16	-	6.44	5.19	1.25	1.74
1994	15.41	3.83	2.22	0.69	0.52	0.00	7.33	0.43	0.21	0.18	-	5.66	2.56	1.06	0.97	1.07	-	6.59	4.82	1.78	2.09
1995	15.31	4.38	1.90	0.46	0.70	0.02	6.69	0.47	0.37	0.34	-	3.89	2.23	-	0.83	0.83	-	5.87	4.48	1.39	1.86
1996	14.25	3.65	1.78	0.34	0.50	0.02	6.69	0.50	0.40	0.37	-	3.61	2.04	-	0.73	0.84	-	6.17	4.78	1.38	2.82
1997	13.90	3.49	1.72	0.40	0.54	0.03	6.35	0.51	0.38	0.48	-	4.21	1.94	0.73	0.77	0.77	-	6.08	4.70	1.38	3.22
1998	14.51	4.17	1.61	0.36	0.67	0.02	6.22	0.56	0.43	0.46	-	4.06	1.81	0.83	0.67	0.72	0.03	6.48	4.77	1.71	2.62
1999	14.88	4.29	1.51	0.46	0.74	0.02	6.47	0.52	0.43	0.43	-	5.33	2.94	0.76	0.64	0.90	0.09	6.29	4.63	1.66	2.50
2000	14.74	4.00	1.46	0.26	0.70	0.02	6.84	0.56	0.46	0.44	-	6.16	3.21	1.20	0.72	0.79	0.24	6.36	4.81	1.56	3.30
2001	15.34	4.44	1.43	0.27	0.69	0.01	7.00	0.57	0.45	0.47	-	6.61	3.47	1.30	0.68	0.85	0.31	6.89	5.29	1.60	3.20
2002	15.55	5.07	1.24	0.27	0.53	0.01	6.92	0.57	0.47	0.47	-	6.83	3.42	1.36	0.83	0.84	0.38	6.87	5.36	1.51	4.03
2003	14.88	4.80	1.04	0.26	0.47	0.01	6.82	0.56	0.47	0.44	-	7.11	3.35	1.34	0.91	0.96	0.55	6.85	5.40	1.45	3.76
2004	14.95	4.62	1.08	0.27	0.47	0.01	6.98	0.60	0.49	0.45	-	7.79	3.95	1.35	0.99	0.98	0.53	7.06	5.62	1.44	3.82
2005	15.60	5.19	1.11	0.27	0.41	0.01	7.02	0.65	0.46	0.48	-	8.06	3.99	1.34	1.15	0.98	0.61	7.22	5.73	1.49	3.87
2006	15.41	5.07	1.11	0.28	0.41	0.01	6.88	0.70	0.45	0.50	-	7.78	3.70	1.33	1.10	0.97	0.69	7.32	5.81	1.52	3.91
2007	15.62	5.29	1.15	0.29	0.45	0.01	6.75	0.73	0.44	0.53	-	7.74	3.70	1.34	1.22	0.95	0.54	7.38	5.85	1.53	3.84
2008	16.70	5.60	1.18	0.65	0.55	0.01	6.99	0.77	0.41	0.53	-	6.88	3.81	0.03	1.34	0.98	0.73	7.32	5.75	1.57	3.86
2009	15.64	5.18	0.83	0.58	0.47	0.01	6.76	0.79	0.43	0.60	-	6.13	3.44	0.00	1.28	0.91	0.49	7.62	5.98	1.64	3.77
2010	15.69	4.90	0.96	0.68	0.54	0.01	6.81	0.81	0.42	0.55	-	6.32	3.57	0.00	1.16	1.03	0.56	7.61	6.02	1.59	3.62
2011	16.11	5.29	0.94	0.73	0.61	0.01	6.73	0.84	0.42	0.55	-	6.44	3.61	0.00	1.30	0.94	0.59	7.79	6.14	1.65	3.74
2012	15.65	4.89	0.88	0.64	0.65	0.01	6.72	0.88	0.42	0.55	-	6.39	3.63	-0.01	1.15	0.96	0.66	7.94	6.21	1.72	4.04
2013	15.45	4.87	0.80	0.55	0.69	0.01	6.70	0.86	0.42	0.54	-	6.27	3.62	-0.01	1.12	0.93	0.60	7.86	6.09	1.77	4.04
2014	15.26	4.80	0.85	0.51	0.64	0.02	6.60	0.87	0.43	0.54	-	5.92	3.35	-	1.07	0.88	0.62	7.85	6.03	1.81	3.85
2015	15.45	4.91	0.80	0.58	0.65	0.02	6.54	0.90	0.47	0.58	-	5.59	3.32	-	0.98	0.87	0.42	7.82	5.92	1.89	3.98
2016	15.61	5.33	0.67	0.54	0.50	0.02	6.58	0.86	0.51	0.60	-	5.41	3.21	-	1.06	0.84	0.30	7.94	6.03	1.90	4.37
2017	15.55	5.02	0.71	0.53	0.49	0.02	6.79	0.86	0.54	0.60	-	5.89	3.36	-	1.06	0.89	0.57	7.92	6.04	1.88	4.37

Created by authors. Primary sources: VarsYear et al (1998), STN, RFB, CEF e IBGE..
*Royalties and participations on oil exploitation. PG = Government shares (economic contributions)

Cofins: Contribución a la financiación de la seguridad social / **CPMF:** Contribución Provisional en Transacciones Financieras / **CSLL:** Contribución social sobre el ingreso neto
PIS: Programa de Integración Social / **Pasep:** Programa de Formacion del Patrimonio de la Función Pública / **PG Petróleo:** Participación del gobierno en la exploración petrolera
Prev. Ampliada: Aportaciones a la seguridad social (total) / **Prev. Social:** Contribuciones de la Seguridad Social al INSS (Instituto Nacional de la Seguridad Social) /
FGTS: Fondo de garantía por Tiempo de servicio

The main explanation for the growth of contributions against taxes lays in the federative issue. According to Varsano et al (1998) and Affonso (2000), once parts of the federal taxes were constitutionally linked to the subnational governments (SNG), the Brazilian state went through a process of fiscal adjustment. The Central government went to prioritize the collection of contributions, especially social contributions, such as the Contribution for the Financing of social Security (COFINS) and the social Integration Program/Assets Training Program of the Public Servant (PIS / Pasep). These tributes were interesting features for the central government at that time, stimulated their tax collection efforts: broad-based, easy to collect and with cumulative incidence - which was partially corrected in the reforms of 2002/2003 (CASTRO, 2010).

The data of Cofins are revealing: they went from 0.77% of GDP in 1988 to almost 4% of GDP in 2005 (its peak). Except the Property Motor Vehicle Tax (IPVA), which started with a tiny collection in 1988 (0.06% of GDP), no income from the national tax system had such a strong performance in that period. Currently it collects approximately 3.4% of GDP.

Under the individual perspective, however, it is worth mentioning the antagonistic behavior verified between two indirect taxes: Tax on Industrialized Products (IPI) and Tax on services of any nature (ISS). While the federal tax that affects the industry regularly deteriorated over time, the municipal tax on services "took off", especially since 2003, when the Supplementary Law No. 116 regulated a series of activities that should be taxed by this tax (SANTOS E CASTRO, 2018). Indeed, the opposite movements of the two taxes reveal the process of structural change through the Brazilian (and global) economy: we walked quickly toward the era of service economy (MILES, 1993), where the industry will increasingly become secondary, obsolete.

2.4 Collection by Government Level

The tax burden, when viewed from the perspective of the federation, may be viewed in two ways: from the direct collection from the government levels or from the final revenue for these areas. This second point will be discussed in the next section. The first point relates to something quite simple: What was the gross tax revenue of each of the three spheres of government (Union, states and municipalities)? Each level is attributed an individual tax burden, which when combined, result taken together in the number presented above.

The Table 3 shows the federative division of the tax burden since 1960 (the first year with available information), both as a proportion of GDP and as a proportion of the tax burden.

Table 3. Federal Division of the tax burden under the direct collection perspectives - 1960, 1965 y 1970/2017

Year	% GDP				% of Tax Burden			
	Union	States	Local	Total	Union	States	Local	Total
1960	11.14	5.45	0.82	17.41	64.00	31.30	4.70	100.00
1965	12.08	5.85	1.06	18.99	63.60	30.80	5.60	100.00
1970	17.33	7.95	0.70	25.98	66.71	30.60	2.69	100.00
1971	17.35	7.22	0.69	25.26	68.69	28.58	2.73	100.00
1972	18.12	7.21	0.68	26.01	69.67	27.72	2.61	100.00
1973	17.82	6.60	0.63	25.05	71.14	26.35	2.51	100.00
1974	18.11	6.37	0.57	25.05	72.30	25.43	2.28	100.00
1975	18.59	5.93	0.70	25.22	73.71	23.51	2.78	100.00
1976	18.96	5.42	0.76	25.14	75.42	21.56	3.02	100.00
1977	19.43	5.39	0.73	25.55	76.05	21.10	2.86	100.00
1978	19.29	5.70	0.71	25.70	75.06	22.18	2.76	100.00
1979	18.45	5.38	0.83	24.66	74.82	21.82	3.37	100.00
1980	18.31	5.31	0.90	24.52	74.67	21.65	3.69	100.00
1981	19.03	5.39	0.83	25.25	75.38	21.34	3.29	100.00
1982	20.00	5.64	0.70	26.34	75.94	21.41	2.65	100.00
1983	20.66	5.56	0.75	26.97	76.59	20.62	2.79	100.00
1984	17.93	5.77	0.65	24.34	73.65	23.69	2.66	100.00
1985	17.50	5.98	0.58	24.06	72.75	24.86	2.40	100.00
1986	18.46	7.07	0.65	26.19	70.50	27.01	2.49	100.00
1987	17.18	6.00	0.59	23.77	72.28	25.24	2.49	100.00
1988	16.08	5.74	0.61	22.43	71.68	25.58	2.74	100.00
1989	16.27	7.20	0.66	24.13	67.41	29.85	2.73	100.00
1990	19.29	8.52	0.97	28.78	67.03	29.59	3.37	100.00
1991	16.01	7.86	1.36	25.24	63.44	31.15	5.41	100.00
1992	16.54	7.27	1.20	25.01	66.14	29.07	4.79	100.00
1993	17.70	6.86	1.22	25.78	68.66	26.60	4.74	100.00
1994	20.18	8.05	1.52	29.75	67.82	27.06	5.13	100.00
1995	17.77	7.71	1.45	26.93	65.98	28.63	5.40	100.00
1996	18.06	7.44	1.35	26.85	67.26	27.71	5.03	100.00
1997	18.15	7.90	1.36	27.41	66.21	28.83	4.96	100.00
1998	18.54	7.62	1.51	27.67	67.01	27.53	5.46	100.00
1999	19.74	7.80	1.46	29.00	68.07	26.91	5.02	100.00
2000	20.38	8.45	1.73	30.56	66.69	27.64	5.67	100.00
2001	21.43	8.86	1.75	32.05	66.98	27.61	5.41	100.00
2002	22.64	8.81	1.82	33.28	68.36	26.19	5.45	100.00
2003	21.94	8.77	1.89	32.60	67.58	26.67	5.75	100.00
2004	22.65	9.00	1.97	33.62	67.79	26.52	5.69	100.00
2005	23.76	9.07	1.92	34.75	68.64	25.93	5.43	100.00
2006	23.43	9.01	1.99	34.43	68.34	25.98	5.68	100.00
2007	23.77	8.78	2.03	34.59	68.93	25.19	5.88	100.00
2008	23.76	8.97	2.03	34.76	68.35	25.81	5.84	100.00
2009	22.38	8.74	2.04	33.16	67.47	26.36	6.17	100.00
2010	22.36	8.81	2.07	33.23	67.27	26.51	6.22	100.00
2011	23.24	8.71	2.13	34.08	68.18	25.56	6.26	100.00
2012	23.08	8.76	2.18	34.02	67.83	25.75	6.42	100.00
2013	22.66	8.76	2.19	33.62	67.42	26.06	6.51	100.00
2014	21.91	8.72	2.24	32.87	66.65	26.52	6.83	100.00
2015	21.67	8.80	2.37	32.84	65.98	26.81	7.21	100.00
2016	21.96	8.96	2.41	33.33	65.89	26.88	7.23	100.00
2017	22.10	9.14	2.50	33.74	65.50	27.11	7.40	100.00

Created by authors. Primary sources: VarsYear et al (1998), STN, RFB, CEF.

Some points are worth mentioning regarding data collection by government level. First, it is possible to divide the horizon into three parts with different behaviors on centralization / decentralization of resources: i) in the 1960s and 1970s, coinciding with the rise of power of the military regime, a clear concentration around the central government is noted; ii) in the 1980s, coinciding with the political opening and the start of the new Constitution, an intense decentralization of revenue takes place, helped by strengthening the capacity of self-taxation of subsequent regional governments to 1988 (SERRA AND AFONSO, 2007); and iii) in the following decades (from the 1990s), a relative stability in the federal division of revenue collected is verified.

Another point worth mentioning is the tax performance of local governments. The growth of municipalities in the scenario of fiscal federalism in Brazil was such that many scholars came to call the Brazilian fiscal federalism "fiscal municipalism" or "municipalist federalism" (AFONSO E ARAUJO, 2000; CASTRO E AFONSO, 2010; E WILSON FERNANDES, 2013). In fact, in terms of direct tax collection, municipalities are demonstrating historically an increasing role in the tax decentralization in the country. States, on the other hand, have a more erratic tendencies and show a long-term shrinkage behavior.

3. AVAILABLE INCOME AND INTERGOVERNMENTAL TRANSFERS

The tax burden among government spheres from the standpoint of available revenue is the budget sequence in the collection perspective. If the spheres of government, initially undertake an effort to collect their specific taxes, in a second time, they start transferring resources with each other, according to constitutional and legal provisions. Thus, the available revenue is not more than revenues resulting in the coffers of government levels after collection and mandatory intergovernmental transfers, for example, the States' Participation Fund(FPE) and the municipal share of the Tax on Circulation of Goods and Services (ICMS).

This form of presentation of the tax burden is probably the one that arouses the interest of analysts of public accounts; it reflects the budgetary situation in each sphere of government and is not as intuitive as the idea of tax burden in a strict sense (imposition of a tax burden to the taxpayer).

The Table 4 shows the federative division of the tax burden since 1960 (first year with available information), both as a proportion of GDP and as a proportion of the tax burden.

Table 4. Federal Division of the tax burden under the Available Income Perspective - 1960, 1965 and 1970/2017

Year	% GDP				% Tax Burden			
	Union	States	Local	Total	Union	States	Local	Total
1960	10.37	5.94	1.11	17.41	59.54	34.10	6.36	100.00
1965	10.40	6.67	1.92	18.99	54.79	35.11	10.11	100.00
1970	15.79	7.59	2.60	25.98	60.77	29.23	10.00	100.00
1971	15.88	6.89	2.50	25.26	62.85	27.27	9.88	100.00
1972	16.61	7.00	2.40	26.01	63.85	26.92	9.23	100.00
1973	16.17	6.59	2.30	25.05	64.54	26.29	9.16	100.00
1974	16.64	6.31	2.10	25.05	66.40	25.20	8.40	100.00
1975	17.14	5.88	2.19	25.22	67.98	23.32	8.70	100.00
1976	17.13	5.81	2.20	25.14	68.13	23.11	8.76	100.00
1977	17.67	5.69	2.20	25.55	69.14	22.27	8.59	100.00
1978	17.50	6.00	2.20	25.70	68.09	23.35	8.56	100.00
1979	16.77	5.59	2.30	24.66	68.02	22.67	9.31	100.00
1980	16.71	5.70	2.10	24.52	68.16	23.27	8.57	100.00
1981	17.28	5.62	2.35	25.25	68.42	22.27	9.31	100.00
1982	18.17	5.82	2.35	26.34	68.99	22.09	8.91	100.00
1983	18.82	5.75	2.40	26.97	69.77	21.32	8.91	100.00
1984	16.01	5.87	2.46	24.34	65.79	24.12	10.09	100.00
1985	15.08	6.31	2.67	24.06	62.67	26.22	11.11	100.00
1986	15.95	7.08	3.17	26.19	60.89	27.02	12.10	100.00
1987	15.24	5.54	2.98	23.77	64.13	23.32	12.56	100.00
1988	13.48	5.97	2.98	22.43	60.09	26.61	13.30	100.00
1989	14.73	6.03	3.36	24.13	61.06	25.00	13.94	100.00
1990	16.95	7.94	3.89	28.78	58.90	27.60	13.50	100.00
1991	13.81	7.47	3.96	25.24	54.70	29.60	15.70	100.00
1992	14.26	7.03	3.73	25.01	57.00	28.10	14.90	100.00
1993	14.90	6.81	4.07	25.78	57.80	26.40	15.80	100.00
1994	17.65	7.47	4.64	29.75	59.32	25.10	15.58	100.00
1995	15.13	7.33	4.47	26.93	56.19	27.22	16.60	100.00
1996	15.05	7.42	4.38	26.85	56.05	27.63	16.32	100.00
1997	15.41	7.58	4.42	27.41	56.21	27.67	16.12	100.00
1998	15.55	7.36	4.75	27.67	56.21	26.61	17.17	100.00
1999	16.53	7.54	4.93	29.00	57.01	26.00	16.99	100.00
2000	17.07	8.16	5.33	30.56	55.86	26.69	17.45	100.00
2001	17.95	8.57	5.53	32.05	56.02	26.73	17.25	100.00
2002	18.90	8.64	5.74	33.28	56.78	25.97	17.24	100.00
2003	18.47	8.47	5.66	32.60	56.65	25.99	17.36	100.00
2004	19.20	8.64	5.78	33.62	57.11	25.70	17.19	100.00
2005	19.91	8.87	5.96	34.75	57.31	25.54	17.15	100.00
2006	19.59	8.82	6.02	34.43	56.91	25.62	17.47	100.00
2007	19.92	8.57	6.10	34.59	57.59	24.78	17.63	100.00
2008	19.62	8.89	6.25	34.76	56.46	25.56	17.97	100.00
2009	18.57	8.35	6.25	33.16	55.98	25.17	18.85	100.00
2010	18.76	8.34	6.13	33.23	56.46	25.09	18.45	100.00
2011	19.33	8.39	6.36	34.08	56.72	24.61	18.66	100.00
2012	19.51	8.34	6.17	34.02	57.33	24.52	18.15	100.00
2013	19.13	8.20	6.29	33.62	56.92	24.38	18.70	100.00
2014	18.31	8.22	6.35	32.87	55.69	25.01	19.31	100.00
2015	18.11	8.23	6.50	32.84	55.15	25.06	19.79	100.00
2016	18.20	8.42	6.72	33.33	54.60	25.25	20.15	100.00
2017	18.51	8.48	6.74	33.74	54.87	25.14	19.98	100.00

Created by authors. Primary sources: VarsYear et al (1998), STN, RFB, CEF, ANP, Aneel and IBGE.

Compared to the direct collection, the available revenue reveals a well-defined net transfer of resources from the central government and state governments to local governments. This is proved by the fact that municipalities are presented as the only one of the three spheres of government that has a available revenue (after transfers) higher than direct collection (before transfers) - a fact that reinforces the thesis of "fiscal municipalism "presented in the previous section.

Regarding the behavior of the breakdown of resources over time, no major developments are verified as regards the sharing between the central government and subnational governments, since the path of movement of centralization/decentralization is quite similar to the direct collection. This is the same sequence of centralization, decentralization and stability, which was highlighted in the analysis of the collection of the taxes by spheres of government.

However, it is worth drawing attention to the trend of rapprochement between states and municipalities in terms of budgetary dimension. If at the beginning of the cycle (1960), states had 34% of public sector revenues in 2014 this percentage fell to 25%. On the other hand, local governments increased their share in available income from 6.4% (1960) to almost 20% (2017). This increase of municipal representation in the composition of public revenue, especially after 1988, has two reasons, according to Santos and Castro (2018): granting fiscal autonomy (own revenues) and intensification of transfers (transfers). This weighting is important, since it is common to reproduce the misconception that municipalities saw their growth be sustained only by federal and state transfers (AFONSO E ARAUJO, 2000).

4. TAX BASE

The view of Tax burden for each tax base is one of the most interesting ways of observing the taxation of a country, precisely for producing a very revealing information about the characteristics of the tax system of the country. The main information extracted from this analysis is the profile of tax equity of the system, i.e. if the tax applied is more progressive or regressive according to the kind of income of individuals.

As in the analysis of the main taxes, the cycle presented here comprises a time horizon of 28 years commencing in 1980, as verified in Table 5.

Table 5. Gross Tax Burden by Tax Base as % of PIB - 1980/2017

Year	Total	Foreign Trade	Goods and Services	Payrolls	Rents	Assets	Others
1980	24.52	0.70	9.98	5.96	3.01	0.27	4.60
1981	25.25	0.59	10.26	6.43	3.37	0.32	4.29
1982	26.34	0.49	10.40	7.57	3.46	0.32	4.09
1983	26.97	0.45	10.27	6.90	4.24	0.23	4.88
1984	24.34	0.41	9.66	6.11	4.76	0.21	3.18
1985	24.06	0.40	10.06	5.84	5.13	0.17	2.46
1986	26.19	0.48	11.76	6.60	5.01	0.32	2.03
1987	23.77	0.40	10.82	5.89	4.31	0.24	2.11
1988	22.43	0.43	10.09	5.29	4.67	0.21	1.74
1989	24.13	0.43	11.00	6.04	5.16	0.12	1.38
1990	28.78	0.39	14.06	6.56	5.67	0.27	1.82
1991	25.24	0.42	12.54	5.66	4.17	0.53	1.91
1992	25.01	0.40	11.85	5.69	4.91	0.36	1.80
1993	25.78	0.45	12.24	6.44	4.64	0.27	1.74
1994	29.75	0.52	15.35	6.59	4.79	0.39	2.09
1995	26.93	0.70	12.58	5.87	5.21	0.73	1.86
1996	26.85	0.50	12.19	6.17	4.39	0.79	2.81
1997	27.41	0.54	12.43	6.08	4.26	0.88	3.22
1998	27.67	0.67	12.13	6.48	4.84	0.91	2.65
1999	29.00	0.74	13.56	6.29	4.93	0.88	2.59
2000	30.56	0.70	14.11	7.10	5.18	1.04	2.42
2001	32.05	0.69	14.64	7.68	5.62	1.06	2.35
2002	33.28	0.53	14.69	7.79	6.43	1.08	2.75
2003	32.60	0.47	14.61	7.75	6.31	1.07	2.39
2004	33.62	0.47	15.41	8.07	6.22	1.07	2.38
2005	34.75	0.41	15.58	8.11	6.92	1.08	2.63
2006	34.43	0.41	15.22	8.24	6.80	1.11	2.65
2007	34.59	0.45	14.98	8.24	7.15	1.14	2.64
2008	34.76	0.55	15.51	8.20	7.59	1.14	1.77
2009	33.16	0.47	14.27	8.54	7.05	1.22	1.61
2010	33.23	0.54	14.79	8.51	6.72	1.19	1.49
2011	34.08	0.61	14.73	8.70	7.26	1.20	1.58
2012	34.02	0.65	14.68	8.84	6.72	1.22	1.90
2013	33.62	0.69	14.45	8.78	6.66	1.23	1.81
2014	32.87	0.64	14.07	8.77	6.65	1.24	1.50
2015	32.84	0.65	13.82	8.80	6.74	1.35	1.48
2016	33.33	0.50	13.50	8.82	7.27	1.40	1.83
2017	33.74	0.49	14.20	8.85	7.32	1.42	1.46

Created by authors. Primary sources: Varsano et al (1998), STN, RFB, CEF e IBGE.

A long-standing feature of the national tax system is its heavy reliance on taxes on goods and services - which account for most of the indirect taxes. Between 1980 and 2017, the base "goods and services" accounted for somewhere between 40% and 50% of Brazil's tax burden - well above the average of developed countries and more similar to developing countries (OECD, 2017).

This marked characteristic of the Brazilian taxation results in undesirable effects on the income distribution in the country. This is because a system based heavily on taxes on consumption of goods and services - especially if applied to an economy with prevalence of poor distribution of income before taxation - tends to accentuate the socioeconomic inequality. The basic explanation for this, according Afonso e Castro (2016), is the fact that the tax paid (in absolute terms) in the procurement of goods and services is the same for all individuals, independently of their social level, which reflects a higher tax burden for poorer individuals than a tax burden related to the personal income.

> "The discussion in this paper has clearly indicated that consumption taxes have a regressive impact on the distribution of household annual [...]. This contrasts with the equalizing impact of personal income taxes, which fall more heavily on the higher income groups" (WARREN, 2008, p.57).

From the time point of view, the structure of the Brazilian tax burden was not significantly altered, especially when we observe the post-Real Plan period (1995 onwards). In other words, the predominance of taxes on consumption has been maintained, followed by the bases of "payroll" and "rents" (and profits and gains) remained, although there have been a shortening of the distance between the latter two. In the countries of the Organization for Economic Cooperation and Development (OECD), there is an evident stability of the share of taxation of goods and services since 1980. However, unlike Brazil, the average of these countries shows an increase in the share of taxes on payroll and social security, at the expense of taxes on rents (individuals and corporations) (OECD, 2018).

5. FINAL CONSIDERATIONS

This article sought, very succinctly and objectively, to consolidate and provide statistics concerning the evolution of the Brazilian tax burden in the postwar period. To do this, different forms of the tax burden (gross tax burden aggregate, main taxes, collection by government level, available income by level of government, and contributive bases) were considered, covering the main analysis perspectives of this traditional indicator.

The exchanges of these authors with different actors over the years makes clear that the issue is of public interest and that there is a need for greater disclosure of information on this topic. Considering the intention of updating regularly this article - once a year - we hope, as the ultimate goal, that the tax burden statistics will be better disseminated in the academic and political fields, and that this will generate more debates leading the Brazilian tax system towards a more virtuous path.

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ESTIMATE OF SALES TAX (ST) EVASION

in Honduras

David **Pineda Pinto**
Pedro **Zúniga**

SYNOPSIS

Tax evasion is an irregular practice whose consequences affect all of society. In terms of collection, for a Tax Administration it is imperative to maintain low levels of noncompliance. However, difficulties are faced in its quantification inasmuch as it is an activity carried out on the edge of the law. Thus, this study presents a methodology based on the National Accounts for estimating Sales Tax evasion in Honduras, beginning with a theoretical description thereof to subsequently quantify it.

CONTENT

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INTRODUCTION

Tax collection represents the Government's main source of revenues. It is of vital importance in order to provide the services which society demands. According to the International Monetary Fund ([FMI], 2014), tax policy is the main tool of the Governments to carry out the distribution of revenues.

To increase collection so that the Government may have more resources, it is necessary to increase the tax base and the taxpayer base and reduce the noncompliance (evasion) gaps or levels.

This last element is the base of this document wherein we endeavor to evaluate the collection potential in a scenario without Sales Tax (ST) evasion and thus quantify the magnitude of this phenomenon. The exercise is aimed at the ST due to its importance in the tax structure of Honduras, since it is the main source of tax revenue.

In the 2013 – 2017 period, in average indirect taxes represented 66.3% of tax revenues and direct taxes 33.7%. Within the indirect taxes, the ST represented 60% in average for the same period (*Graph No. 1*).

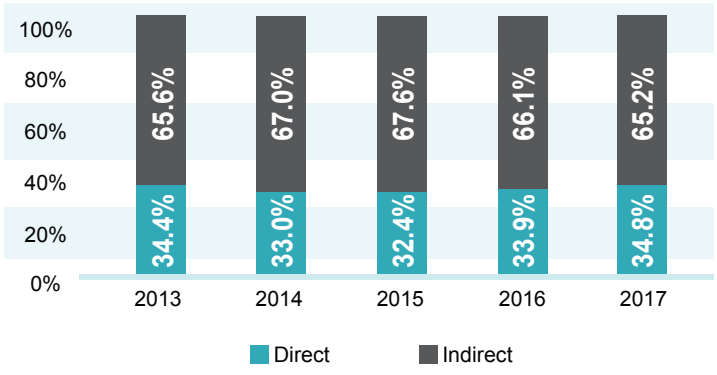
Evasion may be defined as nonfiling and nonpayment of taxes in the corresponding amount, according to the Law. As determined by Barra & Jorratt (1999) in the case of the ST, evasion implies the underdeclaration of debits or the overestimation of credits. The foregoing may cause inconsistencies in other taxes such as the Income Tax (IT), since the underdeclaration of sales or overdeclaration of purchases impact the taxpayers' income tax base.

Evasion, apart from being a fraudulent practice, brings about harmful results to the economy, since on reducing the Government's revenues the quality and coverage of the services rendered by it are directly affected. It is also harmful to *Horizontal Equity*[1], which may have negative implications in taxpayer behavior (Fenochietto, 1999). According to the Inter-American Center of Tax Administrations ([CIAT], 2012), evasion represents unfair competition in the economy and it is the responsibility not only of the Tax Administration (TA), but of the Government and citizens as well.

That is why the reduction of the evasion levels should be one of the main objectives of every Tax Administration.

Noncompliance, it is worth mentioning, is a universal phenomenon since no one likes to pay taxes. It occurs not

Graph Nº1. Tax Structure, % of Collection, Honduras 2013 - 2017



Source: Self-prepared with information from the Secretariat of Finance of Honduras (SEFIN)

1 Taxation principle which provides that individuals under similar conditions should be treated in the same manner.

only in Honduras or in developing countries, but rather in all economies. What varies are the noncompliance levels and the way of trying to reduce them. A recent report prepared by the Economic Commission for Latin America and the Caribbean ([ECLAC], 2018) states that one of the main obstacles for improving public finances in the region is tax evasion. This situation is worsened if one considers the irregularity in the publication and lack of institutionalization in its measurement, which limits the analysis of the problem's dimension and renders difficult the follow-up of the policies focused on reducing it.

In this regard, the work by Gómez Sabaini & Morán (2016) provides some signals on the historical behavior of evasion in the Latin American region. It presents with the information available on some countries the generalized decrease in Value Added Tax (VAT) evasion in early 2000 and its subsequent strengthening as a result of the financial crisis, thus evidencing the countercyclic nature of this variable.

Since it is an activity that is outside the Law, its calculations cannot be made directly. In spite of this limitation various methodologies are used in its measurement, such as: through the theoretical potential obtained from the Supply and use tables (SUT) or National Accounts (NA) Input-Output Matrix, or through a sampling prepared by the TA to detect noncompliance, to then extend the results obtained to the taxpayer universe (Jorratt, 2009).

Herein, a description is made of the methodology for estimating the Sales Tax evasion rate in the Honduran economy. The theoretical potential method is applied, using the National Accounts published by the Central Bank of Honduras (BCH), which maintains the 1993 National Accounts System (SCN93) as technical basis for its estimates. This study covers the 2013-2016 period.

The importance of having available evasion information is to allow the Tax Administration to focus its efforts and allocate its resources more efficiently. It is also an indicator of the efficiency of the TA management as well as of the tax policy itself.

1. METHODOLOGY

In a broad sense, the tax to be paid is calculated as a tax rate applied to a tax base, both of which are defined in the laws (Statutory tax rate and statutory tax base). The tax base of the sales tax is the private consumption of the economy (or total consumption = private consumption + public consumption).

The legal framework that governs the sales tax in Honduras originated in Decree 24-1963 whose purpose was to tax only one of the stages involved in the negotiation of a product. However, eventually the ST has been acquiring the characteristics of a value added tax (VAT) in all stages, determined by the "tax against tax method", of the consumption type and following the use principle.

In this sense, the current objective of this tax is to encumber the purchase-sale (transactions) of goods and services carried out in the economy. The tax rate has undergone several modifications since the entry into force of this regulation. The most recent one was in 2013 through the *Public Finance Organization Law* (Decree 278-2013) which provided for a general 15% rate (previously 12%) and 18% for select products such as alcoholic drinks, tobacco, national and international air transportation tickets. In turn, the Law provides for tax exemption of a series of goods and services considered of general consumption, which do not cause tax on consumption or tax credit in favor of the taxpayer.

As initially mentioned, in the literature there are several methodologies developed to measure the ST evasion rate. This document is based on the theoretical potential approach, which involves estimating the potential tax base and the potential sales tax (potential collection)

based on information from the national accounts system (NAS). This method has been used by several countries of the region. In some cases use is made of the input-output tables or the SUT on the side of the supply or utilization.

The information to calculate the potential tax base comes from the *Supply and Use Tables* (SUT) prepared by the Central Bank of Honduras (BCH) and is part of a series of publications called *"Annual National Accounts"*. The calculations were made with the SUT, which has detailed information of 196 products and 123 activities, in addition to the regulations in force. The SUT is a matrix that relates the supply and demand of the economy according to its components, providing at a high level of disaggregation, the interrelationships between the economic sectors and the products. It also offers information on the use of the goods and services and the cost structures of the industries (NAS, 1993).

The potential tax base is estimated according to accounts on the expenditure side (demand or use)[2]. It mainly consists of final consumption of non-exempt products, added to the encumbered intermediate consumption of the exempt production and encumbered investment of the exempt production. Consumption and investment of the exempt production cause ST when they are not subject to the zero rate treatment. That is, the industry must pay the ST on intermediate consumption and investment of taxed products without a right to credit or refund[3].

Final consumption consists of final consumption expenditure of homes, consumption of nonprofit institutions at the service of homes (NPISH) and Government consumption.

From the potential tax base, one determines the potential collection and the latter is compared with effective collection, obtaining the amount of evasion as the difference between both.

The first step for calculating the evasion is to make a historical review of the modifications of the ST Law[4]. After identifying the exempt products for each period (since their composition has undergone alterations through time) the potential tax base is measured.

As stated in previous paragraphs, to calculate the potential tax base, from the final aggregate consumption one must subtract the consumption which, according to the Honduran regulation is exempt from ST payment. To the foregoing results one adds the intermediate consumption and encumbered investment (Gross Fixed Capital Formation) intended for the exempt production and calculated as follows:

$$CIA_{PE} = \Sigma (CIT_{PE} - CIE_{PE})$$

Where

CIA_{PE} = encumbered intermediate consumption of the exempt production

CIT_{PE} = total intermediate consumption of the exempt production

CIE_{PE} = exempt intermediate consumption of the exempt production

2 It is also possible to estimate it on the basis of production accounts.

3 Since exemptions apply only to the consumption stage, for which reason the purchase of goods and services by producers of exempt goods are part of the potential tax base (Jorratt, 2009).

4 The document *"Updated Sales Tax Law and other Regulations for its collection"* written by Peña (2015), shows in chronological order a compilation of the evolution of the ST regulations.

Since there is no data available of use and destination of the investment matrix[5], it is assumed that the encumbered Gross Fixed Capital Formation (***GFCF***$_A$) has the same proportion as the ***CIA***$_{PE}$:

$$GFCF_{PE} = \Sigma \left(\frac{GFCF_G * CIA_{PE}}{CIT} \right)$$

Where

$GFCF_{PE}$ = GFCF of the exempt production

$GFCF_G$ = encumbered

CIT = Total intermediate consumption

It must be mentioned that given that in some cases the level of disaggregation for exempt goods provided by the regulations is not the same as that appearing in the SUT, it is necessary to adjust the calculation by making some weightings of the products that show this characteristic.

With respect to imports, taken as reference was the import tariff code, likewise, the information from the BCH's *Foreign Trade System* was used to identify the encumbered consumption of the products identified as exempt in the SUT information in order to subtract it from the latter. The same treatment could not be replicated with respect to internal consumption inasmuch as the same level of detail is not available. Therefore, in some cases, use was made of the weight of that observed in imports, while in others additional calculations were made. For example, the proportion (encumbered and exempt) of economic activities such as consumption of electricity, home leasing, sports events and public shows was prepared on the basis of external information (statistical reports and amounts collected), to subsequently integrate it to the calculation of the SUT.

Additionally, taxed consumption of taxpayers in free zones is subtracted from the potential tax base, since the different laws of special regimes exempt its consumption from the payment of the ST, as well as the taxed sales declared by the taxpayers belonging to the Simplified Regime[6], which likewise do not pay tax according to the Law.

The total amount subject to the payment of the ST is thus identified.

5 Formula based on the one prepared by the General Directorate of Internal Taxes of El Salvador ([DGII], 2012) in the document *"Estimation of VAT Evasion in El Salvador"*.

6 Article 11-A of the ST Law provides for a Simplified ST Regime for individuals or corporations with a single establishment and whose taxed sales do not exceed L250,000 annually, which amount shall no be subject to collection, but to submit the tax declaration only.

According to the foregoing, the potential tax base (Non-Deductible ST Expense) is:

Potential tax base

- ***= Taxed final consumption***
- ***+ Taxed intermediate consumption from exempt production***
- ***+ Taxed investment of exempt production***[7]

From this amount one must deduct the actual ST charged in the national accounts. Thereafter,

Potential collection =
Potential tax base * Tax rate

To determine the amount of evasion, one must compare the potential collection with the actual collection,

Amount of evasion =
Potential collection - Actual collection

Gross collection is obtained from the collection reports of the Tax Revenue Administration Service (SAR) and the Secretariat of Finance. To determine actual (net) collection which is the one compared with the potential collection, one deducts from gross collection the ST refunds made during the period being analyzed. These are obtained directly from the ST sworn returns that appear as tax credit for the following period in favor of the taxpayer, upon concluding the analyzed fiscal period (netted from the credit of the previous period).

Finally the evasion rate is determined as follows,

$$\text{Rate of evasion} = \frac{\text{amount of evasion}}{\text{potential collection}} * 100$$

2. RESULTS

The following charts (*Table No.1 and Table No. 2*) show a summary of the calculation structure for estimating ST evasion from2013 – 2016.

Table No. 1:
Formula for calculating the taxable theoretical base

	Potential theoretical base (taxable) =
(+)	Final consumption subject to ST[8] 15%
(+)	Final consumption subject to ST 18%
(+)	Taxed purchases intended for the production of ST exempt goods and services
(+)	Consumption of taxed goods and services by persons not living in the country
(+)	Exports that could have been taxed
(-)	Actual ST that is attributed to the national accounts

Source: Self-prepared.

7 12% and 15% in 2013.

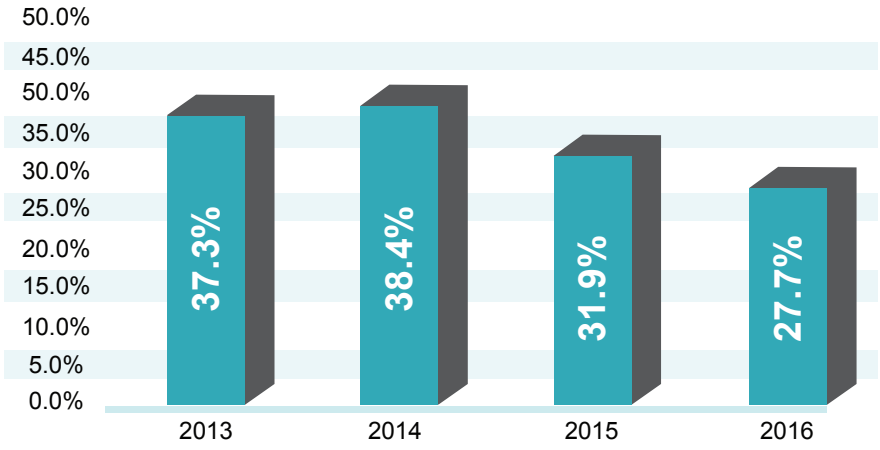
Table No. 2: Auxiliary Calculations

	Final consumption subject to ST
(+)	Final Consumption
(-)	Consumption of good and services exempt from ST
(-)	Consumption which homes make abroad
(-)	Consumption of Sales from Simplified Regime
	Taxed purchases intended for the production of ST exempt goods and services
(+)	Total intermediate consumption of exempt production
(+)	Total intermediate consumption from free zones
(+)	Gross Fixed Capital Formation from exempt production
(-)	Exempt Intermediate Consumption from exempt production
(-)	Exempt Intermediate Consumption from free zones

Source: Self-prepared.

The ST evasion rate in the Honduran economy is shown in *Graph No. 2*. The average in the 2013-2016 period was 33.8%. In 2014 there was an increase in the evasión rate with respect to the previous year. This could be related to the increase in the rate (the general rate went from 12% to 15%), since an increase in rate tends to increase the levels of noncompliance (*Internal Revenue Service of Chile* [SII], 2010) and to the change in the composition of exempt products resulting from the ST reforms included in Decree 278-2013.

Graph Nº2. Fiscal Evasion Rate of ST. Honduras 2013 - 2016

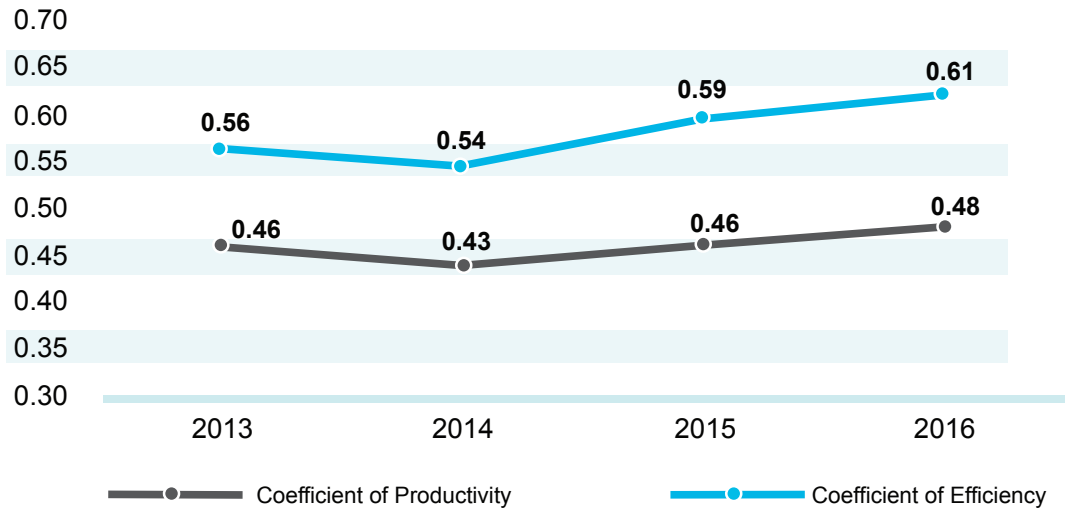


Source: Self-prepared with information from BCH, SAR and SEFIN

Starting in 2015, evasion was reduced to levels lower than those registered in 2013, thus shortening the gap between actual and potential collection (for additional details on the calculations, *consult Annex No. 1*). The foregoing is related to the entry into force of the invoicing regime and the restructuring of the TA, that allowed for considerably expanding the taxpayers and ST filers base, which went from 35,934 in 2013 to 62,681 in 2016.

To complement the previous analysis, the productivity coefficient is calculated. Its purpose is to calculate how much is collected in relation to the GDP by percentage point of tax rate (ST) and efficiency in relation to private consumption according to the rate of said tax. The latter is thus a more precise indicator, since it is closer to the ST tax base. Theoretically, the productivity and efficiency of the taxes may be affected by noncompliance (evasion) and tax expenditure. The greater the latter, the lower the coefficient, for which reason there is an inverse relationship between these coefficients and evasion. Both indicators show the same behavior throughout the series. The deterioration in 2014 and subsequent improvement observed starting in 2015 are negatively related with the behavior of the noncompliance levels previously shown (*Graph Nº3*).

Graph Nº3. ST Coefficient of Productivity and Efficiency. Honduras 2013 - 2016



Source: Self-prepared with BCH and SAR data

3. CONCLUSIONS

The taxed intermediate consumption component of the exempt production generates nondeductible sales tax only when the exemptions are not subject to the "zero rate". In other words, the exemption is only applicable to the value in the exempt productive stage. This means that the companies that produce those exempt goods and/or services are not exempt from the payment of ST in the purchase of inputs used in their production. The same situation is applicable in the case of investment. In Honduras, the zero rate is only applied to exports[8].

The intermediate consumption for one's own use and the nonmarket one which appears in the national accounts are treated as consumption of exempt production. This is so, because even though they are not explicitly exempt in the regulation, these two categories do not collect sales tax in the market. According to the National Accounts System (SCN, 2008), the production for one's own final use includes the products withheld by the producer for his own use as final consumption and the nonmarket production consists of individual or collective goods and services produced by non-profit institutions that serve homes (NPISH) or by the government which are provided free or at economically insignificant prices to other institutional units or the community in its entirety.

This methodology has been widely used in the Latin American countries. Most of these countries have a VAT rather than ST. The ST in Honduras works as a VAT: in both cases, the final consumer is the one who bears the total payment of the tax. Therefore, the methodology is applicable to both and thus, the VAT/ST potential theoretical base may be related to macroeconomic aggregates such as in final consumption expenditure.

Whenever possible, it is convenient to compare the results obtained on the utilization side with the results of the supply side. In this case BCH does not estimate the gross production value at purchaser prices because it does not calculate the purchaser price index, for which reason the comparison could not be made.

Some limitations of the use of this methodology are identified by Jorratt (2009), which are related to the reliability of the information source, as well as the level of disaggregation of the National Accounts.

Another limitation is that the SUT used for the calculation is published in Honduras with a two-year delay. Therefore, the evasion estimates will have the same gap. This restricts the use of the results for the design of control and examination plans.

Tax information is used in preparing the national accounts information; therefore, the theoretical potential loses independence and evasion could be underestimated.

Also, the updates or changes made by the Central Bank, either in its NAS methodologies or information, will represent a change in the estimated evasion results.

When the exempt product established in the regulation does not exactly coincide with the product of the national accounts, additional estimates or assumptions or made.

8 In 2010, Decree 270-2010 eliminated the zero rate that was in force for importers and producers of exempt goods and services from the Strengthening of Revenues, Social Equity and Rationalization of Public Expenditure Law.

It is recognized that the Honduran regulation is complex and very dispersed, since it recurrently undergoes changes.

The Tax Administration and the Secretariat of Finance do not have an orderly registry of the amounts of sales tax refund made (or in process). Therefore, in order to determine the actual (net) collection, the total balance in favor of the taxpayer upon conclusion of the analyzed period (netted from the credit of the previous period) was subtracted from the gross collection.

To estimate the sectorial evasion rate, the classification of economic activities must be standardized with those of the BCH. Currently, BCH uses the Internacional Standard Industrial Classification (ISIC) revision 3, while SAR, on its part uses revision 3, although not well defined. At the time of preparation of this estimate, both institutions are working in the migration toward ISIC 4.

Annex Nº 1

Theoretical Taxable Base and Evasion Calculation.

	Item	2013	2014	2015	2016
	Potential theoretical base (taxable) =	**240,108.3**	**271,323.0**	**285,685.1**	**300,495.4**
(+)	Final consumption subject to 15% ST	146,285.9	173,519.7	185,400.6	198,871.9
(+)	Final consumption subject to 18% ST	27,065.1	16,678.9	18,923.5	21,652.0
(+)	Encumbered purchases intended for the production of ST exempt goods and services	103,306.5	111,615.4	118,128.7	121,506.8
(+)	Consumption of encumbered goods and services by persons not living in the country	3,999.2	5,697.6	5,269.3	6,163.3
(+)	Exports that could be encumbered	0.0	0.0	0.0	0.0
(-)	Actual ST that is attributed to the national accounts	13,483.2	19,509.7	23,113.5	26,046.6
	Additional Calculations				
	Final consumption subject to ST	**173,351**	**190,199**	**204,324**	**220,524**
(+)	Final Consumption	371,504	396,663	422,711.4	451,340.4
(-)	Consumption of goods and services exempt from ST	192,003	201,586	212,957.7	225,293.1
(-)	Consumption by homes carried out abroad	6,140	4,868	5,419.5	5,511.7
(-)	Consumption of Sales of Simplified Regime	9	10	10	11.7
	Encumbered purchases intended for the production of ST exempt goods and services	**103,306**	**111,615**	**118,129**	**121,507**
(+)	Total intermediate consumption of exempt production	194,832	227,179	229,363	244,583
(+)	Total intermediate consumption of free zones	80,606	86,993	92,252	92,001
(+)	Gross Fixed Capital Formation from exempt production	17,260	12,036	15,288	13,959
(-)	Exempt Intermediate Consumption from exempt production	113,353	132,297	131,038	141,541
(-)	Exempt Intermediate Consumption of free zones	76,038	82,295	87,737	87,495
	Evasion Results				
	Potential Collection	**32,872.8**	**43,700.7**	**46,259.0**	**48,971.7**
	Effective Collection	**20,595.4**	**26,929.2**	**31,517.2**	**35,402.2**
	Evasion	**12,277.3**	**16,771.5**	**14,741.8**	**13,569.5**
	Rate of Evasion	**37.3%**	**38.4%**	**31.9%**	**27.7%**
	Rate of Evasion as percentage of GDP	**3.3%**	**4.0%**	**3.2%**	**2.7%**

Source: Self-prepared with information from BCH and SAR.

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ELECTRONIC CONTRACTING

in the State Agency of Tax Administration after the new Public-Sector Contract Law

Olga Luisa
Sánchez Gil

SYNOPSIS

The Public-Sector Contract Law of 2017 incorporates the latest Community Directives on public procurement and pursues the implementation of a more efficient, transparent and comprehensive public procurement system.

The article presented focuses on the novel aspects of the LCSP that affect the award of contracts, with special emphasis on the use of electronic means in the different procedures. All this, from the point of view of the contracting authority and in consideration of the changes necessary for the complete implementation of the aforementioned developments

CONTENT

THE AUTHOR

The author is a State Civil Administrator and a Doctor in Law. Since December 2016, she has been an Adjunct Member attached to the Director´s Office of the AEAT´s Special Delegation in Aragon, based in Zaragoza, and contracting is part of her professional work. This paper resulted from the Final Work of "Master's Degree in Public Management, Public Policies and Taxation (2014 Plan)," presented on July 4, 2018, at the UNED Center under the Institute of Fiscal Studies, and that obtained the grade of Outstanding, under the direction of Mr. Raúl López Fernández, Chief State Attorney of the State Secretariat for Budgets and Expenditure.

INDEX

INTRODUCTION

Law 9/2017, of November 8, on Public Sector Contracts (hereinafter Law 9/2017 or, simply, LCSP[1]), effective as of March 9, 2018, has carried out the necessary incorporation into the Spanish legislation of the latest Community Directives on public procurement (Directives 2014/23/EU and 2014/24/EU, of February 26, 2014[2]). Its study constitutes a matter of full legal relevance, as it entails important modifications on the previous regulatory framework on the subject, constituted, mainly, by Royal Legislative Decree 3/2011, of November 14, which approved the consolidated text of the Public-Sector Contract Law (TRLCSP)[3].

As stated in its Preamble, the LCSP is inspired by the objectives of achieving greater transparency in public procurement and better value for money, while pursuing the implementation of a more efficient, transparent and comprehensive public procurement system, aimed at obtaining greater efficiency in public spending. All this, by respecting the principles of equal treatment, non-discrimination, transparency, proportionality and integrity.

Among the aforementioned principles, transparency stands out, which, as will be seen, is very present throughout the contract award procedure, beginning with advertising those contracts and the new regulation of the contractor's profile in Article 63 LCSP, and concluding with the regulation of the Public-Sector Contract Registry in article 346 LCSP.

This paper has focused on the novel aspects of the LCSP that affect the award of contracts, from the point of view of the contracting authority, with special emphasis on the use of electronic means in the different procedures contemplated in said Law. All this, under the announced premise of achieving an efficient, transparent and complete public procurement system.

1. ELECTRONIC CONTRACTING IN THE LCSP

1.1 Background: Electronic administrative procedures in the LPAC

Before analyzing the treatment of electronic contracting by Law 9/2017, we must look at some background information. Accordingly, the new Public Procurement Directives of the European Union already advocated the generalization of electronic public procurement, under the consideration that electronic information and communication media should become the "standard method of communication and exchange of information in contracting procedures". This allows for streamlining the publication of contracts and increasing the efficiency and transparency of said procedures and, in accordance with all this, expanding the possibilities of participation of economic agents in such procedures throughout the internal market[4].

At the national level, the LCSP was preceded by: Law 11/2007, of June 22, on Electronic Access of citizens to Public Services[5] and Law 39/2015, of October 1,

1 BOE nº 272, of 9-11-2017.

2 DOUE L 94, of 28-03-2014.

3 BOE number 276, of 16-11-2011.

4 See Recital 52 Directive 2014/24/EU.

5 The AEAT procedures were adapted to Law 11/2007 (BOE 150 of 06-23-2007) from 12-31-2009 and the Electronic Headquarters was created, accessible from the portal of the tax agency (www.agenciatributaria.es), or directly from www.agenciatributaria.gob.es. See BORREGO ZABALA, B., "Electronic notification. Practical application by Public Administrations and future forecasts", *The Law, Practical Administrative Contracting*, no. 137, Reflections Section, May 2015, p. 84-92.

concerning the Common Administrative Procedure of Public Administrations (hereinafter, LPAC)[6]. The former established the right of citizens to interact electronically with the Public Administrations, as well as their correlative obligation to provide themselves with the necessary means and systems to allow it.

On the other hand, to the extent that the LPAC is of subsidiary application to the contracting procedures regulated in Law 9/2017, as provided in the fourth Final Provision of the latter, it is justified that we spend some time addressing the electronic regulation of administrative procedures in general[7]. Specifically, due to their interest for our presentation, we will address the following matters contemplated in the LPAC: representation, separation between identification and electronic signature, taxpayers required to interact electronically with Public Administrations and electronic notifications.

Thus, Article 5 of the LPAC established the need to prove the representation of citizens before the Public Administrations, in respect of actions that are not merely procedural (that is, in relation to the contractual matter: formulate requests, submit accountable returns or communications and lodge appeals). For these purposes, it is permissible to justify the representation by means of an "apud acta", face-to-face, or electronic proxy[8]; or by means of the accreditation of its registration in the Electronic Registry of Powers of the Public Administration or competent body. Likewise, article 6 LPAC provides for the obligation of each Public Administration to have an Electronic Registry of Powers of Attorney[9].

Another of the most important novelties of the LPAC is the separation between identification of the subjects and their electronic signature, so that, in general, the first will suffice, while the second will be required, only, when the will and the consent of the interested party must be corroborated[10]. In this way, a minimum set of categories of identification and signature means to be used by all Public Administrations is established[11].

More relevant to our work is the treatment in the LPAC of the subjects who are obliged to interact with public administrations through electronic means. In this regard, as provided in Article 14, said obligation weighs on legal persons; entities without legal status; professionals for whom compulsory registration is required - including

6 The LPAC (BOE No. 236, of 2-10-2015) entered into force on 2-10-2016, with some exceptions indicated in its Seventh Final Provision - related to the electronic registration of powers of attorney, electronic registration, registry of authorized public employees, General Electronic Access Point of the Administration (PAG) and electronic single file - in respect of which 2-10-2018 was set as effective date. However, given the difficulties arising from the implementation, this period has been deferred in another two years, until 2-10-2020, after the modification of the aforementioned Seventh Final Provision, by Royal Decree Law 11/2018, of August 31 (BOE No. 214, of 04-09-2018).

7 The first additional provision of the LPAC recognizes the particularities derived, on the one hand, from the administrative procedures regulated in special laws by reason of the matter (as in the case of the LCSP's contractual regulations) and, on the other, from the actions and procedures for the application of taxes in tax and customs matters (with special mention to Law 58/2003, of December 17, General Tax).

8 See Order HFP/633/2017, of June 28, which approves the models of powers that can be registered in the Electronic Registry of Proxies of the AGE and in the electronic register of powers of attorney of the Local Entities and the valid signature systems are established to carry out the *apud acta* powers of attorney through electronic means (BOE No. 158, dated 4-07-2017).

9 See Order HAP/1637/2012, of July 5, regulating the Electronic Registry of Proxies (BOE No. 177, dated 25-07-2012). See also Resolution of 9-03-2018, of the General Directorate of AEAT, which modifies that of 18-05-2010, in relation to the registration and management of powers of attorney and the registration and management of successions and legal representations of minors and disabled persons to carry out procedures and actions online before the Tax Agency (BOE No. 68, dated 03-19-2018).

10 In particular, as provided in Article 10.2 LPAC, the following shall be admitted as signature systems: The recognized or qualified and advanced electronic signature systems based on qualified electronic signature certificates, which include both legal certificates of legal entity and those of entity without legal status; recognized or qualified electronic seal and advanced electronic seal systems based on qualified electronic seal certificates; as well as any other system that the Public Administrations consider valid, under the terms and conditions established.

11 See Article 1.3 of the aforementioned Order HFP/633/2017 and Resolution of 14-07-2017, of the General Secretariat of Digital Administration, which establishes the conditions for the use of non-cryptographic electronic signature in the relations of the interested parties with the administrative bodies of the AGE and its public bodies (BOE No. 170, dated 07-18-2017). The AEAT does not issue electronic certificates but acts as the Registry Office for the certificates issued by the National Mint and Stamp Factory (FNMT).

notaries and property and mercantile registrars - regarding the procedures and actions carried out in the exercise of their professional activity; the representatives of interested parties who are obliged to interact electronically with the Administration; as well as public employees, regarding the procedures and actions that they carry out with the Public Administrations because of their condition, in the manner determined by regulation by each administration[12].

Finally, we must also address the important developments introduced in article 43 of the LPAC regarding electronic notifications, which will be preferred and will be made at the electronic headquarters or at the only authorized electronic address[13], as appropriate.

Likewise, as provided in Article 41.6 LPAC, the legal certainty of the interested parties is increased, establishing new measures that guarantee knowledge of the availability of notifications such as: the sending of notification notices, whenever this is possible, to the electronic devices and/or to the email address that the interested party has disclosed, as well as access to their notifications through the PAG, which will function as an entry portal.

We will conclude this section dedicated to the LPAC, with the mention of its article 36.1 that determines that "administrative acts will occur in writing through electronic means, unless their nature requires another more adequate form of expression and verification".

1.2 General aspects of electronic contracting in the LCSP

Moving into the study of the regulation of electronic contracting in the LCSP, the first thing that calls people's attention is the absence of a specific section dedicated to this matter. Instead, on the one hand, the fifteenth, sixteenth and seventeenth Additional Provisions may be used, dedicated to the norms related to the means of communication that can be used in the procedures regulated by said Law; the use of electronic, computer and telematic means in the procedures and the specific requirements related to electronic document reception tools and devices, respectively[14].

On the other hand, together with the previous provisions, there are also other manifestations of this matter imposed as mandatory by the Community Directives, such as electronic advertising of ads; the electronic availability of the specifications (through the contractor profile and the electronic contracting platform of the public sector); the regulation of the European Single Procurement Document - DEUC-; as well as the different formulas for the streamlining of contracting; which will be addressed as the different procedures for awarding contracts are developed[15].

Beginning with the study of the Fifteenth Additional Provision LCSP, it develops the following norms regarding the means of communication usable in the LCSP procedures:

12 In Article 14.3 LPAC, Public Administrations can establish by regulation the obligation to relate to them through electronic means for certain procedures and for certain groups of individuals, due to their economic, technical, professional nature or other reasons. In this sense, see Royal Decree 1363/2010, of October 29, regulates cases of notifications and mandatory administrative communications by electronic means within the scope of the AEAT (BOE No. 277, of 11-16-2010).

13 Art. 38.2 RD 1671/2009 establishes an Enabled Email Address System for the practice of electronic notifications that will be available to all AGE bodies that do not establish their own notification systems. See also Order PRE/878/2010, of April 5, which establishes the system of the enabled electronic address system (BOE No. 88, of 12-04-2010).

14 CAMPOS ACUÑA, C., The new public procurement at the local level, WOLTERS KLUWER, 2018, p. 182.

15 See Article 90 ("Transposition and transitional provisions") of Directive 2014/24/EU in which several periods of progressive application of said Directive were established, from its entry into force - 04-18-2014 - to electronic contracting "from end to end" (known by the doctrine as "electronification"), scheduled for 18-10-2018 and which contemplates the mandatory electronic processing of the entire contracting process, from the publication of tenders all the way to electronic payment.

Thus, section 1 establishes that electronic notifications may be made through the Authorized Electronic Address (DEH), or by electronic appearance. In this regard, the State Public Procurement Advisory Board (JCCP) has clarified that this statement includes all electronic notices provided in the LCSP; and also, that the obligation to interact electronically with the contracting bodies also includes individuals[16].

Therefore, considering the general rule of Article 14 of the LPAC, by which, as we saw, individuals were not obliged to interact with public administrations through electronic means; as a peculiarity of the LCSP, all the subjects that participate in the contracting procedures must do so through this type of electronic means, without exception.

Similarly, section 2 states that the processing of the procedures for awarding contracts regulated in the LCSP will entail the practice of notifications and communications derived from them by exclusively electronic means[17].

In turn, according to section 3, the general rule for the submission of tenders and requests for participation is also the use of electronic means, which only yields to the assessed cases provided therein and which must be duly justified in the case file by a specific report[18].

Meanwhile, sections 5 and 8 of the aforementioned Fifteenth Additional Provision contain general obligations, both with respect to the contracting bodies - which must preserve the integrity of the data and the confidentiality of the tenders and requests for participation-, on the one hand; as for electronic, computer and telematic means - which will have to meet the requirements set forth in the Sixteenth Additional Provision, on the other[19]. For this reason, it seems to us that it would have been more useful to include these details at the beginning of this Additional Provision, as a general warning.

As anticipated, in the Sixteenth Additional Provision it is determined that the use of electronic, computer and telematic means must comply with a series of rules that allow compliance with the following basic rules: non-discriminatory character, easy-to-use, accessibility, availability in general and compatibility with general purpose computer products; as well as confidentiality and integrity[20].

In addition, as if it were a true declaration of intentions of domestic lawmakers - even to alleviate the possible vestiges of previous contracting procedures - paragraph g) of section 1 of the aforementioned Sixteenth additional provision states: “The references of this Law to the presentation of written documents shall not impede the presentation of such documents by electronic means

16 See JCCP Report in case file 2/18 “Questions about the electronic processing of procedures”.

17 However, as provided in the same section 2º *in fine*, exceptionally, the possible use of verbal communication is admitted when it is not essential elements of a contracting procedure (contracting documents, participation requests and tenders) and provided that the content of said verbal communication is sufficiently documented (for this purpose, files or written or sound summaries of the main elements of the communication in question are admitted).

18 Section 4 includes various cases of exemption from the obligation to demand electronic means in the submission of tenders, either due to security breaches, or to protect especially sensitive information that requires a high level of protection that is not within the reach of economic operators through other alternative means of access in accordance with the provisions of section 7, which allows the use of tools and devices that are not generally available. See JCCP report in case file 2/18 “Questions about the electronic processing of procedures”.

19 Thus, and just to name a few, we will highlight the need for contracting bodies to ensure that, in all communications, information exchanges and storage and custody operations, data integrity and confidentiality of tenders and requests for participation are preserved (see section 5).

20 In this regard, it is sufficient to cite the importance that these means acquire in the face of such relevant issues as to prove the date and time of sending the requested information, as well as the exact moment of the reception or access to such information; the identity of the sender, integrity of the content of said communications, etc.

or, where appropriate, the generation of electronic physical supports and their subsequent presentation, in accordance with the standards set forth in this article and in its ensuing provisions".

Finally, the Seventeenth Additional Provision contemplates technical issues regarding electronic reception tools and devices, which must guarantee, at a minimum and by the appropriate technical means and procedures: That the exact time and date of receipt of the tenders and requests for participation can be established, along with the documentation associated with them, including the sending of blueprints and drawings (paragraph a); that no one can have access to the data and documents transmitted before the end of the specified deadlines (paragraph b) and that only authorized persons can set or modify the dates of opening of data and documents received (paragraph c), as well as access to all or part thereof (paragraph d) and give access to the transmitted data and documents and only after the specified date (section 3); while the data and documents received and opened, in application of the above, are only accessible to persons authorized to learn such information (paragraph f). Finally, it must be possible to ensure that violations or breaches of the above conditions can be clearly detected (section g).

So far, we have examined the specific provisions in the LCSP on electronic contracting, with all the advantages for legal security, simplification of administrative burdens, fluidity of the procedure, transparency and free competition in the tender that can be deduced from such procedure. However, together with these advantages, the still incipient nature of this regulation is striking, if one takes into account that a significant part of it is pending further regulatory development, not only respecting its own implementing regulations (remaining in force, in everything that does not contradict it, the previous Royal Decree 1098/2001, of October 12, which approved the General Regulation of the Law of Public Administrations Contracts[21]), but of other matters of greater importance for the electronic contracting[22].

Therefore, attention should be paid to the development of these procedures in the hopes that, like all major changes, it will take time until they can be considered fully implemented[23].

1.3 Advertising in contracting procedures

Moving into the analysis of the electronic contracting procedure, this subject matter is addressed in articles 116 to 129 LCSP. In this regard, for the sake of presentation fluency and in the interest of this paper, we will limit ourselves to pointing out the importance of the use of electronic means to guarantee advertising - and, therefore, transparency - in this phase of contract preparation.

Meanwhile, to address advertising we will focus, first, on the publication of ads, then we will address other issues such as the contracting profile of Article 63 LCSP and the Public Sector Contracting Platform –PLACSP- of article 327 LCSP; the fight against corruption and prevention

21 BOE no. 257, from 10-26-2001

22 This is the case with regard to certain technical and practical issues, such as the specifications necessary for the use of electronic means in contracting procedures (see section 2 of DA 16) and various measures contemplated in section 1 of the same DA 16 (those aimed at respecting the principles of confidentiality and integrity of tenders and equality between bidders regarding communications systems and for the exchange and storage of information (see paragraph d); the use of electronic signatures (cf paragraph f), and backup copies of documents submitted electronically by bidders (see paragraph i, mainly).

23 Quoting Professor PAVÓN: "The different pieces of the electronic public procurement puzzle have been placed on the table, although it is true that fitting them properly will only be possible in time. The hope cannot be other than the right to carry out all the procedures electronically". PAVÓN PÉREZ, J.A., "Electronic contracting in Law 30/2007 on Public Sector Contracts: Myths or reality in the transposition of EU regulations to Spanish law", in *Electronic Procurement* Magazine, no. 98, 2008, p. 63-91.

of conflicts of interest of article 64 LCSP and the Public-Sector Contract Registry of article 346 LCSP. Finally, we will refer to other obligations contemplated in Law 19/2013, of December 9, 2013, on transparency, access to information and good governance (hereinafter, Law 19/2003)[24].

Starting with the rules on advertising of ads, the basic premise to consider is that the use of electronic media contributes to streamline publications, while ensuring transparency and legal certainty and allowing free and generalized access to all economic agents, including SMEs.

The bidding of the contracts may be subject to a double type of advertising: optional, relating to prior information notices[25] and mandatory, referring to the publication of the announcements or calls for tender[26].

Based on the foregoing, regarding optional advertising, in accordance with the provisions of article 134 LCSP, contracting bodies are allowed to publish a "notice of prior information" in relation to contracts for works, supplies or services that are subject to harmonized regulation (hereinafter SARA[27] contracts) and will be concluded within a twelve-month period[28], counted from the date of sending it to the EU Publications Office or, where appropriate, from the date of sending, also to the EU Publications Office, of the publication announcement in the contractor profile.

The place for publishing these prior announcements will be either the Official Daily of the European Union (DOUE)[29] or the contractor profile. However, as a particularity, the publication in the DOUE must be prior to that made nationally[30]; while, when the publication is to be made in the contractor profile, the contracting authority must send the announcement of the publication in its profile to the EU Publications Office, in accordance with the requirements of Article 134.5 LCSP.

From the point of view of its importance, the publication of a voluntary announcement of prior information, with a maximum notice of twelve months and a minimum of thirty-five days before the date of sending the tender notice, constitutes one of the assumptions of reduction of the general term for the presentation of proposals[31]; being the application of the general terms the main consequence of the non-publication of this type of optional announcements, only.

24 BOE no. 295, of 10-12-2013.

25 See Articles 48.2 and 52.3 Directive 2014/24/EU.

26 See Articles 49 and 52.1 and 2 Directive 2014/24/EU. The content of the publication of the announcements, in its different modalities, has been regulated in Annex III of the LCSP, which we address here for the sake of presentation ease.

27 Articles 19 to 23 of Law 9/2017 characterize as SARA contracts the contracts subsidized by the contracting authorities and those whose estimated value is equal to or greater than certain amounts, called "thresholds" (€5,548,000 for the contracts of works and concession of works and services; €144,000 for supply contracts awarded by the General State Administration and dependent agencies and €221,000 for others. Finally, service contracts with similar estimated value or higher are subject to harmonized regulation €144,000 for those awarded by the AGE and dependent agencies and €221,000 for others and €750,000 for social and other services contracts in Annex IV). See Order HFP/1298/2017, of December 26, by which the limits of the diverse types of contracts are published for contracting the public sector as of January 1, 2018. (BOE No. 316, of 12-29-2017).

28 However, in the case of special services contracts in Annex IV, the announcement of prior information may cover a period longer than that indicated, as provided in section 6 at the end of article 134. In this regard, Annex II of the TRLCSP has disappeared from the LCSP and the distinction between the contracts of categories 1 to 16 and 17 to 27 included therein. Instead, all service contracts should be treated individually from legal standpoint, except for the specific services of the new Annex IV.

29 As clarified in the Fifth Additional Provision of the Law, contracting bodies must send their announcements electronically to the EU Publications Office, which will confirm receipt. Once the announcement is published in the DOUE, the contracting authority will receive a notification of the publication that will serve as proof of publication.

30 For the sake of the fluidity of the procedure, in accordance with article 134.4 LCSP, contracting authorities may publish it at national level, when they have not received notification of the corresponding publication within 48 hours after confirmation of the receipt of the notice by the Office of EU Publications.

31 In open procedures for awarding SARA contracts, the term will be reduced to fifteen days (as allowed in article 156.3.a LCSP) and in the case of restricted procedures, to ten days (as provided in article 164.1.a LCSP).

Meanwhile, advertising is also presented as an instrument of planning and rationality of contracting, when public sector entities are required to disclose in advance, through a prior information announcement, at least, the SARA contracts they will carry out in a budget year or in multi-annual periods, through the so-called "Contract Plan", as provided in Article 28.4 LCSP.

The second type of advertising we want to mention is mandatory advertising[32] and it includes both the tender announcement under article 135 LCSP - in the phase of preparation of contracts - and, by extension, the announcements of formalization of said contracts under Article 154 and bidding for project tenders under Article 186 LCSP.

With respect to the aforementioned ads, in general, the necessary publication in the contractor profile is established, except for the procedures negotiated without advertising, as will be seen. In addition, in the contracts concluded by the General State Administration - or by the entities linked to it classified as Public Administration agencies - the tender notice will also be published in the BOE. Additionally, in the case of SARA contracts, the ad will also have to be published in the DOUE, being possible to publish in this same medium contract of works, supplies, services, concessions of works and non-SARA services, when the contracting authority deems it convenient, as provided in article 135 LCSP[33].

Thirdly, regarding the possible forms of advertising, not necessarily exclusive to each other, we have also included in this section the contractor profile, which is governed by Article 63 LCSP[34] and which, as we have indicated, is the means of mandatory publication for tender and alternative announcements to the DOUE, in relation to prior information announcements.

In this regard, Title III of Book IV of the LCSP - dedicated to the administrative organization for the management of contracting – governs the management of contractual advertising through electronic, computer and telematic means. In this regard, article 347.2 provides that the contractor profiles of the contracting bodies of all state public sector entities must be included in the Public Sector Contracting Platform (PLACSP); while the institutional web pages of the different bodies will include a link to their contractor profile located on said contracting platform[35].

The specific content of the publications in the contractor profile that allow compliance with the obligations of transparency and equal treatment, is included in the five subsections of article 63.3 LCSP - designated by paragraphs a-e[36]. In this regard, from the point of view of the contracting authority, it is striking that the deadline for fulfilling these obligations has not been established. In response to this shortcoming, the JCCP, in its Report 59/18, after finding that "the time of publication of each document may vary, but in all of them the

32 Regarding the content of contract tender notices, article 135.4 addresses the information listed in Section 4 of Annex III, while that relating to the special service contracts of Annex IV is contemplated in Section 5 of the same Annex III.

33 The relevance of the advertising requirement in relation to the bidding announcements is verified by corroborating the lack of publication of the bidding announcement in the contracting profile, in the DOUE or in the advertising medium in which it is mandatory, in accordance with Article 135; it is one of the causes of nullity of administrative law of those indicated in Article 47 of Law 39/2015, as clarified in Article 39.2 paragraph c) LCSP.

34 Article 63.1 LCSP defines this figure as "the element that groups the information and documents related to the contractual activity of the contracting bodies, in order to ensure transparency and public access to them".

35 Article 347.1 LCSP establishes that the General Directorate of State Assets under the Ministry of Finance and Public Service will make available to all public sector contracting bodies an electronic platform that allows their contractor profiles to be disseminated online, as well as providing other complementary services associated with the computer processing of said data. http://www.contrataciondelestado.es

36 Under these obligations, article 63.5 LCSP addresses other matters related to the development of the tender that must also be published in the contractor profile, such as the annulled procedures, the makeup of the contracting boards, as well as the designated experts. Information on incidents in the contracting process is also included, such as decisions not to award or conclude the contract, abandonment of the award procedure, void declaration of bid, as well as the filing of appeals and the eventual suspension of contracts following an appeal lodged (see section 3 at the end).

purpose established by the Law is the same: to ensure transparency and public access to the corresponding documents". It has established the general rule that "the publication in the profile should be done as soon as it is necessary for the interested parties to access the information".

In accordance with said interpretative criteria, the JCCP in the aforementioned report specifies that the documents mentioned in paragraph a) of the aforementioned article 63.3, relating to the contract preparatory documentation (that is, justification report; insufficient means report regarding the services contracts; justification of the awarding procedure when one other than the open or restricted one is used, specifications of particular administrative clauses and technical requirements and case file approval document), must be published in the first instance in which a potential bidder may be interested in accessing said preparatory documentation. This, in general, will be identified as the announcement of the call for tender[37].

Continuing with the period of publication of the various tenders related to the award procedure, the JCCP specifies that those developed in paragraph e) of article 63.3 (relating to the number and identity of bidders, the minutes of the contracting board, the assessment report of the quantifiable award criteria through a value judgment of each of the tenders and, in any case, the award resolution) must be available at the time the contract is awarded, without exception. However, to the extent that any of these procedures could be relevant for the purposes of a possible challenge prior to the award (e.g., to file an appeal against the decision to exclude a certain tenderer), they must be published as soon as all those previous procedures are finished[38]. Otherwise, the late publication of these documents could lead to a reduction in the defense rights of the excluded bidder.

Therefore, it can be deduced that practically all the procedures of the contracting process are reflected in the contractor profile, this being possible thanks to the widespread use of electronic documents in all phases of said procedure, in compliance with the requirements of the aforementioned Additional Provisions, fifteenth to seventeenth of the LCSP.

As opposed to the transparency that has just been verified regarding the content of advertising in the contracting party profile, section 8 of Article 63 contains several exceptions, allowing certain data not to be published in accordance with the provisions of Article 154.7 - dedicated to the announcement of the formalization of contracts. This must be adequately justified by the contracting authority in the corresponding case file[39].

37 The same temporary approach of considering the period of publication in advance of the announcement of the tender notice that has just been indicated regarding paragraph a) could be applied with respect to paragraphs b) and d) of the aforementioned article 63.3. LCSP (relating to the contract itself, to the means through which it was published and to the links to the corresponding publications).

38 Thus, once again interpreting the criteria of the JCCP in the aforementioned Report 59/2018, regarding the assumptions provided in paragraph e) the publication milestones will be as follows: Regarding the Assessment Report approved by the Board, after the Opening Ceremony of Envelope 2 and regarding the Report on Bids Facing Irregularities incurred (see Article 140.4 LCSP): after the approval of the contract award proposal. For its part, the announcement of the contract award agreement may only occur once said award has taken place. Finally, the publication of the announcement of the agreement approving a modification of the contract provided for in paragraph c) of the same article 63.3. shall occur after the approval of the corresponding modification agreement (see Article 207.4 LCSP).

39 Article 154.7 prevents the publication of information that could hinder the application of a rule, be contrary to the public interest or harm legitimate commercial interests of public or private companies or fair competition between them, or in the case of contracts that have been declared secret or reserved or whose execution must be accompanied by special security measures, or by state security requirements. However, as a rule, before adopting the decision not to publish certain data, the contracting bodies must request the issuance of a report from the Transparency and Good Governance Council.

Fourth, article 64 of the LCSP, dedicated to the fight against corruption and prevention of conflicts of interest, is also one of the novelties of the current contractual regulation. Its inclusion in this paper is justified on the grounds that there is no doubt that advertising constitutes one of the "appropriate measures to combat fraud, favoritism and corruption", with the aim of "avoiding distortions of competition and guaranteeing transparency in the procedure and equal treatment[40]".

Fifth, we will refer to the regulation of the Public-Sector Contract Registry set forth in article 346 of the LCSP, which expressly contemplates the need to facilitate public access to data that is not confidential and that have not been previously published online and through the Internet, in accordance with the provisions of Law 19/2013[41].

For the sake of this presentation, the aforementioned data communications will have to be made by electronic, computer or online means, in the manner determined by the Minister of Finance and Public Service. Likewise, access to the Public-Sector Contract Registry, by the Public Administrations that require them to exercise their powers, will take place electronically[42].

Together with the previous advertising obligations in Law 9/2017, there are also other obligations outside of the aforementioned Law 19/2013, on Transparency Access to Information and Good Governance, article 8 (economic, budgetary and statistical information) of which requires that taxpayers included in its scope of application make public, at a minimum, information related to administrative management acts that have economic or budgetary repercussions and, in particular, all contracts. This provision mandates that taxpayers further specify the purpose, duration, amount of tender and award; the procedure used, the instruments through which, where appropriate, it has been publicized; the number of bidders participating in the procedure and the identity of the successful tenderer, as well as the contract modifications.

2. THE AWARD PROCEDURES

As a starting point of this section of the paper, it is possible to establish a first division between the ordinary procedures for awarding contracts, which are open, and the restricted and other procedures (special and with negotiation): negotiated procedure (with and without publication); competitive dialogue; innovation partnership and design contests.

2.1 Ordinary procedures

2.1.1 Open, open simplified and abbreviated

The open procedure, regulated in articles 156 to 159 LCSP[43], is called to be the mode of award by excellence, allowing the participation of any entrepreneur or economic agent and excluding from it any negotiation, as established in article 156.1 LCSP[44].

40 Spanish lawmakers have opted for legal certainty defining "conflict of interest" under article 64.2 as: "Any situation in which the staff working for the contracting authority also participates in the development of the tender procedure or may influence in the result thereof, directly or indirectly have a financial, economic or personal interest that may appear to compromise its impartiality or independence in the context of the bidding procedure".

41 As an exception, the data of the excluded contracts and those whose price is less than €5000 -VAT included- will not be communicated when the payment system is the fixed cash advance or similar system. In the other contracts below said amount, the name or object of the contract shall be communicated to the successful tenderer along with the identification number or code of the contract and its final amount.

42 The contracting authorities shall communicate to the Public-Sector Contract Registry, for their registration, the basic data of the contracts awarded by them, including, where appropriate, modifications, extensions, variations in terms or prices, final amount and termination.

43 See Article 27 Directive 2014/24/EU.

44 GIMENO FELIU has indicated that the open procedure with simplified processing is called to become the ordinary procedure within its application thresholds. GIMENO FELIU, J. M, "Towards a new law on public sector contracts. A new missed opportunity?", in *Spanish Journal of Administrative Law*, no. 182/2017, Studies, Civitas part, Pamplona, 2017, p. 22.

In the first place, in the tender notice that, as we saw, must be published in the contractor profile located in the PLACSP, both the term for obtaining the specifications - which, as noted also, could be accessed electronically through a link on the PLACSP itself – and the deadline for submitting proposals will be indicated, both of which may coincide.

Meanwhile, these deadlines vary, depending on whether they are subject to harmonized regulation (SARA contracts) or not, as well as depending on the type of benefits (works, supplies, services contracts or works and services concession contracts)[45].

The lawmakers' option for the preferential use of electronic means is expressly stated in paragraph c) of article 156.3 LCSP, where it can reduce by five days the general period anticipated for the presentation of the proposals, when submission is accepted by said means electronic. In addition, in the contracts for the concession of works and services, this will be the only deadline reduction possible.

Next, in the regulation of the examination of the tenders and proposal for the award under Article 157 LCSP, bidders may also submit electronically the documentation proving compliance with the minimum requirements for contracting provided in 140 LCSP ("Presentation of documentation proof of compliance with the prerequisites"), in an envelope or electronic file other than the one contained in their proposal.

In this regard, the aforementioned article 140.1 includes, in general, a responsible declaration that must be signed by a person with the necessary level, duly identified, together with their powers of representation. Regarding the specific content of this declaration, it must comply with the European Single Procurement Document- form, approved within the EU, in accordance with the provisions of Article 141 LCSP[46]. In this way, it is a statement of the financial situation, capabilities and suitability of bidding companies to participate in a public procurement procedure, which is available in all EU languages and is used as a "preliminary test of compliance with the requirements demanded in each tender[47]".

On the other hand, when - according to the possibility admitted in article 145 LCSP- many award criteria are used, bidders must submit their proposals in two envelopes or electronic files: one with the documentation to be assessed through an assessment and another with the documentation to be assessed according to quantifiable criteria through the mere application of formulas, as provided in section 2 of said article 157.

45 In the case of SARA contracts, the deadline for submitting proposals shall not be less than thirty-five days for works, supplies and services contracts and thirty days for works and services concessions, all this, counted from the date of submission of tender notice to the EU Publications Office. In this regard, article 156.5 provides that in open procedures the publication of the tender notice in the contractor profile must be made with a notice like the deadline set for the submission of the proposals in the following section.

Thus, section 6 establishes that the deadline for submitting proposals in other-than-SARA contracts may not be less than fifteen days (which become twenty-six for works contracts and works and services concession contracts), counted from the following day to the publication of the tender notice in the contractor profile.

46 The LCSP contains various details regarding the general content of the responsible declaration provided for in paragraph a) of Article 140.1, depending on the contracting procedures. Thus, as will be seen, with respect to the simplified open procedure, article 141 refers to article 159.4 c) LCSP. On the other hand, paragraph b) of the same article 140.1 makes specific mentions on restricted procedures, tender with negotiation, competitive dialogue and partnership for innovation.

47 As of October 18, 2018, the DEUC is offered exclusively in electronic format, as set forth in Part VI of Commission Implementing Regulation (EU) 2016/7, of 01-01-2016 (DOUE dated 6-01-2016).

In this regard, it has been anticipated that, in these cases of use of electronic files, the beginning of the calculation of the deadlines will take place from the opening of the first aforesaid electronic file[48].

Continuing with the presentation of the open procedure tender, within the established deadlines, the Contracting Board must examine the proposals received and formulate the corresponding award proposal. To this end, in article 157.5 LCSP, as a novelty, when dealing with criteria other than price, or when it is necessary to verify if the offers comply with the technical specifications of the list of requirements, one can collect reports from different organizations. It is, therefore, a clear example of public governance and transparency, by encouraging the participation of the recipients of public policies manifested through public procurement, which we understand should also take place by electronic means of communication, preferably.

Another important exception, derived from the use of electronic means, directly affects the performance of the Contracting Board, with the exception noted in Article 157.4 LCSP of the general rule. It states that the opening of the economic tenders be made in a public ceremony, when the use of said electronic means in the tender should be used.

Finally, the award of the contracts will take place, while, if this does not occur within the indicated deadlines, the bidders will have the right to withdraw their proposal and receive a refund of the provisional guarantee, if one has been constituted, as provided in the Article 158.4 LCSP.

Once the open procedure has been examined, article 159 contemplates a new award procedure: the **simplified open** procedure, with the characteristics that are included in it and that consist mainly of the following:

As cases of application, two conditions must occur concurrently, as required in Article 159.1 LCSP: 1st) The bid amount will be subject to specific limits and 2nd) another limitation, relative to the weighting of the award criteria indicated in the specifications. Thus, with respect to the first limit outlined, the estimated value[49] must be equal to or less than €2,000,000, for works contracts and €100,000, for supply and service contracts. Secondly, among the award criteria there should be no criteria assessed via value judgment or, if so, it may not exceed 25% of the total, expandable up to 45% for contracts that are intended to provide intellectual benefits.

The main feature of the simplified open procedure is to allow -- in cases where all the necessary documentation for the submission of the bid is available electronically -- the tender notice to be only posted in the contractor profile[50].

The deadline for submitting proposals must be, as a rule, not less than fifteen days, from the following day of said publication; increasing to a minimum of twenty days in respect of works contracts.

48 The deadline for opening proposals will be a maximum of twenty days, counted from the end of the deadline for submitting them (see Article 157.3 LCSP). Meanwhile, the award of contracts whose sole criterion for the selection of the successful bidder is that of the price must be made within a maximum period of fifteen days, from the following day of the opening of proposals; while in the cases of many criteria to be considered - or the only criterion used being that of the lowest cost of the life cycle - this maximum term will be extended up to two months, as a general rule, as the Law allows establishing a different deadline under the PCAP (see Article 158.2 LCSP).

49 The concept of “estimated value” is regulated in Article 101 LCSP and is determined by the total amount - excluding VAT - that is payable, according to the estimates of the contracting authority, and pertaining to the functional units that have autonomy for the contracting. In this way, for the sake of transparency, the aim is that bidders can learn the maximum contract amount in accordance with the tender.

50 As provided in section IV of the LCSP Statement of Reasons, the simplified open procedure is created with the aim of being very agile and with the aspiration that contracts can be awarded within one month of the call for tender.

Together with this reduction of the general deadlines, the simplified open procedure presents other features with respect to the general open procedure, foreseen in section 4 of article 159: The requirement that bidders be registered in the Official Registry of Bidders and Classified Companies of the Public Sector (ROLECSP)[51] (or the corresponding official registry of the Autonomous Community, if applicable, see paragraph a); the lack of provisional guarantee (see. paragraph b); and the makeup of the Contracting Board (see paragraph d), which will be validly constituted with the President, the Secretary, an official responsible for legal advice of the contracting authority (in the case of AEAT, the State's attorney) and an official assigned the functions of economic-budgetary control (the controller), in accordance with the provisions of article 326.6 of Law 9/2017.

Among the features of the simplified open procedure, paragraph c) of such procedure 159.4 regulates: both the place of submission of bids -which may only be the registry indicated in the tender notice-; and the conditions for their presentation. In this regard, they must be accompanied by a Responsible Party Declaration regarding the limits set forth in paragraph c)[52] and included, in a single envelope (when only quantifiable criteria intervene by mere application of formulas), or in two envelopes, when award criteria whose quantification depends on a value judgment intervene, as we saw also happened with regard to the ordinary open procedure.

Also, as a peculiarity - and to safeguard transparency and equal treatment - the envelope opening ceremony will always be public, when quantifiable criteria through the mere application of formulas established in the specifications intervene, as required in paragraph d). In the meantime, when award criteria that depend on a value judgment are contemplated, the valuation of the proposals will be made by the technical services of the contracting body within a period not exceeding seven days. Such valuation must be signed by the technician or technicians that perform it, as provided in paragraph e of the same article 159.4[53].

After this public ceremony, in the same session, the Board - after excluding the offers that do not meet the requirements of the specifications and after evaluating and classifying the other offers - will make the award proposal in favor of the candidate with the best score. In addition, it must check the registration in the ROLECSP and the other requirements provided in the Responsible Party Declaration already indicated and, finally, require the company that obtained the best score to constitute a definitive guarantee (for which it will have a deadline no more than five days). Bid winner must also meet the remaining requirements included in articles 75.2[54] and 75.6[55]. All this, within seven business days, counting from the submission of the "electronic communication", as required by point 4 of paragraph f) of article 159.4.

51 Despite the mandatory registration at ROLECSP of the bidders under the simplified open procedures, imposed by article 159 LCSP, on 09-24-2018, the JCCP made a Recommendation for Public Sector Entities, according to which, said requirement should not be demanded, temporarily, in light of "the impossibility of participation of all those interested parties that having been diligent in their requests cannot bid for reasons that are completely alien to them". Instead, the JCCP recommends that the conditions of accreditation of eligibility requirements for contracting established by the law in general be used.

52 See article 159.4 paragraph c): "The submission of the bid will require a declaration from the responsible party regarding the representation of the company presenting the offer; ensuring adequate economic, financial and technical solvency or, where appropriate, the corresponding classification; having the necessary authorizations to carry out the activity; not facing any prohibition to enter into contracts; and a pronouncement on the existence of the commitment referred to in article 75.2".

53 In these cases, as established in paragraph f) of article 159.4, in the opening ceremony of the envelope to be assessed through quantifiable criteria and the mere application of formulas, the result of the assessment carried out by the technical services team will be read out loud.

54 Article 75.2 LCSP addresses the case in which the successful tenderer who is going to resort to the capabilities of other entities to comply with the benefits of the contract must demonstrate that it will have the necessary resources, by presenting a written commitment of said entities to such effect.

55 Meanwhile, Article 76 LCSP allows contracting bodies to require candidates or bidders, stating it in the specifications, that in addition to proving their solvency or, where appropriate, classification, they undertake to devote or ascribe to the execution of the contract sufficient personal or material means for it.

Regarding this dynamic of award, two reflections are raised, in line with contracting practice: On the one hand, the advantages of the responsible party declaration for the agility of the procedures fundamentally benefit the bidders since, from the contracting authority standpoint, they can lead to a delay in award in cases - not infrequent, on the other hand - where there is a problem with the documentation submitted.

On the other hand, given the novelty of the LCSP, remember that there are different valid possibilities for electronic communication (preferably the DEH (Enabled Electronic Address) and, even, it is possible to resort to a statement that includes the link to the CSV in the SEC, provided that they allow to record the precise moment of access to the documentation in question by the recipient of the electronic communication.

Finally, the awarding will take place once the definitive guarantee has been presented and, where appropriate, after corroborating the commitment of the expense for the intervention in accordance with the provisions of Law 47/2003, of November 26, General Budget.

Finally, in section 6 of article 159, other limits of the estimated value are contemplated even lower: less than €80,000, in relation to works contracts and less than €35,000, in respect of supply and service contracts, excluding from the latter those whose purpose is intellectual benefits.

In these cases, further simplification of the open procedure is allowed, which becomes **abbreviated** and includes the following special features: The existence of specific deadlines for submitting proposals[56]; the exemption of bidders from proving their economic and financial or technical or professional solvency, nor are they required to constitute a definitive guarantee; and the possible formalization of the contract with the signature of acceptance by the contractor of the award resolution.

More interesting are the peculiarities of this abbreviated open procedure regarding the status of the offers, since in paragraph c) of article 159.6 LCSP, after specifying that they should be delivered in a single envelope or electronic file, it is established that they should be evaluated only in accordance with quantifiable award criteria through the mere application of formulas established in the specifications. Meanwhile, as set forth below, in paragraph d), this assessment may be made automatically by means of computer devices, or with the help of a technical unit that assists the contracting authority. It must be guaranteed, in any case, by an electronic device, that the opening of proposals will not take place until the deadline for submission has ended, so that no proposals public opening ceremony will take place.

Finally, paragraph e) also requires that both the submitted offers and the documentation related to their assessment be “openly accessible by computer means without any restriction from the moment the award of the contract is notified”.

2.1.2 Restricted Procedure

The other ordinary award procedure is the restricted award procedure, which is regulated in articles 160 to 165 LCSP[57]. It allows any interested company to submit

56 Not less than ten business days from the date of publication of the tender notice in the contractor profile and that, in the case of current purchases of goods available in the market, it will be reduced to five business days.

57 See Article 28 Directive 2014/24/EU.

a request for participation, in response to the tender announcement of the contracting authority, but only bidders who have been selected in response to their solvency will receive an invitation to submit proposals. As in the open procedure, any negotiation of the terms of the contract with the applicants or candidates is prohibited, in accordance with the provisions of article 160 LCSP.

Due to its characteristics, this procedure will be used mainly in the case of intellectual services of special complexity, such as consulting, architecture or engineering[58]. For the rest, as provided in article 165 of Law 9/2017, in the award of the contract, the provisions of the open procedure will apply, except as regards the need to previously characterize the documentation referred to in the article 140.

By way of illustration rather than limitation, we will limit ourselves to pointing out some generalities, in line with our interest in the study of electronic contracting means. Consequently, in the selection phase of candidates, Article 162.4 LCSP provides that "once the status and solvency of the applicants has been verified, the contracting authority will select those who must move on to the next phase, who will be also invited and in writing, to present their proposals[59]" in the corresponding term according to article 164[60].

In this regard, even though no reference has been made to the possible use of electronic means to make the invitations, especially considering that such invitations should be issued at the same time, it can be assumed that there is no problem to send them electronically. Moreover, we consider that in this case the general inclination of the LCSP would hold in favor of the preferred use of electronic means[61].

2.2 Special and negotiated procedures

The examination of the rest of the award procedures includes the negotiated procedure and negotiated procedure without prior publication; the competitive dialogue; innovation partnership and design contests.

Thus, first, the **negotiated procedure**, regulated in articles 166-167 and 169 and 171 LCSP[62], presents important developments regarding the negotiated procedure in articles 169 to 178 of the previous TRLCSP. Its peculiarity is that it is awarded to the tenderer who has been justifiably chosen, after having negotiated the contract conditions with one or more candidates (see Article 166.1 LCSP); these being a minimum of three, in accordance with the provisions of article 169.2 LCSP. Furthermore, as provided in article 169.2 of the LCSP, the negotiation of the tender procedure with negotiation will be done according to the general rules of the restricted procedure.

The cases of application of this procedure, which may take place with advertising, in cases covered in article 167, or, exceptionally, without advertising - concerning

58 The forty-first additional provision of the LCSP recognizes the nature of "intellectual benefits" to the architectural, consulting and urban planning services.

59 The minimum number of entrepreneurs who will be invited to participate in the procedure may not be less than five, as provided in Article 162.2 LCSP.

60 Regarding the deadline for submitting proposals, the aforementioned article 164 distinguishes between SARA contracts and others. With respect to the former, the general term may not be less than thirty days, counted from the date of sending the written invitation (note that no reference is made to the receipt of said invitation). In addition, this period may be reduced in three cases: a) When the prior information announcement had been published, in which case it may be limited to ten days; b) When involving an emergency situation under article 119 and, finally, as regards this work: c) When the submission of offers by electronic means is accepted, then admitting the reduction of the general term by five days, with the particularity that this will be the only admissible reduction of term, in the case of works and services concessions, as we have also seen with respect to the open procedure (see Article 156.3. paragraph c).

61 See Article 174.3 LCSP, regarding competitive dialogue and that expressly provides that "the invitation to candidates shall contain the necessary indications to allow access to the descriptive document and other complementary documentation by electronic means".

62 See article 29 Directive 2014/24/EU.

the lack of prior publication of a tender notice - deserve special mention. Also worthy of special mention are those referred to in article 168, as governed by article 170.

In this regard, among the extensive list of cases of application of the **negotiated procedure without prior publication** under article 168[63], with several specific cases that differentiate between the different types of contract (works, supplies, services, concession of works and concession of services), and also taking into account possible situations of "pressing emergency", as well as another series of circumstances of various kinds; the situation foreseen in paragraph e) draws people's attention, due to the frequency of its possible application.

In particular, these are works and services contracts that may involve the repetition of other similar contracts awarded to the same contractor through any of the bidding procedures regulated in the Law after publication of the corresponding tender notice, with the following conditions: Adjust contracts to a base project in line with purpose of the contract initially awarded; that the possibility of resorting to this procedure is foreseen in the tender notice of the initial contract; that the amount of the new works or services has been taken into account when calculating the estimated value thereof and that no more than three years have elapsed since the conclusion of the initial contract[64].

In the meantime, as a novelty, the negotiated procedure without prior publication by reason of their amount has disappeared. Further on this, section V of the Preamble of the LCSP states that, despite being widely used in practice and being very agile, this procedure lacked transparency since it was not advertised, running the risk of generating inequalities between bidders[65].

On the other hand, the previous private public collaboration contracts, regulated in article 180 TRLCSP[66], have also disappeared.

Third, among the special award procedures that include some type of negotiation, there is also the **competitive dialogue**[67], regulated in articles 172 to 176 LCSP[68].

Fourth, another novelty of LCSP is the **partnership for innovation procedure**, set out in articles 177 to 182[69] and whose objective is to open new procedural channels to encourage innovation.

This also involves a case of negotiations[70] between the contracting authority and the businessmen who,

63 See articles 26.6 and 32 of Directive 2014/24 EU. The only difference with the bidding procedure with negotiation is the absence of notice of prior bidding. See RAZQUIN LIZARRAGA, M. M., "The new directives on public procurement of 2014: Key aspects and proposals for their transformation in Spain", in the *Journal of Public Administration*, no. 196, Madrid, January-April (2005), p. 121.

64 Indeed, it is possible to imagine a situation that repeats itself annually, such as the installation and conditioning of wiring and networks to support electronic equipment located in branches of the different AEAT Offices housing the Income Tax of Individuals campaign, which, as known, takes place every year around the same dates. All this, given the lack of adequate space and means to house the aforementioned equipment at the AEAT facilities, which implies the need to go annually to those other offices that, in turn, need to be periodically conditioned. Well, when involving always the same offices, we may resort to the negotiated non-advertised procedure in accordance with the aforementioned article 168 paragraph e), with the limitations provided therein.

65 However, due to the requirements of the community regulations, the Agreement of the Council of Ministers - approved by Resolution of December 16, 2016, of the General Directorate of State Assets (BOE NUM. 307, of 12-21-2016) - required to include an announcement in the contractor profile for non-SARA contracts referred to in article 177.2 TRLCSP, whose estimated value was equal to or less than €200,000 for works contracts and €60,000, for other-type contracts.

66 Regarding this cancellation, in section IV of the Preamble of Law 9/2017, it is argued that it is due to the low utility of this figure in practice since experience has shown that the purpose of this type of contract can be accomplished through other contractual modalities, such as, essentially, the concession contract.

67 See OLLER RUBERT, M. "Reflections on competitive dialogue", in REDA, no. 157/2003, p. 185-196 and GIMENO FELIÚ, J. M., "Reflections on the competitive dialogue procedure: foundation and prospects", in *Local Studies Magazine*, no. 170/2014, p. 32-56.

68 See article 30 Directive 2014/24/EU.

69 See article 31 Directive 2014/24/EU. The legal regime provided for in article 177.3 LCSP, provides that the research and development phase will be governed by the rules of the service contract, while for the execution phase the rules of the contract relating to the provision in question will apply.

70 The minimum requirements and award criteria are excluded from these negotiations (see Article 179.3 LCSP).

in response to a notice of publication, request their participation in the procedure and that they also have been selected by the contracting authority - at least three times - to invite them to submit research and innovation projects, based on objective solvency criteria.

Negotiations may take place in successive phases, and the initial and subsequent offers may be made in such negotiations, but not the final ones. Finally, the award will be made by a special Board of competitive dialogue, in accordance with the criteria of the best value for money, as provided in Article 145.2, which refers to economic and qualitative criteria[71].

Finally, the study of the procedures for awarding contracts in the LCSP concludes with the design contests, regulated in articles 183 to 187[72], and which seeks to obtain blueprints or drawings, mainly architectural, urban, engineering and/or data processing, through a selection that, after the corresponding tender, is entrusted to a jury, as provided in Article 183 LCSP.

Herein lies its main feature since, as opposed to what occurs at the Contracting Board in the competitive dialogue procedure, in the **project tender**, once the deadline for submitting project proposals has expired, a jury is set up in accordance with the provisions of article 187 LCSP. Another feature of the project tender is the possibility of establishing awards or payments in compensation for the expenses incurred by the participants.

Regarding unanticipated matters, the tender contests will be governed by the rules of the open procedure or, in case the number of participants[73] is limited, by those of the restricted procedure, in everything that is not incompatible; as well as by the regulatory provisions of the contracting of services, as provided in article 187.10 LCSP.

71 This criterion of the best value for money is the best way to compare the offers of innovative solutions, in the opinion of CANEDO ARRILLAGA, M. P., "Public procurement and competition. The new Contracting Directive", in *General Journal of Comparative Public Law*, no. 18 (2015), p. 23.

72 See articles 78 to 82 Directive 2014/24/EU.

73 When the contracting authority decides to limit the number of participants the tender will consist of two phases: In the first one, the participants are selected from among the candidates who had submitted a request for participation (three being the minimum number) and in the second phase the selected candidates will be invited simultaneously and in writing to submit their proposals to the contracting authority (see article 185). The same observations made about the preferential use of electronic media with respect to the restricted procedure apply to the invitation "simultaneous and in writing" (see article 162.4 LCSP).

3. BRIEF REFERENCE TO THE STREAMLINING OF CONTRACTING

The techniques and instruments for electronic and aggregated procurement are addressed is addressed in articles 218 to 230 of the LCSP, which include: framework agreements and dynamic purchasing systems (see articles 218 to 226)[74]; central purchasing bodies (see articles 227 and 228) and centralised purchasing activities (see articles 229 and 230). In addition, the regulation of electronic auctions in article 143[75] is added to the above.

By way of illustration rather than limitation, we limit ourselves to pointing out that the streamlining formulas pursue the improvement of contracting processes - which become totally electronic - with the subsequent economic efficiency derived from it.

From the point of view of this paper, the use of electronic means for the streamlining of contracting also allows adequate administrative cooperation to develop economies of organizational scale, with characteristics of freeness, transparency, confidentiality and integrity, as well as the admissibility of all applicants, not excluding SMEs.

For the reasons stated, the formulas for the streamlining of contracting can be a clear reference with respect to the rest of the procedures for awarding contracts.

74 The dynamic procurement systems will be implemented in accordance with the rules of the restricted procedure, with the particularity provided for in article 224.4 LCSP, that all communications will be made using electronic means only.

75 Electronic auctions constitute a repetitive electronic process to award a contract, based on an electronic device that allows the classification of the different offers through automated evaluation methods. Thus, they are not so much a procedure as such, but a technique that can be used in open, restricted and negotiated procedures, if it is not about intellectual benefits or contracts whose purpose is related to food quality.

4. CONCLUSIONS

Throughout this paper that now comes to an end, it has been demonstrated that the use of electronic means allows simplifying contracting procedures, because it increases transparency and legal certainty, facilitates free competition and contributes to efficiency and the fluidity of the processing, as foreseen by the direct precedent of the new LCSP, this is Directive 2014/24/EU.

At the national level, another of the precedents of the LCSP has been the LPAC. However, the specialty of the contractual matter has determined the different peculiarities that have been exposed, highlighting the obligation to interact with public administrations through electronic means that affects all subjects who participate in contracting procedures, without exception - including individuals.

Also striking is the absence of a specific section in the LCSP, dedicated to the regulation of electronic contracting. Instead, we must resort to the fifteenth, sixteenth and seventeenth additional provisions, as well as to the specific regulation of issues such as electronic advertising of ads, electronic availability of specifications (through the contractor profile and the PLACSP), the DEUC and the different formulas for the streamlining of contracting.

To conclude, despite the progress made by the different streamlining formulas - such as totally electronic processes in which all communications are made solely by electronic means - and the advantages derived from the use of electronic means in contracting, the ultimate goal of achieving “end to end” electronic contracting has not yet been achieved. Therefore, it will be necessary to continue advancing along the path initiated, towards the pursued goal of implementing a more efficient, transparent and complete public procurement system that, in turn, allows for greater efficiency in public spending.

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REVIEW

Hacienda Pública y Gobernanza Fiscal en España: **DESAFÍOS 2020**

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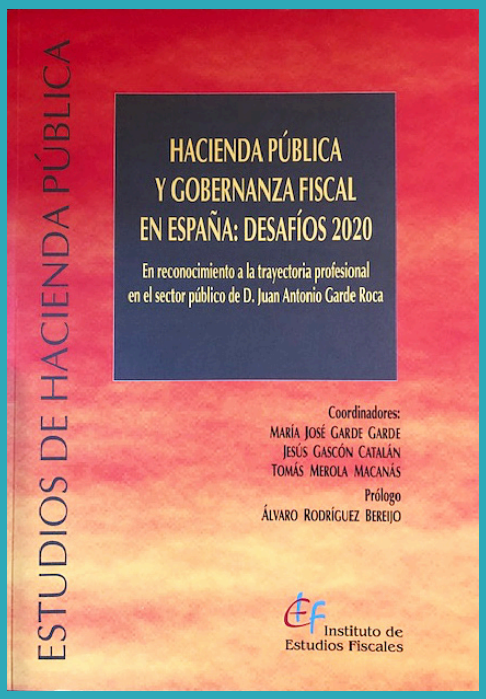

Public Finances, in two arms of revenue and public expenditure, are the central nucleus, the very heart of the State and its Law. The constitutional norms and principles that order them, the *financial* or *fiscal Constitution*, are the central column that makes possible the operation of the entire state organization. They provide effectiveness to the rights of the citizens that the Constitution and the Constitutional Law guarantee, as much in what refers to the system of fundamental rights and public liberties as to the organization of the State power, although often the constitutionalists do not pay due attention to them.

Thus begins the prologue, by Mr. Alvaro Rodríguez Bereijo, President Emeritus of the Spanish Constitutional Court, of the recent book edited by the Institute of Fiscal Studies of Spain, which has just been published under the title **"Hacienda Pública y Gobernanza Fiscal en España: Desafíos 2020"** in recognition of the professional career of **Mr. Juan Antonio Garde Roca**.

In this book, 25 renowned directors and former directors of the Ministry of Economy and Finance and the Spanish Tax Agency, as well as university researchers and professors, carry out an interesting analysis of the 21st century's tax systems and their challenges. Cristina García-Herrera, Santiago Díaz de Sarralde, María José Garde, Jesús Gascon participated, along with authors of the Spanish Tax Administration itself (José Victor Sevilla,

Jaime Gaiteiro, Fernado Díaz Yubero, José Aurelio García Martín, Ignacio Ruiz Jarabo, Jesús Ruiz Huerta). In relation to Good Governance, Budgetary Stability and the Quality of Public Expenditure, Jesús Rodríguez, Manuel Villoria, Luis Ayala, Juan Antonio Gimeno, José Alberto Pérez, Eduardo Zapico and Ana Ruíz contributed, among others.

A highly recommendable book to know both the future prospects of the tax administrations and the evaluation and critical analysis of the Spanish Tax Administration in recent years, and the challenges of the present.

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