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Separation of powers in tax law

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General Report – In search of validity in tax law: the boundaries between creation and application in a rule-of-law state

Ana Paula Dourado

1.1. Introduction: Identifying the problem using a two-fold approach

Separation of powers in a rule of law State can be described in the following way: law is the result of a pluralistic political programme characterized by the Habermasian "discourse principle", courts solve conflicts based on legislation and try to achieve legal certainty and justice as an impartial party on the basis of legal argumentation and democratically enacted and accepted fair procedures, and the administration implements legislation that is not self-executing[1].

Determining the meaning of separation of powers in current tax regimes raises several interrelated issues consisting in the legitimacy of legal competence granted by constitutions and international treaties to the governments, and also by the Treaty on the Functioning of the European Union (TFEU) in the case of its Member States, in the meaning and limits of legal determinacy and indeterminacy, on the one hand, and in the meaning and scope of administrative discretion, on the other hand, as well as in the meaning and scope of judicial discretion and judicial activism.

These issues are not a specific feature of tax law, but are common to every legal field where the legislative competence belongs to the parliament according to the constitution and is often shifted to the governments and courts, either by an express delegation to the government, where the constitution provides for such a tool, or by the use of vague concepts leading to indeterminate results. However, in tax law, the fact that the tax administration has to interpret and apply vague concepts and vague laws introduces more complexity, since it has to be determined whether they constitute an authorization of administrative discretion or whether vagueness is only an issue of legal indeterminacy and corresponding interpretation and whether as such the final word always belongs to the courts – as happens in the fields of law where the administration plays no role in applying the law (such as in penal law)[2].

This topic thus raises questions on explaining and justifying the prominent role played by the tax administration and the courts, and the boundaries between creating and applying the law, not only because this is a legal theory and legal philosophy problem, but in the case of tax law also because tax systems have become very complex and require regulations and rulings enacted by the tax administration that in principle deal only with technical

1. Jürgen Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt-am-Main, 1992, 2. Auflage, p. 229 et seq.
2. See Ana Paula Dourado, *O Princípio da Legalidade Fiscal, Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação*, Coimbra, 2007, e.g., chapter V.

details, but which sometimes go beyond them and contain policy options. Vagueness in tax law and the resulting indeterminacy has also led to regulations, rulings and case law, the main role of which is to reduce that vagueness.

Moreover, the principles of the rule of law and legal certainty are in permanent tension with the principle of equality and the principle of abuse, and whereas the two former ones require determinacy and interpretation according to the average typical case, the two latter ones require flexibility and therefore, to some extent, indeterminacy, so that the law can be correctly applied to each individual case[3]. The principle of abuse will then operate as an interpretative principle[4].

Having these premises in mind, the discussion that follows is oriented toward a two-fold and inter-related approach:

In one approach, I am confronting the rule of law as the aim to be pursued by the separation of powers or by a democratic State as opposed to arbitrary government or a dictatorial regime. Thus, I will discuss the role of parliaments in enacting tax laws, the issue of the validity of law, the democratic legitimacy of the governments that are granted legislative delegated competence on tax matters; the absence of that legitimacy in the tax administrations; the interpretation by the courts, and the fact that both the tax administration and the courts sometimes go beyond the mere application of the law enacted by parliaments and governments, leading to the exercise of administrative policy making and judicial activism, i.e. the creation of law. This is simultaneously a philosophical and constitutional approach.

In the other approach, I will centre the discussion on the rule of law as an ideal that implies predictability of the results, and this requires that laws enacted by parliaments are sufficiently precise. However, legal language as natural language is often imprecise, and I will discuss whether vagueness in tax law and legal indeterminacy bring some advantages to the rule of law State or whether it inevitably leads to arbitrary decisions and therefore to unpredictability. And this is in turn basically a philosophical and legal theory approach.

From the constitutional perspective, as the one that is predominantly handled in the national reports published below, the separation-of-powers issue and consequently the rule of law and the principle of legality of taxes constitute a domestic issue to be analysed under each constitutional system and every comparative of law perspective has to be carefully tackled. Although as valuable as this remark may be, this topic does merit attention from the perspective of comparative law. When I decided to handle it in a broad comparative law perspective, I departed from the assumption that classical assertions such as the one argued by Jesch in 1968, according to whom the principle of legality has to be researched in each domestic system and in each constitution's specific rules[5], are no longer valid in an absolute way, but instead that constitutional pluralism, deriving from worldwide reciprocal influences both at the level of written principles and rules and at the level of interpretation of the constitutional principles characterizing contemporary constitutional law, is recommendable both at the stage of the creation and application of law, and is as strong as legal pluralism in other fields of law [6] such as in tax law.

3. See Paul Kirchhof, «Der verfassungsrechtliche Auftrag zur Steuervereinfachung", *Steuervereinfachung, FS für Dietrich Meyding zum 65. Geburtstag,* Hrsg. Wilhelm Bühler, Paul Kirchhof and Franz Klein, Heidelberg, 1994, p. 13.
4. For the discussion of the principle of abuse as an interpretative principle, see Ana Paula Dourado, «A Single Principle of Abuse in EC Law: a methodological approach to rejecting a different concept of abuse in personal taxation», *The Principle of Abuse in EC Law,* Oxford, 2010, to be published.
5. Dietrich Jesch, *Gesetz und Verwaltung;* 2. Auflage, Tübingen, 1968, p. 4.
6. For a critical view of legal pluralism in the USA, arguing that the ultimate argument for consulting the law of other countries is a "many minds argument", and "that it is most plausible in new democracies, attempting to produce constitutional doctrine without much in the way of established precedents", Cass Sunstein, *A Constitution of Many Minds, Why the Founding Document Doesn't Mean What it Meant Before,* Princeton, 2009, p. 12, 187 et seq.

The EU decision-making process is one strong example of this legal pluralism – internal legal pluralism – since the European Court of Justice (hereinafter: ECJ) recognizes many constitutional and administrative principles as EU principles[7]. Soft law is also currently playing a prominent role in the EU, including in tax matters, and is contributing to the transaction of legal solutions and legal arguments among different jurisdictions. But legal pluralism also occurs at the OECD level, the OECD proposals therefore being influenced by and influencing OECD Member States: the recently introduced arbitration procedure is one example.

1.2. Relationship between the parliament and the tax authorities: The influence of the tax authorities on tax legislation

1.2.1. Validity of law and legislative competence in tax matters

In legal systems governed by the rule of law, separation of powers in tax law is commonly linked to the "no taxation without representation" aphorism or to the principle of people's sovereignty. The latter requires that law is enacted by a parliament, and that the principles of juridical protection of individual rights by independent courts, of administrative legality and of separation between State and society are ensured. The principle of people's sovereignty is an integral part of all national constitutions reported in this book, and can be handled by the principles of the rule of law and legal certainty. My starting point lies in the normative assumption that tax law, like any other law enacted by a parliament, results and receives its legitimacy from democratic procedures, characterized by public discussion and argumentation and from disagreement in a context of free communication, since legislatures operate in the framework of political plurality and hence of disagreement which is incorporated by them.

This normative assumption corresponds to the Habermasian perspective on the validity and legitimacy of law, to his Diskursprinzip[8], and is also central to Jeremy Waldron's "Law and Disagreement"[9]: the statutes enacted "represent the short- or medium-term ascendancy of one view over the others" and "they are essentially the product of large and polyphonous assemblies"[10]. In other words, laws and decisions by the majority underlying them are valid and legitimate because they result from pluralism and a compromise within the democratic process and because they are accepted by the targeted persons and community participants in the political process.

Let me stress that validity of laws lies not only in its source and procedure leading to the recognition of the authority of the law by norm-applying institutions such as the tax administration, tax courts and the ECJ, but also because any potential addressee recognizes those norms in virtue of the source and pluralistic procedure criteria. Valid are the rules of procedure with which all targeted persons would have agreed as participants in rational discourse [11].

From a legal positivist viewpoint, such as the one advocated by Hart or by Raz, it is sufficient that courts and administrative instances accept the norm and declare its acceptance –

7. ECJ Case11/70, Internationale Handelgesellschaft [1970], ECR 1125; ECJ Case 5/88 Wachauf [1989] ECR 2609; ECJ Case C-260/89 ERT [1991] ECR I-2925; Opinion of the Advocate General Case C-168/91 Konstantinidis [1993] ECR I-1191; ECJ Case C-168/91, Konstantinidis [1991] ECR-I 1191; Opinion of the Advocate General M. Poiares Maduro Case C-402/05 P, Kadi [2008] ECR 00000; Paul Craig/Gráinne de Búrca, *EU Law, Text, Cases, and Materials,* 4th ed., Oxford, 2008, pp. 539 et seq.; Armin von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review* 37, 2000, pp. 1307 et seq.
8. Jürgen Habermas, *Faktizität und Geltung:...,* cit., e.g. p. 15 et seq. and 151 et seq.
9. Jeremy Waldron, *Law and Disagreement,* Oxford, 1999.
10. Jeremy Waldron, *Law and Disagreement,* cit., p. 10.
11. Jürgen Habermas, *Faktizität und Geltung:...,* cit., p. 138.

because the law is in force and there is a rule of recognition, or because it is granted authority [12]. But, following the Habermasian perspective, and the analytical theorists jurisprudence, I hereby contend that validity and legitimacy require social validity or social acceptance, i.e., rules are legitimate because they express an authentic understanding of the juridical community, its shared values and interests and a rational choice of strategies and means[13]. Validity is therefore equivalent to legitimacy and that is the meaning attributed to the former whenever I refer to it in this essay.

Validity is not however equivalent to material justice, since the latter requires the rational choice of instruments and equilibrium of interests that do not allow generalization but require compromise. Only when a law solves these problems, does it reach material justice[14]. Discussion on the separation of powers in tax law deals with validity and legitimacy issues of tax law, the competence of the tax administration and the courts, with the meaning and consequences of legal indeterminacy – all of those can be summarized in the rule-of-law principle – and not with material justice issues or the principle of equality. However, the principle of equality can be in tension with the rule of law principle, such as in the case of transfer pricing issues, deductibility of the expenses related to the core activity of a company or of abuse of law[15], and either of them can in the concrete case limit the application of the other.

Claiming validity of law is essential to my essay and general report, not only for the sake of clarification of my point of departure, but also because the context is adverse, since the tax authorities, directly or indirectly through their governments have been playing a prominent role both at national and supra-national (e.g. EU) level in the last decades of the twentieth century and in the beginning of the twenty-first century. Moreover, legislation is normally prepared by technical and experts' committees, often constituted by tax administration officials appointed by the governments and soft law in tax matters plays a relevant role, for example at the EU level. However, the observation of this situation corresponds to the descriptive methodology adopted by political science, and highlighting such alleged supremacy of technical and experts' committees leads to discrediting legislation and is insufficient to explain and justify that taxes are enacted by law and by parliamentary legislation and are accepted as such.

Many legal theorists and philosophers have argued in favour of committees, especially small ones, drafting legislation, because they hold the necessary technical skills in order to achieve high quality[16]. And in fact, the drafting of legislation, including tax legislation, has been done by those specialized committees, but it must be duly stressed that that is different from parliamentary final consent. In other words, a description of the current situation, according to which tax legislation is prepared by technical committees and moreover complemented by governmental regulations and courts decisions does not explain why the "no taxation without representation principle" is still valid or why the legitimacy of taxes is bound to a vote by parliament. The answer to this lies in the idea that the aforementioned validity of parliamentary legislation, based on the democratic enactment procedure and underlying pluralistic discussion is essential to justify the fact that taxes are enacted by law – parliamentary law – and to its authority (validity), even if they are prepared by public officials and other experts in specialized committees and complemented by other legal instruments and soft law and case law.

12. H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Law Series, 1961, chapter VI, pp. 97 et seq., 110 et seq.; Joseph Raz, *The Concept of a Legal system, An Introduction to the Theory of Legal System*, 2nd ed., Oxford, 1980, pp. 197-200; *The Authority of Law: Essays on Law and Morality*, Oxford, 1980, Chapters 1-2.
13. Jürgen Habermas, *Faktizität und Geltung*:..., cit., pp. 192, 194. Jeremy Waldron, *Law and Disagreement*, cit., ch. 2.; Ronald Dworkin, *The Law's Empire*, Cambridge, 1986, pp. 165 et seq. (on the principle of fairness) and pp. 313-354.
14. Jürgen Habermas, *Faktizität und Geltung*:..., cit., p. 192.
15. Ana Paula Dourado, *O Princípio da Legalidade Fiscal*..., cit., pp. 339 et seq.
16. See Jeremy Waldron, *Law and Disagreement*, cit., pp. 42 et seq.

The validity of law and taxes enacted by parliaments is constitutionally ensured in every reported tax system, even if it is fulfilled in a different manner and more or less satisfactorily. In other words, it is common to the national reports in this book that taxes have to be enacted by law because the constitutions so require and this means that the principles of "people's sovereignty" and "no taxation without representation" are constitutionally expressed in a competence rule and the validity issue is then presumed and becomes a formal problem of compatibility of the tax regime with the constitution (except for the UK).

It is further reported in the contributions published in this book, that even if the interpretation followed by the tax administration is not confirmed by the courts, the tax administration will influence the government and both of them the parliament, in order to change the law, accordingly[17]. I can ask whether this influence of the tax administration and government on the parliament is inconsistent with the separation of powers (legislative competence belonging to the parliament) or whether legislative competence in tax law has to include the government's policy in respect of the tax regime. My answer to this question is that the fact that the tax administration will pressure the government and the parliament to change the law only means that governments are able to convince their parliaments of their interpretative paths and solutions – either because there are budgetary needs, equity problems, abuse of law problems or some other motivation. But again I want to stress that it is up to the parliament to accept amending the legislation or not, and in that final decision and in the pluralistic discussion of the solution lies the core aspect of validity of (tax) law. Having claimed this, I want to add that the descriptive methodology allows me to recognize that pluralistic discussion within the parliament varies in the various reported countries and if it is lacking, it weakens validity of tax law and can ultimately have a negative repercussion on the separation of powers.

Notwithstanding the specificities of each financial constitutional system and namely of the Federal States, such as Austria, Belgium, Canada, Germany and the USA, and of the Regional States such as Spain, in comparison to the Unitary States, the national reports below published illustrate that in some constitutional tax systems, the competence to enact tax laws belongs exclusively to the parliament (e.g. Austria[18], Belgium[19], Canada[20], Denmark[21], Germany[22], Israel[23], Japan[24], the Netherlands[25], Poland[26], Russia[27], Serbia[28], the UK[29]). In other reported systems, the competence to enact tax legislation belongs not only to the parliament, but also to the government, which either has delegated legislative competence (Finland[30], France[31], Greece (exceptionally, in respect of non-essential elements)[32],

17. See Part 4, 4.3.5.3.
18. Johannes Heinrich/ Irina Prinz, "Austria: Separation of Powers in Tax Law", 2.1.1. and 2.1.2.
19. Bruno Peeters/Elly van de Velde, "Belgium: Separation of Powers in Tax Law", 2.2.2.1. and 2.2.2.2.
20. Martha O'Brien, "Canada: Separation of Powers in Tax Law", 2.3.3.
21. Jacob Graff Nielsen, "Denmark: Separation of Powers in Tax Law", 2.4.1.
22. Heike Jochum, http://www.eatlp.org/uploads/public/santiago/sop/Germany%20-%20Heike%20Jochum.pdf, 1.
23. Yoseph M. Edrey, http://www.eatlp.org/uploads/public/santiago/sop/Israel%20-%20Yoseph%20M%20Edrey.pdf, 1.
24. Konosuke Kimura, "Japan: Separation of Powers in Tax Law", 2.8.1.
25. Hans Gribnau, "The Netherlands: Separation of Powers in Tax Law", 2.9.2.1.
26. Krzysztof Lasiński-Sulecki/Wojciech Morawski, "Poland: Separation of Powers in Tax Law", 2.10.1. and 2.10.2.
27. M. Sentsova/Danil V. Vinnitskiy, "Russia: Separation of Powers in Tax Law", 2.12.1.
28. Dejan Popović/Gordana Ilić-Popov, Serbia: Separation of Powers in Tax Law: 2.13.1.
29. Sandra Eden, "United Kingdom: Separation of Powers", 2.17.2.
30. http://www.eatlp.org/uploads/public/santiago/sop/Finland%20-%20Marjaana%20Helminen.pdf, 1.
31. Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, "France: Separation of Powers in Tax Law", 2.5.2.2.
32. Eleni Theocharopoulou, "Greece: Separation of Powers in Tax Law", 2.6.2.1.

Italy[33], Portugal[34], Sweden (exceptionally, in respect of non-essential elements)[35], Turkey (exceptionally, in respect of tax rates or tax exemptions)[36], or may adopt exceptional provisory measures (Brazil[37], Italy[38], Spain (in principle, exceptionally and in respect of non-essential elements, but in practice, not as exceptional as the constitution seems to require)[39]. Where the exclusive competence to enact tax laws belongs to the parliament, pluralistic discussion is more effective and the parliament seems in most cases to have more decision-making power on the tax legislation than in systems where the government also has, and exercises, legislative competence. It is also common to many systems reported in this book that in respect of the first type of system, specialized commissions within the parliament handle the drafting and the technical aspects of the tax legislation. All governments are competent to draft tax bills proposals and these are in most cases prepared by the tax administration and the minister of finance. And in all reported countries except Belgium and the United States, the governments do draft tax bill proposals with frequency: see Austria[40], Brazil[41], Canada (the Tax Revenue Agency)[42], Denmark[43], Finland[44], France[45], Germany[46], Greece (exclusive competence)[47], Israel[48], Italy[49], Japan[50], the Netherlands[51], Poland[52], Portugal[53], Russia[54], Serbia[55], Spain[56], Sweden[57], Turkey[58], the UK[59]. In Belgium[60], even though the government drafts tax bills, it does so, on a less regular basis than the members of parliament[61]. Contrary to the other systems reported in this book, in the United States the Executive Branch (the President and its administrative agencies, namely the Internal Revenue Service) does not normally present draft laws to the parliament, but rather policy proposals, the drafting work being done by the House Legislative Counsel and

33. Lorenzo del Federico, "Italy: Separation of Powers in Tax Law", 2.7.1.
34. Antônio Carlos dos Santos/Paulo Nogueira da Costa, "Portugal: Separation of Powers in Taxation".2.11.1.1.
35. Stefan Olsson, "Sweden: Separation of Powers in Tax Law", 2.15.1.
36. Billur Yalti, "Turkey: Separation of Powers in Tax Law", 2.16.1.1.c.
37. Marco Antônio del Greco, http://www.eatlp.org/uploads/public/santiago/sop/Brazil%20-%20Marco%20Aurelio%20Greco.pdf, 1.1.
38. Lorenzo del Federico, "Italy: Separation of Powers in Tax Law", 2.7.1.
39. M. Luisa Esteve Pardo,"Spain: Separation of Powers in Tax Law", 2.14.1.
40. Johannes Heinrich/Irina Prinz, cit., 2.1.1.
41. See Marco Antônio del Greco, http://www.eatlp.org/uploads/public/santiago/sop/Brazil%20-%20Marco%20Aurelio%20Greco.pdf, 1.1., 1.2., 1.3.
42. Martha O´Brien, cit., 2.3.1 and 2.3.3.
43. Jacob Graff Nielsen, cit., 2.4.1.
44. Marjaana Helminen, cit., 1.2., 1.3.
45. Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, cit., 2.5.2.3.
46. Heike Jochum, cit., 1.2., 1.3.1.
47. Eleni Theocharopoulou, cit., 2.6.2.2.
48. Yoseph M. Edrey, cit. 1.1.,1.2.,1.3.1.
49. Federico del Lorenzo, cit., 2.7.1.
50. Konosuke Kimura, cit., 2.8.1.
51. Hans Gribnau, cit., 2.9.2.1 b. and 2.9.3.2.
52. Krzysztof Lasiński-Sulecki, Wojciech Morawski, cit., 2.10.1.
53. Antônio Carlos dos Santos/Paulo Nogueira da Costa, cit., 2.11.1.2 and 2.11.1.3.
54. M. Sentsova/Danil V. Vinnitskiy, cit., 2.12.1.
55. Dejan Popović/Gordana Ilić-Popov, cit., 2.13.1.
56. M. Luisa Esteve Pardo, cit., 2.14.1.
57. Stefan Olsson, cit., 2.15.1.
58. Billur Yalti, cit., 2.16.1.2.
59. Sandra Eden, 2.17.2.
60. Bruno Peeters/Elly van de Velde, "Belgium: Separation of Powers in Tax Law", 2.2.2.2. and 2.2.2.3.a.
61. Bruno Peeters/Elly van de Velde, cit., 2.2.2.3. a. and b.

the Senate Legislative Counsel[62], which demonstrates a strong control of the legislative power by the Congress. At least in one reported country, the parliament does not seem to really handle tax legislation, and it seems to passively accept the draft bills provided by the tax authorities with frequency, without discussing them in detail and scarcely introducing any changes to them[63]. In many reported countries, the parliament has an active role, discussing the draft bills and introducing changes to them, in a way that better ensures the idea that creation of law belongs to it (e.g. Belgium[64], Denmark[65], Israel[66], Turkey[67], the UK[68], the United States[69]).

Although it is obvious that there are no perfect systems, comparison of legal systems reported in this book allows me to conclude that in those systems where the parliament is actively involved in discussing the legislative proposals, either in plenary sessions or in specialized commissions, the validity of law is better achieved. In fact, if not doing so in plenary sessions, in most of the reported countries, specialized parliamentary commissions discuss the draft bills in detail and that seems to be an efficient procedure that does not preclude that laws are effectively passed by the parliament – although it must be recognized that tax law bills are often so complicated and extensive that the parliament cannot in reality take all aspects into consideration[70].

Moreover, in the reported systems where the checks and balances among the three branches – legislative, executive and judicial – function in a good and efficient manner, predictability and certainty seem to be satisfactorily achieved (see the example of Canada and the United States[71]).

Taking the aforementioned context into account, the national reports published in this book confirm that governments are a very significant player influencing tax regimes, either presenting bills, or even passing them or demanding their amendment according to their own idea of equality, ability-to-pay and ultimately, budget needs. Another fundamental aspect must still be added to the discussion: although governments, on behalf of the ministers of finance, publicly take many of the policy initiatives and decisions on tax regimes (tax reforms, amendments to the legislation in force, new regimes), tax policy is currently often decided by the tax administration and international players with no democratic legitimacy, such as the OECD and the European Commission, and this influence can be understood in the context of external legal pluralism and the relevant role it plays.

1.2.2. Legislative competence exercised by the government and regulations from a validity perspective

The influence exercised by the tax administration on the legislation has to be distinguished from the aforementioned delegated legislative competence granted by some constitutions to the governments and these have to be distinguished from administrative regulations on the essential elements of taxes, where the contents of the latter are not previously authorized

62. William Barker, cit., 2.18.2.
63. I am referring to France: Emmanuel de Crouy-Chanel/Alexandre Maitrot de la Motte, cit., 2.5.2.4. But also in the case of Japan, it seems that the Standing Financial Committee of the Parliament does not guarantee active participation of the Parliament in the discussion of the tax legislation (Kimura, 2.8.1). The same is happening in the Netherlands (Hans Gribnau, cit. 2.9.3.1.c. and 2.9.3.2.), and probably in other reported countries.
64. Bruno Peeters /Elly van de Velde, cit., 2.2.2.3.b.
65. Jacob Graf Nielsen, cit., 2.4.1.
66. http://www.eatlp.org/uploads/public/santiago/sop/Israel%20-%20Yoseph%20M%20Edrey.pdf
67. Billur Yalti, cit., 2.16.1.2.
68. Sandra Eden, cit., 2.17.2.
69. William Barker, cit., 2.18.2.
70. See, in this sense, e.g. Jacob Graf Nielsen, cit., 2.4.1.
71. Martha O´Brien, cit., for example, 2.3.2. and 2.3.3.; William B. Barker, cit., 2.18.3.1.

by the parliament. Contrary to the constitutional monarchies of the nineteenth century, where governments were granted primary legislative competence or competence to enact regulations, in the post-Second World War constitutions legislative competence exercised by governments as well as their competence to enact regulations has to be authorized by parliamentary law or be based on previous law[72]. The fact that the political function is not only exercised by parliaments but also by governments and the fact that these emerge from parliamentary majorities has led to a constitutional analysis of the relation between legal sources and not between powers. It is in this context recognized that, where policy decisions on what I call the legal type of tax and which I will define below (the *an* and the *quantum* of the taxes) are, in most of the legal systems reported in this book, jointly taken by the parliament and the government, even if it is up to the parliament to discuss and consent on them. For the sake of clarity, I contend that the relationship between legal sources is not a free relationship among them, but organized instead according to the principle of competence and the different operational spheres granted by the constitution[73].

The indirect democratic legitimacy of the government and its legal sources, the welfare State and the regulatory State, governmental responsibility over the state budget and political responsibility concerning public choice on public expenses also contribute to the legitimacy of governmental normative competence, not forgetting that this legitimacy has to be granted by the parliament and it is under the latter's competence to take the essential policy options on the legal type of the tax, even if the government may further complement those options and decide on more technical and detailed aspects regarding that legal type. The latter aspects of the tax regimes should not be handled by parliaments so that these are not overburdened, but simultaneously, constitutional courts should be competent to judge the compatibility of each normative act (e.g. regulations) with the constitution and not only of laws.

The same legitimacy-type of argument can be used in respect of the EU tax directives, since the Council is constituted by governmental representatives and therefore the Council has indirect democratic legitimacy[74]. Moreover, unanimity and the fact that directives have to be transposed into domestic law ensure validity of (tax) law. Again, even if indirectly, EU directives are also valid in the above mentioned sense according to the principle of sovereignty, and internal legal pluralism – mutual acceptance of fundamental principles by the domestic courts and the ECJ – will solve any conflicts between the domestic and the EU systems, since EU law as well as domestic constitutions have to be observed by the parliaments.

However, it is difficult to state whether delegated competence to enact regulations granted by the parliament to the government (e.g. in Germany) is comparable to delegated legislative competence to the government (e.g. Italy, Portugal, Spain) and whether it has different implications on the validity issue. I would contend in this respect that if the legal type of a tax (again the *an* and the *quantum*) is defined by parliamentary law and the latter authorizes a regulation to complement it, the situation is not different from an authorization by parliamentary law to a decree-law or legislative decree passed by the government, as long as both types of rules are published in the official journals.

The validity issue seems to be different, however, if regulations decide on the legal type of tax by delegation, without any previous political decision taken by a parliamentary law on those elements. This seems to be the situation in Italy, a situation which has been very much criticized by the literature[75].

72. See Ana Paula Dourado, *O Princípio da Legalidade...*, cit., pp. 359 et seq.
73. Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., pp. 218 et seq.
74. Paul Craig/Gráinne de Búrca, *EU Law, Text, Cases and Materials*, cit., p. 137 (pp. 133 et seq.).
75. Federico del Lorenzo, cit., 2.7.1.; Elena Malfatti, *Rapporti tra deleghe legislative e delegificazioni*, Torino, 1999, pp. 155 et seq.; Adriano di Pietro, "I regolamenti, le circolari e le altere norme amministrative per l'applicazione della legge tributaria", *Trattato di Diritto Tributario*, Annuario, Padova, 2001, pp. 335 et seq.

Following the above reasoning, the separation of powers and the rule of law will not be achieved whenever the essential decision on what I have been calling the legal type of tax is not taken by parliamentary law, but instead by delegated governmental law or by regulation, the latter situation being more critical as long as there is no legal parliamentary authorization containing the main policy decision on the legal type of tax. Even worse is the case where the regulation can be enacted by the minister of finance alone and not by the government.

1.2.3. Competence to enact regulations and rulings

In all reported systems, the governments have competence to enact regulations and the tax administrations have competence to enact rulings [76]. In the cases where regulations and rulings are frequent tools, laws are normally less detailed and technical details are left to the latter, and the advantage lies in the greater flexibility to adopt the rules[77]. In any case, in all reported systems the government and the tax administration either directly or indirectly have a big influence on the final result of the tax regime.

In respect of some of their application functions, the government and the tax administration can be described as one entity (e.g., preparation of draft legislation at the technical level by the tax administration according to domestic government policy guidelines; tax administration delegates at the EU and OECD technical level following domestic government policy guidelines, tax administration legal reasoning and legal advice as the basis of the decision on hierarchic claims against tax assessments addressed to the Minister of Finance, the legality of which is claimed by the taxpayer).

But a distinction between the government and the tax administration is to be drawn in respect of the legislative competence that is granted to the government by some constitutions, and effectively exercised by them, in respect of regulations enacted by the government and not by the minister of finance alone, and also in respect of rulings that are enacted by the tax administration and the role of which is disputable and varies according to the different jurisdictions. Nevertheless, an interaction between the government and the tax administration still exists in the latter cases, and it is common to find an influence of the tax administration or the high bureaucrats in the government that again poses issues of democratic legitimacy.

1.2.4. The domain of parliamentary law vs. legal sources in cascade: creation vs. application

A star-like system seems to characterize the types of systems where the parliament is in the centre enacting laws, and each power has its competence, regulating those laws and applying them to the concrete case; legal sources in cascade, in contrast, characterizes the types of systems where each power simultaneously interprets and complements the gaps of the other legal source, creating rules. Vagueness is in the latter systems progressively fulfilled by the normative acts that complement and observe the ones that are on the higher levels of the cascade. I tend to claim that even in legal systems where tax laws are exclusively enacted by parliamentary law, like the federal ones reported in this book (e.g. Austria, Canada, Germany, United States), and which would in principle be described as a star-like system, legal sources of taxes are also organized in cascade and the difference between the two systems is in this respect blurred.

76. See a slightly different situation in Serbia, concerning rulings: Dejan Popović/Gordana Ilić-Popov, cit., 2.13.3.
77. The volume of rulings is, however, very much critized in Japan: see Kimura, cit. 2.8.3.

Since, as I will claim below, legal indeterminacy resulting from vagueness in law only occurs in important and hard cases, the complementary role of a rule or court decision does not necessarily imply exercise of discretion by the power exercising its competence and therefore this pyramid is not identical to the Kelsenian pyramid according to which there is no difference between creation and application of the law, because the "authority" applying the norm also creates norms. In other words, still according to Kelsen[78], the executive and judicial branches have inevitable discretion when applying the law, because application would always imply the fulfilment of gaps according to extra-legal arguments, since legal arguments would not be sufficient to justify one and only one correct answer. Differently, by stating that the government, the tax administration and the courts complement the parliamentary law and its vagueness, I do not mean that they are systematically going beyond application, and therefore acting with discretion and making use of extra-legal arguments. Taking into account that the parliament has a reserved competence to enact legislation in tax matters, as a rule, application of parliamentary law is a bound activity, in respect of the legal type of the tax. However, when the vagueness of parliamentary law is high and a regulation fills the existing gap according to extra-legal arguments (taking policy options that cannot be justified by the legal type of tax or exclusively by legal arguments) creation occurs if the rule aims at being universal.

I therefore contend that, taking into account the current constitutional reality in various reported countries, legal sources are coordinated and are complementary in cascade, being guided by the underlying legal type and trying to add more concrete elements to the legal type, in most cases according to hermeneutical methods: parliamentary law, government legislation and regulations, administrative self-binding rulings, coherent and consistent case law leading to settled case law[79]. In important and hard cases, legal indeterminacy will lead to the creation of rules by the government, administration and courts[80].

This is related to another main idea underlying my essay, regarding the distinction between validity of the law and adequate application of the law[81]. Let me recall with Klaus Günther that the validity claim of a rule is extended to everyone and that it is also connected with the increasing volume and density of a society[82]. To a certain extent, validity therefore implies vagueness, since vague laws take into account the typical situation and devalue the particularities of a case[83], and in this way it can be applicable to a large number of situations. In turn, the taking into account of the particularities of a case belongs to the application moment of the rule, because only then are the relevant features of a particular situation to be selected and their appropriateness to the norm verified. Application involves the checking of whether the relevant features of the individual case belong to the semantic

78. Hans Kelsen, "Science and Politics", *What is Justice?, Justice, Law and Politics in the Mirror of Science, Collected Essays,* Berkeley, Los Angeles, 1957, pp. 365, 366, 369 et seq.; *Théorie Génerale du Droit et de l'État, suivi de La Doctrine du Droit Naturel et le Positivisme Juridique,* translated by Béatrice Laroche and Valérie Faure, Paris, 1997 (1945, 1928), p. 187; *Teoria Pura do Direito,* 6.ª ed. Coimbra, 1984 (1960), translated by Baptista Machado, pp. 464 et seq.
79. Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., pp. 215-232.
80. On the meaning of hard cases, see: H.L.A. Hart, *The Concept of Law,* cit., pp. 124 et seq.; Ronald Dworkin, *Taking Rights Seriously,* cit., pp 81 et seq.; Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", cit., p. 215; Manuel Atienza, *Tras la Justicia, Una Introducción al Derecho y al Razonamiento Jurídico,* Barcelona, 1993, pp. 174-176; Juan B. Etcheverry, *Objectividad y Determinación del Derecho, Un Diálogo con losherederos de Hart,* Granada, 2009, 147 et seq.
81. See Jürgen Habermas, *Faktizität...*, cit., 266 et seq.; Klaus Günther, *The Sense of Appropriateness, Application Discourses in Morality and Law,* New York, 1989, translated by John Farrell, p. 168.
82. Klaus Günther, *The Sense of Appropriateness...*, cit., pp. 270-271.
83. Karl Larenz/Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft,* Berlin, Heidelberg, 1995, 3. Auflage, pp. 290 et seq.; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff,* 2. Auflage, Wien, New York, 1991, pp. 544-555; Hans J. Wolff/Otto Bachof, *Verwaltungsrecht I,* 9. Auflage, München, 1974, pp. 18-190.

extension of the norm and is also institutionalized in procedures that make the assessment of the particular features of the case possible. Using Klaus Günther's words, application of law is a "free space of appropriateness argumentation based on the law itself, and political and moral principles accepted by a specific community"[84].

It may sometimes be difficult to distinguish when the tax administration, the government and the courts are creating law or applying the law, whenever they complement the essential policy choices consented to by the parliament (since vagueness can be overcome, if integrity, in Dworkin's sense, guides interpretation[85]). In the above described context, regulations and rulings can simultaneously belong to the creation and the application of law or to either of them, depending on whether the universal characteristics of the norm are present and are not exclusively based on the hermeneutical elements or whether they are exclusively based on these elements. In other words, I contend that whenever there is legal vagueness and indeterminacy and the government or the tax administration rule has a universal claim and goes beyond appropriateness, that rule belongs to the field of creation. This is so, even if that rule is less universal than the parliamentary law and is not valid in the way parliamentary law is (by pluralistic discourse), but the fact that it is procedurally legitimized and that appropriateness cannot explain its features, exclude it from the field of mere application.

The issue is then an issue of validity (and constitutionality) of those regulations and rulings.

1.3. The meaning of legal indeterminacy in tax matters

1.3.1. The rule of law

As previously mentioned, taxes are to be enacted by parliamentary law and in some systems by the government's decree-laws or legislative decrees following an authorization of the parliament according to the procedural rules foreseen in each constitution. In order to fulfill the requirements of the rule of law and avoid arbitrary (unpredictable) decisions by a power that is supposed to apply the law instead of creating it, legal rules are expected to be clear, coherent, prospective and stable and therefore capable of orienting the behaviour of their addressees and constrain the will of the judge who is expected to treat like cases alike[86]. In other words, in order to fulfil their function – both from the perspective of validity and of constitutional conformity – legal rules on taxes have to be determinate. Equal treatment and predictability of the tax are only achieved if the law is determined enough.

Although the crisis of the law as an instrument to achieve equality, and in this way justice, is often highlighted[87], the role played by laws enacted by the parliament in the democratic decision process must not be underestimated, as I recalled above. In fact, decisions on the fundamental issues regarding taxation (as well as in other legal fields) by the parliament

84. *The Sense of Appropriateness...*, cit., pp. 169-173.
85. Ronald Dworkin, *Law's Empire,* Cambridge, 1986, chapters V and VI; Klaus Günther, *The Sense of Appropriateness...*, cit., pp. 269 et seq.
86. Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", *Law and Interpretation, Essays in Legal Philosophy,* Ed. by Andrei Marmor, Oxford, 1995, cit., p. 229; Andrei Marmor, "The Rule of Law and its Limits", *Law and Philosophy,* 2004, pp. 38-43; Timothy Endicott, *Vagueness in Law,* New York, 2003 (2000), pp. 185, 188; H.L.A. Hart, *The Concept of Law,* cit., pp. 138-150; Ronald Dworkin, *Law's Empire,* cit., pp. 93 et seq.; Stephen Guest, *Ronald Dworkin,* 2nd Ed. Edinburgh, 1997, pp. 171 et seq.
87. David Lyons, *Ethics and the Rule of Law,* Cambridge, London, New York, New Rochelle, Melbourne and Sydney, 1984; pp. 194 et seq.; Andrei Marmor, "The Rule of Law and its Limits", cit., pp. 5 et seq.; *Clotilde* Nyssens, "Comment s'Établit la Règle de Droit Aujourd' hui? Le Point de Vue d' une Assistante Parlamentaire", *Élaborer la Loi Aujourd'hui, Mission Impossible?,* dir. Benoît Jadot/François Ost, Bruxelles, 1999, pp. 107 et seq.

distinguish democratic from dictatorial regimes and arbitrary results, and the law is still seen as the best instrument to achieve equality[88]. This fundamental feature characterizes both common law and civil law systems.

Legal determinacy is therefore required in tax law on the basis of the idea that justification of judicial decisions presupposes that they are exclusively grounded on legal arguments so that the taxpayer can conform its behaviour to the law. Judicial decisions are justified – their coerciveness is justified – if they only use legal arguments, so that the taxpayer may adapt his behaviour to the law[89]. Thus, as I will claim below, the typical (foreseen) cases regarding the legal type of tax have to be discussed and passed by the parliament (parliamentary law).

By the use of vague rules leading to indeterminacy, the parliament circumvents its constitutional duties to enact legislation and decide on the *an* and *quantum* of taxes. Thus, legal indeterminacy will shift the power of decision-making from the parliament to the executive and judicial organs. In broad terms, legal indeterminacy leads to judicial discretion, judicial activism and also to legislative (by the government) and administrative discretion and, if frequent, ultimately to the lack of authority of the law and to arbitrary governance. I.e., a vague law leads to unpredictable decisions by the tax administration and the courts and the rule of law and separation of powers seems to be unattainable. In other words, legal indeterminacy becomes a problem in a rule of law State when it suggests that the exercise of a rational assessment on the basis of exclusive legal arguments cannot be claimed against a different exercise[90].

1.3.2. National constitutions and the essential elements of a tax: the legal type of a tax

I have claimed that even if tax rules are to be enacted by law – in principle, by parliamentary law – it is currently recognized that only the essential elements of a tax – the legal type of a tax – are to be so enacted. The same is true in respect of tax process and procedural rules and rules on tax offences; however, these are not genuine tax rules, but instead judicial, administrative and criminal rules subject to the constitutional requirements of the corresponding field of law. Thus, not every detail of the tax regime has to be decided by law, and the issue on determinacy implies both the identification of those elements as well as the degree of detail – the minimum level of legal determinacy – that has to be decided by law.

The elements constituting the legal type of a tax, broadly referred to above as the *an* and the *quantum* of a tax, have been identified by Albert Hensel[91], in the second edition of his tax book, published after the first German General Tax Code drafted by Enno Becker (1919)[92] and since then influenced many of the continental tax legal systems. Those elements are the tax object, the taxpayer, the taxable base and the tax rates and I call them the legal type of a tax, trying to accommodate the German expression *Tatbestand*, corresponding to the Italian *fattispecie*: the legal type of a tax is a legal abstraction of the facts chosen by the

88. Jeremy Waldron, *Law and Disagreement*, cit., ch. 5; Timothy Endicott, *Vagueness in Law*, cit., pp. 186-187; John Rawls, *A Theory of Justice*, Cambridge, Massachussets, 1971, p. 237; Ronald Dworkin, *Law's Empire*, cit., pp. 95-96.
89. Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", cit., pp. 235-237.
90. Idem, cit., p. 227-229; Andrei Marmor, "The Rule of Law and its Limits", cit., pp. 38 et seq.; Timothy Endicott, *Vagueness in Law*, cit., pp. 185 et seq.; H.L.A. Hart, *The Concept of Law*, cit., pp. 138 et seq.; Ronald Dworkin, *Law's Empire*, cit., pp. 93 et seq.
91. Albert Hensel, *Steuerrecht*, Berlin, 1927, 2. Auflage, p. 39; E. Reimer/C. Waldhoff, "Steuerrechtliche Systembildung und Steuerverfassungsrecht in der Entstehungszeit des modernen Steuerrechts in Deutschland – Zu Leben und Werk Albert Hensels (1895-1933), *Albert Hensel, System des Familiensteuerrechts und andere Schriften*, Hrsg. Reimer/Waldhoff, Köln, 2000, pp. 36-43.
92. See also Enno Becker, "Grundfragen aus der neuen Steuergesetzen", *Steuer und Wirtschaft*, 1926, pp. 241 et seq.

legislator as paradigm, as pattern, as the typical ones and invariably should include object (*an*) and assessment (*quantum*) as the essence of the principles of people's sovereignty and rule of law in tax law. Both the German and the Italian literature have worked on the *Tatbestand* or *fattispecie* concept, based on Feuerbach's and Beling's research in penal law[93], and Hensel introduced it in tax law. The fact that the legal type of a tax has to be determined by law is a requirement of the rule of law and of the competence belonging to the parliament in deciding and enacting taxes (or crimes, or fundamental rights). In this sense, the legal type of taxes as the object of the exclusive competence granted to the parliament fulfils the constitutional requirement for precise laws (or legal determinacy) as opposed to vague laws (possibly leading to legal indeterminacy).

It is common to every reported country in this book that the aforementioned legal type of tax is determined by law as part of the constitutional principles on separation of powers and "no taxation without representation", although most constitutions do not explicitly include it under the competence of the parliament (but for example, the French[94], the Greek[95] and the Portuguese[96] constitutions do). I can also add that the legal type of tax, being a dogmatic concept, although characteristic to the civil law countries methodology, is valid in common law countries and in any tax system belonging to any other family of law. Thus, the legal type of tax is universal and common to every country herein reported and to every rule-of-law State. What varies in the legal systems under analysis is the constitutional reality or the way the parliament, the government, the tax administration and the courts interpret and comply with that requirement.

I have now clarified that the issue on who has the final decision on the legal type of tax as long as there is relevant pluralistic discussion, is central to my view on the rule of law and separation of powers. I have also identified the relevant object of that discussion and decision: the legal type of tax. Thus, separation of powers, taxation according to the rule of law and legal determinacy regarding the legal type of tax are intrinsically connected and aim to achieve predictability of taxes and the principle of legal certainty. Delegation of the main policy decisions regarding that legal type or too much vagueness will weaken the rule of law and may ultimately lead to arbitrary decisions.

As I will discuss below, legal determinacy and indeterminacy are quantitative matters and as long as the main policy options on the legal type of tax are taken by parliamentary law, then decree-laws, legislative decrees, regulations, rulings and case law can contribute to the achievement of that certainty in respect of quantification issues.

1.3.3. The meaning of determinacy and indeterminacy

I have been claiming that the topic of separation of powers in tax law relates to the democratic legitimacy of the powers that ultimately decide on what is the legal type of a tax. If the aforementioned issues are to be answered by philosophy of law and by the constitutions, creation and application of tax legislation faces the common difficulties and constraints of legal drafting and interpretation, because legal language is imprecise. Thus, separation of powers is not only to be solved by the constitutional principles and rules, in their written form (whenever there is a written constitution) and in their application (constitutional reality), but also by a methodological or legal theory approach (what is legal indeterminacy and

93. Paul Joh. Anselm Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, Giessen, 1801, 1. Ed., §§ 68, 89; Ernst Beling, *Die Lehre vom Verbrechen*, Tübingen, 1906, ch. V; Alberto Gargani, *Dal Corpus Delicti al Tatbestand – Le Origini della Tipicità Penale*, Milano, 1997, pp. 465 et seq.
94. Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, cit., 2.5.2.2.
95. Eleni Theocharopoulou, cit., 2.6.2.1.
96. Antônio Carlos dos Santos/ Paulo Nogueira da Costa, cit., 2.11.1.1.

how it can affect democratic tax systems). The latter analyses the intrinsic constraints to legal language and drafting: legal language as human language is inevitably imprecise, only quantitative concepts are determined and to a certain context even these can lead to indeterminate results[97].

Taking into account these premises, the legal type of tax not only implies identification of its elements, but also that it is sufficiently determined by parliamentary law. I claim in this respect that the main policy options on that legal type have to be discussed and decided by parliamentary law. Legal authorizations to the government, when they are constitutionally authorized must be determined enough and orient the government on its task, so that predictability on further solutions is granted. When the law is vague and still needs to be complemented by the government, it cannot be so vague as to empty the legal type of tax: determinacy in respect of the legal type of tax is required.

How precise or detailed the law needs to be in respect of the legal type of tax is thus to be analysed and even though it is a constitutional requirement, since otherwise separation of powers and validity of law would not be achieved, it ultimately is an issue of philosophy of law and legal theory. My assumption in this respect is that vagueness is quantitative[98]. Laws can be more or less vague, and with the exception of rules only containing figures (tax rates, for example as long as there is not a range of tax rates to be chosen by the tax administration or the court), a rule is hardly always precise and indeterminacy can occur, in the sense that a situation will arise that has not been foreseen by the legislator and also often one result from interpretation will not exclude other possible results. Awareness of the open texture of the law and the rule-scepticism due to the impossibility of anticipating all circumstances targeted by the law by the legislator was pointed out by Hart, Raz and the analytical theory of law[99], and they have contributed to the recognition of methodological constraints which are present even when the constitutions grant exclusive competence to parliamentary law on a certain matter.

My next assumption is that legal determinacy occurs when the whole amount of legal arguments is enough to justify a judicial decision (or an administrative decision)[100]. Legal determinacy is neither to be assessed in respect of each word or words used in a paragraph of a provision, nor in respect of one isolated legal concept, and sometimes nor even in respect of an isolated rule but it is the result of interpretation of the rule. A concept can be vague, but interpretation of the rule can be determinate, in the aforementioned sense that the whole amount of legal arguments is enough to justify a decision. Determinacy is not a synonym for too detailed laws and for predictability as to the exact amount of tax to be paid, since the former can lead to indeterminacy, in the sense that it can lead to legal gaps or to too complex solutions causing interpretation difficulties[101]. In the UK report published below, it is recalled that the judiciary has not applied legislation on the basis that it is incomprehensible (in the words of Lord Simonds in the House of Lords in 1946), even though the reporter does not relate this issue with legal indeterminacy (or hesitates to do so)[102,103].

97. See e.g., Arthur Kaufmann, *Rechtsphilosophie*, München, 1997, pp. 124-125; *Grundprobleme des Rechtsphilosophie*, München, 1994, pp. 101-102, 106.
98. Matthias Klatt, "Semantic Normativity and the Objectivity Claim of Legal Argumentation", *Associations Journal for Legal and Social Theory*, 2003, pp. 121-122; Timothy Endicott, *Vagueness in Law*, cit., pp. 31 et seq., 188 et seq.,(191), Dietrich Jesch, Unbestimmter Rechtsbegriff und Ermessen" *Archiv des öffentlichen Rechts*, 1957, pp. 167-168, 177-178.
99. H.L.A. Hart, *The Concept of Law*, cit., pp. 121 et seq.; Joseph Raz, *The Authority of Law...*, cit., pp. 72-74; Timothy Endicott, *Vagueness in Law*, cit., pp. 57 et seq., 63-75; Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", p. 215.
100. On the meaning of indeterminacy: Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", idem.
101. Timothy Endicott, *Vagueness in Law*, cit., pp. 29 et seq., 188-190 et seq.
102. Sandra Eden, cit., 2.17.3.
103. See the Danish report and the reference to indeterminacy caused by too detailed rules: Jacob Graff Nielsen, cit., 2.4.2.

Thus, some vagueness (and vagueness is to some extent unavoidable) and open legal types are neither unconstitutional nor do they lead to invalid, illegitimate or arbitrary regimes. The same is true in respect of express remittance to decree-laws and regulations, so that these rule the technical aspects of a tax regime – these can also be passed by domestic rulings, comitology and soft law procedures within the EU.

For example, if the tax legislator opted in the personal income tax code to enumerate the types of capital income without allowing for any other types to be included in the rule, many types of capital would either be outside of the scope of the rule and that would mean that the precise rule led to treatment of like situations differently – taxation of some capital income vs. non-taxation of some other capital income – or the judge would try to treat the income as capital income, either with recourse to a General Anti-Avoidance Rule or without recourse to exclusive legal arguments and that would lead to higher unpredictability of the results. The same applies to the enumeration of tax subjects.

In this sense, some rules on taxes such as the definition of the tax object and subject and deductibility of costs are often open legal types, so that like situations are treated alike. The rule of law is then achieved if legal rules on the legal type of taxes are determined in the easy cases, allowing other principles to be taken into account, and when the final results aimed at the law are more predictable because of some vagueness than by detailed and supposedly precise rules.

Legal determinacy is desirable in order to (democratically) justify coercive judicial decisions. The latter decisions should not be based on extra-legal arguments, such as cultural rules and shared practices that go beyond the semantic extension of the legal norm, even if these are used by the courts and in that way to a certain extent internalized in the institutionalized procedure (appropriateness of application). Legal determinacy is required in order that the individual, including the taxpayer, is given the opportunity to behave according to the law in respect of the legal type of tax.

In turn, legal indeterminacy is an indeterminacy of legal arguments and it normally occurs when the available amount of legal arguments is insufficient to explain one and only one result achieved by the courts (Coleman/Leiter formulation)[104]. Indeterminacy in this sense may occur when the available amount of legal arguments is not able to assure and justify one and only one result in important or difficult cases and it will normally only occur in important and hard cases[105]. A decision on the latter will be a result not only of legal arguments and principles (as happens in respect of easy cases) but also implying harmonization of contradictory principles and values, with several solutions being possible. In the latter case, a discretionary decision will occur, but it will still imply formal rationality: Consistency has to be observed, binding legal rules have to be respected, any evidence produced cannot be disregarded, the fundamental arguments will still have to be legal arguments (based on rules and principles) and not extra-legal ones (such as shared cultural rules and shared social practices)[106].

The second meaning of indeterminacy that is relevant to this essay can also take place when legal arguments are not adequate to guarantee any result. This situation occurs in the case of legal gaps[107], and although in a mature legal system genuine legal gaps seldom occur, because they can be overcome by all legal players (by all powers)[108], in fields such as

104. Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", cit., p. 215.
105. Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", cit., pp. 226-227.
106. Ronald Dworkin, *Taking Rights Seriously*, Revised ed., London, Duckworth, 1977, pp. 105-107; Manuel Atienza, Tras la justicia, Una introducción al derecho y al Razonamiento jurídico, Barcelona, 1993.
107. In the Sense of Joseph Raz, *The Authority of Law...*, cit., pp. 70-74.
108. See Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", cit., pp. 226-227.

in tax law, where the exclusive legislative competence belongs to the parliament even if it can be delegated, legal gaps both in parliamentary law and government-delegated decree-laws occur and they imply that in that situation no taxes may be levied.

Thus, legal indeterminacy cannot be eliminated, and tax law will intentionally or unintentionally sometimes be indeterminate. Discretion is related to the first meaning of indeterminacy as described above, whereas filling legal gaps by analogy relates to its second meaning. In the following paragraphs and pages, unless I expressly mention that I am taking into account the latter meaning of indeterminacy, I will be referring to its first meaning.

The relevant issue in tax law is then whether discretion is granted to the tax administration so that it decides each case according to its own circumstances, whether there is in principle an obligation to contribute to determinacy, by way of enacting general rules, and/or whether the last word always belongs to the courts. The role of the tax courts and of the ECJ within this framework also has to be discussed.

My assumption is that vague laws leading to indeterminacy are not synonymous with administrative discretion, although vague laws may grant administrative discretion. In other words, administrative discretion is granted by law, it may be granted by expressions such as "the Minister of Finance can grant an exemption to...", or it may be conceded by vague laws, it aims at fulfilling public aims and its limits are defined by law, but beyond those aims and limits it always requires a subjective assessment by the tax administration according to the circumstances of the concrete single case[109].

1.3.4. Techniques of legal drafting

Aware of the constraints, and taking them into account, legal theory has identified two main techniques of legal drafting and the aims they achieve in respect of interpretation and relationship among the powers. One corresponds to the adoption of general rules, standards and principles aimed at a general group of persons and/or objects. As Hart explained, in any field of law as well as in any large group, general rules, standards and principles understood by a multitude of individuals and requiring of them a certain conduct, must be the main instrument of social control[110]. Identification of classes and general classifications are a condition for a successful operation of the law over a multitude of individuals and areas of social life[111].

I can call this technique typifying and it implies the finding of common characteristics of a group that will be the object of the regime[112]. In this way, equality and predictability are assured and in tax law this is the prevailing technique, since tax law aims at reaching general, global and typical cases of the manifestation of wealth, and at simplifying the underlying reality[113]: aiming at the typical case, the legislator also aims at predictability of the regime. However, and on the contrary, if the typifying is targeted at non typical-cases or exceptional cases, it is no longer connected to the principle of predictability. Typifying can either be done by illustrative conditions or detailed rules.

In the case of detailed rules based on the type, the conditions of which are drafted as exclusive rather than as illustrative, the parliament in principle leaves less room for interpretation and discretion. German authors have identified the latter technique as "closed typifying" (*Tatbestandsmässigkeit*), supposedly required in fields such as penal law and tax law, and there are two related reasons justifying its adoption.

One is connected with the rule-of-law requirements: it concerns the fact that in civil law countries, the legislator is normally required by the written constitution to decide on the aforementioned regimes, following principles such as the *nulla poena sine lege* from Feuerbach, and the "no taxation without representation" principle, and in order to be effective, the legislator has to target at the average pattern or average type among a multitude of individuals. But the decision will only be effectively taken by the parliament if it leaves no discretion to the application organs, and therefore if it typifies the circumstances in such a way that they become the exclusive circumstances to be taken into account, avoiding or at least reducing legal uncertainty.

The other reason is related to legal certainty and foreseeable taxation, since these in principle are achieved by detailed legal provisions. However, this typifying technique will lead to a progressive departure from underlying typical cases and therefore to tax regimes contrary to the principle of equality and ultimately to tax avoidance[114].

On the contrary, the precedent method in common law countries, normally based on an individual assessment of cases, as well as the methodology according to which legislation is to be based on the average or frequent type and the open, illustrative typifying of the main characteristics of that type, can in theory lead to greater uncertainty (however, both techniques are now common to both legal traditions). As opposed to the general rules typifying all or most of the circumstances, the use of vague concepts by the law favours its application on a case-by-case basis. This technique aims at more equitable solutions, since it permits each case to be handled in its specificities, although it leads at the same time and as a rule (or more frequently) to indeterminate results and to larger discretion by the tax administration and the courts. In this circumstance, the rule of law (determinacy of law) and its aims are in tension with other purposes followed by tax law, namely taxation according to the principle of equality or the ability-to-pay principle.

The use of vague concepts in the law, instead of closed-typified solutions, is also legitimate in tax law, since, taking into account that the legislator cannot anticipate every circumstance, if the law is too determined, it will encourage tax planning and abusive behaviour. Leaving to the tax administration and the courts the assessment on whether the individual circumstances either correspond to the general circumstances of the law or to an abusive behaviour, will allow a result closer to the idea of justice and distribution of tax burdens based on the ability-to-pay principle underlying that specific law. In this respect, some national reporters mention the anti-abuse purposes followed by some vague rules, and which in this way justify indeterminacy of tax legislation[115]. Moreover, as previously argued, vague concepts do not necessarily lead to indeterminate results and are therefore in certain cases adequate for achieving legal certainty.

In all countries, both techniques are used, although in most countries detailed tax rules seem to prevail over vague ones. In Canada, for example, tax acts are very detailed but are accompanied by indeterminate clauses, e.g., relating to amounts of deduction (test of reasonableness) and a General Anti-Abuse Clause (GAAR)[116]. And for example, whereas in Greece and Italy the tax legislation is normally detailed[117], in Poland the situation varies[118],

109. Karl Engisch, "Die normativen Tatbestandselemente im Strafrecht", *Festschrift für Edmund Mezger zum 70. Geburtstag*, Hrsg. Karl Engish and Reinhart Maurach, München, Berlin, 1954.
110. H.L.A. Hart, *The Concept of Law*, cit., p. 121.
111. See Klaus Günther, *The Sense of Appropriateness...*, cit., pp. 270-271.
112. See Heinrich Henkel, *Introducción a la Filosofia del Derecho - Fundamentos del Derecho*, Madrid, 1968 (1964) transl. by Enrique Gimbenart Ordeig, pp. 575 et seq.
113. Heinrich Henkel, *Introducción...*, cit., p. 588; Paul Kirchhof, "Der verfassungsrechtliche Auftrag zur Steuervereinfachung" *Steuervereinfachung, Festschrift für Dietrich Meyding zum 65. Geburtstag*, Hrsg. Wilhelm Bühler, Paul Kirchhof and Franz Klein, Heidelberg, 1994, pp. 6 et seq.
114. See on the subject, Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, ch. VII.
115. See e.g. the Belgian report: Bruno Peeters/Elly van de Velde, cit., 2.2.3.1, 2.2.3.2. and 2.2.3.4.; see also the reference to several anti-avoidance rules in the Canadian report: Martha O'Brien, cit., 2.3.3.
116. Martha O'Brien, cit., 2.3.3.
117. Eleni Theocharopoulou, cit., 2.6.3.1.; Federico del Lorenzo, cit., 2.7.2.
118. Krzysztof Lasiński-Sulecki/Wojciech Morawski, 2.10.2.

in Russia the literature seems to require more determinacy in respect of the taxable base[119], and in France it is normally not very detailed[120]. In Spain, a distinction is made between state taxes and regional and local taxes, in the latter case, discretion being granted to local authorities[121]. Moreover, in Canada, the UK, the US and Sweden, the courts have an important contribution to make vague concepts more determined and developing tax principles[122].

Thus, most of the national reports published in this book, although confirming that the use of general and detailed legal rules typifying the circumstances is the technique normally followed by the legislator in tax matters, also illustrate the fact that vague concepts are used in tax legislation, namely in respect of rules on the taxable base and especially in respect of admissible deductions. Vague concepts such as "costs related to the activity" or "costs intrinsically related to the activity" are common to some reported systems.

All in all, legal certainty and separation of powers formally understood favour detailed and typified legislation, whereas the ability-to-pay principle which in turn requires in some cases an anti-abusive interpretation (the principle of abuse used as an interpretation principle) and anti-abuse provisions, favour the adoption of vague concepts and application of the law on a case-by-case basis. Thus, both techniques can be combined by the tax legislator, as long as the adoption of general, typified and detailed rules prevail over vague rules. Reading the contributions to this book, I can conclude that the use of vague legislation is not a problem, although in many systems parliaments implicitly or explicitly delegate too much power to the government.

1.3.5. Vague laws and administrative discretion

Administrative discretion and its meaning and relationship with vague laws and legal indeterminacy have been widely discussed in the European civil law countries (Germany and Austria, France and the legal systems influenced by the latter, such as Italy, Portugal and Spain) in the twentieth century, but the debate goes back to the constitutional monarchies in the nineteenth century, which have played an important role in the development of the discussion. At that time, administrative discretion corresponded to a free administrative space granted by vague laws, it was identified with the administrative activity outside the scope of law, it was a reality strange to law, not ruled by law, and therefore identified with a right to administrative choice of legal creation (so-called Jellinek line of reasoning)[123]. In contrast to this position granted to the administration, and in apparent contradiction to it, still according to Jellinek's doctrine, courts were strictly bound by law, and their activity was limited to a logical-automatic application of the law[124]. Thus, vagueness and indeterminacy implied freedom of the administrative activity, administrative creation of law uncontrolled by the courts, and the constitution and legislation constituted a limit and not the fundament of the administrative activity.

The twentieth century was characterized by bringing vague laws, and the legal indeterminacy and administrative activity related to them, within the scope of interpretation

119. M. Sentsova/Danil V. Vinnitskiy, 2.12.2.
120. Emmanuel de Crouy-Chanel/Alexandre Maitrot de la Motte, cit., 2.5.3.2.
121. M. Luisa Esteve Pardo, cit., 2.14.2.
122. Martha O'Brien, cit., 2.3.3.; William B. Barker, cit., 2.18.1; Sandra Eden, cit., 2.17.3.
123. Walter Jellinek, *Gesetz, Gesetzanwendung und Zweckmässigkeitserwägung, zugleich ein System der Ungültigkeitsgründe von Polizeiverordnungen und -Verfügungen, Eine Staats- und Verwaltungsrechtliche Untersuchung*, Tübingen, 1913, pp. 30 et seq., 36-40, 132 and 188-189; *Verwaltungsrecht*, 3. Auflage, Berlin, 1931, pp. 28 et seq.; Hans Heinrich Rupp, " 'Ermessen', 'unbestimmter Rechtsbegriff' und kein Ende", *Festschrift für Wolfgang Zeidler*, Hrsg. Walter Fürst, Roman Herzog, Dieter C. Umbach, Bd. 1, Berlin, New York, 1987, pp. 460-461.
124. Hans Heinrich Rupp, " 'Ermessen'..., cit., pp. 457-459.

and application of law. The law now appears as the fundament of the administrative decision, and no longer as a negative limit to the administrative activity[125]. Facing administrative discretion as a way of applying the law and achieving its aims and not as an extra-constitutional prerogative inherited from the constitutional monarchies' framework is also a way to refrain the judicial attack to the former[126]. Some German authors have however contributed to deepening the traditional perspective opposing discretion to interpretation[127]. Whereas discretion would mean the creation of law and would grant a choice between or among legally authorized alternatives, vague concepts situated in the if-conditions of the legal norm would imply application of law, which in turn either meant application bound to law or legal indeterminacy granting some free space to extra-legal arguments uncontrolled by the courts[128]. That absence of control is based on the argument that there would be no advantage in replacing a subjective administrative assessment (by the administration) by another subjective assessment (by the courts).

This distinction between administrative discretion and margin of free assessment is somehow puzzling, taking into account the aforementioned movement of subjecting administrative activity to law. If the administration is bound by law, even when it has to apply vague laws, the fact that they have to be interpreted like any other laws would imply judicial control as happens in every other field of law, including those where legal determinacy is specially required, such as criminal law and fundamental rights law. In any case, the discussion on pure discretionary concepts and vague laws leading to indeterminacy but subject to judicial control has its origin in the end of the nineteenth century and bringing administrative activity to law has been a process, the evolution of which is more or less linear. It has been a process parallel to the one that abandoned identification of law and reason, to the substitution of the interpretation theory of "jurisprudence of concepts" by the trends in favour of teleological interpretation, to the approximation of administrative discretion and judicial discretion[129].

1.4. The consequences of legal indeterminacy in tax matters

1.4.1. Administrative discretion and judicial discretion

I have contended above that discretion is granted by law to the administration; I also contended that legal indeterminacy has to be identified by legal theory; it has been recognized that both the administration and the courts sometimes have to interpret vague laws according to some extra-legal arguments which means that the law is binding according to different degrees or intensity, and the two extremes are not acceptable: neither an automatic application of law nor unlimited discretion is acceptable; the more vague the law is, the broadest the margin of discretion/free assessment by the organs applying the law. Interpretation and application of law implies identification of the type foreseen and covered by the law, so that the individual case can be subsumed in the legal type (assessment on appropri-

125. See David Duarte, *Procedimentalização, participação e fundamentação: para uma concretização do princípio da imparcialidade administrativa como parâmetro decisório*, Coimbra, 1996, p. 339 (pp. 337 et seq.).
126. Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., pp. 380 et seq.; Fritz Ossenbühl, Tendenzen und Gefahren der neueren Ermessenslehre", *Die öffentliche Verwaltung*, 1968, p. 626.
127. See e.g. Otto Bachof, "Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht", *Juristische Zeitung*, 1955, n. 4, pp. 98 et seq.; Carl Hermann Ule, "Zur Anwendung unbestimmter Rechtsbegriffe im Verwaltungsrecht", *Forschungen und Berichte aus dem öffentlichen Recht, Gedächtnisschrift für Walter Jellinek*, Hrg. Otto Bachof, Martin Drath, Otto Gönnenwein, Ernst Walz, Bd. 6, München, pp. 309 et seq.
128. Fritz Ossenbühl, "Tendenzen und Gefahren...", cit., p. 619.
129. Hans Heinrich Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre, Verwaltungsnormen und Verwaltungsrechtsverhältnis*, 2. Auflage, Tübingen, 1991, pp. 169-191; Dietrich Jesch, *Gesetz und Verwaltung*, cit., pp. 9-29.

ateness). Both in the case of administrative and of judicial discretion, the boundaries of interpretation of law have to be defined.

Although the meaning of administrative discretion is still debatable and debated, my claim is that, even if it belongs to the application of law – it has to be granted by law and exercised within its limits –, the core of administrative discretion lies in the extra-legal justifying arguments and in the subjective assessment of the individual case. In other words, administrative discretion implies the choice and selection of essential policy-decision criteria determined and limited by law [130].

Taking into account the aforementioned premises, the issue is whether they are sufficient to equalize administrative discretion/margin of free assessment and judicial discretion and to make it indifferent that in face of legal indeterminacy in tax law the final decision either belongs to the tax administration or the courts. In order to answer this question, the legal theory and philosophy of law arguments are not sufficient to justify any administrative discretion and free space recognized by the courts for judicially uncontrolled extra-legal assessments put forward by the administration, since legal theory and philosophy of law only allow us to identify legal indeterminacy and to discuss validity of law and the limits of interpretation (by the courts), but the boundaries of the competence of the administration and the courts are not discussed.

That free space has to be justified by arguments on the type of subject that has to be ruled on, connected with the different functions, competences and types of responsibility belonging to different powers. Subject matters such as administrative planning, administrative evaluation of people, situations and social processes are to be decided by the administration because the administration is not only led by interpretation principles and rules but also by political arguments; the government can ultimately be politically responsible for it[131]. On the contrary, courts are exclusively led by law and any extra-legal arguments have to be framed by legal principles[132] – although I recognize that legal indeterminacy will only occur in important and hard cases (the amount of legal arguments will never ensure or justify one and only one result in important and hard cases), it will often occur and extra-legal arguments will imply judicial discretion.

Most arguments used in respect of subject-matters other than taxes are not applicable to the latter, being the case of the practicability arguments connected with the impossibility to have access to certain evidence because it cannot be repeated and to the technical-scientific character of the matter (practical difficulties with regard to the judicial control of oral examinations at universities, for example) and the technical-scientific characterization of some independent commissions.

In tax law, legal vagueness and indeterminacy do not as a rule imply the granting of administrative discretion, since it does not require a subjective assessment in each concrete case. Taking into account that the legal type of tax, as previously discussed, has to be determined by parliamentary law, and that legal determinacy is required in respect of the policy decisions on the legal type, administrative discretion as above defined has to be exceptional and justified by constitutional principles that in a concrete case are to prevail over the exclusive competence granted to parliamentary law. In tax law, any discretion granted to the government (to the minister of finance) will most frequently occur in respect of tax benefits rules, which are not strictly tax rules since they have extra-fiscal aims, constitute an exception to the tax incidence rules and to the ability-to-pay principle, and are therefore simultaneously led by the principles belonging to the economic constitution and to the tax consti-

130. Fritz Ossenbühl, "'Ermessen' und 'unbestimmter Rechtsbegriff' im Verwaltungsrecht", *Recht und Staat in Geschichte und Gegenwart*, n. 230-231, Tübingen, 1960, p. 87; "Tendenzen und Gefahren...", cit., p. 619.
131. See Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., pp. 468 et seq. and the literature cited therein.
132. Idem.

tution. As a general rule, interpretation of the law will be decisive for determining whether it requires such single assessment.

This means that if the law is not unconstitutional because the legal type of tax has been satisfactorily determined by parliamentary law, vagueness and application of vague laws by the tax administration will imply judicial control, unless the principles of legal certainty and predictability together with the principles of practicability and second-best equity, recommend reduction of vagueness and indeterminacy by a general and abstract rule, either by regulations, rulings or soft law instruments.

1.4.2. Judicial control of vague laws

Reporting the situation in the contributions published below, I verify that in some countries the requirement of detailed statutory regimes seems to be effectively controlled by the courts (e.g. Belgian, Brazil, Greece, Japan, Poland and Russia)[133] and that indeterminacy is associated by some national courts with the necessity of fighting tax abuse (e.g. Belgium, Denmark)[134], but except for the Danish report and its author's view[135], simplicity of tax law was not mentioned as a reason for indeterminate laws. Nevertheless, complexity as a problem that can lead to non application of a law by the judiciary is mentioned in the UK report[136] and complexity arising from a huge amount of regulations and rulings was mentioned (e.g. Japan[137]). In countries such as Canada, the UK and US legal indeterminacy is not seen as a problem, since it belongs to the courts to find the ultimate meaning of a statute (using all interpretation methods, regulations, administrative rulings, judicial decisions and general principles)[138]. In Canada, statutory indeterminacy will be unconstitutional if it infringes the "right to life, liberty and security" (if they lead to arbitrary results), and in the USA, if it is so unclear that will be arbitrary[139]. In Serbia, there are doubts on whether legal indeterminacy raises an issue of constitutionality[140], but most reporters highlight that in the case of indeterminacy, regulations and rulings will complete the regime (differently, Greece[141]).

Constitutional courts have in some reported countries (e.g., Belgium, Brazil and Poland) held vague tax rules unconstitutional once or twice[142]. In Japan the Supreme Court has declared tax rules unconstitutional due to indeterminacy in a few cases[143]. In Russia the Constitutional Court has held some vague tax rules unconstitutional, but the case law is increasingly filling in the legal indeterminacy[144]. It must be stressed that in most reported countries, the competent courts have never held a tax rule unconstitutional due to its inde-

133. Bruno Peeters/Elly van de Velde, cit., 2.2.3.4.; Marco Antônio del Greco, cit., 2.4.; Eleni Theocharopoulou, cit., 2.6.3.2. and 2.6.4.; Kimura, cit., 2.; Krzysztof Lasiński-Sulecki/ Wojciech Morawski, 2.10.2; M. Sentsova/Danil V. Vinnitskiy, cit., 2.12.2.
134. Bruno Peeters/Elly van de Velde, cit., 2.2.3.1., 2.2.3.2.; Jacob Graff Nielsen, cit., 2.4.2. and 2.4.3.
135. Jacob Graff Nielsen, cit., 2.4.2.
136. See also the reference to complexity as a problem that can lead to non application of a law by the judiciary, in the UK report: Sandra Eden, cit., 2.17.3.
137. Kimura, cit., 2.8.1.
138. Martha O'Brien, cit., 2.3.3.; Sandra Eden, cit., 2.17.3; William B. Barker, cit.2.18.3.
139. Martha O'Brien, cit., 2.3.3; William B. Barker, cit., 2.18.3.
140. Dejan Popović/Gordana Ilić-Popov, cit., 2.13.2.
141. Eleni Theocharopoulou, cit., 2.6.4.
142. Bruno Peeters/Elly van de Velde, cit., 2.2.3.4.; Marco Antônio del Greco; 2.4.; Krzysztof Lasiński-Sulecki/Wojciech Morawski, cit., 2.10.2.; tax rules have been challenged on the basis of indeterminacy in Canada, but no tax provision has ever been held to be invalid on that basis: Martha O'Brien, cit., 2.3.3.
143. Kimura, cit., 2.8.2.
144. M. Sentsova/Danil V. Vinnitskiy, cit., 2.12.2.

terminacy. As a result, vague rules are considered to be compatible with the rule of law in most situations and when leading to indeterminacy their application either implies the supremacy of the tax administration or of the courts.

In some countries, the literature highlights the difference between discretion and indeterminacy (e.g. Austria, Germany, Greece, Portugal)[145]: discretion is often considered to be prohibited; in the case of legal indeterminacy, the final word belongs to the courts. In Greece interpretation seems to be close to a literal interpretation (on the opposite side, see e.g. Canada, Sweden)[146].

Thus, the practice in various reported countries on the judicial control of legal indeterminacy applied by the tax administration varies. In the case of the administrative application to the concrete case, in some reported countries, like Germany, courts have or tend to have the last word on the interpretation of any vague laws (the protection of fundamental rights has led to judicial control by the German constitutional court whenever issues related to them were raised), unless in the case of German tax rulings, the control of which is discussed[147]. In other countries, such as Portugal, tax courts have until recently avoided control of indeterminacy, recognizing some margin of free assessment[148]. When the tax administration enacts regulations, it seems common to most reported countries that the courts recognize a broad margin of free assessment on the normative solution chosen by the administration: what I call a margin of free typifying[149].

All countries seem to have independent courts, and even if recognizing some margin of free assessment to the administration, they are in principle granted the last word on the indeterminacy of tax legislation.

I can also conclude that in common law systems the role of the courts' case law, in progressively determining legal concepts and rules is understood as part of their function (see the Canadian and the US reports), whereas in civil law systems (written) constitutions clearly provide for an exclusive or nearly exclusive legislative competence of the parliament in tax matters. As previously mentioned, in some cases, constitutions of civil law countries even expressly subject specific tax elements to that exclusive competence – normally, the aforementioned *an* and *quantum* of the tax – tax object, tax subject, taxable base, tax rates – even if requirements on determinacy vary, and in respect of the quantification elements, especially in respect of the taxable base and deductions allowed, some room is granted and recognized by the courts to free assessment or typifying. The constitutional rules on the allocation of legislative competence in tax matters and definition of which tax matters are subject to that competence creates the grounds for judicial control of legal indeterminacy in civil law countries.

However, in practice, the judicial control on the constitutionality of vagueness in tax law leading to indeterminate results does not differ much in civil law and common law countries. The trend, already pointed out by Hart in 1961, shows that the legal families belonging to one or the other of them have become closer regarding the way they face legal determinacy and indeterminacy.

"Two principal devices, at first sight very different from each other, have been used for the communication of such general standards of conduct in advance of the several occasions

145. Johannes Heinrich/Irina Prinz, cit., 2.1.2.; Eleni Theocharopoulou, cit., 2.6.3.1.; for the German and Portuguese literature and case law, Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., chs. V and VI.
146. Eleni Theocharopoulou, cit., 2.6.4.; Martha O'Brien, cit., 2.3.1.; Stefan Olsson, cit., p. 2.15.3.
147. See Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., pp. 650 et seq.; – Ana Paula Dourado/Rainer Prokisch – «Das steuerrechtliche Legalitätsprinzip im portugiesischen und deutschen Verfassungsrecht», *Jahrbuch des Öffentlichen Rechts*, 1999, vol. 47, pp. 35-77.
148. Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., pp. 9 et seq., 143 et seq., 516 et seq.
149. Following to some extent Lerke Osterloh's, *Gesetzesbindung und Typisierungsspielräume bei der Anwendung der Steuergesetze*, Baden-Baden, 1992.

on which they are to be applied. One of them makes a maximal and the other a minimal use of general classifying words. The first is typified by what we call legislation and the second by precedent. We can see the distinguishing features of these in the following simple example. One father before going to church says to his son, 'Every man and boy must take off his hat on entering a church'. Another baring his head as he enters the church says, "Look: this is the right way to behave on such occasions"[150]. Still according to Hart, "Much of the jurisprudence of this century has consisted of the progressive realization (and sometimes exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative general language (legislation) is far less firm than this naïve contrast suggests"[151].

The European Union and its legal system and institutional players, the economic regional integrations spread throughout the continents, the globalization phenomena, the legal players at the international playing field both at an institutional level (such as the IMF, OECD, EU) or acting as discussion *fora* (such as the IFA and the EATLP) and the pluralism of legal sources and competences resulting from them, all have contributed to intensifying the aforementioned trend of approximation of common law and civil law legal systems.

Although it is clear in most systems that the final word on the interpretation of vague rules belongs to the courts, and that legal indeterminacy is not a synonym for granting administrative discretion, the truth is that the answer on who is competent to determine the meaning of vague rules depends very much on the interaction between the tax administration and the courts, the role played by the former and the latter in the legal system as a whole and in tax matters specifically, ultimately on how courts interpret and apply the law.

1.4.3. Administrative functions and margin of free typifying through regulations and rulings

I have claimed so far that the theoretical-analytical arguments on indeterminacy are not enough to justify the margin of free typifying granted to the tax administration in enacting regulations and rulings. It is true that in the case of regulations the normative competence is at stake and it can and must be distinguished from the application of vague laws to the concrete case. However, in respect of administrative rulings and soft law instruments it is not clear whether and to what extent I can distinguish them from the interpretation/application to the concrete case, since they result from the application of vague laws (decree-laws and regulations, if that is the case), to the concrete situation. Application of law as an analogy circle between the individual case and the rule, as it happens with case law, is very clear when one wants to explain the origin of administrative rulings. But in all of the aforementioned cases of administrative activity – either exercised by regulations, rulings or (other) soft law instruments – the law is vague and its vagueness is reduced by the administration and not by the courts.

Thus, I have to ask whether the tax administration, according to its competence, efficacy, legitimacy and procedure can decide on how to interpret and apply the vague tax legislation to a series of identical cases[152] and possibly create rules. My premise is that this activity occurs in respect of more or less vague laws and that implies a margin of free assessment by the tax administration, lying beyond the core of the legal type of tax.

150. H.L.A. Hart, *The Concept of law*, cit., p. 121.
151. Idem, p. 123.
152. Mutatis mutandis, Fritz Ossenbühl, "Rechtsquellen und Rechtsbindung der Verwaltung", *Allgemeines Verwaltungsrecht*, Hrsg. Hans-Uwe Erichsen/Dirk Ehlers, 12. Ed., Berlin, 2002, p. 219. Ana Paula Dourado, *O Princípio da Legalidade Fiscal...*, cit., p. 469.

Even if I distinguish between discretion and a free administrative assessment/typifying granted by legal indeterminacy, I am taking into account the different functions and competences: the legislative power and the degree of determinacy that parliamentary law has to comply with, the government and the executive power and the extent to which they are bound to the (parliamentary) law, the jurisdictional and the control it is expected to implement.

More than any specificity of the tax administrative activity and the purposes it follows or the political responsibility that has to be assumed by governments in respect of tax decisions, the aforementioned margin of free assessment uncontrolled by the courts is justified due to the requirements of determinacy and predictability. Thus, as a rule, vagueness and indeterminacy will either lead to judicial control of the tax administrative act or to control of the legality of the rule complementing the vague law: that is the case of tax abuse accepted in many civil law countries as an interpretative principle and arguably by the ECJ as well – together with the principle of equality tax abuse justifies a certain legal vagueness implying a casuistic analysis on whether a "wholly artificial arrangement" exists, and that assessment by the tax administration is to be controlled by the courts. At the same time, principles of the second and third level can make the abuse principle more concrete and ultimately settled case law will contribute to progressive determinacy.

I conclude that the interpretation granted to the law by the tax administration in its normative regulatory activity either by legally binding instruments or by soft law instruments is to be accepted by the courts as long as the interpretation is defensible, since indeterminacy implies that more than one answer is legally correct, and replacing it would increase uncertainty. Courts must control the legality of the procedure, any contradictory regimes, control and balance the different applicable international law principles and in the case of EU Member States the European law principles, as well as constitutional and legal principles. However, if the government and the tax administration do not reduce legal indeterminacy in the aforementioned manner, the courts must control the administrative application of vague rules and reduce its indeterminacy by way of settled case law.

1.4.4. Judicial control of rulings in tax law

In principle, rulings enacted by the tax administration only bind the tax administration itself (in the US, if the interpretative regulations present a reasonable interpretation of legislative provisions, they are followed by the courts – they are deemed to have received congressional approval and have the effect of law."[153]). However, rulings enacted by the tax administration are in some countries followed by the courts, as long as these rulings are not considered to be illegal (see, e.g. Canada, Italy, Japan, Poland)[154]. In other countries they are examined along with the evidence and facts of the case (Russia)[155] or as relevant arguments (Spain)[156]. Thus, in most countries courts are not bound by the rulings, but in Poland the courts cannot deprive taxpayers of protection deriving from rulings even if these are illegal[157]. In Serbia the Minister of Finance has competence to answer interpretation issues, but his opinions are not binding[158]. All this implies that the interpretation by the tax administration of indeterminate laws helps the courts to reach a possible meaning (see, e.g. Denmark, Spain)[159].

153. William B. Barker, cit., 2.18.3.5., United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212 (2001).
154. Martha O'Brien, 2.3.4.; Federico del Lorenzo, cit., 2.7.3.; Kimura, cit.,2.8. 3.; Krzysztof Lasiński-Sulecki/ Wojciech Morawski, 2.10.3.
155. M. Sentsova and Prof. Danil V. Vinnitskiy, 2.12.3.
156. M. Luisa Esteve Pardo, cit., 2.14.4.
157. Krzysztof Lasiński-Sulecki/ Wojciech Morawski, cit., 2.10.3.
158. Dejan Popović/Gordana Ilić-Popov, cit., 2.13.3.

1.4.5. Conclusions: Determinacy of the legal type of tax

Comparing different constitutional and legal systems and taking into account the premises and arguments above, I contend that the core of the parliamentary law and delegated decree-laws or legislative decrees has to cover the typical cases aimed at the legal type of tax and that the core has to be broader than the margin left to covering untypical ones.

Regarding the object of tax, parliamentary law has to directly define the typical manifestations of wealth that each tax aims to reach (the paradigm cases), and it also has to enumerate them, unless the political option and definition is clear and it delegates to the government decree-law or legislative decree the concrete enumeration of those manifestations. The best technique in this respect seems to be the definition and enumeration of the typical cases, but an open enumeration with a residual clause that allows taxation of any manifestation of wealth that can correspond to the definition.

However, in a rule-of-law State there can be no legal irrebuttable presumption of wealth, consumption or income, since even though irrebuttable presumptions constitute a legal technique aimed at achieving legal determinacy, in the sense that they avoid proof of facts, irrebuttable presumptions on any manifestation of wealth is incompatible with the ability-to-pay principle. But, if an irrebuttable presumption on the tax object itself is prohibited, rebuttable presumptions are not, namely in the case of wealth the origin of which has not been declared to the tax authorities and whenever there is non-compliance of cooperation duties (when accounting does not reflect, inform or clarify about an accrual of income that justifies the acquisition of certain assets). Moreover, within the European Union, irrebuttable presumptions on accrual of income and assessment of the taxable base are prohibited if discriminatory, even if led by anti-abuse purposes, which means that in the case of discrimination, the tax administration and the domestic courts have to consider the individual circumstances of the case: the ECJ has recognised application of domestic anti-abuse concepts as long as that does not prejudice the "full effect and uniform application of the Community law provisions allegedly relied in an abusive manner"[160]. Regarding the taxpayer, it seems that an illustrative enumeration of taxpayers is the best technique to adopt, so that some entities are not outside the scope of the tax by adopting a legal form that is not foreseen in the law.

As previously mentioned, quantification of tax has also to be determined by parliamentary law, so that predictability as to the amount to tax to be paid is assured. But, since quantification often implies assessments based on the typical cases, due to the practical impossibility of considering the particularities of each case (second best equality), the details of the legal tax regime can be determined by decree-law or legislative decree and the more technical aspects by regulations or even rulings in a way that, globally considered, the tax regime progressively becomes more concrete. In respect of the quantification rules, namely in respect of deductible costs, tax legislation is frequently vague as is exemplified by the reported countries in respect of the incurred costs necessary to obtain the gross income. Taking into account that vagueness in tax law and legal indeterminacy will reduce the validity of law and the predictability of the amount of tax to be paid, progressive reduction of that indeterminacy by enactment of decree-laws, regulations and rulings will contribute to pre-

159. Jacob Graff Nielsen, cit.,2.4.3.; M. Luisa Esteve Pardo, cit., 2.14.3., 2.14.4.
160. Opinion of Advocate General Poiares Maduro, *Halifax*, cit., point 65; ECJ Case C-206, *Palletta* [1996] ECR I-2357, para. 25; *Kefalas*, cit., paras. 21-22; ECJ C-373/97, *Dionisios Diamantis and Elliniko Dimosio (Greek State)*, [2000] I-1705, paras. 34-35; *Centros*, cit., paras. 24-25.

dictable results and also to achieving validity of law, since the parliament will be able to amend the law if it does not agree with the way in which determinacy was achieved by other legal and soft law instruments.

1.5. Relationship between the tax administration and the tax courts

1.5.1. The situation in the reported countries

The tax administration is in all countries bound by the court's decision on the case, but in most countries not bound in respect of similar cases (e.g. in some reported countries the tax administration has tried to circumvent domestic courts decisions[161]) – unless they are common law systems. In some countries the tax administration follows the case law in similar cases (e.g. Austria, Belgium, Japan[162]), and in some others even pays special attention to it, and is even organized by the tax administration itself in order to be available and distributed to the competent departments and officials (e.g. France, Poland, Serbia)[163].

I can highlight two aspects that have been mentioned before in this essay and that show the big influence of the tax administration in the tax legislation:

- Legal indeterminacy is normally filled in by regulations and rulings and if the vagueness of the legislation is high, the solution found by the tax administration expresses a relevant margin of free assessment or typifying (relation parliament/government/bureaucrats);
- Even if the courts control the above mentioned free assessment, through the control of the legality of the regulations and rulings, if the vagueness is high, they will normally accept the tax administration's solution, as long as it is defensible, due to the principle of practicability, and unconstitutionality of indeterminate legal rules seldom occurs;
- And in all, or almost all, countries, when the courts declare the illegality of the tax administration interpretation of the law, and support the taxpayers' viewpoint, the tax administration will try to have the law amended and will often achieve this, in order to reach the meaning proposed.

1.5.2. Conclusions: The consequences of legal indeterminacy in tax matters concerning the tax object, the tax subject, and the quantification elements

I have contended in the previous pages that vagueness of tax laws, when leading to indeterminacy, implies a margin of free assessment granted either to the tax administration in enacting more detailed regimes by regulations, rulings or soft law instruments or to the courts, the broadness of which depends on the degree of indeterminacy. I also contended that separation of powers in tax law and the rule of law require that vague rules in respect of the taxable base and quantification items are progressively determined by a joint activity of the tax administration and the courts.

The country reports published in this book illustrate that the fact that the courts control of the application of vague rules by the tax administration creates a balanced solution – any transfer of power conferred by the parliament to the tax administration by the use of legal vagueness leading to indeterminacy is compensated by the judicial control of a correct interpretation.

Due to the fact that tax law has to be enacted and passed by the parliament, vagueness in tax law and legal indeterminacy will again not as a rule lead to discretion but either to

161. See Part 4, 4.3.5.4. and 4.3.5.5.
162. Johannes Heinrich/Irina Prinz, cit., 2.1.4.; Bruno Peeters/Elly van de Velde, 2.2.5.5.; Kimura, 2.8.4.
163. Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, cit., 2.5.5.4.; Krzysztof Lasiński-Sulecki/Wojciech Morawski, 2.10.4.; Dejan Popović/Gordana Ilić-Popov, 2.13.4.

judicial control or, in the case of the taxable base (quantification items), to a subsequent concretization work by the government, administration and courts, possibly implying a creation of rules. Notwithstanding the distinction I mentioned in 3.5. and reintroduced below, all of them must look for the typical situations and foresee them. In the case of the government and tax administration, they are supposed to act by issuing a general and abstract rule – decree-law, regulation, ruling – and in the case of the courts, case law should be consistent and progressively settled. The main and real disadvantage with this methodology is that it greatly contributes to complexity of tax law[164].

It seems, however, that as long as taxes remain high in OECD countries, complexity of tax law is unavoidable. Although all tax systems reported in this book are presumably too complex, the legal sources leading to this complexity vary and it seems that in countries where the legislative competence belongs exclusively to the parliament the law itself is very (perhaps too) detailed (e.g. Germany), whereas in those reported systems where the legislative competence can be and is delegated to the government the complexity derives from multiple sources: laws enacted by parliament, decree-laws enacted by the government, regulations enacted by the government or the minister of finance, rulings enacted by the tax administration (e.g. the Netherlands and Japan) and detailed case law (cf. Austria).

Taking into account the previous premises, my conclusions in respect of the legal type of tax are the following ones: legal indeterminacy of the tax object and or the tax subject implies an option between yes and no: it is taxable /it is not taxable; it is a taxpayer/it is not a taxpayer. By legal indeterminacy, I mean in this context the two forms I mentioned above and that I now recall: one form of indeterminacy occurs when the law does not give an answer in important or difficult cases because the amount of legal arguments is never adequate to lead to any result (so-called legal gap)[165]; and the other occurs when legal arguments can justify several answers and not only one, and it implies that some situations (tax object or tax subject) can be neutral or negative. In these cases, where a yes or no answer is required, vagueness and indeterminacy lead to an issue of boundaries of permitted interpretation vs. prohibited interpretation, since either there is a legal gap or candidates for the rule can be neutral or negative. I contend the decision on whether the tax object or the tax subject is foreseen or not in the law requires an assessment on a case-by-case basis, and accordingly the answer always belongs to the courts. Moreover, there are no reasons of practicability or equality that justify enactment of more detailed rules by the tax administration, and any legal gaps (implying a no answer from the interpreter) have to be fulfilled by the legislator.

In respect of quantification rules, the inclusion in or the deduction of certain amounts (e.g. transfer pricing issues, deduction of necessary, indispensable or reasonable costs, representation costs, deduction of health care costs, etc.) from the taxable base is a matter of massive administration, and the principles of equality (a second-best equality or the achievable equality) justify the fact that the tax administration is guided by the typical taxpayer or the typical case when vague laws and resulting legal indeterminacy allow for more than one correct legally justified decision. As previously mentioned, enactment of rules on the basis of vague laws must be considered legal by the courts as long as the interpretation granted to them by the tax administration and any typifying implying creation of rules is defensible. If in the process of controlling legality of the government/administrative norm within the

164. Christian Waldhoff, "Vertrauenschutz im Steuerrecht", *Vertrauenschutz im Steuerrecht*, Hrsg. Heinz-Jürgen Pezzer, *DStJG*, Bd. 27, Köln, 2004, pp. 129 et seq.; Klaus Vogel/Christian Waldhoff, *Grundlagen des Finanzverfassungsrechts, Sonderausgabe des Bonner Kommentars zum Grundgesetz, (Vorbemerkungen zu Art. 104 a bis 115 GG)* Heidelberg, 1999, pp. 316 et seq.
165. This can also occur when there is conflict among several rules and principles, because the legal system is very rich: Coleman/Leiter, cit., pp. 226-227 et seq.

margin of free assessment/typifying, the court itself suggests a solution replacing the one given by the tax administration, it will increase legal uncertainty. This margin of free assessment/typifying within the scope of normative process must be especially recognized in respect of the tax matters identified by the tax courts and the literature, according to criteria regarding sharing of specific competences, namely the principle of practicability and the political responsibility of the government in respect of certain politically oriented decisions: granting of deductions, definition of tax havens, granting of tax benefits (state aids).

Due to the principle of people's sovereignty (or the "no taxation without representation" aphorism), validity of law, predictability and legal certainty of amount of taxes to be paid, administrative discretion is only exceptionally acceptable.

Taking into account the previous conclusions, if I next admit that the tax administration grants a certain meaning to a vague legal rule taking into account the circumstances of the individual case, the court has to control the administrative application of the rule and in respect of quantification issues, it may even consider that typical cases should have been taken into account (for example, on the ground that there is no certainty on the underlying individual elements such as documentation on costs and its characterization, the value of the immovable asset) and accordingly substitute the interpretation granted by the tax administration for it. Such a decision based on the frequent or average typical case will hopefully create the basis for settled jurisprudence in the future. Subjects such as administrative corrections to the taxable base, application of indirect assessment methods in case cooperation duties are not fulfilled, valuation rules on immovable property, should be progressively defined on the basis of general administrative rules and coherent case law. However, judicial decisions based on the frequent or average taxpayer should be subsidiary to the administrative action by way of regulations and rulings since courts are by definition supposed to decide the individual case according to its particular circumstances.

1.6. Relationship between different legal sources (legal pluralism)

EU Member States tax systems reported in this book face a challenge concerning pluralism of legal sources emerging from each Member State's domestic system, from the EU legal order – EU primary (the Treaties) and secondary (directives, regulations) legislation and soft law instruments – and from international treaties to the extent that they are domestically applicable. In the case of EU Member States, the most complex issues arise in respect of EU and domestic legal orders, i.e. in respect of what is known as internal legal pluralism, or, in other words, legal sources binding the EU institutions and the Member States. This challenge affects both the domestic legislator that has to comply with EU law, the tax administration and courts that have to comply with all valid legal sources (EU, international and domestic law). Conflicts may arise in respect of EU constitutional law and domestic constitutions since acceptance of the primacy of EU law over national constitutions has not been uncontroversial and unconditional which implies that plurality of constitutional sources are often to be solved in a non-hierarchical manner, by reciprocal influence and recognition of common principles and rules. Conflicts of the EC Treaty and national constitutions have not arisen so far in tax law, but can arise in the future in respect of principles such as the separation of powers, the sovereignty of the people, legal certainty, retroactivity, equality and abuse of law (and now in respect of the TFEU). External legal pluralism can raise other sort of conflicts, namely, in respect of the interpretation of tax treaties and instruments of soft law (e.g. codes of conduct, OECD reports and commentaries), which often imply cross references to domestic law concepts and the competent judicial organs do not often promote coordination regarding the interpretation of different legal orders. But legal arguments and strategies circulate more than ever among different *fora* and legal jurisdictions.

In the reports published below, in most EU Member States, the tax administration acts as being bound to tax treaties and EC secondary law (in the latter case, EU Member States), but it does not consider itself bound to the ECJ case law. On the contrary, in the same EU Member States, courts are constitutionally bound to international and EU law (in the latter case, EU Member States), including the ECJ rulings, in principle even if the ruling refers to other Member State's legislation, as required by the CILFIT doctrine. I recall that according to CILFIT an ECJ decision can be so clear on the compatibility of a certain domestic rule or regime, that a similar rule or regime in force in another Member State can and should be decided by national courts without a referral to the ECJ. But in practice, interpretation of CILFIT by national courts of EU Member States varies considerably[166].

166. See the General Report and Part I of Ana Paula Dourado/Ricardo Borges eds. *The Meaning and Scope of the Acte Clair Doctrine in Direct Taxation*, IBFD, Amsterdam, 2008, 515 pp.