Studi Tributari Europei. Vol.15 (2025)
ISSN 2036-3583

The repeated failure of taxes on hydrocarbons as resources of the autonomous communities

Javier Lasarte Álvarez* Jesús Ramos Prieto**

Submitted: October 9, 2025 – Published: July 15, 2026

El reiterado fracaso de los gravámenes sobre hidrocarburos como recursos de las Comunidades Autónomas

This paper analyzes the legal failure of two tax mechanisms implemented in Spain to fund the Autonomous Communities (CCAA) through hydrocarbon taxation. First, it examines the Retail Sales Tax on Certain Hydrocarbons (IVMDH), in force between 2002 and 2012, which was declared contrary to European Union Law by the Court of Justice (CJEU) in 2014. The reason was that said tax lacked a genuine "specific purpose" (health or environmental) distinct from a purely budgetary one, thus violating community directives. Subsequently, the paper analyzes the regional rate of the Special Tax on Hydrocarbons, applied between 2013 and 2018 to replace the previous one. In 2024, the CJEU ruled that this mechanism also infringed European regulations, as Directive 2003/96/EC prevents the establishment of differentiated tax rates by regions in harmonized taxes, barring strict exceptions that Spain did not meet. The authors conclude that national legislation repeatedly ignored the requirements of European fiscal harmonization, resulting in the expulsion of both taxes from the legal system.

Este trabajo analiza el fracaso jurídico de dos figuras tributarias implementadas en España para financiar a las Comunidades Autónomas (CCAA) mediante el gravamen de hidrocarburos. En primer lugar, se examina el Impuesto sobre las Ventas Minoristas de Determinados Hidrocarburos (IVMDH), vigente entre 2002 y 2012, el cual fue declarado contrario al Derecho de la Unión Europea por el Tribunal de Justicia (TJUE) en 2014. El motivo fue que dicho impuesto carecía de una "finalidad específica" real (sanitaria o medioambiental) distinta de la meramente presupuestaria, vulnerando así las directivas comunitarias. Posteriormente, se analiza el tipo autonómico del Impuesto Especial sobre Hidrocarburos, aplicado entre 2013 y 2018 para sustituir al anterior. En 2024, el TJUE sentenció que este mecanismo también infringía la normativa europea, ya que la Directiva 2003/96/CE impide establecer tipos impositivos diferenciados por regiones en impuestos armonizados, salvo excepciones estrictas que España no cumplía. Los autores concluyen que la legislación nacional ignoró reiteradamente las exigencias de armonización fiscal europea, provocando la expulsión de ambos tributos del ordenamiento jurídico.

Keywords: Regional financing; Hydrocarbon tax; European Union Law; IVMDH (Retail Sales Tax on Hydrocarbons); Fiscal harmonization.

* Universidad Pablo de Olavide (Spain); jlasalv@upo.es
Professor Emeritus of Financial and Tax Law at the Pablo de Olavide University of Seville

** Universidad Pablo de Olavide (Spain)
Professor of Financial and Tax Law at the Pablo de Olavide University of Seville

SUMMARY: 1. Taxation of hydrocarbons and regional financing – 2. Chronicle of the first failure: the Tax on Retail Sales of Certain Hydrocarbons as a tax without *a specific purpose* (2002-2012) – 2.1. Towards a uniform system of financing of the Autonomous Communities – 2.2. Possible creation of a tax on retail sales of hydrocarbons. Limitations of European rules on VAT and Excise Duties – 2.3. Consultation with the Director-General for Fiscal Policy of the European Commission – 2.3.1. VAT issues – 2.3.2. Harmonised Excise Issues – 2.3.3. Issues relating to the creation of new taxes on products subject to harmonised excise duties – 2.4. Establishment of the tax and first Judgment of the Court of Justice of the European Union – 3. Chronicle of the second failure: the regional rate of the Special Tax on Hydrocarbons (2013-2018) – 3.1. Establishment of a dual structure of tax rates (state and regional) – 3.2. Rushing is never good: the state sought the backing of a 2011 proposal for a directive withdrawn by the Commission in 2015 – 3.3. Second judgment of the Court of Justice: there is no room for a regional differentiation of tax rates in a harmonised tax – 3.4. Some lessons learned from the judicial pronouncements on the link between taxation on hydrocarbons and regional financing – 4. Brief final consideration

1. Taxation of hydrocarbons and regional financing

Since 2002, state taxation on certain hydrocarbons has been used as a resource for the financing of the Autonomous Communities of common regime (Autonomous Communities). Previously, this part of our tax system was reserved exclusively for the State Treasury, but from that year onwards the growing spending needs of these Communities led to a partial transfer of this substantial tax collection. Lots of millions of euros come out of mountains of cents. In 2022, the last year for which data on the final settlement of the regional financing system is available, the Autonomous Communities received 7,841,081,667 euros in this way, which are distributed among them according to the consumption of petrol, diesel and fuel oils in their respective territories.

With the aim of increasing the sufficiency, financial autonomy and fiscal co-responsibility of the Autonomous Communities, a two-pronged strategy was adopted between 2002 and 2019. On the one hand, the State created an additional tax on these energy products (different from the tax previously payable at the state level), ceding all their income to the Autonomous Communities. On the other hand, these territorial entities were given the power to regulate tax rates, thus enabling them to adjust the tax burden generated by this new levy. However, we will soon see that the two solutions implemented successively in our national law to link the taxation of hydrocarbons with regional financing have collided with the harsh reality of European Union law, the violation of which has been found by the Court of Justice in two judgments in 2014 and 2024.

2. Chronicle of the first failure: the Tax on Retail Sales of Certain Hydrocarbons as a tax without *a specific purpose* (2002-2012)

2.1. Towards a uniform system of financing of the Autonomous Communities

The implementation of the financing of the Autonomous Communities of common regime born from the Constitution of 1978 had been done through five-year regulations that were not giving satisfactory results. They caused continuous regulatory changes with unequal effects in the different territories and frequent conflicts. Before the end of the five-year period 1997-2001, the Ministry of Finance, led by Cristóbal Montoro, the Secretary of State for Finance, which had just been joined by Enrique Giménez-Reyna (who unfortunately is no longer with us), the Council for Fiscal and Financial Policy, the Autonomous Communities themselves (three of which, Andalusia, Castilla-La Mancha and Extremadura, had rejected the provisions of the last five-year period and had been acting, with some reason, *in partibus infidelium*), a large group of politicians, university professors and professionals in the complex world of taxes were convinced that it was absolutely necessary to design and approve a new system of territorial financing applicable to all the Autonomous Communities. The foral territories of Navarre and the Basque Country, backed by the Constitution, would continue with their special regime; those were times when respect for the constitutional text (frequently attacked in recent years) was considered so necessary that this approach was generally accepted, although there was no lack of some reasonable criticisms, in particular of the quota system. But these questions were left out of the work to which we are now going to refer.

The Secretary of State for Finance had the urgent task of setting up a Commission at the end of September 2000 that would quickly be responsible for proposing a new system of regional financing that could be applicable from 2002. A series of objectives and questions were formulated for this purpose. But in these pages we limit ourselves to recalling that the Ministry and its Secretary of State insistently asked that the possibility of transferring part of the collection of Value Added Tax (VAT) or some Special Taxes to the Autonomous Communities be taken into account. And the picture was completed with the specific question of whether new indirect taxes could be created, a matter that required a careful analysis of the provisions of the European Economic Community (now the European Union), since VAT and Excise Duties had been harmonized by Community rules and left little room for action to the Member States in this area. The time has therefore come to respond to these questions that were promoted both at the level of the Ministry and the Autonomous Communities (in particular, Catalonia).

2.2. Possible creation of a tax on retail sales of hydrocarbons. Limitations of European VAT and Excise Rules

The aforementioned Commission rejected two possible new taxes on the consumption of alcoholic beverages and on tobacco for technical reasons that are not relevant now. On the other hand, he focused carefully on the analysis of the approval of a tax on the consumption of hydrocarbons in the retail phase that could be transferred to the Autonomous Communities.

The Sixth Directive regulating VAT then in force (Council Directive 77/388/EEC of 17 May) stated in Article 33.1 that other levies (including excise duties) which did not have the general character of a turnover tax or give rise to formalities in the crossing of a border due to movement or exchange between Member States could coexist with this first harmonized tax in Europe taxed goods or merchandise (the same provision is currently included in Article 401 of the current Council Directive 2006/112/EC, of 28 November). Some judgments of the Court of Justice of the EU assumed and facilitated this interpretation of the aforementioned provision, which allowed the project of the possible creation of such a tax to go ahead. The *Report on the reform of the regional financing system* issued in mid-2001 by the aforementioned Commission (published by the Institute for Fiscal Studies in 2002) stated the following:

> “If we apply the same reasoning as the ECJ of 9 March 2000, *Evangelischer*, C-437/97, to the possible tax on the consumption of hydrocarbons, we conclude that it does not constitute a general tax '*since its purpose is not to cover all economic transactions carried out in the Member State in question'*. We are dealing with a tax that would only affect a limited class of goods, as it exclusively taxes the delivery of hydrocarbons for consideration. That circumstance is sufficient to recognise its compatibility with Article 33 of the Directive without it being necessary to examine the other characteristics of VAT and its application to it.”

But a second problem had to be faced: would this future tax be compatible with the European rules on Excise Duties that had also been subject to harmonization? Article 3 of Directive 92/12/EEC (equivalent to the current Article 1.2 of Council Directive (EU) 2020/262 of 19 December 2019) expressly stated that this provision was applicable to hydrocarbons (as well as alcohol, alcoholic beverages and tobacco products). And in paragraph 2 it stated the following:

> "The products referred to in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that such taxes comply with the applicable tax rules in relation to excise duties or VAT for the determination of the taxable base, assessment, accrual and control of the tax."

Behind this rule appeared a serious issue: it took away security from the Member States that decided to demand this theoretical tax on hydrocarbons. It consists of knowing with certainty what we should understand by *specific purpose*. In Spain (and in the other Member States) there is no shortage of tax experts with complex minds willing to invoke arguments derived from strange interpretations, provided that they can lead to the acceptance of new tax figures that strengthen and extend the Treasury with collection fruits.

Fortunately, the Court of Justice came to terms with this conceptual indeterminacy and clearly stated that a *specific purpose* was one that had no *budgetary objective*, that is, that neither the Treasury nor the legislator intended only to collect, but to achieve a different purpose that we can frame in the broad concept of *extra-taxation* o Non-fiscal purposes of taxes. This is the case when new levies are approved on alcohol, tobacco or hydrocarbons if the proceeds from these items are used to finance programmes for better protection of health or the environment.

Leaving aside other regulatory or jurisprudential issues, the *Report* of the aforementioned Commission clearly defined its position:

> "Well, if we apply the above reasoning to a future Tax on the consumption of hydrocarbons, the first thing it must have is a specific purpose. For example, it would be necessary for it to be used to finance certain services within the competence of the Autonomous Communities, such as Health or the Environment. Therefore, it would have to be considered as an affected tax within the meaning of Article 27 of the General Tax Law, according to which the '*income from State taxes shall be used to cover its general expenses, unless a specific allocation is established by law on an exceptional basis.*'"

The new tax should serve the aforementioned purposes without interfering with VAT or harmonized Excise Duties.

2.3. Consultation with the Director-General for Fiscal Policy of the European Commission

The Secretary of State for Finance, Enrique Giménez-Reyna, and his Chief of Staff, Jaime Parrondo (both Tax Inspectors), paid maximum attention to this matter which, in our opinion, was not easy for the Ministry to assume. And the right decision was taken that the Commission preparing the *Report* on the new regional financing should consult the Director-General for Fiscal Policy of the Directorate-General for Taxation and Customs Union, Michel Aujean, an exceptional open-minded Community tax expert with extensive knowledge and daily practice of the rules and approaches of each and every one of the Member States.

In April and May 2001, the Spanish Commission presented the Director-General with three brief documents setting out the main doubtful issues that had been identified at the time of drafting the *Report*, relating to the possible coexistence of a new tax on retail sales of hydrocarbons (which would be transferred to the Autonomous Communities) and the European regulations on VAT and Excise Duties which imposed specific rules and limitations on member States. We summarize below the answers that were communicated to the Spanish Commission after several meetings held in Brussels with the aforementioned Director of Fiscal Policy and a small group of officials from the Directorate-General for Taxation and Customs Union, specialists in the different taxes. The reply to the consultation was issued on June 14, 2001. All this documentation is published in the annex to the *Report*.

2.3.1. VAT issues

With regard to VAT, two basic rules were established:

1) European provisions do not allow the Autonomous Communities to set differentiated VAT rates for transactions located in the territory of their jurisdiction. Article 12 of the Sixth Directive provided at that time in paragraph 3 (as does Article 96 of Directive 2006/112/EC) for a single standard rate for each Member State. And paragraph 4 (equivalent to Article 98 of Directive 2006/112/EC) authorised Member States to apply one or two reduced rates. But the neutrality of VAT would be put at risk if the Autonomous Communities were allowed to set disparate tax rates in the different territories.

2) The Sixth Directive prevented the existence in the Member States of any additional tax intended to be levied on turnover, which is the main characteristic of that harmonised tax.

These are requirements that are easy to understand by any Member State, of which both the Spanish Commission and the Ministry of Finance were aware.

The first is an insistence on the unity of VAT rates within each State, reflecting the European Commission's desire to harmonise or approximate the rates of the Member States, which has not yet been properly achieved. In this context, it was logical that the Autonomous Communities should be prevented from joining the position of these States against this Community objective.

The second was less relevant in this case, because the new tax on hydrocarbons proposed by Spain was unrelated to the tax on turnover.

2.3.2. Harmonised Excise Issues

This issue is more complicated than the previous one. Hence, the Director-General for Fiscal Policy felt obliged to issue a prior warning:

> "Before replying in more detail to the questions relating to excise duties and new taxes, the Commission recalls that it opposes any initiative which jeopardizes the necessary approximation of the tax systems of the Member States, in particular as regards the rates of products subject to excise duty."

He also reminds us that the doctrine of the Court of Justice has insisted that in the field of these harmonised taxes the Member States must apply *a single national tax rate*, higher than the minimum value established in the corresponding directive. It is true that Article 8(4) of the repealed Council Directive 92/81/EEC of 19 October on the harmonisation of the structures of the excise duty on mineral oils allowed (as does Article 19(1) of the current Directive 2003/96/EC) for the Council to authorise a Member State to regulate particular exemptions or reductions; but this rule is only applicable *for specific policy reasons* (another indeterminate concept that should be specified). In addition, the Director-General's reply emphasized that, at least at that time, there was "no precedent for general regional differentiation of excise duties in the European Union".

An unequivocal conclusion can be drawn from this: Europe is wary of tax competition between Autonomous Communities, which can also lead to an erosion of the base of these Excise Duties. And he concludes:

> "In this state of affairs, according to the information available, it would seem that the fundamental principle of the unity of harmonized excise duties would not be respected in the event of regional differentiation of these taxes.

In this way, the answer to the question would be negative."

2.3.3. Issues relating to the creation of new taxes on products subject to harmonised excise duties

The commented document also makes some brief specific considerations regarding the creation of new taxes on hydrocarbons and formulates two conclusions of interest. The first reads as follows:

> "Spain could create new national taxes on tobacco and hydrocarbons under certain conditions, in particular: i) that the objective pursued is other than mainly the budgetary one; ii) that the tax is not payable until the time of putting it for consumption."

The second conclusion refers to the possible establishment of regional differences in these new taxes. The answer recalls, in the first place, that the arguments put forward regarding the regional differentiation of excise duties are also valid for them. And it warns, secondly, of the importance of "proving unequivocally that the regional differences that would be made would respond to general imperatives of coherence between the amount of the tax and the problems it aspires to solve", so that the tax liability should be defined in the Autonomous Communities "according to objective criteria set at the national level". On this basis, the following conclusion is made:

> "The Commission considers that, according to the information available to it, the draft presented concerning the introduction of taxes with different tax rates in the Autonomous Communities applicable to tobacco and hydrocarbons would not comply with Community legislation."

2.4. Establishment of the tax and first Judgment of the Court of Justice of the European Union

The Tax on Retail Sales of Hydrocarbons (IVMDH) was finally created by Article 9 of Law 24/2001, of 27 December, on Fiscal, Administrative and Social Order Measures (which was the accompanying Law of the 2002 Budget). It would be effective in Spain (with the exception of the Canary Islands, Ceuta and Melilla) from 1 January 2002. From its inception it appeared as a tax ceded by the State to the Autonomous Communities and its main characteristic was that its collection, from the application of the state and regional rates, would be allocated in its entirety to health expenses regulated by *objective criteria* applicable at the national level; notwithstanding the collection of the regional rate, over which regulatory competence was attributed to the Autonomous Communities from the outset, could also be dedicated to environmental actions also subject to national criteria.

Reading the *Report* of the Spanish Commission, the questions and answers of the consultation submitted to the Directorate-General for Fiscal Policy and European Customs Union and Law 24/2001 gives the impression that everything was ordered and clearly established. For the new tax to work smoothly, all that remained was to define or list the health expenditures, the environmental actions and the national criteria for its application. However, no one properly took care of these matters, which day by day were left for tomorrow; It seemed that policymakers, burdened by major problems, were all looking for an author to relieve them of that burden. But the expected Pirandello, busy with his business, did not appear; and no one took on the task.

This gap could not be filled later in the regulations approved by the Autonomous Communities when exercising their regulatory powers. In defence of the regional legislators, it should be noted, however, that they could not have gone further either, given that the State had not defined the "objective criteria set at the national level" which, according to Law 24/2001, should have guided the allocation of the income from this tax to the coverage of health or environmental expenses.

So when the Catalan company Transportes Jordi Besora SL appealed against the application of the IVMDH, asking for the return of the amounts paid, it was acting from a firm position protected by the law, strengthened by the correct decision of the High Court of Justice of Catalonia to refer such a question to the European Court of Justice for a preliminary ruling and, therefore, it seemed obvious that Europe would reject this new Spanish tax. And so it happened, as authoritative voices of academic doctrine had predicted.

The simplicity and forcefulness of paragraphs 44 and 45 of the Judgment of the Third Chamber of the Court of Justice of 27 February 2014, Case C-82/12, *Transportes Jordi Besora SL*, lead us to recommend reading them. The first states forcefully that "the introduction of a tax on hydrocarbons of variable amount according to the Autonomous Communities, as proposed by the Spanish authorities, was contrary to Union law". And the second goes so far as to say:

> "45. In those circumstances, it cannot be accepted that the Generalitat de Catalunya and the Spanish Government acted in good faith by keeping the IVMDH in force for a period of more than ten years. The fact that they were convinced that that tax was in conformity with EU law cannot call that assertion into question."

When drafting the ruling, the European Court focused on the main question referred to it by the High Court of Justice of Catalonia. It consisted of knowing whether or not the new tax on the retail consumption of hydrocarbons had a *specific purpose*; and the European judges ruled that this basic requirement was not met since this tax "does not have as its purpose, in itself, to guarantee the protection of health and the environment", which implied the disobedience of Article 3.2 of Directive 92/12 (a rule now included in Article 1.2 of the Directive (EU) 2020/262 of 19 December 2019).

That was the only reason given by the Court for expelling the IVMDH from Spanish law. He did not need to delve into the issue of the diversity of the tax rates approved by the Autonomous Communities. To do this, we will have to wait for the Judgment issued by the Court in 2024, which we refer to below.

3. Chronicle of the second failure: the regional rate of the Special Tax on Hydrocarbons (2013-2018)

3.1. Establishment of a dual structure of tax rates (state and regional)

Despite the disappearance of the IVMDH, the political will remained intact not to deactivate the capacity of the Autonomous Communities to have a regulatory impact on this sector of taxation, which most of them had been using in their respective territories. The experience of recent decades shows that progress towards greater fiscal decentralisation of the autonomous state is almost always irreversible. Hence, an alternative shortcut was sought in our domestic legislation, precisely in the direction that had been discarded in 2002. Specifically, the tax corresponding to the extinct tax was relocated since 2013 to the Special Tax on Hydrocarbons, whose net collection had already been ceded by the State since 2009 at 58 per cent. This substitution was articulated through the addition of a special state tax rate and a supplementary regional rate (in which the so-called health cent, *rectius* cents sanitary) was camouflaged. In this way, the regulatory powers of the Autonomous Communities were left intact, although they are now redirected to the sphere of a tax harmonised by the European Union in which a novel factor of inter-territorial diversity was introduced.

3.2. Rushing is never good: the state sought the backing of a 2011 proposal for a directive withdrawn by the Commission in 2015

The discussion then arose in another scenario: did the European rules provide sufficient coverage for this regional differentiation of tax rates in a harmonized excise such as the Special Tax on Hydrocarbons? The answer was negative. But Spain ventured to take this step in the confidence that a proposal for a Directive presented by the Commission in April 2011 (COM/2011/0169 final) would be approved imminently. In this initiative, which included multiple modifications to energy taxation, the European authorities were inclined to give Spain the green light so that there could exist, with effect from 2013 and within certain limits, territorial differentiations in the tax rate of the harmonised excise duty on hydrocarbons. But formally this required the inclusion of an express and unique authorisation in the text of Council Directive 2003/96/EC, of 27 October 2003, granting

Spain the possibility of imposing higher rates on general energy consumption in some parts of its territory.

It is striking that the presentation of this proposal for a 2011 Directive was considered by the Ministry of Finance and by the Spanish Parliament itself to be sufficient support to modify precepts for the purpose of recognising the powers of the regional Treasuries to increase the quota of the Special Tax on Hydrocarbons, adding to the state rates (general and special) a variable regional rate depending on the different classes of products subject to taxation (This attribution of competence was emptied of content since 2019).

However, our legislator was hasty, because the Commission retracted that proposal for a Directive in March 2015 in yet another example of the difficulty of reaching the unanimity required by Article 113 of the Treaty on the Functioning of Tax Harmonisation for the Council to adopt. And in this context, the amendments made in 2012 to our domestic law were clearly out of the game from the European perspective. As expected, this deficiency did not go unnoticed by the taxpayers, who filed administrative and judicial claims on the grounds that the refund of the undue income paid was legitimately appropriate, given the contravention of EU law due to a domestic regulation that maintained, between 2013 and 2018, the existence of an additional regional rate in the harmonised tax on fuels.

Although this lack of coverage did not bode well, it took a long time for our tax authorities to react. During the six-year period between 2013 and 2018, this so-called regional section of the Special Tax on Hydrocarbons was in force in Law 38/1992, replacing the extinct IVMDH. In addition, most of the Autonomous Communities exercised their competence to set tax rates. And such a tax was only eliminated from 2019 by Law 6/2018, of 3 July, on the General State Budget for 2018. Things were returning to the regulatory framework of the European Union. But this did not prevent the Court of Justice of the European Union from issuing a ruling. By Order of 15 November 2022, the Contentious-Administrative Chamber of the Supreme Court had agreed to refer the following question to it, on the occasion of the appeal filed by the company DISA Suministros y Trading SLU:

> "Is Directive 2003/96/EC of 27 October 2003 restructuring the Community system for the taxation of energy products and electricity, in particular Article 5 thereof, to be interpreted as precluding national legislation, such as Article 50(b) of Law 38/1992 of 28 December 1992, of Excise Duties, which authorized the Autonomous Communities to establish tax rates of the Special Tax on Hydrocarbons, differentiated by territory, in relation to the same product?"

The Court of Luxembourg was thus called upon to rule on an unknown that, as we have seen, had already been debated internally in our country since 2001 on the occasion of the reform of the regional financing system.

3.3. Second judgment of the Court of Justice: there is no room for a regional differentiation of tax rates in a harmonised tax

In view of this background, only an unexpected interpretation by the Court of Luxembourg could save us from a second reprobation for contravening European law because of the formula used to link the taxation of hydrocarbons to the financing of the regional treasuries.

And, as expected, that prodigious interpretation did not come. The Judgment of 30 May 2024, case C-743/22, *DISA Suministros y Trading SLU,* has been categorical in declaring the incompatibility of Directive 2003/96/EC, in particular Article 5 thereof, with the Spanish legislation that empowered the Autonomous Communities between 2013 and 2018 to establish rates of the Special Tax on Hydrocarbons "differentiated for the same product and use depending on the territory in which the product is consumed outside the cases provided for this purpose".

The Court based its reasoning on the recognition that several provisions of Directive 2003/96/EC (Articles 5, 6, 7 and 15 to 19) leave the Member States, generally or specifically some of them, a certain margin of discretion to modulate the system of excise duties by means of differentiated tax rates and exemptions or reductions. Article 5 stands out on this point, which empowers Member States to apply different tax rates, under fiscal control, provided that they comply with the minimum levels of taxation prescribed in the Directive and are compatible with Community law. Among these four cases, which are classified as "exhaustively listed", the possibility for a Member State, as Spain did with the regulation approved in 2012, to set different rates of excise duty for the same product and the same use depending on the regions or territories where its consumption is carried out is not included.

In addition, other rules of Directive 2003/96/EC authorise Member States or some Member States to apply reduced rates of excise duty or exemptions depending on the territory in which the product is consumed. As a provision of more general scope, Article 19.1 of this Directive establishes that the Council, acting unanimously and on a proposal from the Commission, may authorise Member States that request it "to introduce differentiated rates of excise duty by means of further exemptions or reductions for reasons linked to specific policies". Consequently, the possible application of several rates within a Member State for the same product and use is subject to compliance with a twofold procedural (authorisation by the Council) and material (compliance with minimum levels of taxation) requirement.

The Court insists that the capacity of national legislation to act on the basis of these provisions is, however, restricted, formulating the following conclusion:

> "It is therefore apparent from both Article 5 and an analysis of all the provisions of Directive 2003/96 which provide for tax reductions or exemptions that, although it is true that the scope of taxation of energy products and electricity is only partially harmonised and that directive gives Member States a certain amount of room for manoeuvre to enable them to implement policies adapted to national contexts, it is no less true that this margin of manoeuvre is limited. It follows that, irrespective of compliance with the minimum levels of taxation imposed by that directive, the powers offered to the Member States to establish differentiated tax rates and exemptions or reductions in excise duty may be exercised only in strict compliance with the conditions laid down by the relevant provisions of Directive 2003/96."

This interpretation is based on the objectives of the Directive (to promote the proper functioning of the internal market in the energy sector, avoiding distortions of competition and negative effects on the free movement of goods), which could be undermined if each Member State were to be recognised as having the possibility of applying differentiated rates in its regions for the same product and use "without any delimitation or control mechanism". And at this point an idea appears in the judgment that, in our view, is of great relevance:

> "While, according to recital 4 of that directive, significant differences in the national levels of energy taxation applied by the Member States could be detrimental to the proper functioning of the internal market, the same is a fortiori true of differences between the regional levels of energy taxation applied in the same Member State."

It is clear from this paragraph that the European Union accepts with resignation the differences between the Member States in terms of the level of tax burden derived from the taxation of energy; it is the toll that must be paid due to the limitations of the tax harmonization process itself. However, it is much more reluctant to accept such regional differences in this area of taxation, beyond the cases expressly provided for in the Directive, which the Court insists must be interpreted strictly.

It is clear that by attributing to the Autonomous Communities regulatory competence to set a regional tax rate in the Special Tax on Hydrocarbons, none of the exceptions provided for by Directive 2003/96/EC was applicable. And, consequently, our domestic legislation clearly violated Community law, without such disobedience being supported by other justifications alleged by the Spanish Government in the case (such as the political and financial autonomy of the Autonomous Communities and the consideration of this tax as a differentiated indirect tax with a specific purpose).

Once the doubt raised by the preliminary ruling has been cleared and the opposition to European Union law has been assessed, the Supreme Court Judgment 1470/2024, of 20 September, has upheld the appeal, setting the limits on the refund of the amounts paid at the time by the regional section. But we consider that the problems that such a return may pose are alien to these pages.

3.4. Some lessons learned from the judicial pronouncements on the link between taxation on hydrocarbons and regional financing

In the interval of just over ten years, the Court of Justice of the European Union has issued two convictions against Spain for considering that the national regulations approved in order to associate the taxation of hydrocarbons with the financing of the Autonomous Communities are contrary to the European order. However, both pronouncements have a very different scope, since they deal with different tax figures: the first, not harmonized by Community provisions; and the second, subject to strict tax harmonization rules.

The Judgment of 27 February 2014 did not at any time question the fact that between 2002 and 2012 our country resorted to the creation and application of a new state tax, the IVMDH, configured since its inception as a resource entirely ceded to the Autonomous Communities. Nor did it assess the impact, from the perspective of European law, of the attribution of regulatory powers to these territorial entities to set the regional tax rate, with the consequent appearance of regional differences in the tax burden on energy products subject to taxation.

The Court of Luxembourg simply found that this tax lacked a specific purpose, other than a purely fiscal one, since a predetermined allocation of its collection proceeds to unique health or environmental protection programmes had not been ordered. And it declared, consequently, that one of the requirements to which Article 3.2 of Directive 92/12/EEC made subject, as Article 1.2 of Directive (EU) 2020/262 does today, the possibility for Member States to create other indirect taxes on products subject to excise duties harmonised by the European Union, had not been complied with.

On the contrary, the Judgment of 30 May 2024 concerns a harmonised excise duty, the Special Tax on Hydrocarbons. It does not call into question the national decision to partially cede its collection to the regional Treasuries. For the European authorities, this is a strictly domestic matter, outside the scope of competence of the Union, which falls squarely within the so-called institutional autonomy of Spain as a Member State. The problem arose from the attribution of regulatory powers to the Autonomous Communities over a harmonised tax, opening the door for regional differences in tax burden to be generated during the period 2013-2018 (years in which this tax was required) without there being general or specific authorisation in Directive 2003/96/EC authorising Spain to adopt this measure.

From the joint study of both pronouncements, it is possible to draw, in our view, four basic lessons about the margin of manoeuvre available to our legislation to configure the taxation of hydrocarbons as a tax resource of the regional treasuries, a path that seems irreversible given their pressing financial needs.

> 1st. The distribution of revenue and of the tax powers of application and review are domestic matters outside European law.
>
> 2nd. The regional tax rate in the Special Tax on Hydrocarbons travels a remote path that is difficult to access.
>
> 3rd. It is difficult to define the specific purpose of an additional tax on mineral oils.
>
> 4th. The possible return to a tax on consumption in the retail phase of hydrocarbons, with a real specific purpose and with a regional differentiation of tax rates, is an issue that must be addressed in the context of the general reform of the regional financing system.

4. Brief final consideration

The first tax to which we have referred, IVMDH, was created by Law 24/2001 of 27 December (Montoro being Minister of Finance), which expressly ordered the allocation of the amounts collected to health or environmental expenses, previously determined by objective criteria at the national level. This was its *specific purpose* required by the European legislator. The payment of this tax was in force until its repeal by Law 2/2012, of 29 June, on the initiative of Montoro (who was again in charge of the Ministry) who was well aware of the condition imposed by Law 24/2001 in accordance with the criteria of the European Union. This levy was supported by the consultation submitted to the aforementioned Directorate-General for Taxation and Customs Union, provided that the new tax fulfilled its *specific purpose*. And since this requirement was not met, the Treasury itself felt obliged to promote that repeal before the Court of Justice issued a ruling.

As we have seen, the second tax on hydrocarbons was caused by the aforementioned Law 2/2012 which inserted a supplementary regional rate, known as the health cent, into the Special Tax on Hydrocarbons. The Spanish Government and legislator hoped that such a decision would be accepted by European Union law because of the content of a simple Commission proposal of 2011; but this document was later withdrawn and that Law was left without any support in Community law. And even so, it was not corrected or repealed and continued to be applied to taxpayers until 2019, due to its repeal (also prior to the judgment of the Court of Justice) by Law 6/2018, of 7 June (when María Jesús Montero was Minister of Finance). During this stage of application there was no regulation on the *specific purpose* of this sanitary cent. History repeats itself.

The aforementioned judgments of the European Court of Justice of 2014 and 2024 put an end to this contradiction and expelled both taxes from our national system, with the harsh warning in the 2014 pronouncement that neither the Catalan Generalitat nor the Spanish Government acted in good faith. And it is inevitable that we wonder how it could happen that so many years passed without the Government, and in particular the Ministries responsible for Finance, Health and the Environment, the Courts that approved the aforementioned laws or the Autonomous Communities, beneficiaries of the collection, avoiding this mismatch of our Law with specific rules of the European Union, easy to understand, although it could be laborious to determine the health or environmental services. It is even necessary to take into account the slowness of the legal proceedings caused by the requests of taxpayers who requested the refund of the amounts paid for both taxes.

We lack the necessary information on the actions and omissions of those responsible for these institutions to facilitate a convincing response. And this is the reason why we have avoided critical words and imputations of responsibility. We will only make a brief general consideration below.

Any state, regional or local Treasury, or even the EU Treasury, is carried away by an inevitable collection inertia, fuelled by the idea that you have to collect as much as possible as soon as possible. The usual procedures or protocols that open the doors to the immediate demand for tax credits are effectively attended to because the payment of public expenses must be met. And the collection of taxes such as those we have just analysed strengthens this inertia. The Treasury is aware that, even in the event that the corresponding courts force the repeal of the two taxes that have fallen on taxpayers for years, only those who had reliable evidence of the acquisition of the hydrocarbons and the payment of the repeated taxes could request their refund. Or to put it another way and with maximum simplification: mainly, companies that can present truthful accounts for each year. The millions of people who regularly go to petrol stations are far removed from this accounting discipline. Therefore, in the worst case, the Treasury only loses part of its harvest.

All this has been well known to the political leaders, who, in addition, should have been warned of the situation and the possible consequences. We are certain that they paid attention to these warnings and considered them accurate, but they remained silent and calm, strangely possessed by the Cervantine spirit that appears in the *sonnet's valenton* about the tumulus of Philip II. Each of them listened and kept silent because *whoever says otherwise is lying*.

"And then, incontinent,
He soaked the chapeo, he required the sword,
He looked sideways, he went, and there was nothing."

And since no one avoided the distance between national rules and European law in time, the Court of Justice of the EU easily confirmed the expulsion from our legal system of both taxes: the IVMDH and the regional rate of the Special Tax on Hydrocarbons. *And there was nothing*.