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Article

Building up the EU Revenue Side: But What Is a Tax in EU Law?

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Abstract
While the US Constitution expressly grants the federation the power to tax, Article 311 TFEU is silent on whether such power exists at the EU level. This contribution argues that the Union has the power to tax, provided that the chosen resources in the basket match the objectives and policies of the Union. Since the achievement of the internal market is a shared competence (Article 4 TFEU), the Union can decide the level of resources tailored to this goal. Although the Union has a broad power to tax under Article 311 TFEU to pursue its objectives and policies, the member states are still the "masters," able to decide the level of resources under the unanimity rule. To resolve this paradox, this contribution embraces a democratic legitimacy of EU taxes that grant the European Parliament the power to decide the revenue side of the EU budget. EU democratic taxes approved by the European Parliament could reaffirm the redistributive function of taxes, thereby allowing the redistribution of wealth from rich to poor.

Keywords
democratic legitimacy; EU budget; EU fiscal capacity; EU internal market; EU taxation; Next Generation EU

Issue
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1. Introduction: Is There an Implicit Power to Tax Within the EU Treaty Architecture?

Since 1970, the EU budget has been predominantly financed by transfers from the national budgets, which are themselves drawn essentially from taxes levied by the member states. This way of funding is not at odds with international organizations such as NATO or the OECD. The Covid-19 pandemic has started to change the EU fiscal landscape. The Next Generation Economic Recovery Program (NGERP) is composed of the European Union Recovery Instrument (Council Regulation of 14 December 2020, 2020) and the Recovery and Resilient Facility (Regulation of the European Parliament and of the Council of 12 February 2021, 2021). The NGERP authorizes the Commission to borrow on the capital markets (€800 billion) on behalf of the Union to support the post-pandemic economic recovery within EU member states and to grant them sufficient resilience. The NGERP would provide resources to the member states, two-thirds of which would be disbursed as grants and one-third as loans to fund their economic recovery.

The NGERP has important fiscal underpinnings in so far as it has implicitly triggered the need for the EU to create its own tax resources through the structure of the EU budget to repay the resources borrowed from the financial markets. The EU's Own Resources Decision (ORD; Council Decision of 14 December 2020, 2020) for the period 2021–2027 becomes a milestone in the path towards strengthening the fiscal autonomy of the EU (De Witte, 2021; Fabbrini, 2022; Garbarino, 2022). Some authors have stressed that the NGERP abandons a "surveillance model" where the member states maintain all power of taxation, and the EU has a corrective role as an enforcer of discipline and replaces it with a progressive adoption of a classic fiscal federalism model where the EU acquires taxation powers and its own independent sphere of fiscal authority, and thus its own fiscal tools for macroeconomic stabilization (Fabbrini, 2022).

In this temporary framework (2021–2027), the following taxes are forecast to finance the NGERP: (a) national contributions calculated on the weight of non-recycled plastic packaging waste (Plastics Own Resource), (b) Carbon Border Adjustment Mechanism and EU Emissions Trading System, (c) digital levy, (d) financial transaction tax, (e) a financial contribution linked to the corporate sector or a new common corporate tax base (Interinstitutional Agreement, 2020, Annex 2).

Despite the initial optimism towards EU fiscal federalism, represented in the words of the German Finance Minister Olaf Scholz, making the ORD akin to the "Hamilton moment" in the US, a more cautious approach has been taken in the literature. Firstly, as De Witte (2021) pointed out, the NGERP is a case of "creative legal engineering" since it has bypassed the traditional EU budget mechanism following the Treaty on the Functioning of the European Union (TFEU, 2016, Article 311) to be approved under the joint legal basis of Article 122 TFEU and Article 175(3) TFEU. Secondly, not only is the NGERP temporary, but the Union still lacks its own power of taxation (Fabbrini, 2022; Traversa, 2022; Woźniakowski, 2022). Thirdly, although the European Council has only agreed to a non-recycled packaging waste as of 1 January 2021, it seems to be configured more as a contribution by the member states than as a proper tax levied on the heads of EU citizens (Martín Jiménez, 2022; Neumeier, 2023; Sciancalepore, 2023).

Several authors, who have advocated for a permanent EU fiscal capacity based on EU taxes and not based on state financial transfers of the EU member states, have supported a constitutional EU reform to recognize the EU power to tax (Fabbrini, 2022; Poiares Maduro, 2012). The rejection of the EU power to tax in the current EU treaties is grounded in the argument that the EU lacks any authority to tax since it is not a sovereign state or a sovereign organization (De Grauwe, 2013, p. 169; Moravcsik, 2001). There has not been an explicit transfer of sovereign power to tax from the member states to the European institutions, as conversely occurred in the US when the federal power to tax emerged in 1787: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States" (Constitution of the United States of America, 1787, Article 1, Section VIII, clause 1). Unlike in the US, where the debt crisis triggered the recognition of the EU power to tax, in the EU, the debt crisis accelerated the process of regulation of the fiscal policies of the member states (Woźniakowski, 2022, p. 82).

Following the fiscal patterns provided in the editorial to this thematic issue of *Politics and Governance* (Woźniakowski et al., 2023), autonomous fiscal capacity requires independent resources (EU taxes). This contribution aims to shed light on the meaning of taxes under EU law. Does the Union have an implicit power to levy taxes under Article 311 TFEU? This author will argue that EU law has embraced a functional definition of taxes as a transfer of mandatory resources for financing the EU's policies and objectives. This author will argue that such a broad definition of taxes is included within the wording of resources in Article 311 TFEU. The structure of this article is as follows. Section 2 outlines the concept of taxes in EU law, which are mandatory resources to finance general interest. Section 3 is devoted to presenting the argument that taxes fall within the broad meaning of resources in Article 311 TFEU since they are a means to pursue EU policies and goals, namely the internal market (TFEU, 2016, Article 4). However, the unanimity rule could become a procedural obstacle to the approval of EU taxes. Section 4 critically analyses the basket of resources in the period (2021–2027) and elaborates on the premises for a more autonomous EU power to tax. Section 5 defends the major role of the European Parliament in deciding the level of resources. Section 5 briefly summarizes the findings of this contribution.

2. A Functional Concept of Tax in EU Law Linked to the Internal Market

Taxes are conceptualized as compulsory contributions paid to the government to finance public expenditure (Barassi, 2005; Barker, 2005; Menéndez, 2013). In comparative law (Italy, France, Belgium, UK, Germany, etc.), the common features of a tax are (a) mandatory contribution imposed by an organ of the government, (b) collecting money to finance public expenditure and promote general interest, and (c) gathering revenue which goes into the state's budget, with the taxpayer receives nothing in return (Barassi, 2005, p. 62). There are minor differences between countries. For example, in Germany, taxes can be imposed by a public entity (i.e., a church); a few countries link taxes with the ability to pay principle (Spain, France, Italy); some countries carve out payment in kind as taxes (Luxembourg, Switzerland). In domestic law, taxes must be distinguished from the payment of public fees/contributions (so-called "non-fiscal levies"), where the payer obtains a particular benefit/service from the public authorities in exchange for the payment.

Taxation is not mentioned in the TFEU, not as an exclusive competence of the European Union (Article 3), as shared competence (Article 4), as a coordinating competence (Article 5), nor as a complementary competence (Article 6) between the member states and the EU. However, Articles 2–6 of the TFEU do not set a clear-cut classification of the distribution of competence between the Union and the states. In the current legal debate on the exercise of competence, which has superseded the previous legal debate on the existence of the Union's competence, there is a complex interaction between the EU and national powers which triggers discrepancies between the formal allocation of power in the treaties and the actual legal practice (Azoulai, 2014). This precisely occurs to taxation, which remains within the sovereignty of the member states. However, the Union has a legislative power to harmonize the member states' legislation in the field of indirect taxation (TFEU, 2016, Article 113) and direct taxation (TFEU, 2016, Article 115) to prevent interference or obstacles to the establishment or functioning of the internal market, provided unanimity is obtained.

Unlike in domestic law, the concept of tax under EU law has a broad scope. The Court of Justice of the EU (CJEU) concludes that a tax must comply with three requirements. Firstly, taxes impose an obligation upon the taxpayer alongside enforcement by the tax administration: "There must be an obligation to pay those amounts and, where that obligation is not satisfied, the debtor must be pursued by the competent authorities" (IRCCS, 2017, paragraph 32). Secondly, taxes are intended to finance general interest (IICCS, 2017, paragraph 34). Taxes must simply pursue a general interest, regardless of whether the tax collection is ring-fenced into a special fund distinct from the state's budget (CIBA, 2010, paragraphs 23–24, C) or there are prevailing regulatory reasons (i.e., environmental policy) rather than purely budgetary purposes (Endesa, 2023). Thirdly, the amount payable in a tax must be unrelated to the costs of the transaction (SONAE Tecnologia de Informação, 2021, paragraph 32).

Such a broad concept of tax contrasted with the opinion of Advocate General (AG) Campos Sánchez-Bordona, who supported a narrow meaning of tax. In IRCCS, the AG interpreted that these Italian electric charges were contributions of a non-fiscal nature since the collection went outside the state budget and did not involve the national tax authorities (IRCCS, 2017). Advocate General Campos Sánchez-Bordona insisted again on this distinction between taxes and financial contributions of a non-fiscal nature in his opinion in Messer France (Messer France, 2018, paragraph 33).

In a nutshell, the CJEU simply requires that a tax be mandatory, unrelated to any public costs, and pursue a general interest. In this definition, it is neither relevant that the collection is ring-fenced for a particular use (CIBA, 2010), that it responds to several listed general interests (IRCCS, 2017), or that the prevailing reasons are regulatory rather than revenue-raising. Such a broad functional concept of tax in EU law serves a harmonization goal insofar as domestic taxes could become obstacles to the internal market (Martín Jiménez, 2018, p. 177).

Since the internal market justifies a broad definition of taxes, what is the meaning of the internal market? Article 3(3) of the Treaty on the European Union (TEU, 2016) mandates the Union to establish an internal market. TFEU (2016, Article 26(2)) defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaties." The invocation of EU freedoms of circulation, particularly in the work performed by the CJEU, has eroded member states' power to design their domestic tax systems. The retained power formula in the case law of CJEU—"Although direct taxation does not as such fall within the purview of the Community, the powers retained by the member states must nevertheless be exercised consistently with Community law" (Schumacker, 1995, paragraph 21)—shows that there is no nucleus of sovereignty that member states can invoke against the Union action (Azoulai, 2014). Hence, the achievement of the internal market is the entire raison d'être for harmonizing domestic tax legislation and limiting sovereign rights.

The legal meaning of the internal market is still devoid of clear contours and ambiguities, thereby triggering enormous legitimacy issues within the European polity (García Antón, 2018; Weatherill, 2017). Rather than simply eliminating obstacles, the achievement of the internal market reflects a broad metaphor to foster the political and social integration of the EU. As Weiler (1991, p. 2477) observed in his hallmark "The Transformation of Europe," the internal market:

> Is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is, at the same time, a highly politicized choice of ethos, ideology, and political culture: the culture of "the market."

The achievement of the internal market has led the integration process to achieve non-market aims and pursue a social and political integration agenda (De Witte, 2012). Therein are the constant tensions emerging between the economic and the social/political dimensions of the goal of the internal market (Elisabeta Dano and Florin Dano v Jobcenter Leipzig, 2014; Laval un Partneri, 2007; The International Transport Workers' Federation and The Finnish Seamen's Union, 2014). Baquero Cruz (2018, p. 2) recalls an anecdote told by the legendary Judge Pierre Pescatore that illustrates the metaphor of the internal market:

> The first one is a story about how the physical copy of the Treaty of Rome, which was to be signed on 25 March 1957 in a formal ceremony at the Campidoglio, was not ready because of a delay at the Zecca dello Stato, the Italian state printing works. What the representatives of the six member states ended up signing was a stack of white pages, with the first printed pages on top.

These white pages, signed in 1957, illustrate the "leap into the unknown" that the internal market means for European integration. The CJEU's constant struggle between the two competing principles of neutrality and territoriality in its case law in taxation is a clear example that the contours of the internal market are far from being immanent or predetermined (Schön, 2015).

3. EU Taxes Are Covered by "Own Resources" in Article 311 TFEU

3.1. EU Taxes to Achieve the Internal Market

Article 311 TFEU stated: "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources." As Neumeier (2023, p. 335) stated, there is little or no discussion in the literature on the meaning of own resources and the legal requirements to qualify as a resource. The High-Level Group on Own Resources report emphasized that the Union does not have the power to levy taxes:

> Thus, talking about an "EU tax" or mislabelling the EU's own resources as EU taxes without further specification may not only be incorrect from a legal point of view, it fuels suspicion and incites criticism towards any attempt to reform the system of own resources by making policymakers and citizens believe that there is a hidden agenda behind such reform. (Monti et al., 2016, p. 20)

In the author's view, the denial of EU taxes under Article 311 TFEU is mere "rhetoric," preventing citizens and member states from thinking that there is a hidden integration agenda. Taxes, as previously defined by the CJEU, are means to pursue a general interest. Resources in Article 311 TFEU are meant to fund EU policies and objectives. Hence, resources are sufficiently broad to include taxes as a means to fund objectives and policies (Bizioli, 2022). Regardless of the label used, what is important for EU law purposes is that taxes/resources support EU policies and objectives. This link between EU taxes and EU objectives is obvious in the recent Plastics Own Resource (Neumeier, 2023). Despite being designed as a national contribution rather than a proper tax levied on the heads of EU citizens, it goes beyond raising funds for the Union to embrace an environmental protection goal (Neumeier, 2023; Sciancalepore, 2023). Since the Union has shared competence in the environment (Articles 4(2) and 192 TFEU), the Plastics Own Resource contributes to achieving such a goal.

Under EU law, it is not relevant whether the revenue collected is allocated to the member states to provide them with sufficient resources to face the adverse consequences of the pandemic (NGERP) or to the EU itself to cover the administrative expenditure of all European institutions. What is crucial is that taxes/resources match the Union's goals and objectives. This strong functional link between resources and EU policies is stressed in Chapter 2 of the 2016 High-Level Group on Own Resources, which articulates a system of own resources to support EU policies and objectives (Monti et al., 2016, pp. 36–56). Neumeier (2023) also referred to this link by labeling the resources in the ORD as "political own resources."

If there is an EU competence to achieve a particular objective, there should be EU own resources to achieve it. While the link between resources and environmental goals of the Union is straightforward in Article 192 TFEU, how can an EU tax contribute to pursuing the internal market goal if it is still a journey to the unknown? The achievement of the internal market is a shared competence between the Union and the member states (TFEU, Article 4(2)). The EU's competence to harmonize legislation to guarantee the establishment or functioning of the internal market (TFEU, Articles 114–117) has evolved. Although in the beginning, such Union power was connected to the harmonization of existing domestic laws, the CJEU has progressively transformed this "harmonization" power into a "regulatory" power that was—almost—completely independent of the existence of national legislation (Schütze, 2014). In areas such as the value added tax (VAT), which have been heavily harmonized, some authors conclude that the Union has a de facto power to tax (Groenendijk, 2023). That means that not only does the EU have the competence to design the VAT rules through the VAT Directive, but it also keeps a percentage of VAT collected as its own resource (a rate of 0.3% on each member state's VAT base). In direct taxation, in the last six years, we have witnessed an unprecedented development of tax harmonization in areas of anti-avoidance and transparency. Every legislative measure of the Union in relation to direct taxes fits within the legal basis of TFEU (Article 115): (a) Council Directive of 14 December 2022 (2022) on ensuring a global minimum level of taxation for multinational groups in the Union (Directive (EU) 2022/2523 of 14 December 2022, 2022), (b) Council Directive of 12 July 2016 (2016) laying down rules against tax avoidance practices that directly affect the functioning of the internal market, and (c) Council Directive of 29 May 2017 (2017) amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries (Council Directive (EU) 2016/1164 of 12 July 2016, 2016; Council Directive (EU) 2017/952 of 29 May 2017, 2017). While the former directive introduces a series of anti-avoidance measures to be implemented by the member states, the latter directive, the so-called Pillar 2 Directive, ensures a minimum level of effective corporate taxation at the level of the member states. One may argue whether such recent EU legislation, which basically aims to protect domestic tax collection by the member states, contributes to the functioning of the internal market.

There are no limits to the legislative action of the Union to pursue the internal market. It seems that the principles of subsidiarity and proportionality (TFEU, 2016, Article 5; EU Protocol No 2 on the application of the principles of subsidiarity and proportionality to the TFEU) play an insignificant role. The impact assessment on subsidiarity and proportionality prepared by the Commission in relation to EU tax proposals (e.g., Pillar 2 Directive) is quite short and vaguely justifies the EU proposal in the general need to obtain tax coordination. The Commission is bestowed with broad discretion (European Commission, 2022). The CJEU has also endorsed the broad discretion of the EU legislative power within the subsidiarity and proportionality analysis (Czech Republic v European Parliament and Council of the European Union, 2019; Vodafone and Others, 2010, paragraph 52 and 77). No legislative EU tax measure has been successfully challenged by a member state for breaches of the subsidiarity and proportionality principle.

In a nutshell, the meaning of the internal market justifies almost any legislative measure of the Union. Consequently, any resource levied on the Union under Article 311 TFEU could serve to achieve such a broad and undefined regulatory goal. However, some authors have rejected the EU power to levy taxes under the principles of conferral in Article 5 TUE (Traversa, 2022). The member states reacted to prevent the competence creeping under Articles 114–117 TFEU by introducing the principle of conferral in the 1992 Treaty of Maastricht. The Lisbon Treaty also put more limits on the Union's competence (see Charter of Fundamental Rights of the European Union on the TFEU, 2016, Article 51). The principle of conferral entails that competences not conferred upon the Union in the treaties remain with the member states. The EU may do no more than its member states have authorized it to under its governing treaties (Weatherill, 2017). This author does not share Traversa's (2022) view that the principle of conferral limits the power of the Union to levy taxes under Article 311 TFEU (Traversa, 2022). The principle of conferral relates to the substantive competences of the Union and not means/resources to allow the Union to exercise such competences. If the Union has shared competence to create and consolidate the internal market (TFEU, 2016, Article 4(2)), all EU resources are possible to attain such an objective. The only limit is that the ORD cannot create resources that are detached from the EU policies and objectives. The previous open-ended meaning of the internal market towards an unknown social/political integration in pursuit of a close union of Europeans could justify the EU levying EU taxes under Article 311 TFEU without any substantive restriction.

3.2. A Procedural Obstacle to Approving EU Taxes Under Article 311 TFEU: The Unanimity Rule

The need for unanimity in decision-making can jeopardize the approval of EU taxes. Article 311 TFEU provides for a legislative procedure under which the European Parliament is merely consulted. The fact that the Council must act unanimously means that each member state has a veto right that could hinder the approval of EU taxes. The ratification of the national parliaments of the Council's decision on its own resources (TFEU, 2016, Article 311.3) renders the Council decision an act equivalent to primary legislation (Killmann, 2019). The unanimity rule in Article 311 TFEU is reinforced within the prohibition to apply the general *passerelle clause* (TEU, 2016, Article 48 (7)) introduced in the Lisbon Treaty to shift from unanimity to a qualified majority. Article 353 TFEU (2016) rules out the general passerelle clause for the own resources (TFEU, 2016, Articles 311(3), 311(4)).

The approval of EU resources is subject to a "double unanimity filter," both for legislating in tax matters (for the internal market, TFEU Articles 113 and 115; for environmental reasons, Article 192(2)) and to include new taxes as resources in Article 311 TFEU (Grisostolo & Scarcella, 2023). On the one hand, the Union must agree in the ORD that a new resource will finance part of the Union's budget under 311 TFEU. On the other hand, a tax directive containing the tax regulation needs to be approved under Articles 113 and 115 TFEU.

Is there any possibility of circumventing the second unanimity rule to approve the directive containing the tax? In the author's view, the qualified majority present in Article 114(2) TFEU cannot be applied as the legal basis. Article 114(2) TFEU expressly excludes harmonization of "fiscal provisions." On the meaning of fiscal provisions within the scope of Article 114(2) TFEU, the CJEU has confirmed that this term covers not only all areas of taxation but also all aspects of taxation, whether material or procedural rules (Airbnb Ireland UC v Région de Bruxelles-Capitale, 2022, paragraphs 27–30; Airbnb Ireland and Airbnb Payments UK, 2022, paragraphs 29–31). In the Airbnb cases, such a broad interpretation of "fiscal provisions" in Article 114(2) TFEU meant that several domestic measures (i.e., the obligation to withhold, appoint a representative, etc.) were outside the scope of the EU Directives 2000/31, 2006/123, 2015/1535, approved under Article 114(2) TFEU, and thus fell within the exclusive competence of the member states. Similar argumentation would preclude the recourse to a qualified majority within the legal basis of the elimination of market distortions in Articles 116 and 117 TFEU. Firstly, the meaning of "fiscal provisions" in Article 114(2) TFEU should have a force of attraction within all the articles of Chapter 3 ("Approximation of Laws"). Secondly, it is unlikely that EU taxes could be tailored to the wording of Article 116 TFEU, which requires that "a law, regulation or administrative action in member states is distorting the conditions of competition in the internal market" (Englisch, 2020, p. 58–61).

The debate in the EU law boils down to circumventing unanimity. This is, for example, the case of the recent lawsuit presented by Exxon against the EU temporary solidarity contribution targeting companies in the energy sector that benefited from the high energy prices approved by the European Council on 30 September 2022 (Council Regulation (EU) 2022/1854 of 6 October 2022, 2022). The solidarity contribution was approved under the qualified majority in Article 122(1) TFEU, which allows the Council to introduce measures in case of severe difficulties arising in the supply of certain products, such as energy. The General Court must assess whether the solidarity contribution has a fiscal nature and should be carried out in accordance with the unanimity rule in Article 311 TFEU and not by qualified majority voting (Article 122).

The member states are the key stakeholders in deciding where the Union should go within the integration path and, thus, whether it should be granted sufficient resources to achieve this goal. Accordingly, the double unanimity filter preserves the veto power of the member states in deciding the revenue side of the EU budget.

4. Financing the EU Budget More Autonomously?

The 2020 Interinstitutional Agreement sketches a list of own resources in the period 2012–2027. In the author's view, a look at the list shows disappointing outcomes: First, it is unlikely that the new resources match the massive borrowing derived from the temporary NGERP expenditure and, second, it is not clear yet whether the new resources will become permanent candidates to finance the EU budget in long-term multiannual financial frameworks.

First, the environmental taxes, namely the Plastics Own Resource, the Carbon Border Adjustment Mechanism, and the EU Emissions Trading System are regulatory taxes. While "pure taxes" are implemented to raise revenue for the government to pay for public services and public infrastructure, the main purpose of "regulatory taxes" is not to raise revenue but rather to correct market failures, promote/disincentivize, and reduce negative externalities (Avi-Yonah, 2011; Avi-Yonah & Edrey, 2021). These EU environmental taxes aim to reduce the use of non-recycled plastic and the emission of greenhouse gases and prevent carbon leakage. Not much revenue collection is expected in the long term insofar as the member states are progressively reducing their environmental damage and adopting a more environmental-friendly policy, for example, by reducing the use of non-recycled plastic (Martín Jiménez, 2022).

Second, an EU digital levy cannot be enforced in the context of the current solutions to the tax challenges of the digitalization of the economy. In the recent 11 July 2023 Statement of the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy, the OECD/G20 BEPS Inclusive Framework compels the countries to remove the existing digital levies (OECD & G20, 2023). The repeal of digital levies permits states to collect taxes on the residual profit of multinationals under Amount A of Pillar 1. Since 138 states, including European Union member states, signed the statement, it does not make sense that the EU insists on enforcing a digital levy against the international consensus under Pillar 1. Third, the financial transaction tax, also mentioned in the High-Level Group on Own Resources report (Monti et al., 2016), was eventually not approved when the Commission proposed it in 2011 in the aftermath of the 2008 financial crisis. The fact that only 11 member states supported the 2011 initiative does not foresee a broad consensus in the Council to reach unanimity.

Fourth, the last resource is "the financial contribution linked to the corporate sector or a new common corporate tax base" (Interinstitutional Agreement, 2020). Last 21 June 20023, the Commission proposed a new temporary statistical own resource based on company profits to be replaced by Business in Europe: Framework for Income Taxation (BEFIT). "Such statistical resource is a national contribution calculated as 0.5% of the notional EU company profit base, an indicator calculated by Eurostat based on the national accounts statistics" (European Commission, 2023a). Such statistical resource implies that rich member states, with more registered companies subject to corporate income tax, would eventually contribute more to the EU budget than poorer member states. Although this statistical own resource is likely to collect more revenue to pay back the NGERP expenditure, rich member states could raise concerns about why they must contribute more to the EU budget.

The ORD (2021–2017) still relies on national contributions to finance the EU budget. Examples are the Plastics Own Resource and the statistical own resource based on company profit. The Union is extensively funded with contributions from member states, such as the one based on the gross national income and the VAT's own resource (a rate of 0.15%–0.3% to the national VAT base that could not exceed 50% of the gross national income). The literature stresses that the EU should have more autonomy to create its own resources and reduce the dependency of the member states (Hudetz et al., 2017; Monti et al., 2016). The 10 May 2023 Resolution of the European Parliament concluded that the financing of the Union is in breach of the intention of the founding fathers and the spirit of the treaties, which called for autonomous resources (European Parliament, 2023).

Prior to the NGERP, some authors have countered that the EU budget dependency on member states' contributions could be justified under the principle of subsidiarity in Article 5 TEU, which allocates tasks or responsibilities to the lowest level of government that can be expected to cope adequately with the task (Lipatov & Weichenrieder, 2016, p. 15). The principle of subsidiarity matches the so-called "decentralization theorem," which stipulates that policies should be decentralized unless the EU is more effective than actions taken at the lowest levels of government. Unlike federations such as the US, Canada, and Switzerland, where the central government provides public services and redistributes funds from those with high incomes, the public sector in the EU is decentralized (Bordignon & Scabrosetti, 2016; Büttner, 2016). Since the Union does not provide public goods or redistribute income, the member states are free to articulate their tax system to provide them.

Assessing whether the Union should provide public goods and redistribute revenue is a political debate that would require a reform of the treaties. The subsidiarity principle could be a suitable yardstick to determine to what extent the EU budget would require more autonomous resources and less dependency on the member states. In the author's view, a common market tax (CMT) could be the right candidate to finance the EU budget and guarantee major EU autonomy if this scenario occurs. Some commentators have already mentioned the possibility of taxing companies that profit from the internal market and EU policies (Kotsogiannis, 2016; Woźniakowski & Poiares Maduro, 2020). The CMT should be designed considering the following two premises. Firstly, the CMT should be levied in areas where the Union has exercised its legislative competence to harmonize the legislation of the member states. In fiscal federalism studies (Peeters & Smet, 2022), this is referred to as tax autonomy, which means the capability of a specific level of government to legislate on the elements of the tax (tax base, tax rate, allowances, etc.). Secondly, the CMT should not increase the effective tax burden on European citizens. Either a new tax or surcharges on top of their national taxes would likely trigger massive discontent and feed Eurosceptic discourses. If so, as reflected in some federal states (e.g., Spain and Germany), the best initial solution would likely consist of shared taxes between the Union and the member states. In a later stage, a surcharge on an EU harmonized taxable base (VAT/corporate taxation) could replace the initial revenue-sharing mechanism and pave the way towards a more autonomous EU fiscal capacity.

Applying the above premises to design the CMT, there are several alternatives within a revenue-sharing mechanism. In the field of indirect taxation, the CMT could be based on the VAT system. The 2016 High-Level Group on Own Resources report already mentioned a VAT own resource to replace the current one, a complex statistical resource dependent on the gross national income (Monti et al., 2016, p. 52). The taxable base and the scope rules of VAT have been extensively harmonized (Council Directive of 28 November 2006, 2006). The fact that the Union has exercised its legislative competence to harmonize the taxable base (tax autonomy) justifies the Union sharing tax collection with the member states. The design of a CMT based on VAT would require, first, harmonizing the VAT tax rates. Although the VAT taxable base is harmonized in the directive, the tax rates vary tremendously among the member states. Second, it would be necessary to determine the percentage of revenue to be transferred by the member states to the Union. Such a percentage to share with the Union could be objectively determined by measuring the volume of VAT intra-community transactions of goods and services. Such a chargeable event reaffirms the internal market dimension of a CMT based on VAT.

In the field of direct taxation, the BEFIT proposal could be the basis for a CMT. As stated, the Commission intends to replace the statistical resource on the notional EU company profit base with the BEFIT. The BEFIT directive proposal was launched on 12 September 2023 by the Commission (European Commission, 2023b). The initiative aims to introduce a common set of rules to calculate the taxable base of groups with a taxable presence in the EU provided that they have an annual revenue of more than €750 million. In contrast with VAT, the corporate tax base has not yet been harmonized. In direct taxation, the EU has only harmonized anti-avoidance provisions (Council Directive (EU) 2016/1164 of 12 July 2016, 2016; Council Directive (EU) 2017/952 of 29 May 2017, 2017) and certain cross-border intra-group transactions (e.g., Council Directive of 3 June 2003, 2003; Council Directive of 30 November 2011, 2011). The BEFIT proposal will overturn the pending 2016 proposal for a Common Consolidated Corporate Tax Base, which never had sufficient support within the Council. BEFIT provides that all companies that are members of the same group calculate their tax base following a common set of tax adjustments to their financial statements. Once the tax bases of all members of the group are aggregated into one single tax base, each member of the BEFIT group will have a percentage of the aggregated tax base, calculated based on the average of the taxable results in the previous three fiscal years. Although the pillar 2 directive guarantees that the effective tax rate of a multinational enterprise in each jurisdiction cannot be below 15% (Council Directive (EU) 2022/2523 of 14 December 2022, 2022), the member states are competent to determine the corporate tax rate and collect the corporate taxation. Provided that unanimity is eventually reached to approve BEFIT, a decision needs to be made regarding how the revenue is to be shared between the Union and the member states.

5. A More Democratic Role of the European Parliament in the Approval of EU Resources

From the previous sections, a paradox emerges. The Union can no longer be characterized as an international organization but as a separate supranational political power with separate interests/goals from the member states (Pescatore, 1972). Since the achievement of the internal market is a shared competence, Article 311 TFEU permits the Union to create the necessary resources to achieve this goal. However, the member states secured their positions as the masters of the treaties under the double unanimity filter to decide which resources are included in the basket (TFEU, 2016, Article 311). In terms of resources, the Union is still a prisoner of an international organization's mindset. That mindset reproduces the imbalances in the EU's economic governance (Economic and Monetary Union). While the monetary policy is centralized by the European Central Bank, the economic policy remains at the member-state level.

The US Constitution expressly refers to the power of Congress to levy taxes. Such power of the US Congress to tax is unrestrained and clearly derived from the American Revolution under the slogan "no taxation without representation" (Avi-Yonah & Edrey, 2023; Georgiou, 2023). Collecting taxes conveys a democratic expression of how we divide the bill for the goods and services that we collectively deliver to ourselves (Kleinbard, 2016; Menéndez, 2013; Pantazatou, 2023). This democratic relationship between the level of expenditure and the revenue is materialized in the two primary functions of taxation: (a) It determines how much of society's resources will be transferred to the government to provide public goods, and (b) it plays a central role in re-distributing wealth among different individuals from rich to poor (Murphy & Nagel, 2002, p. 76).

Such democratic justification is absent in Article 311 TFEU, which provides for a legislative procedure under which the European Parliament is merely consulted. As if the Union were still an international organization, the member states have the role of approving the basket of resources under unanimity constraints. As stated, this way of financing the EU budget is highly dependent on the member states' contributions, which is in line with the decentralization level and the lack of EU public goods. If the Union eventually provides public goods and redistributes income in the future, the role of the Parliament should be increased. The marginal role attributed to the European Parliament within Article 311 TFEU is unacceptable. Taxes must embrace a democratic rationale, as the American Revolution showed, and the US Constitution later codified (Constitution of the United States of America, 1787, Article 1, Section VIII, Clause 1). In the author's view, Article 311 TFEU should be amended to recognize an explicit autonomous EU power to tax, thereby granting the EU Parliament a decisive role in approving the autonomous resources and redistributing the proceeds collected to achieve EU solidarity (TEU, 2016, Article 2).

Increasing the democratic legitimacy of EU taxes by granting a decisive role to the EU Parliament enhances solidarity. Since its inception, the Union has promoted solidarity through different mechanisms. For example, the Common Agriculture Policy has provided income support for farmers, and the European Structural Funds have supported social and economic development in the member states. The NGERP is no exception. The funds are allocated to the member states to recover from the Covid-19 pandemic. However, as De Witte (2021, p. 678) argues, "This distribution of funds through the EU does not operate a direct transfer from the richer to the poorer member states, as the EUR 750 billion will neither be 'German' nor 'Greek' debt but truly common debt." If the European Parliament had a major role in approving the basket of EU taxes, they would eventually lead to a proper fiscal transfer from rich to poor, strengthening true EU solidarity.

6. Conclusions

In EU law, taxes are included within the broad definition of resources under Article 311 TFEU. In assessing domestic taxes, the CJEU has endorsed a functional definition of taxes as a means to serve general interests. Such a functional definition of tax could be extrapolated to Article 311 TFEU, which requires that resources match EU policies and objectives. The Union has a broad margin to decide the level of resources needed to achieve its EU policies and goals. Since the achievement of the internal market is a shared competence, the Union is entitled to decide the level of resources needed to achieve this goal. The debate on how to finance the EU budget oscillates between the contributions of the member states and the need for major autonomy. For the purposes of granting the EU major autonomy in creating its own resources, this author has already sketched a potential CMT, which could be either a direct or an indirect tax.

Although the Union has a broad power to tax under Article 311 TFEU, the member states are still the "masters," able to decide the level of resources under the double unanimity filter. Such a paradox needs to be solved by increasing the role of the European Parliament in deciding the basket of resources. Adding democratic legitimacy to the approval of EU taxes could enhance solidarity. Although the Union has traditionally exercised solidarity (Common Agriculture Policy, European Structural Funds, NGERP), EU democratic taxes approved by the European Parliament could reaffirm the redistributive function of taxes, thereby allowing the transfer of wealth from the rich to the poor.

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