
The Relation Between Sovereignty and Taxation Power Within the European System: The Anti-Sovereign

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13.1 The “Negative” Taxation as a Qualifying Feature of the EU Law

13.1.1 The Evaporation of the Taxation Power Within the EU Legal System: The “Negative” Taxation

In the modern State the connection between sovereignty and taxation is one of the crucial points of the constellation of values defined at the constitutional level. The sovereignty, which is expressed in constitutional and pluralist democracies using the regulatory powers related to the primary interests and needs of community life according to a logic of balancing and weighting of the conflicts of interest, involves the management of the necessary financial resources as an essential tool for the realization of the general aims. The taxation, which is the key stage of the formation

of public financial resources, is presented as well as a basic element of the institutional organization of the social community, as an indispensable condition for achieving the basic collective purposes, including the protection and the development of primary individual rights. In this perspective, taxation can be represented as a kind of transcendental condition of common life, not only aimed at the achievement of the overarching goals of freedom, security and development defined in the constitutional table, but also directly instrumental to the self-realization of the personality of each individual in the social community.

The declination of the link between sovereignty and taxation assume different connotations depending on the inclination of the axiological framework either towards the State or rather in the direction of the civil society (considering the rights and freedoms of individuals). In the diachronic modern constitutional history it has indeed found a significant correlation between the idea of sovereignty, widespread and accepted in the Constitution, and the general taxation.

In the English constitutionalism of seventeenth century the tax interest is presented firstly as a specific interest of the sovereign, focused mainly in his individual position of monarch, owner of an estate, which stands in the dialectical confrontation and often in conflict with the interest of the singular citizens to safeguard their own sphere of freedom and wealth; then, with regard to the developments of the bourgeois revolution, the relation of taxation with the general purposes of the economic and social community begins to emerge, although in a recessive position with respect to the fundamental rights of property and freedom recognised to the individual sphere.

French Enlightenment develops the connection between the sovereignty and the fiscal interest, being accentuated the instrumental role of the tax power with respect to the general purposes of the social community; in comparison with the tax interest, the individual rights fade significantly, going to occupy a subordinate and marginal role.

Even in the era of German Idealism the fiscal interest is presented as a fundamental value of the community, such as to establish the attribution of strong public powers to the State with respect to which the individual citizens stand in a totally subordinate position: thus it becomes definitively surpassed the thesis which identified the power to tax as an personal attribute of the monarch-sovereign, with consequent fixation of the relation between taxation and sovereignty at a primary axiological level.

Finally, in modern Constitutions it is peacefully implemented the reconciliation between the tax authority and the sovereignty: in particular, it is explicitly stated in any Constitution that the exercise of regulatory powers in tax matters is to be reserved primarily to the Parliament, indicating a clear connection between the democratic and popular sovereignty and the regulation of the phenomenon of taxation; it was also recalled, in this regard, how the recognition of Parliamentary competence essentially brings the debate about making law to the constitutional organ that, in line with the needs of a pluralistic society, seems better able to proceed to the balancing of the values involved in a complex and delicate matter like taxation.

Now, the advent of European law has placed a question of considerable consistency in order to the actual axiological dimension of taxation: in fact, if it is indisputable that the European Union has led to a significant restriction on the exercise of legislative powers of nation-States, it must be checked what is the role played by the power of taxation in this institutional context.

The examination effectuated in the previous chapters revealed in principle how the so-called “fiscal sovereignty” (namely the complex of powers relevant to the needs of the tax regulation) has remained a core competence of the Member States. The legal system coming from the EU sources is in fact marked by the principle of “negative taxation”: the values of the Treaty and the provisions established by the Directives (and sometime by the Regulations) are clearly indicating that the primary aim set at the European level is represented by the identification of constraints and conditions, and more generally by the definition of “limits” to the exercise of legislative power by the Member States; therefore, it emerges the need to contain and to “limit” the taxation power outsourced at peripheral level (of the Member States) and not to assume that regulatory power at the central level (of the European Union). The “negative taxation” therefore expresses the purpose of limiting the fiscal sovereignty of another counterparty, which is still acknowledged to the individual Member States, excluding a main process of “positive taxation”, through which the supranational organization (the European Union) independently establishes and implements a plan of legal values, as a result of the transfer of fiscal sovereignty from the national States.

It is to point out that even from a procedural and formal point of view the framework of “negative taxation” finds an evident confirmation. Indeed, the legal tool to be most commonly used to adjust the tax matters at EU level is undoubtedly represented by the Directives, being relegated to a very sporadic and marginal use the role of Regulations; in addition, the field of direct taxation—which is crucial to any modern tax system—is largely defined through the tools of the *soft law* (namely, recommendations, guidelines and opinions by the EU institutions); this is clearly indicating that the European Union operates basically as an institution of orientation and legal suasion, that is called to promote adherence to certain lines of regulation, but basically unfit to directly adjust the tax matter with strict and rigorous effects, especially when compared to the measurably relevance of the financial measures of the nation-States. It should be added that the principle of unanimity, that apply to the deliberations of the Council with regard to decisions on tax matters, is another significant indication of the unsuitability of the EU to intervene promptly and extensively to the definition of the tax regulations, expressing on the contrary the permanence of a role essentially limited to the identification of general principles that can detect the unanimous consent of each Member State.

A confirmation of the conceptual background shown here arises also from the position taken by the Court of Justice; in accordance with a framework of “negative taxation”, it emerges a clear inclination towards specific treatment of the peculiarities of the case, which is typical of a jurisprudence oriented to the case

law, which is essentially to express a certain lack of connective tissue of legal values. With regard to indirect taxes—known as the most regulated area of taxation in the European legal order—the Court assumes a recognitive attitude about the rules established in the primary and secondary EU law, refusing to put in critical discussion, or at least to develop an “evolutionary” interpretation, about the normative postulates expressed by the European legislature; only with regard to the area of direct taxes, considering the lack of adequate legislation regulating the matter, the case law focuses on the identification of general principles, related primarily to the protection of the four freedoms of the Treaty and to the affirmation of the principle of non-discrimination. In any case, the Court of Justice shows a highly pragmatic approach, aimed primarily at the declination of the obstructive rules formalized under the EU law (and firstly, of the principle of non-discrimination in its various forms and methods), without showing the axiological impulses which characterize the judicial construction of the law in the legal systems with “positive” content.

It should also be noted that the structure of fiscal powers as regulated under EU legal order appears to be completely upside down compared to the usual distribution of powers in the constitutional orders inspired by a federalist logic; indeed, the bodies of the European Union are holders of a regulatory power (although limited) with particular regard to the field of indirect taxes, while direct taxes are attributed to the exclusive competence of the individual Member States (except the guiding role of the EU institutions for some matters); on the contrary in the federal systems it is attributed to the central organs typically the power to regulate the direct taxation, and it is recognized a limited (and non-exhaustive) competence with regard to the indirect taxes and to the minor tributes. Even from this perspective it emerges the clear distinction of the European Union with respect to the federal organizations, confirming the lack of an incisive power to tax in the hands of the European bodies.

Therefore it is possible to argue that the “negative taxation” denotes the delimiting function of the European regulations with respect to the exercise of the tax powers by the nation-States, fragmenting (if not pulverizing) the constellation of values expressed around the phenomenon of taxation in individual particles with a precisely negative content.

The power of taxation, as an engine for development of the idea of sovereignty, from the centre of propulsion for the theoretical configuration of the primary relationships between the governed subjects and the governors, inescapable as a hub for the reconstruction of the balance between the interests of the social community and the rights and freedoms of the individual, which has been spreading in pluralistic democracies of the twentieth century, is transformed into the European framework in a mere regulatory mechanism to be contained and circumscribed. The European taxation thus becomes essentially a matter related to the research of “limits” and to the definition of the areas of national competence.

From this point of view, it seems possible to formulate an answer to the first reported question: the affirmation of the European Union is considered to indicate

an evaporation of the power of taxation, at least when compared with the general lines of evolution in modern constitutional history. It is completely abandoned the axiological core of the taxation interest which has emerged in the current Constitutions, in favour of a minimal position oriented towards the negative logic of non-discrimination.

13.1.2 The Cultural Background of the Discipline of Fiscal Power Lies in the Economic Doctrine Which Affirms the Principle of Neutrality

One element that contributes substantially to the configuration of the European taxation in “negative” terms must be found in the power of suggestion exerted on the EU institutions by the economic doctrine that affirms the importance of the principle of neutrality in international transactions.

In fact, the concept of “common market” has been interpreted in the literature as a concept of efficiency in the allocation of resources and factors of production, and thus according to a typically economic perspective. So, the allocative efficiency is determined crucially on the basis of the phenomenon of taxation, given that the tax levy is likely to affect the flows of goods and capital towards the most productive locations, thereby distorting the functioning of the common market. In this context it is defining the principle of “fiscal neutrality” as the value for the purpose of establishing a common market of an international nature.

The neutrality assumes, however, several aspects, being able to configure as a criterion for the adjustment of fiscal policies related to the commercial or financial transactions for inbound or for outbound. Therefore it emerges the concept of “capital export neutrality” in order to indicate that the tax factor may not take the character of a distorting disincentive with respect to the conduct of cross-border investments, having rather to generate the equalization of the tax treatment of income produced abroad compared to the national income earned in the country. Moreover, it has been identified the concept of “capital import neutrality” in order to define the equality of tax treatment of capital arriving at the financial market of a State, regardless of the national or foreign origin, according to a perspective of “competitive neutrality”.

The economic doctrine (R. A. Musgrave) pointed out that these two forms of neutrality can be adopted jointly when the tax systems of the nation-State show a fundamental identity, which may be judged as a mere theoretical abstraction, almost unworkable on a concrete plan. Thus it appears preferable to identify the priority form of neutrality to be taken as a reference point in the construction of a common fiscal policy by a supranational organization: in this regard it has been identified the criterion of “capital export neutrality” as the principle prevailing at an axiological level, since it is considered more functional in achieving an efficient allocation of capital on the global (supranational) market.

In fact, the capital export neutrality favours the outflow of capital to the locations with intrinsically greater capacity on the basis of the mere elimination of distortionary tax factors: capital and economic activities are thus oriented towards the production sites on the basis of evaluations linked exclusively to the degree of effectiveness and efficiency in the combination of production factors, and therefore according to an essentially economic judgment.

On the contrary, the “capital import neutrality” creates a flow of capital in the domestic market because of an equality of tax treatment; so if the tax rates (or generally the taxation) in the domestic market seem to be more attractive than those of the foreign States, capitals flow into the market of the importing State on the basis of assessments of fiscal convenience and not of economic opportunity.

The capital import neutrality poses therefore a typically “domestic” criterion, showing the features of its “internal neutrality” as dependent on the fiscal policy adopted exclusively by the importing State; otherwise, the capital export neutrality is presented as an “external neutrality” which is related to the policy of several States (namely the State of the source and the State of the residence), requiring the coordination and the adaptation of the national taxation laws.

Only the capital export neutrality must therefore be considered as an appropriate criterion to ensure the effective tax neutrality with respect to the allocation of factors of production within the common market and as such it represents the concept of neutrality to be taken in the definition of the fiscal policy to the supranational unions.

Moreover, the criterion of capital export neutrality has the added advantage of leaving almost unchanged the tax sovereignty of the individual States, because each of them is able to maintain the full capacity to establish the system of taxation applicable to the economic agents, without interfering with the efficient allocation of productive resources at the international level: it is sufficient, in the implementation of the aforementioned criterion of “external neutrality”, to ensure the full deduction of the tax paid by an economic agent in other EU countries on the basis of multilateral agreements, to achieve the full equality of tax treatment of the foreign income compared to the income generated in the country.

Therefore it is clear that the taxation is considered in predominantly negative terms, as a factor likely to lead to distortions than the “natural ability” of the market operations, and therefore as an element to circumscribe (if not even to delete).

This theoretical approach was clearly taken as the basis of the decisions of EU institutions in order to regulate the phenomenon of taxation, formulating a clear option for the reconstruction of the power of taxation as a specific and typifying attribute of the nation-State to be contained and restrained where appropriate to avoid interference with the structure of the common market.

In this regard it must be cited the Ruding Report where it is clearly stated the belief that the primary aim of the European Union in the field of taxation consists in the elimination of distortions and inefficiencies determined by the national tax systems about the full allocative efficiency of productive resources. According to a careful investigation carried out on the economies of EU countries, it was found

that taxation is likely to influence sensitively the choice of location of productive investment and, consequently, the conformation of the legal and financial structures of economic agents; it produces, therefore, the opportunity to establish appropriate criteria of “external neutrality” capable to ensure precisely the elimination of tax barriers that may interfere with the pursuit of an optimal structure of the common market, at least in terms of allocative efficiency.

13.1.3 The Instrumentality of the Taxation Power to the Market in the EU Legal Order: The “Neutral” Taxation

The “negative” taxation of the EU legal order reconnects to the axiological liberal system which has typically denoted the development of the European Union. As already observed, the principle of tax non-discrimination constitutes one of the most significant corollaries of the four fundamental freedoms of the Treaty, expressing one of the most robust safeguards for the protection of a competitive structure of the market.

However, it is known that the promotion of economic freedom was the driving force for the development of the common market, featuring not only the rules of the Treaty, but also the rules developed in the derivate legislation. This is an assessment easily understandable, considering that the conviction of the Member States about the economic integration was seen as the first, indispensable step towards the political and social integration.

By the approval of the Treaty of Maastricht some additional values, not of an economic nature—and in particular the security policy and the development of international policies—have been considered in the EU constitutional framework in order to express an enlargement of the European purposes. However, it still seems to be limited to a primordial stage the practical and operational implementation of such values, remaining the EU integration process basically related to typically economic purposes.

The dominant idea of the EU law is so yet to be identified in the protection and promotion of competition and connected freedoms, avoiding obstacles and barriers that could restrict the free economic action of the individual agents resident in the Member States. The “negative” taxation is presented as the legal instrument to prevent tax regulations that can take an obstructive connotation about the free development of the common market.

It is evident that the cardinal point of reference regarding the evolution of the EU legal order about taxation matters can be identified in the concept of “market”, or rather in the conviction that the protection of the market—understood as the metaphoric place where the commercial transactions and the entrepreneurial initiatives are carried out—represents the primary goal of the process of European integration.

This ideological background appears consentaneous to a general climate, more and more widespread in European democracies, which seems to reproduce patterns

strongly inclined towards political and institutional structures of liberal type, in which the decisions on the redistribution system of general income are assigned precisely to the natural composition of the “market”, as a consequence of the crisis of the Welfare State. The market is thus seen as a kind of regulatory mechanism of social and economic balances, to serve as a parameter of the allocative efficiency only on the basis of individual capacities and not on the basis of general assessments previously determined by the State.

Therefore, also the fiscal phenomenon is adjusted accordingly: the European order comes to reducing the weight of the tax measures, while necessary for the achievement of essential resources for public expenditures, in order to avoid that taxes can result in impediments that alter the ability of the natural functioning of the market. “Negative” taxation is presented as well as the corollary of “neutral” taxation, which assumes the character of the postulated theoretical background around which is developed the legal system. In this perspective, there is a clear understanding in the EU institutions about the implementation of economic theories that face the model of “neutral” taxation for the configuration of the systems of public finance in supranational unions.

Moreover, the formulation and the development of the concept of “harmful tax competition” as an emerging value of EU legal order aligns conceptually the “negative” taxation, connecting to the same axiological liberal system. This idea denotes the opening to the “market” as a reference point of the fiscal choices, clearly showing the failure of national fiscal sovereignty with regard to the logic of full competition of economic agents.

It should be noted, however, that the assumption of the “market” as the reference value of the EU legal order contrasts sharply with the choices adopted in the Constitutions of the nation-States, where the taxation is generally recognized to have an important propulsive function with respect to the process of social transformation. The implementation of an efficient and balanced tax system, in fact, performs a crucial role in the social development programs in line with the fundamental rule of substantial equality formally implemented in many constitutions and in any case received in the material Constitution of each democratic country. The involvement of all citizens in the payment of taxes, eliminating spaces of impunity and privilege, as well as reducing the specific weight of the categories favoured by reasons of timocratical prevalence, more than any other social mechanism allows to operate a distribution of resources between the unequal people which is capable to produce a reduction of economic inequalities and an elevation of weaker social classes. The adjustment of taxation—*rectius*, the taxation interest—connects closely to the protection of values far from the neutrality of the market, to identify otherwise in the promotion of social integration through the establishment of appropriate “chances of life” that enables people effectively to achieve the implementation process of social freedom. The fiscal interest in national Constitutions thus appears as a principle of “freedom from deprivation”, under which a pulse is output to correct imbalances in the distribution of natural resources so as to facilitate the process of social transformation.

In this perspective it is clear that the line of demarcation between the EU law and the national Constitutions is typically due to a different presentation of the criterion of equality as founding principle of the taxation. In the EU law it has been imposed the logic related to the principle of “formal equality”, whereby the position of the taxpayers—essentially concerned to as *homines oeconomici* (so as agents of the production system)—is assessed on the basis of a “horizontal” equality of treatment: taxation should not alter in any way the opportunity to enter the market, so as to ensure a levelling of the tax burdens for homogeneous categories of subjects, regardless of timocratic importance or productive force; the individuals are therefore equalized as to the taxation in relation to the formal aspect of the production of a single event economically significant (act or activity) and not further discriminated with reference to the subjective position overall. The national Constitutions shows, otherwise, the acceptance of a criterion of taxation regulated on the redistribution of national income for social purposes; it determines the transposition of the principle of “substantial” equality, according to which the taxation should be joined to the purpose of promoting the equality of *chances* between consociates, and thus should overcome the differences (especially economic and social) of the starting positions in order to seek equal treatment of “vertical” type; in this context, the levelling of taxes is not identified with regard to the single economic act or activity, but rather to the overall situation of the taxpayer—regarded not as an economic agent, but essentially as a “personality” whose development and self-determination is to be encouraged—and therefore by reference to the figure of the substantial economic capacity of the subject.

Accordingly, the principle of non-discrimination is a natural application of the principle of formal equality within the EU, used to preserve the maintenance of liberal opportunities typically belonging to the system of the European Union (namely the equal access to the market). In contrast, the tax interest and the ability to pay are the axiological corollaries of the substantial equality spread in the national Constitutions, devoted to promote the social development programs and the redistribution of national income among the consociates.

This is a clear axiological demarcation also reflected in terms of tax system. Indeed, in the context of the EU legal order there is no place for some regulations completely metabolized into national legislation (such as the progressivity of taxation or the use of tax benefits in order to permit a social configuration of the economic structure, or the protection from the tax evasion or elusion and the general promotion of efficiency measures, which are clearly linked to the tax interest to ensure the effective collection of tax revenues to be used for the pursuit of collective utility).

The “neutral” finance towards which the EU legal order is oriented appears, therefore, significantly different, in axiological terms, from the national tax legislation, which on the contrary is inspired by models of “functional” finance. The idea of “market” is worth so to mark a remarkable distance between the regulatory system of the taxation power granted within the EU and the legal framework widespread in the individual States.

13.2 The Anti-Sovereign

13.2.1 The Relationship Between Sovereignty and Power of Taxation in the European Union: The Anti-Sovereign

The “negative” taxation, expression of an ideological option oriented towards the concept of market and the neutrality of the public finance, clearly indicates how the EU legal system is characterised by a subtractive but not substitutive function with regard to the tax power exercised by individual Member States.

In other words, the European Union assumes directly the power to regulate some tax matters to be subtracted to the competence of the nation-States, and thus reducing the national fiscal sovereignty; otherwise, the EU legislation shall not determine basically a positive regulation of taxation, and therefore a substitution of a new fiscal power to the power originally conferred to the nation-States, but rather shall produce a restriction on the national tax power, aimed at preventing that it can be addressed in certain directions, and in particular that might result as an obstructive factor to the freedom of the market and to the structure of competitive business.

The “negative” taxation typically marks the limitation of the national sovereignty in tax matters, without leading to a replacement of the same through a European fiscal sovereignty. In this perspective it can be argued—echoing the intuition of relevant constitutional doctrine—that the European Union represents the “anti-sovereign”, in opposition to the national power in order not to introduce a new sovereignty, but to contain and sometimes to exclude the sovereignty of nation-States.

Indeed, it is known that the European Union shows some institutional features that are not easily reconcilable (at least in the version currently regulated by the Treaties) with the modern concept of sovereignty. Especially the EU lacks the two fundamental preconditions of sovereignty: the conception of the ascending power (determined by the popular representativeness) and the connection with a nation of people. Furthermore, it seems doubtful the uniqueness of a political subject, appearing often the EU initiative distributed in a plurality of organs and institutions with an highly differentiated statute, which basically express the inability to assume a monopolistic control of the sovereign power. The same institutional organization, spoiled by the lack of democratic legitimacy, is often an expression of the interests of social and economic forces not ordered according to the usual criteria of the political competition, but rather through extemporary and uneven agreements.

Therefore, it produces naturally the attribution to the European Union of a regulatory function that does not respond to a logical ordering with a positive content, according to the directions made by the holder of the sovereign power, but rather it is aimed at annihilating the national sovereign power, so to remit the composition of the interests at stake to the trans-national judgment of the market.

The process of erosion of national sovereignty does not respond to the establishment of a new order of values adjusted according to the feedback of a different and superior holder of sovereign power, but on the contrary is the premise of the spread of a self-referential and self-regulated order, which is formed as a result of

commercial transactions and by the meeting of supply and demand and is not imposed by a democratic force representative of the interests of the social community; an order that is typically responsive to the logic of the market competition in the global society, which misses any constellation of collective values, and where it emerges and self-protects the freedom to act for the pursuit of economic goals.

Therefore it also changes the traditional correlation between freedom and public power: in the democratic systems the scope of the individual freedom has to be compared and weighted with the general interests of the social community which are guaranteed by the law and therefore represented and collected by the sovereign power; within the European framework the freedom to act is presented essentially as a freedom of fact, whose implementation appears as a space not governed by the law or at least (if it is accepted the idea that the market is an order of relations *always* governed by a norm of law) subtracted from the control of the public power, being referred directly to itself and therefore disconnected from any relationship with respect to the general interests and to the social purposes.

In this scenario it coherently emerges the “negative” taxation of the EU legal order, bringing out a set of rules that cancel out the national sovereignty and thus undermine the reasons of legitimacy of the tax power and, at the same time, bring to the market the ability of self-regulation of the economic phenomena. The power of taxation thus loses all social elements, waives the progressive aspirations to the income redistribution and the promotion of a process of transformation of society in line with the needs of removing the material obstacles to the full development of the personality of all citizens, and becomes a mere instrument for raising financial resources for the performance of public tasks, to be carried out without further social connotations, as neutral as possible with respect to the productive ambitions of the economic agents.

The plot developed in the tax legislation so provides a significant conceptual contribution to the reconstruction of the relations between centre and periphery in the European framework, contributing to the configuration of the European Union as an anti-sovereign which limits and weakens the sovereignty of the nation-States, but does not replace it with a different sovereignty, capable of a discretionary assessment about the general interests, considering instead that the assessment must be remitted to the market evaluations.

13.2.2 The Dangers of the Anti-Sovereign: The Risks of the Assumption of the Idea of “Market” as Paradigm of Taxation Power

In the anti-sovereign perspective it further increases the tension of the relationship between the EU law and the national law, being emphasized a contrast between the European system decisions, due to the market, and the complex of values with a social connotation, metabolized in the national Constitutions.

In this regard, according to a recurring trait of the democratic systems of the twentieth century, the social structure and the balance of interests are realized

through the regulation of the relationship between the political power and the economic power. The globalization of the economy and the development of productive entities with a multinational character, connected to a spatial context which is not circumscribed and limited to the national territory, have changed the logic of the national adjustment of economic phenomena. The international market does not coincide with the territory of one or more States, it is not marked or divided by material borders and even does not show the physicality of the territory; the space of the globalized economy (more correctly the plurality of international economic spaces) is marked from the network of trade and contractual relationships, often virtual and managed by remote, and therefore it is de-materialized or rather *de-territorialized*. The abandonment of reference to the territory is to indicate the decline of the national political power, inappropriate with respect to the regulation of phenomena that develop over the spatial area of competence, in an axiological dimension that escapes, often completely, the regulatory capacity of the national sovereignty.

The split between political and economic space is so recorded in the European treaties through the abandonment of the national sovereignty—as in tax matters—and emphasized by setting an order of freedom that recognizes the capacity for the self-regulation of the globalized market. In this perspective, it is argued, not unreasonably, that the EU legal order presents itself as an *a-political* framework, namely disengaged from the fabric of social values that characterize the democratic Constitutions and orient the political action, rather having to be brought to the spontaneity of the market interests, as a kind of natural and neutral regulation about the production and the commercial exchange.

The crisis of the traditional concept of absolute sovereignty of the nation-States thus leads to put the control of the economic resources from the political class to the forces that direct the unified market. There is thus a kind of reverse logic than the traditional relationship between State and market: the Member States begin to become functional to the markets, and adhere to the decisions and the linkages emerging from the market about the economic and social reasons, moving away from the traditional concept of sovereignty. It determines a clear reversal of the relationship between economic power and political power: the plan of the choices and decisions made by the State is often subordinated and controlled by the international finance and the supranational economy. So the control of social changes tends to escape from the political and institutional governance of the States to flow naturally towards the centres of power that determine, more or less unconsciously, the economic relations which combine and dissolve time after time in the market.

The national State, in this context, becomes a regulatory centre of the market, the holder of a power of mediation about the economic resources between the social partners and the productive forces multinationals. In essence, it emerges an “administrative” function of the State instead of the social function which denoted the development of pluralist democracies and which has been widely absorbed in the democratic Constitutions.

It may be obvious what the major threat is looming with the consolidation of such a weakening of the national sovereignty: bringing the decisions of general interest to the natural composition of demand and supply and relying on the capacities of self-regulation of the market attribute the power to define the set of conflicting interests to the international economic community, where—as well know—there is not a stable hierarchy of powers and it totally lacks an institutional organization, but rather it comes to appear the dominant economic forces of large multinational corporations, trade unions and productive organizations, centres of cross power and groups of interest, even transient and temporary.

The market, in its most “wild” and aggressive profile, where the “strong agents” also ruthlessly impose themselves on the “weak agents” favouring the expulsion from the production cycle or otherwise confining them to narrow areas, is the true core of the decisions that are taken in a globalized society. The marginalization of the political power and the downsizing of the national sovereignty behave like the emergence of a class of indefinite and indefinable holders of the new sovereign power (often even causally), which is called upon to make the decisions regarding the allocation of resources and wealth flows.

The danger of the anti-sovereign, therefore, is the abandonment of the idea of the social function in the establishment of a market order which may produce a balance between the different interests of the social community, according to a plan of progressive transformation of the society fostered and promoted by the set of values assumed in the constitutional charters; on the contrary, it is determined a structure of economic relations uncontrollably generated by the market forces and related to the ungovernable and casual composition of the interests through the trading transactions, which shows the progressive strengthening of the “strong and rich agents” to the detriment of the “weak and poor agents”. In addition, the democracy of the market that is going to replace in concrete terms the democracy of the Constitutions appears unfair and socially disharmonious, calling to the effective participation in the competitive game—and thus to the allocative decisions—only a few subjects and excluding the majority of associates (considered only as passive consumers).

In this light, the assumption of the “negative” taxation as paradigm of the taxation power stresses the risks of the anti-sovereign: the abandonment of any social connotation about the redistribution of the tax burden, which is considered only as a mere financial instrument for the coverage of the public debt, steadily promote the primacy of the market compared to any function of the State in order to conform the regulatory and public power; it establishes the axiological interests of the competitiveness compared to the general interests of the social community; it determines the decay of the fabric of the values established by the democratic Constitutions in comparison with the need for the self-adjustment of the economic forces.

The tax interest and the ability to pay, the general needs of the community and the individual liberties, which have traditionally made up the constitutional dialectic of the tax law, lose this role in the EU legal order, assuming the hazy outlines of a distant luminescence, which is basically unable to address the regulatory action.

On the contrary, the principle of non-discrimination—which is the cardinal point of reference of the tax legislation in the European legal system—creates a new framework based on the free competition, which is the natural balance of the market interests, for the choices on the allocative and redistributive structures.

The “negative” taxation provides, therefore, a further impulse to the spontaneous order of the market, to the *cosmos* (in the sense proposed by Von Hayek) of the economic forces, in which the composition of the interests happens according to an a-causal and indeterminate logic, to the detriment of the less protected parties of the social community.

13.3 The Remedies Against the Risks of the Anti-Sovereign

13.3.1 The European Constitution as a (Partial) Antidote to the Anti-Sovereign

A remedy to contain the risks of the anti-sovereign seems to be visible in the promulgation of the (future and hopeful) European constitution, which can be defined as a pattern of the values that serves to trace the path of the EU legislation.

In particular, hopefully the European Constitution could resume in its plot legislation the principles formulated in the constitutional traditions of the Member States.

At first, as part of a general review of the mechanisms of formation of the EU rules about taxation matters, it should be accepted and formalised the principle of “the consent to the imposition” which implies the popular representativeness as a source of legitimation of the taxation power. This would obviously reassemble the split between the exercise of the power of taxation and the lack of democratic legitimacy that seems to be one of the main critical factors in the process of adjusting the fiscal phenomenon at the European level.

In addition, and more importantly, the European Constitution should pick up the fundamental principles of the ability to pay and of the tax interest as unavoidable moments of the dialectic of the constitutional tax law.

On the one hand, it seems so appropriate that in the European Constitution it is formalised the interest of the general community corresponding to all the citizens and residents of the Member States (to be called as a real *European taxation interest*) to the collection of the financial resources necessary for the development and the promotion of the process of social transformation and the removal of the material obstacles to pursue the substantial equality of the consociates.

On the other hand, it should also be highlighted the principle of allocation of tax burdens among the citizens that connects to the principle of equality, always understood in a substantial way, aimed at encouraging the pursuit of a genuine equality of chances of the individuals.

Both principles may be expressed in an explicit form, as in the most recent European constitutions (Italy, Spain, Portugal), or be implicitly inferred through an exegetical interpretation endorsed by the parliamentary work and the reconstruction

of doctrine and jurisprudence. In any case, regardless of the option granted, the presence of these principles into the structure of constitutional values undoubtedly gives an innovated axiological impetus to the normative regulation of the phenomenon of taxation, taking it away from the exclusive conditioning pulse of the market and bringing it to a controlled environment, governed by the political class in adherence to a system of values which is socially shared.

Certainly, the highlighting of the constitutional principles that innervate the tax laws is not enough to exclude definitively the permanent role of the anti-sovereign: the tax regulations of the Treaty and the maintenance of the regulations of the derivate tax law always remain oriented in the direction of the “negative” taxation and therefore would leave unchanged the normative assumption for the attribution of the allocative decisions to the market, resulting in a relevant limit to the national sovereignty without actually replacing it with a European sovereignty.

In any case, the claim in the European Constitution of the basic values of the fiscal dialectic introduces a fundamental element of impulse in order to initiate a regulatory process in a counter-direction compared to the anti-sovereign, that is suitable to trigger progressively the formation of tax rules with a positive content (and not only with a limited and negative function), orienting the tax function towards a social and redistributive task that fits with the modern concept of sovereignty.

In this context, the approval of the European Constitution, without representing a *panacea* that removes any risk of the assumption of the market as a paradigm of the power of taxation, may undoubtedly be considered as a fundamental step forward in the construction of a European sovereignty and, in the meanwhile, in the substantial regulation of the phenomenon of taxation according to the logic of a federal State which is worth to partially and progressively overcome the anti-sovereign.

13.3.2 The Formation of a European Financial Administration

Alongside the development of the European Constitution a second element seems to provide a significant boost to overcome the logic of the anti-sovereign, namely the formation of a real European financial administration.

In particular, it consists in initiating a process of setting-up a force of control which is relevant for tax purposes within the territory of the entire European Union, with the means and powers typically granted to the tax authorities, but that is dropped by the national executive and which is placed at the service of the EU institutions (according to a model to some extent prefigured in the *Fiscalis* program). The presence of administrative offices typically dedicated to the achievement of fiscal targets of the European Union, independent from the national forces, is to ensure an instrument capable of actually allowing the concrete implementation of a European tax policy, without having to depend on the degree of adhesion and cooperation of the Member States. Indeed, the establishment of an independent administrative force allows the European Union to act directly for the protection and implementation of the EU regulatory requirements, through a complex of

offices that receive instructions and directives by the EU institutions and answer for their actions only to the same institutions.

Following the general guidelines presented by relevant doctrine on the interesting hypothesis to establish a world tax organization, it can imagine that such a European administrative force entrusted with a wide range of functions and in particular:

- *cognitive functions*, relating to the acquisition of specific information on tax-relevant behaviours of residents in the European Union, including electronic tax declaration (it can even think about the preparation of *tax return* models according to the needs and characteristics defined at EU level that each taxpayer could send annually);
- *control functions*, relating to the monitoring and to the control of the economic agents residing in EU territory, to be achieved through the so-called “knowledge management” (and thus through desk checks, with examination of databases and telematics verification of the facts), and, where appropriate, through checks “on the ground”, with access and inspections of the places where economic activities take place;
- *conciliatory functions*, to be achieved through the establishment of offices and conciliation procedures of the tax disputes out of court, both with reference to the possible disputes between States and the European Union, and (in further perspective) with regard to the claims of individuals residing in the EU territory with respect to the rules of EU origin;
- *functions of study*, such as the analysis of the trends of national tax systems and the problems of international taxation (and particularly of harmful tax competition) with the main task of compiling statistics and details of general economic and fiscal policy, which should become the common reference point for the legislative activity in the field of taxation (in that respect it can think about the preparation of an annual tax report of the EU);
- *advisory functions*, consisting of the technical assistance to the legislative and parliamentary institutions and to the national tax administrations, in order to facilitate the coordination and harmonization of regulations and procedures with respect to the models highlighted in the EU legal order.

In essence, these functions are recognized, almost everywhere, to the national tax authorities and are a necessary counterpart of the fiscal sovereignty as they allow to concretely implement the rules developed in the abstract into legislation.

On the other hand, it can be considered as acquired into the democratic constitutional system the recognition of the public function of the administrative apparatus, as an essential tool for the achievement of the general purposes of the social community through procedural modules which allow to compose the inevitable tensions between the individual freedoms and the administrative efficiency. In particular, in the dialectic between the interests and values involved in the tax matters, the administrative operation is teleologically coordinated with the balance achieved by the taxation legal system in order to facilitate the solution of weighting

of individual rights with the taxation interest. The organizational dimension, and especially the regulation of the financial administration, thus assumes a clear instrumental connotation to the definition of the tax laws.

In this perspective, it should be evident that the formation of a European administration constitutes an essential moment in the process of establishing a EU taxation sovereignty, as an essential step to make concrete and operational the regulatory provisions enacted into the EU law.

This should facilitate the effective dissemination and stabilization of normative values developed at the EU level, in line with the principles accepted in the European Constitution, thus helping to overcome the phase of the “negative taxation” and, however, accentuating the sensitivity of the EU institutions to consider the power of taxation not as a mere tool of the market liberalization, but also as an effective means to implement directly the social and redistributive policies that represent assets of an irrevocable and pluralist democratic Constitution of our time.

13.3.3 The EU Taxation Law in the Transition Phase

At the current stage the EU institutions show to be taking a typically transient historic step, going to overcome the initial design of a confederation of States devoted to satisfy only the purpose of an economic cooperation and moving in the direction of an institutional organization with the consistency of a federation which has an effective and overt power of sovereignty.

Even the legal system suffers from this stage presenting as a transitional law, which characterizes the legal categories of flowing and mutable meanings.

Therefore, the “negative” taxation, despite having been the original paradigm of the power of taxation, currently assumes the character of a transitory discipline, which is destined to be overcome by the progressive changes resulting from the European constitution and from the still incipient “federalization” of the European Union.

At least, at this stage, the defensiveness of the fiscal sovereignty constantly sought by the individual Member States can be covered under a different point of view: it does not seem to indicate the entrenchment of the States on selfish positions, aimed at combating the centripetal logic of the European aggregation; indeed, this would conflict not only with the popular European motion which has continually been raised in the policy statements of several governments, but it also appears purposively unjustified considering that none of the major Western countries intend to carry out international tax competition to the detriment of other countries.

Rather, it is to be assumed that the defence of the fiscal sovereignty on significant portions of the national taxation is due to an axiological choice: through the proper taxation, the States choose to preserve the constellation of values consecrated in the constitutional Charters by the attacks of the anti-sovereign, thus avoiding to give up in the regulation of the phenomenon of taxation the fundamental values of equality and freedom, protection of the social community and promotion of the civil

transformation, fighting back with the strong impetus of the market towards the definition of the values and interests according purely to the expectations and the decisions of the economic forces.

The tightness of the national fiscal sovereignty can thus be understood not as an obstructive or protective attitude of the nation-States, but as the defence of the Constitutions from the attack of the anti-sovereign, waiting for the completion of institutional processes that have as their goal the formation of a federal European State.

In essence, the maintenance of the strong core of the national taxation power is one of the last gasps of the democratic Constitutions, perhaps a bridge for the transition to a new higher constitutional Charter of supranational and European dimension, which is in any case symptom of the vitality of the constitutional values in the democratic society and expression of the ability to resist to the urges coming from the market and its economic forces.