



EDITORIAL

NEITHER REPRESENTATION NOR TAXATION? OR, “EUROPE’S MOMENT” – PART I

The philosophical implication of the abused formula “no taxation without representation”, or, in medieval terms “*nullum scutagium nisi per commune consilium*” can hardly be overshadowed. It underlies a conception of social organisation which departs from the Hobbesian paradigm, based on the unconditioned devolution to an absolute sovereign of all the prerogatives hitherto possessed by self-determined individuals. In contrast to that model, the link between representation and taxation rather suggests the existence of a community endowed with common institutions, possessing prerogatives and powers to be exercised for the common good.

Although historically sprouting as a limit to the unfettered power to levy tax, the relation between taxation and representation appears to be bidirectional. Taxation requires representation, as only the social body and its representatives have the moral authority to impose individual sacrifice for the common good. Conversely, representation also requires taxation; not only for the quite trite consideration that determining the common good without the means to attain it is an empty word. In addition, taxation, though unpleasant as it may be, establishes a link between the input and the output of the political decision, between the expectations created and the results attained. It is, therefore, a necessary ingredient to ensure legitimacy to political power. Taxation and representation are an indissoluble dyad marking the border between democracy and autocracy.

Yet, as well known, in the Union order this dyad is split. From the inception of the process of integration, the Union’s claim to represent the citizenry of Europe was not accompanied by the power to provide for the means to pursue its objectives and values. In spite of the emphatic proclamation of Art. 311, paras 1 and 2, TFEU the relevance of the Union’s own resources in the budget is still quite limited.

The weakness of the Union as a fiscal power is easily explained by the procedure necessary to adopt a Decision on its own resources. Under Art. 311, para. 3, TFEU, this Decision not only requires the unanimity within the Council, after consulting the Parliament, but also the approval by the Member States (MS) in accordance with their respective constitutional requirements. This is a very special procedure, whereby the MS must express their unanimous consent under two different forms: as members of the Council as well as in their capacity as subjects of international law. The rationale for this distinction probably lies in the constitutional implication of the Decision on own resources, which could transform the nature of the Union and make it a self-determined entity, possessing the power to provide by itself the means to pursue its objectives. The control exerted by the MS over this procedure is tantamount as a form of external control over the development of European integration.



This transformation seems to have suddenly materialised between the late spring and the late autumn 2020, when the Commission proposed a package of measures concerning the recovery and the relaunch of the economy of the MS seriously affected by the Covid-19 pandemic, ambitiously labelled *Next Generation EU* (communication COM(2020) 456 final of 27 May 2020 from the Commission, *Europe's moment: Repair and Prepare for the Next Generation*). These measures ought to be funded by Union's own resources which should then be increased in order to allow the Commission to borrow money on a very large scale on the financial markets. The funds raised should be repaid through a corresponding increase of the Union's budget.

This communication closely follows the scheme usually employed by States to finance public expenditures. In the absence of financial resources to fund public policies, States can borrow money on the financial market and repay it with future revenues, mainly taxation. In modern democracies, this process is entirely based on democratic decisions, from assessing the necessity of public expenditure to borrowing money, from employing the money for public need to raising the means for their repayment. If that were the case, one could maintain that the Unions is breaking free from the direction and control of its MS in shaping its policies; that, after the title of the communication of the Commission, "Europe's moment" has finally arrived.

The Commission's proposal contained all the elements of this virtuous process. The Commission determined that "Europe was confronted by a public health challenge that quickly became the most drastic economic crisis in its history"; it went on by pointing out that "[i]t is in our common interest to support the hardest hit, strengthen our single market and invest in our shared European priorities". The communication went further on by determining the dangers ahead, unemployment, poverty and inequalities, and the remedies thereto, namely "massive investment in a sustainable recovery and future", defined as the "common good for our shared future". This is an unequivocal assessment of the existence of public needs requiring a European common effort. On that basis, the Commission proposed to fund the new recovery instrument entirely out of the EU's own resources and, for this purpose, to use its very strong credit rating to borrow a very large amount of money on the financial markets. The details of these projects were spelled out in the proposal for a Regulation of the European Parliament and the Council establishing a recovery and resilience facility (COM(2020) 408 final of 28 May 2020).

In its meeting of 14-21 July 2020, the European Council, while highlighting the exceptionality of the project in light of the extraordinariness of the events, reached a substantial political agreement on the proposals submitted by the Commission. After another tensed meeting of the European Council on 10 December 2020, the Council adopted, on 14 December 2020, a new Decision on the Union's own resources (Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom).

However, in spite of the intense on-going debate between the supporters of a fiscal Europe and the custodians of the budgetary discipline, the very nature and implication of this ambitious project are still nebulous. Is the idea of common debt for common goods really heralding a new phase in the process of integration, featured by massive redistributive policies, or is it rather, and more modestly, an expedient to obtain convenient credits rating, unapproachable for most of the MS, to boost their own economic policies and strategies? In the former case, this new turn could well materialise the ideal inspiration which emerges from some new objectives and values of the Union enshrined in Art. 3 TEU, such as the social market economy, the social progress or the social justice, hitherto mainly considered as mere ideal types, which do not really contribute to determine the normative powers assigned to the Union. In the latter case, this project would further sublimate the prominent role of the MS and their ability to bend the Union constitutional setting for their own purposes.

These two approaches are not only philosophically diverse. They are also politically and normatively antithetic. The magnitude of the financial resources to be raised and the objectives of economic policy to be attained would have pleaded for a common European recovery plan, developed and implemented by the European Institutions or under their close direction and control. This approach would have not been inconsistent with the primary competence in the field of economic policy, conferred to the MS by the founding treaties, in particular by Arts 120 and 121 TFEU. Quite the contrary, Art. 122, para. 1, bestows upon the Union the power to take actions in the field of economic policy, in situations of serious crises symmetrically affecting all the MS. A recovery plan facing the economic and social consequences of the Covid-19 pandemic would have plainly fallen within the scope of this provision.

Presumably because of its intrusiveness in a field jealously guarded by the MS, such an approach was never seriously considered in the long and thorny debate preceding the first proposals of the Commission. The prevailed view regarded the Union's action as limited to provide financial assistance to the national plans of the MS, and to control their consistency with broad European guidelines. Both the SURE Regulation (Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak), the first program related to the consequences of the pandemic, and the proposal for a Regulation establishing a Recovery and Resilience Facility (COM(2020) 408 final, cit.), the beating heart of Next Generation EU, follow this scheme (see Art. 2 of the SURE Regulation and Art. 4 of Proposal for a Regulation COM(2020) 408 final, cit.). The amount of financial assistance is provided by the Commission within national limits set by the European Council.

It is not easy, however, to identify an appropriate legal basis for this scheme.

The SURE Regulation is grounded on two legal bases: Art.122, para. 1, and Art. 122, para. 2, none of them plainly conferring to the Union that power. In *Pringle* (judgment of 27 November 2012, case C-370/12, para. 116), the Court of Justice found that Art. 122, para. 1, TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems. Conversely, Art. 122, para. 2, TFEU allows for measures of financial assistance to individual MS, but only in asymmetrical crises (see European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, recital 4; *Pringle*, cit., paras 65, 118). By no way the cumulation of these two legal bases could have formed the foundation for a third action, namely measures of financial assistance to all the MS in symmetrical crises.

The proposal for a Regulation establishing a Recovery and Resilience Facility is based on Art. 175, para. 3, TFEU, which is part of Title XVIII, whose main objective is to support MS's economic policies and to secure the overall harmonious development of the Union through structural funds. Structural funds, however, are instruments of ordinary intervention, chiefly inappropriate to support projects which, for the magnitude of the objectives pursued and of the means required, should be considered as extraordinary. This consideration may have played a role in the decision to have recourse to Art. 175, para. 3, which confers to the Union a broad power to take specific actions "outside the funds". However, measures which exceed the limits of the structural funds arguably also exceed the entire competence of the Union under Title XVIII, including actions outside the funds. In addition, even assuming that Art. 175, para. 3, confers to the Union a large power to take actions of economic policy in extraordinary situations, in which the social and economic cohesion of the Union is at stake, it would be a logical oddity to act "outside the funds" while using typical means of actions of the funds. In addition, as pointed out by the CJEU, actions outside the fund are, by nature, actions specific to the Union (Court of justice, judgment of 3 September 2009, case C-166/07, *Parliament v. Council*, para. 46).

Even more controversial appears the second part of the game, namely that related to the repayment. Even though the loans are formally own resources for the purposes of Art. 311 TFEU, they are substantially debts which the Union must redeem with cold cash. Thus, their final qualification depends on how they will be repaid. If there is a credible plan of repayment, the European loans can be plausibly be qualified as “genuine” own resources under Art. 310, para. 4; otherwise, the recovery fund will create public debt of the Union: not really a great European moment.

With regard to this issue, everything under heaven is in utter chaos. In the proposal for a Council Decision on the system of own resources of the European Union (COM(2018) 325 final of 2 May 2018), the Commission proposed a basket of new own resources: a reform of the corporate tax base, a contribution from the EU emissions trading system, a plastic packaging waste contribution. In its communication of 27 May 2020, COM(2020) 456, it expressly mentioned a carbon border adjustment mechanism, which has been lingering for years in the debate on own resources. More detailed proposals, inspired by a different philosophy, whereby the repayment should be entirely covered by income “from genuine new own resources” and in a “pre-defined time frame”, were put forward by the European Parliament in its legislative resolution P9_TA(2020)0220 of 16 September 2020 on the draft Council Decision on the system of own resources of the European Union.

What is left of all this in the final Decision on own resources? Recital 7 mentions a national contribution calculated on the basis of non-recycled plastic packaging waste, which “should be introduced”. Recital 8 formulates a request to the Commission to put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy with a view to their introduction “at the latest by 1 January 2023”; it further “takes note” of the European Council’s invitation to put forward a revised proposal on the EU emissions trading system, and reiterates the intention to “work towards” the introduction of other own resources, which may include a financial transaction tax. It is apparent that, apart from national contribution based on non-recycled plastic packaging, uncertainty reigns about the other prospective own resources: their content and revenue, the time of entry into force, the operating mechanism, the natural or legal persons on which they will levy and even their legal nature.

In spite of the magnitude of the financial stakes mobilised by the Union and of the ambitious objective to transform a dramatic event into an opportunity to change Europe and its Union, this “Europe’s moment” appears to be much less momentous than it is claimed to be.

Virtually, all the elements which contribute to the virtuous process underlying the relationship between representation and taxation are lacking. It is not the Union which determines the common goods to be attained. Nor does the Union lay down the modalities and the timing of their attainment. All these elements are determined by individual MS in their national recovery plans, prepared and implemented by national authorities, under a broad control and surveillance of the Commission. Finally, although the Union is the sole debtor vis-à-vis the international investors, it does not possess, at the present time, the means to repay its debt. In other terms, the Union does not dispose of the power to present itself in front of the European citizenry and to impose taxation in return for the common good prospectively to be attained. For the time being, it is virtually acting as a debt agency of its MS.

The constitutional moment whereby *scutagium* and *consilium* represent two distinct but related aspects of the European democratic legitimacy has not arrived yet.