



**Neumark Vindicated**  
*The Europeanisation of National Tax Systems  
and the Future of the Social and Democratic Rechtsstaat*

*Agustín José Menéndez*



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## **Abstract**

The power to tax is usually regarded as one of the last competences exclusively in the hands of the Member States of the European Union. As shown in this paper, this is a wrong assumption that results from a double optical illusion: the illusion that the power to tax equals the power to *collect* taxes – when the power to shape taxes through constitutional and statutory norms is also of great importance; and the illusion that with the abandonment of plans to harmonise national tax systems and create taxes that were genuinely European in the 1980s, the power to tax has remained firmly in the hands of Member States.

To fully appreciate the extent to which national tax systems have been Europeanised, the author distinguishes three distinct patterns of Europeanisation: Integration through tax harmonisation (prevalent up to the late 1970s); integration through the removal of tax obstacles (dominant from the 1980s to the explosion of the present European crises); and integration through fiscal consolidation (which is the growingly dominant pattern of transformation of national tax systems). This paper considers the causal role played by integration through tax harmonisation in the present European crises and explores the consistency of the emerging paradigm of integration through fiscal consolidation. The author concludes that what is needed is not to grant taxing powers to the EU, but to make use of European law to recreate the Member States' capacity to tax effectively and fairly.

## **Keywords**

Constitutional Norms – Europeanisation – European crises – European Union – Fiscal Consolidation – National Tax Systems – Power to Tax – Tax Harmonization

*To Juanma Barquero: Thou shouldst be living at this hour*

Conversely, however, the cause of European integration would be retarded if monetary integration were to be pursued but the attempt were to fail. The potential dangers of monetary integration stem from the loss of power of altering the national exchange rate; such a loss could threaten the more stable countries with excessive inflation and/or the more inflationary countries with a loss of prosperity that would be the more intractable because it would be manifest as a regional problem rather than a balance of payments problem. This danger is particularly acute in the European context because different national traditions and institutions could give rise to inconsistent trends in unit costs in different national "regions". This development would be so disastrous, if released, that it would inevitably lead to the destruction of monetary union.

Altiero Spinelli, *The European Adventure*, 1973, 80

The whole legal establishment of the office of the judge advocate was magnificent. Every state on the brink of total, political, economic and moral collapse has an establishment like this.

Jaroslav Hašek, *The Good Soldier Švejk*

## Introduction

This paper<sup>1</sup> aims at tackling two closely related questions:

- What role did the set of European norms governing national tax laws play in the gathering of the European crises?
- What changes should be made into the European framework of taxation to overcome the crises?

The first question tends not to be posed because taxation is regularly depicted as one of the last trenches behind which national sovereigns resist the incoming European tide (but see Genschel and Jachtenfuchs, 2010; Menéndez, 2005; a comparative perspective on transformation of tax systems in Steinmo, 1993). This assumption is simply wrong. National tax systems have in fact been deeply and thoroughly Europeanised since the very moment the European Communities were established (Section I). The persistent myth of the untrammelled national sovereign is largely the result of an optical illusion. Resulting from the (wrong) reduction of the power to tax to the power to collect taxes (when the power of shaping these taxes at the constitutional and legislative levels is also a key part of that power) and from the belief that the abandonment of the original pattern of Europeanisation of national tax systems in the early 1980s. Actually, as I show in Section II, the end of harmoni-

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<sup>1</sup> This is a longer version of a chapter to be published in *The End of the Eurocrats Dream*, edited by Damian Chalmers, Mark Jachtenfuchs and Christian Joerges forthcoming with Cambridge University Press. Many thanks to them for giving me the opportunity of being part of a scholarly team which united so as to be able to diverge. I would also like to thank profs. Tuori and Losada (both at Helsinki University) and prof. Rasmussen (at Copenhagen University) for being so kind as to arrange the seminars in which previous drafts of this paper were discussed. Special thanks to Andrés Boix, Jeremy Leaman, Francisco Rubio Llorente, Sergio Ramírez, Pedro Teixeira and Klaus Tuori.

sation was not the end of the Europeanisation of national tax systems; on the contrary, Europeanisation became deeper and faster, only it proceeded *by very different means*. National taxes were homogenised by the pressure exerted by economic actors making use of their revamped economic freedoms to challenge, one after the other, national tax laws that were said to create obstacles to the exercise of economic freedoms. This shift fostered the financial, fiscal and macroeconomic weaknesses that became open crises in 2007.

The present European crises and the way in which they have been governed have resulted in the radicalization of the pattern of Europeanisation of national tax laws. The absorption by exchequers of massive amounts of financial risks (a good deal of which were the direct result of asymmetric monetary union) has made many Member States of the Eurozone *indebted states*. These states have been required by European Union law to place their tax systems at the service of repaying principal and interests of massive piles of debts, so as to protect the interests of creditors, even if at the cost of abandoning the constitutional commitments of the *Social and Democratic Rechtsstaat*.

In Sections III and IV I argue that if integration through fiscal consolidation gets entrenched, Europeans will be forced to choose between *this form of* European integration and the Social and Democratic Rechtsstaat. This is why we need a very different Europe, and indeed a very different tax Europe. In particular, we do not need *more Europe*, i.e. the of transferring of tax collecting powers to the European Union, but a radically different Europe, i.e. a Europe that becomes (again) the servant of the Social and Democratic Rechtsstaat by means of rescuing the capacity of Member States to make autonomous and democratic use of their tax powers.

## **I. The original tax paradigm of European integration: Integration through tax harmonisation**

Establishing “an internal market in the form of a common market” (Art. 2 TEC) implied redrawing and redefining economic borders. Taxes were (and remain) a fundamental instrument in the creation of economic borders. Consequently, European integration could not but entail the transformation of national tax systems. The national constitutions which authorized and mandated European integration as well as the founding Treaties of the European Communities (which should be interpreted in the light of the former, Fossum and Menéndez 2011) required tax integration aimed at the simultaneous realisation of three goals: Firstly, national tax systems had to be rendered integration friendly. Economic borders had to be made porous to the goods and economic actors from all Member States. This involved four main things:

- Substituting national by European customs duties, or what is the same, removing customs duties inside the Communities, enacting a European customs code, and transferring the power to collect duties at the external borders of the Communities to the supranational level (Art. 3(a) and 3(9) TEC).
- Redesigning national consumption taxes – including turnover taxes and excise duties (Art. 99 TEC in light of Art. 95 TEC) so that they would not become customs duties by other means; this required assigning the power of legislative design of consumption taxes to the Communities (Art. 99 TEC).
- Harmonising other tax figures when that would be required in view of the stage of economic integration reached (Art. 100 TEC)
- Coordination of the use of taxes as macroeconomic levers (Art. 103 and 105 TEC)

Secondly, the Europeanisation of national tax systems should shelter, not undermine, the Social and Democratic Tax State. If post-war constitutions mandated integration, this was not for the sake of integration itself, but as a means to realise the normative ideals of the Social and Democratic Rechtsstaat. The tax system was expected to discharge three functions, closely related to each of the pillars of the Social and Democratic Rechtsstaat (Musgrave, 1945; Musgrave, 1959; Neumark, 1970; Barquero Estevan, 2002). The Rechtsstaat ideal required the provision of revenue with which to pay for public goods and services. A key operationalization of the Democratic State was the use of taxes as macroeconomic pulls and levers with which to steer the economy, so as to ensure that the democratically forged will was effectively implemented and not hampered by the structural power of market actors.<sup>2</sup> Finally, the Social State required that the kind of taxes to be collected and the pattern of distribution of the tax burden not only generated revenue with which to fund public goods and services (aimed at ensuring material, and not only formal, equality) but at the same time taxes contributed to the redistribution of income, so as to keep inequality in check.

This required in particular that:

- The harmonisation of national taxes (and even more so the assignment of tax collecting powers to the European Communities) had to be the result of political decisions with strong democratic legitimacy. Thus the requirement of unanimous agreement within the Council (Art. 100 TEC) and of a quasi-constitutional decision to assign tax collecting powers to the Communities (Art. 201 TEC *in finem*).

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<sup>2</sup> But it should be kept in mind that ordoliberalism, German and not German, contested the wisdom of any form of active interventionism and limited steering to “stabilisation” (Röpke, 1963: chapter VIII).

- The autonomy of national tax legislators should be preserved (von der Groeben 1968). The design of the tax system, the tax mix (the different taxes to be collected), the design of each tax, the objectives to be realized through each tax were questions that had to be tackled in a highly contextual fashion. The socio-economic and political context, but also the history and culture of each country had a role to play (European Commission 1962: 98,100). This was clearly established in 1953 when the High Authority affirmed that restitution of turnover taxes at the border did not constitute price discrimination (European Commission 1953: 109), but actually was necessary to ensure that Member States remained capable of determining the level of turnover taxation to be applied in their territory (Haas 1958: 60ff; Regul 1966: 88-97). The reconciliation of integration and national tax autonomy was also reflected in the understanding of free movement of goods and the other economic freedoms as operationalisations of the right to non-discrimination on the basis of nationality. The goal of creating a common market did not by itself predetermine the substantive content of national regulations, very especially those aimed at realizing socio-economic goals, but only that the nationals and goods from other Member States would be treated as nationals were treated.
- The use of national taxes as macroeconomic levers should be coordinated; indeed, the further integration proceeded, the stronger was the case for coordination, as the effects of national steering policies would like be felt in the common market as a whole, not only within single states.

Thirdly, an autonomous supranational power to tax should be developed. In the short and mid runs, the Communities needed a minimum set of tax collecting powers to fund the running costs of the Communities (Art. 172 TECSC and Art. 201 TEC). In the mid and long runs, the size of the supranational tax collecting powers had to be proportional to the policies and tasks of the Communities (Art. 201 TEC, analogically). Explicit mention was made to financial assistance to Member States experiencing a balance of payments crisis (Art. 108.2 TEC).

The constitutional philosophy of *integration through tax harmonisation* was perhaps most clearly articulated in the Neumark Report of 1962. The report was penned by leading public finance experts, both European and non-European (for a collection of related papers, see Shoup 1967). Its chairman Fritz Neumark cut a remarkable figure. He was born and educated in the turbulent interwar Germany. He was then forced into exile in Turkey from 1933 to 1952, to return then to Germany and become the *doyen* of German and indeed European public finance (Fuentes Quintana 1974). Extremely well read in the (then leading) US public finance literature, deeply knowledgeable about the post-war transformation of European national tax systems, active participant in the recasting of the tax system of Turkey (Andic and Andic 1981;



Andic and Reisman 2007), Neumark exerted a decisive influence in the Committee, and contributed to the normative articulation of the implications of the Social and Democratic Tax State for European integration (compare European Commission 1962 with European Commission 1967).

Significant pieces of harmonizing legislation were passed in the first two decades of the common market. A common customs code was in force by 1 July 1968.<sup>3</sup> The key principles of a common system of turnover taxation, in particular of Value Added Taxation (VAT) were agreed upon in 1967<sup>4</sup> (as we will see in Section II.1, the VAT tax base will be further harmonized in 1977). The Directive concerning indirect taxes on the raising of capital was approved in 1969.<sup>5</sup> Despite the spectacular clash in 1965 between the Commission and the French Republic over the assignment of tax collecting powers to the Communities to fund the common agricultural policy (European Commission 1965), a modest set of tax collecting powers were transferred to the Communities in 1970,<sup>6</sup> in the expectation that they will render the EU financially autonomous.

At the same time, the European Court of Justice played a relevant but thoroughly supporting role. The Court acted as enforcer of the Treaty provisions that established the concrete tax steps to be taken to create the common market, including standstill clauses on customs duties<sup>7</sup> and crucially the provision prohibiting the introduction of measures equivalent to quantitative restrictions.<sup>8</sup> From 1968, the Court started to review the validity of national tax norms by reference to the now directly effective right to free

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<sup>3</sup> 'Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the common customs tariff', OJ L 172, of 22.07.1968, pp. 1-402. The original Treaty established a complex division of labour between intergovernmental and Community decisions on the matter. Tariffs were harmonized in 1968, but customs law as such was only harmonized much later, through the 1992 Customs Code.

<sup>4</sup> 'First Council Directive 67/227/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes', OJ 71, of 14.04.1967, pp. 1401-1403. 'Second Council Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes, structure and procedures for application of the common system of value added tax', OJ L 71, of 14.4.1967, pp. 1303-67

<sup>5</sup> 'Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital', OJ L 249, of 03.10.1969, pp. 25-29.

<sup>6</sup> 'Treaty amending certain Budgetary provisions of the Treaties establishing the European Communities and of the Treaty Establishing a single Council and a single Commission of the European Communities, signed at Luxembourg on the 22nd day of April, 1970, 1971 O.J. (L 2) 1; Regulation No. 2/71 of the Council of 2 January 1971 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, 1971 O.J. (L 3) 1.

<sup>7</sup> Cf. Case 26/62, *Van Gend en Loos*, [1964] ECR 347.

<sup>8</sup> Cf. Case 27/67, *Fink Frucht*, [1968] ECR 223.

movement of goods.<sup>9</sup> The Court was keen to go beyond a formal analysis of the way in which national legislators taxed goods, and engage into an analysis of whether formal equality cloaked discrimination in material, economic terms.<sup>10</sup> However, the Luxembourg judges restrained themselves from both reviewing the validity of tax norms that had not been yet harmonized (thus staying clear of all personal taxes) and from quashing national tax norms that affected the exercise of economic freedoms but did not discriminate against economic actors or goods from other Member States.

This slow and politically mediated process of harmonisation of taxes was clearly compatible with the consolidation of the Social and Democratic Rechtsstaat, and in particular, of the welfare state. While both public spending and taxation were largely stable in relative terms (the latter despite the programmed decline of customs duties, eliminated for intra-EC trade, and lowered for international trade, see Table 1), sustained and high economic growth meant a steady increase in actual resources. And indeed the weight of social expenditure over total public expenditure tended to grow in a context of very low unemployment (see Table 2).

Table 1: Tax revenue European Communities 1965–1971

	1965	1968	1971
GERMANY	31.6	32.2	32
FRANCE	33.6	33-8	33.1
BELGIUM	30.6	34.2	34.4
NETHERLANDS	30.9	33.8	34.9
ITALY	24.7	26.1	25.5
LUXEMBOURG	26.4	25.9	24.4

Source: OECD

Table 2: Social spending (selected European countries)

	1950	1954	1958	1962	1966	1970	1974	1978
GERMANY	16.63	17.18	20.51	20.70	22.49	23.55	28.67	30.89
BELGIUM	12.57	13.55	15.90	19.27	22.55	25.10	28.70	37.27
ITALY	9.39	12.23	15.25	17.36	20.17	21-11	23.53	26.54
SPAIN	4.07	3.18	3.90	3.98	5.06	9.98	12.05	16.68
PORTUGAL	3.21	3.78	4.33	4.67	4.79	6.08	8.60	11.90

Source: Espuelas 2012.

<sup>9</sup> Case 45/75, *Rewe*, 1976 [ECR] 181.

<sup>10</sup> See for example Case 168/78, *Commission v. France*, [1980] ECR 347.

Parallel to supranational harmonisation (as was the case with consumption taxes), there were signs of a process of slow convergence of national tax systems (through what now may be fashionable to refer as a process of mutual learning). The key four (personal income tax, corporate income tax, social security contributions, general consumption taxes) became even more so the pillars of national tax systems. Still, there remained major differences, as the different weight of the personal income tax in tax revenue illustrates (a range of variation that would be drastically increased in 1973, when Denmark and Great Britain, where the personal income tax played a fundamental role in the tax system, see Table 3). Idiosyncratic tax formulae (as the Belgian personal tax applied to both corporations and physical persons) tended to be repealed. And by the late sixties, a new German government was experimenting with a modest set of tax measures to steer the economy (Leaman 1998). All this goes some way to account for the fact that when the newly democratized Greece, Spain and Portugal had to think about what shape to give to their tax systems, the template to be found in the Neumark report was the obvious one to consider.<sup>11</sup>

## **II. From integration through tax harmonisation to integration through the removal of tax obstacles**

The monetary and economic crises that hit Europe in the early 1970s pushed the process of European integration off balance. Economic integration had proceeded quite a long way, but national socio-economic structures were still rather different. Consequently, the crises had different impacts in different Member States. Moreover, the Communities lacked sufficient institutional, structural and financial means with which to give a coordinated response to the crises. So the very different impact of the crises was further compounded by the uncoordinated national policies applied to contain and overcome them (Scharpf 1991). Under such conditions, it was a matter of time that the background conditions that had rendered possible to reconcile integration with the consolidation of the Social and Democratic Rechtsstaat would start to deteriorate. By the end of the 1970s, it would be the very socio-economic consensus around the Social and Democratic Rechtsstaat that will be seriously challenged. Ordoliberal ideas were ascendant in Germany, and the apparent success of the Bundesbank in the fight against inflation was seen as many as turning the German socio-economic constitution (as understood by ordoliberals) into a model (Leaman 2000). Even more clearly, the British socio-economic constitution underwent a radical mutation after the electoral victory of Thatcher in 1979 (Gamble 1988; Fry 2008; but see Rogers 2013). Neoliberalism had come to stay.

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<sup>11</sup> This was outstandingly clear in the Spanish case. See Comín 2007.

It was against this background that a fundamental shift in the means and goals of integration came to happen. The very fact that integration was politically mediated (and decisions subject consequently to unanimous consent within the Council of Ministers and the European Council) came to be seen as a key part of the problem. This created the conditions under which the DG Common Market persuaded the European Court of Justice that it was time a new understanding of free movement of goods was endorsed. In *Cassis de Dijon* the ECJ widened quite drastically the bite of free movement of goods by establishing that it will be ready to quash national laws that placed obstacles to the exercise of that freedom, even if those obstacles were *not* discriminatory.<sup>12</sup> This was interpreted by the Commission as opening up for a new *path* of integration alternative to that mediated by politics, i.e. integration through the mutual recognition as equally valid of all national legal standards.<sup>13</sup> On the face of it, this seemed a radically pluralistic option. As a matter of fact, mutual recognition implied empowering economic actors to foster the homogenisation of national laws by means of challenging their validity on the basis of their economic freedoms. This new approach, with its sharpest corners somehow cut, underpinned the policy program of the European Commission from the mid-1980s (European Commission 1985). The goal of establishing an internal market was no longer defined by reference to the regulatory ideal of the common market, but by reference to that of the single market. And still, *l'Europe par le marché* was conceived as a “neutral” goal which could be appealing to otherwise increasingly antagonistic socio-economic visions (Jabko 2009; van Apeldoorn 2002). This paradigmatic shift in the goals and vision of European integration led to a transformation of the European framework governing national tax laws.

## 1. No more tax harmonisation

### A) 1970s: Tax harmonisation stalls

During the seventies, the élan of integration through tax harmonisation was still strong enough so as to lead to the approbation of some important pieces of legislation. Firstly, a much tighter common definition of the tax base of VAT was introduced in 1977, rendering possible to make a fraction of VAT a European tax from 1979.<sup>14</sup> Secondly, the institutional and economic means to provide financial assistance to countries experiencing balance of payments problems were created.<sup>15</sup> Italy (in 1974) and Italy and Ireland (in 1976) were

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<sup>12</sup> Case 120/78 [1979] ECR 649.

<sup>13</sup> ‘Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 (“Cassis de Dijon”), OJ C 256, of 03.10.1980, pp. 2-3.

<sup>14</sup> Sixth VAT Directive (Directive 77/388/EEC) of 17 May 1977, OJ L 145, of 13.6.1977, pp. 1-40.

<sup>15</sup> See ‘Decision of the Council 143/71, of March 22nd, 1971, setting up the machinery for medium-term financial assistance’, OJ L 73, of 27 March 1971, pp. 13-15 and ‘Regulation

recipients of that assistance.<sup>16</sup> Thirdly, Member States agreed to introduce changes in their national tax legislation so as to render technically possible to coordinate tax increases or decreases as a means of coordinated macroeconomic steering.<sup>17</sup> Fourthly, arrangements to exchange data between national tax administrations were put in place in 1977, as a means of counteracting the growing extent to which the most mobile forms of capital income and wealth were disappearing from the radar of national tax authorities.<sup>18</sup> Fifthly, mechanisms of assistance in the cross-border collection of taxes were created.<sup>19</sup>

Still, with the single exception of the VAT directive, these decisions either did not have a lasting impact or remained simply without any real effect. Moreover, many other tax proposals gathered dust. Including, in particular, Commission proposals concerning the harmonisation of corporate income taxation failed to be seriously considered by the Council of Ministers.<sup>20</sup>

## B) 1980s: Tax harmonisation is abandoned for good

The systematic failure to broker the required unanimous agreement in the Council, coupled with growing divergence of views about the point of European tax norms, led to the Commission renouncing the ambition of

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397/75 of the Council, of 17 February 1975, concerning Community loans', OJ L 46, of 20 February 1975, pp. 1-2.

<sup>16</sup> 'Directive du Conseil accordant un concours financier à moyen terme à la République italienne', JO L 341, 20 December 1974, pp. 51-5; Décision du Conseil 322/76, du 15 mars 1976, relative à un emprunt communautaire en faveur de la République italienne et de l'Irlande', JO L 77, 24 March de 1976, pp. 2-14. The terms of the loans can be found in 'Décision du Conseil 323/76, du 15 mars 1976, fixant les conditions de politique économique à observer par l'Irlande', JO L 77, 24 March 1976, p. 15 and 'Décision du Conseil 324/76, du 15 mars 1976, fixant les conditions de politique économique à observer par la République italienne', JO L 77, 24 March 1976, p. 16.

<sup>17</sup> 'Council Directive of 18 February 1974 on stability, growth and full employment in the Community', OJ L 63 of 5 March 1974, pp. 19-20, see especially articles 5 and 8.

<sup>18</sup> Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ L 336, of 27.12.1977, pp. 15-20. Article 3 open up to automatic exchange of information, but Article 8.1 excluded any obligation when a Member State was "prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes".

<sup>19</sup> Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, OJ 73, of 19.3.1976, pp. 18-23.

<sup>20</sup> Proposal for a Directive of the Council concerning the harmonisation of system of company taxation and of withholding taxes on dividends, COM (75) 392, OJ C 253, of 05.11.1975, pp. 2-8.

enacting a comprehensive set of European laws ensuring the harmonious interaction of national tax laws.<sup>21</sup>

Indeed, the choice for the single market led to a radical new understanding of the relationship between integration and the power to tax. The Commission came to expect that the convergence of national tax systems would not be the result of political agreements, but of the unilateral adaptation of national laws to the dynamics of market integration. This new approach would come to be labelled in the mid 1980s “tax coordination” or “tax cooperation” (European Commission 1997a).

Although regulations and directives were still needed, the Commission will now put forward minimalistic proposals, tackling rather narrowly the tax distortions unlikely to be wiped out by “market-led” integration. This was the spirit in which the Parent Subsidiary Directive<sup>22</sup> and the Merger Directive<sup>23</sup> proposals (finally approved in 1990) were drafted. And this was the vision underlying the Ruding report on corporate income taxation (European Commission 1990). Moreover, when possible, mechanisms of social integration other than law were to be preferred to coordinate tax systems. Instead of a directive on transfer pricing, the Commission ended up proposing an arbitration convention.<sup>24</sup> And instead of a directive on corporate income taxation, a “code of conduct” and a rather informal procedure (the first instance of what later came to be known as the open method of coordination) were tried.<sup>25</sup> Tax cooperation was expected to result in leaner and narrower secondary norms. It was hoped the minimalistic character of these regulations and directives would render easier to approve them. This was not the case. Few and far between tax proposals ended up in the Official Journal.

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<sup>21</sup> The abandonment of tax harmonisation was already in the making by 1980. See European Commission (1980). The conclusions (page 64ff) are telling. The Commission highlights the difficulties and renounces to fix a schedule.

<sup>22</sup> Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 225, 20. 8.1990, p. 6-9.

<sup>23</sup> Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, OJ L 225, 20. 8.1990, pp. 1-5

<sup>24</sup> Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L 225, of 20 August 1990, pp. 10-24.

<sup>25</sup> See European Commission (1997a). The Conclusions of the ECOFIN Council of 1 December 1997 concerning tax policy contain a code of conduct identifying harmful tax practices. See OJ C 2, of 6 January 1998, pp. 1-6. The Code of Conduct was fleshed out by the so-called Primarolo Group. See ‘Code of Conduct Group (Business Taxation), SN 4901/99, of 23 November 1999. On this as a precedent for the open method of coordination, see Radaelli 2003.

## 2. Turning private actors (largely multinationals) into enforcers of integration through the removal of tax obstacles

A) The 80s and early 90s: Widening the set of national tax laws the validity of which was reviewed by the ECJ

The new understanding of economic freedoms as operationalisations of a substantive conception of private property and freedom of enterprise, first fleshed out in *Cassis de Dijon*, had a double impact on the review of the European constitutionality of national tax laws: Firstly the ECJ became willing to review the validity of *all national tax laws* and not only the national laws concerning taxes that had been previously harmonized. The leading cases were *Avoir Fiscal*<sup>26</sup> and *Schumacker*.<sup>27</sup> They entailed a massive increase in the breadth and depth of the Europeanisation of national tax systems because Europeanisation became *fully autonomous* from political decision-making. Whether the relevant tax had been harmonized or not, the European validity of national tax laws could now be reviewed.

Secondly, and simultaneously, the ECJ was careful to calibrate the impact that the vast expansion of tax laws susceptible of being challenged on the basis of eventual breaches of economic freedoms had. The ECJ introduced limits to the scope of economic freedoms by acknowledging the extent to which the coherent functioning of the tax system was a fundamental collective interest. In *Daily Mail* the ECJ affirmed that the freedom of establishment did not entail the right to reincorporate in another state to avoid paying the taxes due on capital gains not realized at the time of the transfer.<sup>28</sup> This reflected the premise, made explicit by AG Darmon, that freedom of establishment only extended to activities with a genuine economic link, and not to activities aimed at avoiding the full application of laws.<sup>29</sup> In *Bachmann*<sup>30</sup> the ECJ showed its readiness to limit the freedom to provide services so as to protect the *coherence* of the Belgian tax system. Even if the ruling left largely unspecified what was exactly meant by *coherence of the tax system*, the decision had the potential of reorienting the case law of the ECJ, and made it more sensitive to the relational and redistributive character of the tax system.<sup>31</sup>

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<sup>26</sup> Case 270/83, *Avoir Fiscal* [1986] ECR 273.

<sup>27</sup> Case C-279/93, *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-225.

<sup>28</sup> Case 81/87, *Daily Mail*, [1988] ECR 5483, see especially pp. 37-38.

<sup>29</sup> [1988] 3 CMLR 713, at p. 717.

<sup>30</sup> Joined Cases C-204/90, *Bachmann*, and C-300/90, *Belgium*, [1992] ECR I-249, especially pp. 27-28 and 35.

<sup>31</sup> On the details of the case, see Menéndez (2009:201ff).

## B) The late 90's and early 2000's: Taxes as obstacles to economic freedoms

The final step in the transformation of the pattern of Europeanisation of national tax systems was triggered by two decisions of constitutional importance: the reconfiguration of free movement of capital as a full-blown economic freedom and the launch of an idiosyncratic and asymmetric economic and monetary union.

- Directive 88/361 liberalized all capital movements, particularly movements of a purely financial nature, unrelated with the exercise of any other economic freedom. In its turn, the Treaty of Maastricht expanded the freedom to movements of capital to and from third countries. The purpose of this massive extension of the breadth of the freedom to move capitals was to maximize the chances that financial markets operated as a disciplining force of national fiscal policies within EMU (Dyson and Featherstone 1999).
- Asymmetric economic and monetary union came hand in hand with not only free movement of capital, but also with rules disciplining fiscal policy, and indirectly, public spending and taxation. The Protocol attached to the Maastricht Treaty on the excessive deficit procedure established ceilings of 3 per cent GDP for the deficit and 60 per cent GDP for public debt.<sup>32</sup> Thresholds that were reiterated and procedurally fleshed out in the Stability and Growth Pact.

It was after these two transformations were in place that the Court of Justice took a further step and started to regard all tax laws, whether or not discriminatory, as potential obstacles to the exercise of economic freedoms. The cases where the ECJ first shifted its approach were *Futura*<sup>33</sup> and *Verkooijen*.<sup>34</sup> This multiplied the possibilities of challenging national laws taxing capital income by means of rearranging all investments and corporate structures as cross-border ones. At the same time, the Court restricted the extent to which the collective interest in the efficiency of the tax system would justify the infringement of an economic freedom. If original *Bachmann* opened the door to understanding cohesion as a property of the tax system as a whole, and thus related to the relational and redistributive character of the tax system, coherence was soon reduced to a property of the relationship between the tax system and each individual taxpayer; what mattered was the coherent treatment of each taxpayer, which left out the relational and redistributive character of the tax system. The leading cases in that regard were *Wielockx*<sup>35</sup> and, perhaps even

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<sup>32</sup> See now Protocol 12 to the consolidated version of the Treaty of European Union, on the excessive deficit procedure.

<sup>33</sup> Case C-250/95, *Futura*, [1997] ECR I-2471.

<sup>34</sup> C-35/98, *Verkooijen*, [2000] ECR I-4071.

<sup>35</sup> Case 80/94, *Wielockx*, [1998] ECR I-2493.



more clearly *Sevnsson and Gustaffson*<sup>36</sup>, with *Verkooijen*<sup>37</sup> closing the argumentative turnaround.

This led to a maximalist interpretation of economic freedoms that the ECJ itself (partially) rectified. This came via a combination of the private law notion of “abuse of rights” (of economic freedoms) and of the affirmation of “tax sovereignty” as an overriding interest that might justify the restriction of economic freedoms, as in *Marks and Spencer*<sup>38</sup> *Cadbury*<sup>39</sup> or *Thin Group Litigation*.<sup>40</sup> Still, the ECJ remained reluctant to overcome its formalistic approach to the tax implications of the “obstacle” conception of economic freedoms. Indeed, the creation and recreation of legal structures for the purpose of not paying taxes would only constitute an “abuse” of economic freedoms under rather exceptional circumstances. It is worth quoting at length from *Cadbury*:

It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of *wholly artificial arrangements* which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory (my italics).<sup>41</sup>

Or, what are the same, partially artificial arrangements did not constitute an abuse of economic rights. The “genuine economic link” required by AG Darmon in *Daily Mail* was no longer required.

### 3. Abandoning plans to transfer taxing powers to the EU

#### A) Diluting the 1970 decision to transfer tax-collecting powers to the EU

The long labours of transferring tax-collecting powers to the European Communities were rather quickly lost.

In 1984 the British “cheque” was agreed, reintroducing the logic of Member States, not individual taxpayers, as the main units of contribution to the

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<sup>36</sup> Case C-484/93, *Sevnsson and Gustaffson*, [1995] ECR I-3955.

<sup>37</sup> Case C-35/98, *Verkooijen*, [2000] ECR I-4073.

<sup>38</sup> C-446/03 *Marks and Spencer*, [2005] I-10837, par. 39 and 49.

<sup>39</sup> Case C-196/04, *Cadbury*, [2006] ECR I-7995, par 55-56.

<sup>40</sup> C-525/04, *Thin Cap Group Litigation*, [2006] ECR I-2107, par. 75.

<sup>41</sup> Case C-196/04, *Cadbury*, par. 55.

European budget.<sup>42</sup> This trend was further confirmed in 1988. In that year the size of the European budget was increased, but at the price of diminishing the relative weight of European taxes a source of revenue. National contributions relative to GNP were to become a key component of the European budget, as they are still now. Finally, in 1993 the European rate of VAT was capped at one penny in the pound (to be further halved in 2000).<sup>43</sup>

## B) Plans to transfer tax-collecting powers to the EU abandoned for good

Blueprints for monetary union and studies on the future shape of European public finances had made invariable reference to monetary union coming hand in hand with a sizeable increase in the tax collecting powers of the European Communities (most clearly, European Commission: 1977).

However, when monetary union was agreed in 1992, no new tax collecting powers were transferred to the European Union. In the run up to monetary union, there was a (formally) temporal increase in the monies spent in structural and cohesion funds, a decision (politically) linked to that of launching monetary union. But that was the only decision that was taken (see Begg 2003 for an argument in favour of regional policies within monetary union, despite the apparent convergence of income levels).

The decision not to grant new taxing powers and new resources to the supranational level was especially surprising given the fact that the degree of economic heterogeneity among the States that finally made up the Eurozone was very considerable. Standard economic knowledge regarding optimal currency areas (Mundell 1961; Kaldor 1978) was left aside. Instead, the implicit assumption was that the *economic and financial dynamics* that monetary integration will unleash, will by themselves ensure that the Eurozone would become an increasingly optimal currency area (Rose 2000; presciently against, Gustavsson 2002).

## 4. Implications

The consolidation of the Europeanisation pattern of integration through the removal of tax obstacles played a very significant role in the transformation of national tax systems. As the opportunities of capital income and wealth to

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<sup>42</sup> Conclusions of the Presidency of the Fointainebleau European Council, 25-26 June 1984, available at: <[http://aei.pitt.edu/1448/1/Fontainebleau\\_june\\_1994.pdf](http://aei.pitt.edu/1448/1/Fontainebleau_june_1994.pdf)>.

<sup>43</sup> See 88/376/EEC, Euratom: Council Decision of 24 June 1988 on the system of the Communities' own resources, 1988 O.J. (L 185) 24-8. The Inter-institutional Agreement of 29 October 1993 on budgetary discipline and improvement of the budgetary procedure, 1993 O.J. (C 331) 1-10, contained the financial perspective from 1993 onwards. This was later formalized as 94/728/EC, Euratom, Council Decision of 31 October 1994 on the system of the European Communities' own resources, 1994 O.J. (L 293) 9-13.

escape the tax net increased, the yielding capacity of tax systems was challenged. If the revenue yielding capacity of the tax system was increased, this was by means of adjusting the tax burden to their ability to evade taxes, not only to their ability to pay (Section A). And still, expenditure grew more rapidly than tax revenue. This forced states to either issue debt to pay for current expenses (resulting in the partial return to the debt state), (Section B) or to rely on the growth of private debt as direct or indirect source of additional tax revenue (Section C). The net result was that the Social and Democratic Tax State mutated into a hybrid form, into a mix of Social and Democratic Tax State and Market Enabling State.

#### A) From taxing according to the ability to pay to taxing according to the ability to evade taxes a capital unleashed entailed the erosion of tax bases and a dynamics of competition between tax systems

The unleashing of capital after the monetary and economic crises of the early 1970s challenged the capacity of states to track capital income and wealth flows (see Table 3, Helleiner 1994). This created not only new structural opportunities to evade taxes, but also many novel opportunities to play out one tax system against the other, triggering dynamics of tax competition (Avi Yonah 2000).

When in 1979 the United Kingdom liberalized capital movements, the other Member States of the Communities came under an enormous pressure to follow suit (very especially because they were increasingly reliant on debt to fill the gap between taxation and expenditure, as we will see). Directive 88/361 and the Treaty of Maastricht resulted in the full liberalisation of capital movements. At that point, states entered into a race to attract capital by means of offering non-residents a zero rate on their returns.<sup>44</sup> In the absence of proper tax cooperation among European states, non-residents could reap a zero-tax at destination, and avoid reporting the capital income at the state of their residence (Lodin 2000). Unsurprisingly, it became part of the financial game that British banks advertised in German newspapers, and German banks advertised in British newspapers offering attractive investment opportunities with an “advantageous” tax treatment (Mohamed 2000: 132, fn 57). Similarly, the combined effect of the radical interpretation of freedom of establishment and free movement of capital was to reorganize multinational corporate structures so as to maximise the chances of reducing tax liabilities (Bartelsman and Beestma 2000; Murphy 2012).

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<sup>44</sup> It is very instructive to notice that the 10% withholding tax on savings in Germany after Directive 88/361 was passed was quashed by the German Constitutional Court on the basis that compliance was bound to be extremely asymmetrical. The tax was repealed, and a new one at 30% was introduced, only this time non-residents were explicitly exempted from the tax. Cf. 2 BvR 1493/89 BStB1 II 1991 at 654.

Table 3: Size of shadow economies, selected countries

Country	Currency Demand (% official GNP)					Model Approach (% official GNP)	
	1960	1970	1980	1990	1994	1960	1978
Austria	0.4	3.9	5.0	7.2	8.32 <sup>1</sup>	4.6	8.9
Belgium	7.8 <sup>4</sup>	10.4	16.4	19.6	21.4	4.7	12.1
Canada	n.a.	5.8/7.2 <sup>2</sup>	10.1/11.2	n.a.	14.6	5.1	8.7
Denmark	3.8/4.8	5.3/7.4	6.9/10.2	9.0/13.4	17.6	3.7	11.8
Germany	2.0/2.1	2.7/3.0	10.3/11.2	11.4/13.1	14.5 <sup>1</sup>	3.7	8.6
Finland	n.a.	n.a.	n.a.	n.a.	n.a.	3.1	7.6
France	n.a.	3.9	6.9	9.4	14.3	5.9	9.4
Ireland	n.a.	4.3	8.0	11.7	15.3	1.7	7.2
Italy	8.4 <sup>4</sup>	10.7	16.7	23.4	25.8	4.4	11.4
Japan	n.a.	n.a.	n.a.	n.a.	n.a.	2.0	4.1
Netherlands	n.a.	4.8	9.1	13.9	13.6	5.6	9.6
Norway	1.3/1.7	6.2/6.9	10.2/10.9	14.5/16.0	17.9	4.4	9.2
Spain	n.a.	n.a.	18.0 <sup>3</sup>	21	n.a.	2.6	6.5
Sweden	1.5/1.8	6.8/7.8	11.9/12.4	15.8/16.7	18.3	5.4	13.2
Switzerland	1.2	4.1	6.5	6.9	7.5 <sup>1</sup>	1.1	4.3
UK	n.a.	2.0	8.4	10.2	n.a.	4.6	8.0
USA	2.6/4.1	2.6/4.6	3.9/6.1	5.1/8.6	9.4	4.6	8.3

Source: Schneider 1997, 1996, 1975, 1978, 1965.

The dynamics of tax competition became so evident that the Commission was forced into putting forward proposals to deal with it. Quite interestingly, the result was not a re-evaluation of the new pattern of Europeanisation of national tax systems, but the development of a peculiar distinction between “good” and “bad” tax competition, the latter being relabelled “harmful tax competition” (see European Commission 1997a, 1997b). Paradoxically, the acknowledgment of the effects of unleashing capital over tax systems resulted in the further entrenchment of the assumption that the proper relationship between national tax systems should be one of *competition*.

#### b) How tax revenue could keep on going up despite the erosion of tax bases

Despite the growing opportunities to evade taxes, the revenue collected through taxes did not go down, but kept on growing (even if at rates insufficient to cover expenditure). How could that be (see Table 4 for an overview of total tax revenue in a selection of European countries)?

Table 4: Total tax revenue, selected European countries (1970–1991)

	1970	1973	1976	1979	1982	1985	1988	1991	1970/ 1991
Germany	31.5	35	34.3	36.4	35.5	36.1	36.0	35	+3.5
France	34.1	33.5	36.7	38.1	40.3	41.9	41.2	41.3	+6.8
Italy	24.8	23.1	25.4	25.3	31.9	32.5	34.6	36.8	+8
United Kingdom	35.3	30	33.5	30.7	37.1	35.8	34.8	32.7	-2.6
Netherlands	33.5	37	38.2	40.1	40.2	39.9	42.8	42.4	+8.9
Spain	15.5	17.2	17.9	21.4	23.5	26.8	30.1	31.9	+16.4
Portugal	17.6	16.7	20.5	19.9	23.7	24.1	25.6	27.5	+9.9
Greece	19.1	17.3	20.2	21.2	23.5	24.4	23.5	25	+5.9
Ireland	27.6	27.6	31	27.6	32.6	33.7	35.7	32.4	+4.8

The revenue yielding capacity of the tax system was preserved by means of shifting the criteria of allocation of the tax burden. The tax sacrifice demanded from taxpayers came to be graduated not only by reference to their ability to pay, but also by reference to their capacity to avoid taxes. In practice that meant that the tax burden imposed upon the less mobile tax bases (employed labour both through income tax, social security contributions and fees for the use of public services).<sup>45</sup> At the same time, taxes on more mobile tax bases were reduced. Paradigmatic in that regard was the splitting of the personal income tax base and taxation of capital gains according to a scheduler system (at a lower and flat rate) (Sørensen 1994).<sup>46</sup> Both the marginal rates and the number of brackets of personal income taxes were reduced (with the revenue effect partially compensated by reducing deductions and tax credits, with rather asymmetric distributive effects) (OECD 2006). The revenue yielding capacity of corporate income taxes stagnated or declined, despite the fact that the capital share in national income grew constantly.

Revenue was maximised, but only at the price of compromising the structural coherence of each tax and of national tax systems as a whole (Williams 1997: 10). This dynamics was hard to stop once set in motion, because integration through the removal of tax obstacles resulted in the impotence of both European and national legislators to rebalance tax systems. In most cases, the

<sup>45</sup> By 1996 the Commission claimed that there had been a clear shift in the distribution of the tax burden. Taxes burdening labour had gone up from 34.7% to 40.5%, while taxes on other factors of production had gone down from 44.1 to 35.2% of the total tax yield. See European Commission (1996).

<sup>46</sup> This was justified as a means to render more probable that at least a fraction of the tax was paid. If the rate was low enough as to be lower than the “price” that should be put on the risk of the taxpayer being discovered by the tax authorities, taxpayers will choose to pay *even if they could avoid the tax*.

European legislator could not intervene, either because no unanimity within the Council could be obtained (as was for example the case with the tax treatment of cross border dividends), or because there would not be a unanimous majority in the Council to amend the existing regulation or directive (as was the case with VAT). National legislative interventions ran the high risk of being challenged again before the European Court of Justice.

## B) The (partial) return of the debt state

Tax revenues were maximised, but total tax revenue lagged behind public expenditure. This was already the case in the seventies. However, it did not lead automatically to the growth of public debt. High levels of inflation, plus resort to the monetization of debt by central banks curbed the growth of debt. Inflation reduced the weight of the stock of debt, while central bank intervention kept down the costs of financing deficits.

The tax gap became a real problem once deflationary policies were applied to kill inflation.<sup>47</sup> On the one hand, the growth of the structural levels of unemployment reduced the yield of social security contributions while increasing social expenditure. On the other hand, it was decided that the state should only borrow at “market” conditions. Indeed, the prohibition of the monetizing of debt via the central bank and/or the acquisition of debt by the central bank was understood to be a precondition for joining the immediate precedent of EMU, the Exchange Rate Mechanism (Bagnai 2012) Finally, the end of inflation was also the end of the constant erosion of the stock of public debt (see Table 5 for an overview of EU member state government spending).

Table 5: Total government spending 1970–1999, selected European countries

	1970	1973	1976	1979	1982	1985	1988	1991
Germany	38.5	41.6	48.3	46.5	47.5	45.2	45	46.3
France				44.9	49.9	51.9	50.1	50.7
Italy	32.7	35.1	38.4	40.6	46.7	49.8	50.4	54
United Kingdom	41.7	43.2	48.9	44.8	50.4	48.4	40	42.5
Netherlands	43.2	44.6	50.8	53.7	59.1	57.3	56.4	54.9
Spain	22.5					42.7		
Portugal				30.8	35.7	37.5	36.1	41.3
Greece								
Ireland								

Source: [www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Public-Expenditures.html](http://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Public-Expenditures.html) (Germany, UK, Netherlands), Italia, Ragioneria dello Stato.

<sup>47</sup> Indeed public debt levels started to grow much earlier in Germany, where the autonomous Bundesbank applied anti-inflationary monetary policies since very early on (Streeck 2014).

### C) Private debt as booster of tax revenue

Private debt grew in most European states at unsustainable levels in the 90s and early 2000s. This was hardly an exclusively European development, even less a pattern only registered within the Eurozone. It was in fact a general trend of “Western” economies (Wade 2008).

The growth of private debt was to a rather large extent the flip side of the repression of wages through which inflation was curbed (as reflected in a constantly declining labour income share since the late seventies, European Commission 2007:chapter V, Bagnai 2014: 213ff) and of the very erosion of the capacity of states to tax effectively.

More profits and fewer taxes resulted in more capital in private hands, which in turn had to seek for investment opportunities (Harvey 2014; Bagnai 2014). This fostered three critical developments:

- Firstly, resort to private debt as a means of compensating the loss of available income resulting from the repression of wages and over-taxation. Private individuals started to engage into debt not to pay for long-term investments, but to pay for consumption. At the same time, the growth of private debt counteracted the deflationary effect of wage repression, in fact resulting in a peculiar form of “private” Keynesianism, in a “private” substitute of expansionary fiscal policy (Crouch 2011; Streeck 2014; Bagnai 2014).
- Secondly, unsustainable growth of economic activities which offered high returns in the short run. The paradigmatic example was real estate bubbles, where unsustainable non-financial and financial growth met (Taub 2014).
- Thirdly, the constant exponential growth of financial assets, with a series of financial bubbles facilitated when not triggered by accommodating monetary policy (Coggan 2011; Lapavitsas 2013).

The specific pattern of growth of private debt within the Eurozone was very much shaped by the economic and financial dynamics of asymmetric economic and monetary union. The decision of German governments to aim at a reduction of the unit labour costs through the repression of wage growth far below the growth of productivity aggravated the structural shortcomings of a far from optimal currency area which lacked institutional and financial means to redress imbalances (Bagnai 2012; Flassbeck and Lapavitsas 2015). Germany and the states that followed German wage policy (such as Finland) cumulated growing trade surpluses thanks to low labour unit costs, while other states cumulated deficits. With fixed parities, adjustment via the exchange rate could not happen. The structural consequences of this development were postponed thanks to massive capital flows moving in the opposite direction of trade.

This was reflected in the symmetric current account positions of on the one hand Germany and the Netherlands, and on the other hand Greece, Spain, Ireland and Portugal. In the short run, this resulted in the mirage that asymmetric economic and monetary union could by itself foster convergence and turn the European Union, by the *spontaneous* action of market forces, into an optimal currency area (Rose 2000). Massive capital flows were interpreted as proving that if capital was liberated, it would seek the best investment opportunities, and in the process, level off income and wealth levels within the Eurozone (see Table 6 for an overview of current account deficits). Indeed, the countries at the receiving end of capital flows seemed to be doing better (with Portugal being the odd exception) than those exporting capital (Germany being for a long period being regarded as the *sick man* of Europe, cf. Economist 2004).

Table 6: Current account balances, selected Eurozone countries

	1997	1999	2001	2003	2005	2007	2009	2011	2013
Germany	-0.44	-1.31	-0.01	1.90	5.10	7.40	5.90	6.80	7.50
Netherlands	6.22	3.67	2.45	5.27	7.40	6.70	5.20	9.10	10.40
Austria	-2.42	-1.64	-0.80	1.70	2.20	3.50	2.70	1.60	2.70
Spain	-0.09	-2.85	-3.85	-3.50	-7.40	-10.00	-4.80	-3.70	0.80
Greece	-3.84	-3.41	-6.70	-6.50	-7.60	-14.60	-11.20	-9.90	0.70
Italy	2.72	0.66	-0.06	-0.80	-0.30	-1.30	-1.90	-3.00	1.00
Ireland	2.35	0.28	-0.64	0.00	-3.50	-5.30	-2.30	1.20	6.60
Portugal	-5.78	-8.60	-10.23	-6.40	-10.30	-10.10	-10.90	-7.00	0.50
Eurozone as a whole	n.d	n.d	n.d	0.30	0.10	0.10	-0.10	0.10	2.40

Source: OECD, Eurostat

From a tax perspective, the growth of private debt, and in particular, the specific pattern of growth of private debt within the Eurozone, resulted in the development of various strategies to develop *alternative tax bases* with which to fill the tax gap *without the need of resorting to public debt*.

- Some states fostered the growth of unsustainable economic activities that in the short run seemed to contribute to high growth and to result in massive tax yields. The real estate bubbles in Spain and Ireland are paradigmatic examples in that regard (Cabe 2011; Naredo and Álvarez 2011) In Greece and Portugal the economic and fiscal stimulus resulted from the growth of private consumption.
- In other states, the rapid growth of private debt *in other countries* allowed the constant growth of exports, which yielded taxes through personal and corporate income taxation. By 2010, 50 per cent of German GDP was exported. This reflected changes in the way the chain of production was reorganized (most trade remains in Europe and



elsewhere *intra-firm* trade), but also the extent to which the German economic and tax model became dependent on external demand.<sup>48</sup>

- Finally, some states have facilitated, through a mixture of an odd form of active neglect and active participation, the development of the legal and economic activities which render possible the artificial circulation of money through their financial institutions, or the establishment of “shell” corporate structures within their territory, with the aim of avoiding the payment of taxes (Palan 2002; Shaxson 2011; Brooks 2014). This does not only undermine the tax collecting capacity of other states, but also allows the countries from which the providers of this legal and economic services operate to tap the tax revenue that results from the location in that jurisdiction of highly paid lawyers and economists specializing in “tax management”. The three Benelux countries, Ireland and the United Kingdom have a considerable share of the tax evasion industry.<sup>49</sup> As is well-known, the Lux Leaks investigation has revealed the extent to which the Luxembourgish government participated actively in corporate schemes to avoid taxes.<sup>50</sup> By 2010, the financial and tax evasion industries had substituted the iron industry in its role as driver of the national economy (Shaxson 2011).

## 5. Integration through the removal of tax obstacles and the gathering of the crises

Integration through the removal of tax obstacles played a role in fostering the financial, fiscal and macroeconomic structural weaknesses of the European Union, which will become open crises when the subprime crisis would hit Europe in 2007.

Firstly, integration through the removal of tax obstacles contributed to the growth of the structural gap between the levels of public expenditure and tax revenue. It also created some of the means through which the tax gap could be dissimulated, such as the different strategies to turn the growth of private debt into sources of tax revenue. The obvious problem was that the tax gap was structural, while the dissimulation strategies were not only bound to be

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<sup>48</sup> According to World Bank figures, export of good and services stood for 27.1% of German GDP in 1999, and for 45.6% of its GDP in 2013. Although the relative weight of exports was constant, the key turning point was 2004. In 2003 exports were still at 32.6 GDP; by 2006 they were at 41.2% GDP. It is hard to miss the relation between the Harz reforms and this acceleration of exports. This high level of dependence on the external sector makes the German economy very exposed to the evolution of international trade. In 2009 exports fell by 5.7% GDP, and this accounts for most of the very sharp contraction of GDP in Germany.

<sup>49</sup> For the Netherlands, see van Dijk et al. 2007. See the reports on each of the mentioned EU states in the Financial Secrecy Index compiled by the Tax Justice Network, available at: <http://www.financialsecrecyindex.com/>.

<sup>50</sup> See <http://www.icij.org/project/luxembourg-leaks>.

unsustainable, but came with massive hidden costs to the taxpayer (so more than filling the tax gap, they delayed the moment in which the gap would materialize). As a result, it can be said that integration through the removal of tax obstacles played a very important role in fostering enormous fiscal weaknesses, which would play a major role in the unfolding of the European crises. The rapid deterioration of the fiscal position of countries such as Ireland or Spain was indeed due to the arrears of tax dissimulation strategies becoming suddenly due. By facilitating the growth of finance to get taxes today, states had ensured massive losses for tomorrow (Shaxson and Christensen 2014).

Secondly, integration through the removal of tax obstacles was far from being unrelated to the accumulation of structural financial weaknesses. For one, the unleashing of capital from controls led not only to growth of massive opportunities to evade taxes, but also to the progressive adjustment of the pattern of taxation to the ability to evade of taxpayers. The net result was that the tax system absorbed less of the income accruing to capital owners. And what capital owners saved in taxes further fed the growth of financial assets and the process of financialisation of both economic and social activities. For two, the flip side of the coin was constituted by those taxpayers who saw their tax burden grow to compensate the revenue lost due to the erosion of the capacity to tax mobile capital income and wealth. Because most of these taxpayers were private or public employees, they were affected at the same time by stagnant wages resulting from the structural decline of the wage share since the 1980s. These two trends fostered the growth of private debt, including borrowing to pay taxes. For three, the growing tax gap opened up the way to the financialisation of public finances. The tax gap was only partially filled through the adjustment of the tax system to the ability to evade taxes. A good deal of the gap was filled through public debt first, and through the tax proceedings of economic activities sustained by the growth of public debt later. In both cases the means to render possible state functions came to depend directly or indirectly on financial actors and institutions. As Streeck has highlighted, this had major political implications (Streeck 2014: 79ff). But by itself it further contributed to the growth of financial activities.

Thirdly, integration through the removal of tax obstacles led to rendering tax systems ineffective tools of macroeconomic steering. For one, the less that tax authorities know about income and wealth flows, the more difficult it is to estimate the impact of tax changes, and, consequently the riskier it is to engage into active intervention through tax policy. For two, over taxation of “honest” taxpayers and under taxation of “mobile” taxpayers reduces the margin of manoeuvre for macroeconomic steering. When some taxes are pushed to a level close to those at which they would become simply unbearable for those who pay, and other taxes are kept artificially low to preserve the incentive of

mobile taxpayers to pay them, macro-economic steering through taxes becomes close to impossible. For three, the fiscal rules at the core of the Stability and Growth Pact further dented the possibility of macroeconomic steering through taxes. The original rules of 3 per cent deficit and 60 per cent debt were not only rather arbitrary, but prevented proper steering when that would require breaching fiscal rules, while leaving states full discretion to implement pro-cyclical policies as long as they stayed within the fiscal rules.

## 6. The long-term tax implications of the massive pile of widow risks

The massive current account imbalances to which I have referred in section 4 were the result of the rapid growth of cross-border lending and borrowing. Financial integration was led and propelled by cross-border flows of capital. This was not only well received, but regarded as evidence of the well-functioning of monetary union. However, it is important to keep in mind that no steps were taken to either create coordinated or supranational structures of supervision of cross-border financial activity, or to create mechanisms to either allocate responsibility for the ensuing cross-border financial risks, or to share such risks (Teixeira 2011).<sup>51</sup> In a rather similar way to monetary union proceeding without fiscal union, the integration of financial markets proceeded without banking union.

This had massive tax implications. A community of risks was created by stealth, through the individual decisions of private financial institutions. But not community of insurance was established. A massive pile of “widow” risks cumulated. The (wrong) belief that the new techniques of pricing of risks could do away with risks (Tett 2009; Derban 2011) made European institutions proclaim once and again that widow risks were quasi-hypothetical risks. In the remote event that such risks became losses, markets will absorb them.

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<sup>51</sup> Some preparations were made for that eventuality. See ‘Memorandum of Understanding on high-level principles of cooperation between the banking supervisors and central banks of the European Union in crisis management situations’, 10 March 2003, see the press release at [http://www.ecb.europa.eu/press/pr/date/2003/html/pr030310\\_3.en.html](http://www.ecb.europa.eu/press/pr/date/2003/html/pr030310_3.en.html)) and ‘Memorandum of Understanding and co-operative between the banking supervisors, Central Banks and Finance Ministries of the European Union in Financial Crisis Situations’, 18 May 2005, see the press release at [http://www.ecb.europa.eu/press/pr/date/2005/html/pr050518\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2005/html/pr050518_1.en.html). See also Schnasi and Teixeira (2006).

### III. Integration through fiscal consolidation: Taxes in the indebted state

#### 1. General but asymmetric fiscal crises: 2007–2010

##### A) The immediate public finance implications of the crises

The economic crisis pushed almost all Member States into deficit positions. However, the fiscal impact of the crises was asymmetric. The degree of deterioration of public finances largely depended on two factors. One was the financial losses that each state absorbed. The other was the degree to which tax revenue had come to depend on economic activities propelled by the constant growth of private debt during the previous decade.

Firstly, the rapid transformation of the financial crisis into an economic crisis led to a rather automatic deterioration of the public finances of all member states of the European Union. The economic slowdown made tax revenue decline, while employment-assistance (as in Germany) or unemployment insurance (as in Spain) pushed social expenditure up (see Table 7). Some states (but far from all) engaged into significant discretionary fiscal spending. Temporary tax rebates played an important role.<sup>52</sup>

Table 7: Deficits Eurozone, selected countries 2007–2011

	2007	2008	2009	2010	2011	2012
Germany	0.3	0.0	-3.0	-4.1	-0.9	0.1
Netherlands	0.2	0.2	-5.5	-5.0	-4.3	-4.0
France	-2.5	-3.2	-7.2	-6.8	-5.1	-4.9
Italy	-1.5	-2.7	-5.3	-4.2	-3.5	-3.0
Spain	2.0	-4.4	-11.0	-9.4	-9.4	-10.3
Portugal	-3.0	-3.8	-9.8	-11.2	-7.4	-5.5
Greece	-6.7	-9.9	-15.2	-11.1	-10.1	-8.6
Ireland	0.2	-7.0	-13.9	-32.4	-12.6	-8.0

Secondly, national exchequers absorbed a rather considerable amount of the financial risks that had been created through the exponential growth of financial assets in the years preceding the crises. The non-rescue of Lehman Brothers was widely believed to have unleashed a world financial crisis, and to have proven that it was *absolutely necessary* that states intervened to avoid the collapse of any other major financial institution (no “systemically relevant” bank should be allowed to fail: the *too big to fail doctrine*). Banks should be underwritten by exchequers, relieved of their troubled assets by the state, or

<sup>52</sup> A summary is available at: <<https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Taxes/over-tax-measur-crisis/fileBinary/over-tax-measur-crisis.pdf>>.

have their capital basis improved by injections of public money (European Council 2008). The fact that this entailed *protecting* the interests of capital holders, despite the fact that they may have been reckless, was regarded as beside the point. The bailout of banks, and the consequent full protection of its shareholders, was the lesser evil (Geithner 2014).

This was bound to have massive tax implications, as the costs of bailing out the banks will end up being paid by the taxpayer. However, it was constantly argued that this was not really the case. The crisis of European financial institutions had not much to do with the state of those financial institutions, but was merely a crisis of *confidence* resulting from the panic imported from the United States after the near meltdown of the US financial system (Trichet 2009). When intervening to bailout financial institutions, states were assuming purely *contingent* financial risks that once the panic would have been overcome, would report *profits* to states.

Table 8: Public debt 2007–2011, selected European countries

	2007	2008	2009	2010	2011	2012	2013
Germany	63.5	64.9 (+1.4)	72.4 (+7.5)	80.3 (+8.1)	77.6 (-2.7)	79.0 (+1.4)	76.9 (-2.1)
Netherlands	42.7	54.8 (+12.1)	56.5 (+0.7)	59.0 (+2.5)	61.3 (+2.3)	66.5 (+5.3)	68.6 (+2.1)
France	64.2	67.8 (+3.6)	78.8 (+11.0)	81.5 (+2.7)	85.0 (+3.5)	89.2 (+4.2)	87.2 (-2.0)
Italy	99.7	102.3 (+2.5)	112.5 (+10.2)	115.3 (+2.8)	116.4 (+1.1)	122.2 (+5.8)	127.9 (+5.7)
Spain	35.5	39.4 (+3.9)	52.7 (+13.6)	60.1 (+7.4)	69.2 (+9.1)	84.4 (+15.2)	92.1 (+7.9)
Greece	103.1	109.3 (+6.2)	126.8 (+17.5)	146.0 (+19.2)	171.3 (+25.3)	156.9 (-14.4)	174.9 (+18.0)
Ireland	24.0	42.6 (+18.6)	62.2 (19.6)	87.4 (+25.2)	111.1 (+27.7)	121.7 (+10.6)	123.3 (+1.6)
Portugal	68.4	71.7 (+3.3)	83.6 (+11.9)	96.2 (+12.6)	111.1 (+14.9)	124.8 (+13.7)	123.3 (1.5)

The financial crisis made it impossible for the Eurozone to keep on avoiding the question of who should be the insurer of last resort of the financial risks resulting from cross-border financial activities (see Table 8 for overview of public debt in a selection of Eurozone countries). The solution finally applied in 2010/2011 (section 2, below) was now pre-configured (see subsection B, below). But the strong belief in the purely contingent character of the risks absorbed by the state hid in plain sight the momentous implications of two key decisions taken at this point in time:

- For one, the fundamental decision *not to* create a community of insurance against financial risks created by cross-border activities. The then incumbent French presidency proposed the creation of a €300bn fund to deal with banking crises (The Economist 2008). This was summarily rejected by the German Chancellor of the Exchequer. Attempts at ad hoc coordination of bailouts (Dexia and Fortis) revealed the limits of the contingency plans elaborated before the crisis (for Dexia, see Woestyne and van Caloen 2008).
- For two, states took unilateral decisions to support *their* financial institutions. The obvious conflicts that this entailed with European norms on state aid were first ignored, and then avoided by means of a rather retroactive and very lax construction of state aid norms by the European Commission.<sup>53</sup> A race to the top concerning deposit guarantees, initiated by Ireland, was cloaked as a common decision to increase the guarantee ceilings in the relevant Directive.<sup>54</sup>

Thirdly, the enormous fragility of some of the tax compensatory strategies used to dissimulate the tax gap was suddenly revealed. As the real estate bubbles burst, tax revenue collapsed in Spain (from 38 per cent of GDP in 2007 to 31.6 per cent of GDP in 2009) and took a plunge in Ireland (for the same years, 32.8 per cent GDP to 29.7 per cent GDP, see Table 9 for a more extensive overview). The United Kingdom also experienced an important decline of its tax revenue. To the difficulties of the very tax significant real estate market, there were added the crisis in the massively oversized financial sector. The contribution of the City to total British revenue declined from 17 per cent GDP in 2007 to only slightly more than 12 per cent GPD in 2009.

## B) Two momentous fiscal decisions that will become decisive later on

The Irish financial sector was not only extremely leveraged, but also extremely exposed. Even if one bank in particular (the Anglo Bank) was especially troubled, all banks were running out of liquidity by mid-September 2008. Irish banks had come to depend on the massive inflows of capital from other Euro-zone states, which now suddenly dried up. The Irish government proposed, and the Irish Parliament ratified, the extension of a blanket guarantee to all Irish financial institutions for two years.<sup>55</sup> It is important to notice that the blanket

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<sup>53</sup> Presidency Conclusions, European Council, 15 and 16 October 2008, available at: <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/103441.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/103441.pdf)>. Four Commission Communications followed. See OJ C 270, of 25.10.2008, pp. 8-14; OJ C 10, of 15.01.2009, pp. 2-10; OJ C 72, of 26.03.2009, pp. 1-22; OJ C 195, of 19.08.2005, pp. 9-20.

<sup>54</sup> Directive 2009/14/EC, OJ L 68, of 13 March 2009, pp. 3-7.

<sup>55</sup> Credit Institutions (Financial Support) Bill, of 30 September 2008, available at: <<http://www.oireachtas.ie/documents/bills28/bills/2008/4508/b4508d.pdf>>; Credit Institutions (Financial Support) Act, 2 October 2008, available at: <<http://www.oireachtas.ie/documents/bills28/acts/2008/a1808.pdf>>.

Table 9: Tax revenue 2007–2011, selected Eurozone countries

	2007	2008	2009	2010	2011
Germany	38.7	38.9	39.4	38	38.5
Netherlands	38.7	39.2	38.2	38.9	38.6
Austria	41.7	42.7	42.4	42.1	42.2
France	43.4	43.2	42.1	42.5	43.7
Italy	42.7	42.7	42.9	42.5	43.7
Spain	37.1	32.9	30.7	32.2	31.8
Greece	32.5	32.1	30.5	31.7	32.4
Ireland	31.5	29.5	28.1	28.0	28.2
Portugal	32.8	32.8	31.0	31.5	33.2
United Kingdom	35.7	37.1	34.3	35	35.8

guarantee implied that Ireland as state of incorporation of the debtor financial institution would absorb the widow financial risks generated during the first ten years of EMU.

The cost of underwriting financial institutions had a major long-term effect. The €500bn plan to support its financial institutions was presented by the incumbent German government as both absolutely necessary (Connolly, 2008) and as further proof of the need of introducing a debt brake in the German Fundamental Law. The debt brake proposal predated the crises and was prompted by the chronic fiscal problems of some *länder*, which forced the federal state to assist them again and again. To put it differently, up to 2008 the debt brake was seen as a German answer to a German problem. But the potential costs of underwriting German banks started to alter the way in which constitutional fiscal rules were seen (see Deutsche Bank 2011; Hamker 2012; for a critical analysis, see Hein and Truger 2014). As we will see, the European fiscal crises of 2010 and 2011 will turn the debt brake into a German answer to a European (non-German) problem.

### C) No changes to either European tax policy or in the case law of the ECJ

Despite the fact that the crises had an obvious and immediate financial impact, there was no major change in European tax policy. The Commission engaged into a new exercise of relabelling. After tax cooperation, now it was the turn of good (even robust) governance on tax matters (European Commission 2009). There was no substantive change and indeed no major policy initiative was launched.

Rather similarly, the crises did not seem to have an impact on the case law of the European Court of Justice. The rebalancing of its case law, through

reference to the tax sovereignty of Member States, predated the crises, and was not significantly affected by it (Pantazatou 2013).

## **2. From asymmetrical fiscal crisis to integration through fiscal consolidation: 2011 onwards**

The time gained in 2007 and 2008 by underwriting financial risks was soon up. By late 2009, the Greek state was on the verge of fiscal collapse. By the fall of 2010, it would be the turn of the Irish state. Portugal, Cyprus and Spain would follow. The mix of causes of the fiscal crises of these states was not exactly the same. But in all cases the massive inflows of capital from other Eurozone states had played a major role in the gathering of the crises. And in all cases, the way in which the “widow” risks were finally assigned and dealt played a decisive role in how the crises were solved.

### **A) Forging the consolidating tax state through “financial assistance”**

It was already noticed that the crises hit most rapidly and deeply the Eurozone states that had been net importers of capital during the first decade of monetary union. In the sequence characteristic of external debt crises, the sudden stop of capital flows revealed the fragility of public and private finances. Financial institutions were pushed off balance and had to be underwritten by states. The Treasuries saw the interest rates they had to pay to issue debt grow. Eurozone states were especially vulnerable, because they had lacked since the beginning of EMU the means of last resort to deal with a fiscal crisis, i.e. issue new currency to pay principal and interest on their debt. This is why Member States experiencing similar problems but not Members of the Eurozone did not experience a fiscal crisis (De Grauwe, 2012; Wolf, 2013). But there is no debtor without a creditor.

The eventual non-payment of the public and private debt of the Eurozone states nearing fiscal asphyxia would have inflicted a major blow to the financial institutions of the Eurozone through which capital had been exported during the first ten years of EMU. In particular, German, Dutch and French banks ran the risk of suffering major losses. The German, Dutch and French states were insurers and guarantors of last resort of those banks. So if losses in proportion to the risks incurred would have been inflicted upon those banks, massive burdens would have resulted for those states (see Table 10).

Greece, Ireland, Portugal, Cyprus and Spain will come more or less close to fiscal collapse. The causes of the fiscal crises were many, and varied from one country to the other. It could fairly be said that all of them had been weak tax states (although the patterns of transformation had been different) and were especially vulnerable to financial crisis because of their traditional dependence



Table 10: Exposures to debtor states

a) Exposure to Greece of financial institutions, 3 <sup>rd</sup> quarter (Million dollars)								
	Public sector	Banks	Non-bank private	Unallocated sector	Foreign claims	Other exposures	Total exposures	% of total exposures (277.9)
Germany	26.3	3.9	10.1	0	40.3	29.2	69.4	24.97
France	19.8	1.4	42.1	0	63.3	28.7	92.0	33.19
Italy	2.6	0.3	1.9	0	4.7	1.7	6.4	2.30
Spain	0.6	0	0.5	0	1.1	0.4	1.5	0.54
UK	3.2	4.3	7.5	0	15.1	5.3	20.4	7.34
US	1.8	0.5	4.7	0	6.9	36.2	43.1	15.50
Japan	0.5	0.5	0.9	0	1.9	0.1	2.0	0.71
b) Exposure to Ireland of financial institutions, 3 <sup>rd</sup> quarter (Million dollars)								
	Public sector	Banks	Non-bank private	Unallocated sector	Foreign claims	Other exposures	Total exposures	% of total exposures (813.7)
Germany	3.4	57.8	92.8	0	154.1	54.3	208.3	25.59
France	6.6	16.83	21.2	0	44.7	33.4	78.1	9.59
Italy	0.8	3.3	10.9	0.3	15.3	9.1	24.4	2.99
Spain	0.3	3.3	9.4	0	13	4.5	17.5	2.15
UK	6.6	37.4	116.1	0	160.2	64.4	224.6	27.60
US	1.5	17.9	40.3	0	59.7	54.3	113.9	13.99
Japan	1.5	1.8	17.7	0	21.0	1.5	22.5	2.76
c) Exposure to Portugal of financial institutions, 3 <sup>rd</sup> quarter (Million dollars)								
	Public sector	Banks	Non-bank private	Unallocated sector	Foreign claims	Other exposures	Total exposures	% of total exposures (321.8 b \$)
Germany	8.4	18.1	13.6	0	40	8.5	48.5	15.07
France	16.1	6.5	14.8	0	37.4	8.1	45.6	14.17
Italy	0.9	2.3	1.5	0	4.7	3.2	7.9	2.45
Spain	8.8	6.1	70.3	0	85.2	23.4	108.6	33.74
UK	2.6	6.2	16.5	0	25.4	8.5	33.7	10.47
US	1.6	1.4	1.5	0	4.5	43.6	47.1	14.63
Japan	1.3	0.3	0.8	0	2.4	0.4	2.8	0.87

Cont'd

d) Exposure to Spain of financial institutions, 3 <sup>rd</sup> quarter (Million dollars)								
	Public Sector	Banks	Non-bank private	Unallocated sector	Foreign claims	Other exposures	Total exposures	% of total exposures (1098 b \$)
Germany	29.5	85.8	85.7	0	200.9	41.4	242.4	22.07
France	46.0	55.8	81.3	0	183.1	41.6	224.7	20.46
Italy	3.3	9.0	16.2	0.2	28.7	13.1	41.8	3.80
Spain	-	-	-	-	-	-	-	-
UK	10.0	34	72.4	0	116.3	36.1	152.4	13.87
US	4.7	20.6	26.3	0	51.6	136.0	187.5	17.07
Japan	9.7	4.5	10.2	0	24.4	4.8	29.2	2.65

Source: Bank of International Settlements ([http://www.bis.org/publ/qtrpdf/r\\_qt1103b.pdf](http://www.bis.org/publ/qtrpdf/r_qt1103b.pdf))  
Starting in late 2009

on foreign capital.<sup>56</sup> What made the crises really explosive was the rapid growth of their external indebtedness since the launch of EMU and the fact that EMU implied that these states lacked basically any policy lever with which to face a fiscal crisis.

Four key decisions were taken to deal with the fiscal crises of these states:

Firstly, the fiscal and the financial crises were exchequered, i.e. financial risks were absorbed by exchequers (and ultimately made to bear on taxpayers).

- States were prevented from defaulting. Even if there was no Treaty provision foreclosing default, European institutions, and very especially the ECB, prevented the Greek government from even considering default. IMF involvement would have required partial Greek default, and indeed some of the IMF board members insisted on that happening (see IMF 2010). Their opposition was overrun and the IMF Articles of Agreement were changed on the hoof to reconcile IMF massive involvement with Greece not defaulting (see Bagnai et al. 2015). Once Greece did not default, the precedent was set.
- States were required to underwrite in full their banks, so financial institutions would not default either. We already saw how the Irish state was strongly required to underwrite its banks in 2008. In 2010 pressure was exerted so that Ireland would stand by the blanket guarantee, even if that rendered unavoidable that Ireland asked for financial assistance from other Eurozone states (O'Brien 2011a; O'Brien 2011b; Collins 2012; Honohan 2014).

<sup>56</sup> Indeed, these were the states for which special provisions were foreseen when free movement of capital was liberalized through Directive 88/361.

Secondly, the costs of nationalizing financial risks were to be bore exclusively by the exchequer of the states at the receiving end of capital flows. The costs of non-defaulting and of underwriting financial institutions were to be bore by the “debtor” states. The responsibility that stemmed from the miscalculation of the risk they were incurring into when lending to “debtor” states or to the financial institutions of “debtors” states was simply set aside. This of course implied relieving of any responsibility the states where these financial institutions were established as insurers and guarantors of last resort of these institutions.

Thirdly, *taxpayers of the Eurozone as a whole* were to underwrite the debt of debtor states. Given that the states which were required to bear all financial risks were already bordering fiscal collapse, further additional debt required underwriting by a third party. Most of this came in the form of financial assistance from the Eurozone as a whole (with the support of the IMF). Formally, this assistance was structured either through “coordinated bilateral” loans (the first Greek programme in 2010)<sup>57</sup> or through the various variants of a European Monetary Fund that followed (plus IMF assistance).<sup>58</sup> But relief was also provided by means of the ECB buying sovereign bonds in secondary markets.<sup>59</sup> In practice, this meant that the taxpayers of debtors states were required to collect the bill of absorbing financial risks, but the taxpayers of the Eurozone as a whole were required to underwrite the taxpayers of debtor states.

Fourthly, the underwriting was given under the condition of creditors dictating the economic and fiscal policy to be applied by debtor states (this is what the so-called “conditionality” implied). Debtor states were forced to undergo an internal devaluation (which meant a devaluation of labour instead of the impossible currency devaluation) and to engage into fiscal policies fitting into the so-called growth through austerity paradigm (Alessina and Ardagna 1998;

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<sup>57</sup> See Economic Adjustment Programme for Greece, European Commission, May 2010: [http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2010/pdf/ocp61\\_en.pdf](http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf)

<sup>58</sup> Press release on the extraordinary ECOFIN of 9 and 10 May 2010 can be found at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/114324.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf). Regulation (UE) 407/2010 of the Council of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12 May 2011, pp. 1-4; the framework agreement of the European Financial Stability Facility of 7 June 2010 can be found at: <http://www.boe.es/boe/dias/2011/07/11/pdfs/BOE-A-2011-11824.pdf>. The incorporation of the special purpose vehicle at: [http://www.efsf.europa.eu/attachments/efsf\\_articles\\_of\\_incorporation\\_en.pdf](http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en.pdf). For the Treaty creating the Stability Mechanism, see <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>.

<sup>59</sup> ‘Decision of the European Central Bank establishing a securities market programme’, 14 May 2010 can be found at: [http://www.ecb.int/ecb/legal/pdf/1\\_12420100520en00080009.pdf](http://www.ecb.int/ecb/legal/pdf/1_12420100520en00080009.pdf).

very decisively Alessina 2010): or what is the same massive cuts to public expenditure (very especially social expenditure, which was in some cases strictly capped by reference to specific figures) combined with a redistribution of the tax burden, by means of a further shift of the tax burden from capital to labour (with the typical mix being an increase of the standard VAT rate, suppression of concessionary VAT rates for essential goods, the increase or introduction of fees for the use of public services; while taxes on capital income were expected to be, if anything, lowered). The rationale was that shock economic therapy will result in the rapid reduction of labour costs and lead to strong trade surpluses. These surpluses would allow paying external debt and triggering private investment.

These decisions were presented as the operationalization of European “solidarity” with the debtor states. However, the loans did not support the debtor states as such. Most (when not all) the monies were not spent by the states recipient of financial assistance, but merely transited through them, quickly ending in the hands of the financial institutions that had lent to the debtor states or to the financial institutions of the debtor states (Mouzakis 2015; ATTAC Austria 2013). To label this as solidarity is deeply problematic. Solidarity means literally to bear risks together. Eurozone taxpayers were not being so much showing solidarity towards the citizens of debtor states, as much as they were showing solidarity with the financial institutions that loaned capital to debtor states and the financial institutions of debtor states. It is indeed telling that in all assisted countries public debt levels experienced a drastic increase after being recipients of “solidarity”. This reveals the extent to which “solidarity” with debtor countries was as a matter of fact solidarity with the financial institutions exposed to debtor countries. The rhetoric of solidarity could be abused because it was not understood that the conflict of interest between capital holders and debtors was transformed through “financial assistance” into a conflict of interest between the taxpayers of debtor and creditor countries. This did not only relieved lenders of any financial responsibility, but also created the false impression that the fiscal crises were caused by the fiscal profligacy of debtor states. This diagnosis failed to consider the structural forces at play in the massive cross-border capital flows during the first decade of EMU, and the role played by financial institutions in the gathering of the crises.

Internal devaluation plus growth through austerity had a massive impact on the configuration of debtor states. Debtor states were transformed into indebted states. As such, these states were required to make their tax system a key element in the process of transformation of its socio-economic structure into a *more competitive* one. Taxes were to regain redistributive and economic steering functions. Only the pattern of redistribution was now aimed at increasing the capital at the disposal of capital owners and steering consisted in fiscal dirigis-

me aimed at micromanaging economic policy (Scharpf 2014) so as to facilitate internal devaluation and ensure automatic corrections in the fiscal position so as to ensure that principal and interest of the debt were honoured.<sup>60</sup>

## B) Constitutional and legal entrenchment of the consolidating tax state

The blueprint of the consolidating tax state was first forged and developed during the fiscal crises of 2011 and 2012. That this was not intended as a temporary, “crisis management” expedient became very clear during 2012 and 2013, as the changes into the primary and secondary law of the European Union, as well as idiosyncratic quasi-constitutional norms were approved through formally international treaties codifying the legal basis of the tax consolidating state.

At the constitutional or quasi-constitutional level, it is important to stress the significance of the obligation imposed to patriate and enshrine in the constitution (or norms of constitutional nature) “debt brakes”.<sup>61</sup> The European Court of Justice was given the formal power of reviewing the national constitutional or quasi-constitutional norms adopted to comply with this obligation.<sup>62</sup> While many Member States have still to introduce the reforms, some followed the “German” debt brake model and reformed their constitutions accordingly (Spain, Italy and Slovenia). The Spanish constitutional reform of September 2011 is especially relevant. The procedure followed was at the very least peculiar, avoiding all the consultations needed to approve even an ordinary law (García Gestoso 2012:79-81). The amended text did not only include a debt brake, but more transcendently, a clause giving preference to the payment of principal and interest of public debt over any other public expenditure (including, quite obviously, social expenditure).<sup>63</sup>

The tax consolidating state was given concrete shape by the new fiscal rules at the basis of the revamped Stability and Growth Pact. The “old” fiscal rule regarding public deficit was tightened. Public accounts should be in surplus or close to surplus, meaning at most a 1% deficit, and for those states with a far from unblemished fiscal record, the threshold was -0.5%.<sup>64</sup> Moreover, new

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<sup>60</sup> It is very important to keep in mind that the Memoranda of Understanding are an odd mix of soft form (subject to change every quarter, when creditors revise the degree of compliance with the programme) equipped with extremely hard coercion mechanisms (the constant threat of the next payment of the assistance not being disimursed unless the assisted state does not comply in full with the evolving terms of the Memorandum).

<sup>61</sup> Article 3.2 of the Fiscal Compact.

<sup>62</sup> Article 8 of the Fiscal Compact.

<sup>63</sup> See amended text of the Article 135 of the Spanish Constitution.

<sup>64</sup> Vid. See Article 2a, second paragraph of the consolidated text of Regulation 1466/97. Further tightened by Fiscal Articles 3.1a) and b) of the Stability Treaty to 0.5% GDP, except

rules establishing deficit and debt reduction trajectories were introduced. The latter rule is of enormous importance. It foresees that all states exceeding the 60 per cent debt ceiling should reduce their debt levels, year in and year out, by 5 per cent of the amount in which they exceed 60 per cent.<sup>65</sup> In practice, this implies the obligation for many states to run constant massive primary surpluses. What the memoranda of understanding obliged countries provided with financial assistance to do, this rule requires of states which had not been subject to such discipline, such as Italy (or Spain, receiver of financial assistance in its “light touch” version) (Giacché 2012 argues, quite convincingly, that the decision to impose the debt reduction trajectory had a major causal role in the 2011 fiscal crisis in Spain and Italy). Moreover, Eurozone states are obliged to introduce automatic correction mechanisms, so that either expenditure goes down or taxation goes up when the yearly fiscal objectives become clearly imperilled by the way in which the economy and public finances evolve.<sup>66</sup> Finally, the assignment to the supranational level of the power to supervise the macroeconomic balance of each national economy is bound to result in a further limitation of the space to take autonomous fiscal decisions (Scharpf 2013).

The bite of these new set of fiscal rules has been largely trusted to the new procedures of fiscal coordination and supervision within the Eurozone. The sequence of the so-called European Semester implies a radical empowerment of supranational institutions. For one, national budgetary processes are subject to much closer monitoring, to the point that the draft budget is submitted to the Commission before it is submitted to the national parliament. For two, national budgetary procedures are required to become structured not around the yearly budget, but around the five-yearly fiscal perspectives, something which drastically reduces not only the margin for discretionary fiscal policy, but also for change in fiscal policy resulting from a new democratic majority being elected in a Eurozone state.<sup>67</sup> For three, decisions concerning the monitoring and supervision of fiscal policy are now taken when a qualified minority of Eurozone states supports Commission’s proposals.<sup>68</sup> This largely entails given de facto power to the creditor states over the debtor states (on the extent to which creditor states have shaped the government of the crises, see Dyson 2014).

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for countries with debt levels significantly below 60% and clearly “sustainable” public finances, as specified in Article 3.1 d of the same Treaty.

<sup>65</sup> Article 4 of the Fiscal Compact.

<sup>66</sup> Fiscal Compact. Article 3.1.e. For the common principles laid down by the Commission, see the Commission’s communication, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0342:FIN:EN:PDF>.

<sup>67</sup> Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ L 306, 23.11.2011, p. 41-47.

<sup>68</sup> Article 7 of the Fiscal Compact.

### **C) The counterpoint: Automatic exchange of information?**

At the same time that the pattern of tax integration through fiscal consolidation got entrenched, the fiscal crises has led to legislative initiatives and actual Directives that may point to the recovery of the old integration through tax harmonisation paradigm and in particular, the reintroduction of dynamics of cooperation between tax administrations.

In 2010 a new Directive on cooperation on the recovery of tax claims (of debts owed to tax authorities) was introduced, drastically widening the scope of the old 1976 Directive and improving the mechanics of cooperation.<sup>69</sup> In 2011 the 1977 Directive on administrative tax cooperation was superseded by a new Directive aiming at automatic exchange of information between Member States.<sup>70</sup> The Directive was rendered operative by a first implementing regulation in 2012,<sup>71</sup> and even more clearly so, by a second one in 2014.<sup>72</sup> This new framework for tax cooperation came hand in hand with the amendment of the savings income directive, closing a good deal of its loopholes.<sup>73</sup>

To be noticed also is the fact that in 2011 the Commission put forward a Directive proposal aiming at the harmonisation of the tax base of the corporate income tax,<sup>74</sup> which revives the understanding that harmonisation going beyond the correction of the failures of homogenisation through tax competition is needed.

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<sup>69</sup> 'Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures', OJ L 84, of 31.03.2010, pp 1-12.

<sup>70</sup> 'Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC', OJ L 64, of 11.3.2011, pp. 1-12.

<sup>71</sup> 'Commission Implementing Regulation (EU) No 1156/2012 of 6 December 2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation', OJ L 335, of 07.12.2012, pp. 42-46.

<sup>72</sup> 'Commission implementing Regulation (EU) no 1353/2014 of 15 December 2014 amending implementing Regulation (EU) No 1156/2012 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation', OJ L 365 of 19.12.2014, pp.70-74.

<sup>73</sup> 'Council Directive 2014/48/EU of 24 March 2014 amending Directive 2003/48/EC on taxation of savings in the form of interest payments', OJ L 111, of 15.04.2014, pp. 50-78.

<sup>74</sup> 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)', COM (2011) 121/4, available at: [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/common\\_tax\\_base/com\\_2011\\_121\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/com_2011_121_en.pdf).

## IV. Reconciling (again) integration and the Social and Democratic Tax State

This book<sup>75</sup> aims not only at increasing the understanding of how the present European crises came about, but also at considering what should be done to contain and overcome the crises. A concrete tax policy agenda cannot but be shaped in the “in-between” that is the political sphere. Consequently, it is more a political than a scholarly task. What can be done here is to sketch five general observations which are perhaps stronger on *what should not be done* than on what *should be done*.

Firstly, the degree of Europeanisation of national tax systems is so high that any meaningful reform proposals have to factor that into account. Any tax policy proposal needs to spell out what changes would be required both at the supranational and the national level, what obstacles to change result from the present configuration of supranational and national constitutional law, and what consequences reform would have in both the European and the national levels.

Secondly, it is quite obvious that one possible alternative is to dismantle in full the European framework constraining and disciplining national tax systems. But two things should be kept in mind. For one, such a dismantlement would only be coherent (and indeed stand a chance of being functional) if it came hand in hand with the redefinition of the overall relationship between the national and the European socio-economic constitutions. As was shown in this paper, national tax systems have been deeply Europeanised, but not only and not so much as a result of European tax regulations and directives, but mainly through the influence that the present understanding of economic freedoms as operationalisations of the right to private property and freedom of enterprise has structurally exerted over the tax system (plus the structural constraints stemming from the “new economic governance” of the Eurozone in the process of getting consolidated). Simply opting out from European tax legislation would not recreate national tax autonomy. For two, a complete retreat into national sovereignty (through a radical exit from any form of European cooperation) may not do either. The European framework of national tax law has become a straitjacket due to its structural bias in favour of the *consolidating tax state*. There is no guarantee, however, that outside of the framework of European integration the structural power of capital would not end up limiting tax choices. This should not be constructed, however, as a plea in favour of the *status quo*. The *status quo* (including EMU as has come to be shaped in the aftermath of the crisis) is part of the problem, not of the solution (Flassbeck and Lapavistas 2015; Streeck 2014; Bagnai 2014.) But the original

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<sup>75</sup> See note 1.



paradigm of taxation through tax harmonisation is a powerful reminder of the possibility of making European integration and the consolidation of the Social and Democratic Rechtsstaat mutually reinforce each other (see section I).

Thirdly, the cases put forward to transfer tax-collecting powers to the European Union since the crises began are hardly convincing. These proposals are the wrong proposals, for the wrong reasons and at the wrong time. Most of these proposals regard European taxes as the source of the financial means with which to postpone (again) the payment of debt (Trichet 2011; Maduro 2012). But it is high time we either pay debt, or declare it will not be paid. The case for a European power to tax is also based on wrong reasons. The advocates of European taxes present taxes as a *functional means* to solve the crises. But taxes are not a mere expedient to collect revenue, but a key institution in the functioning of democracy. This is indeed the key blind spot in the proposals. Advocates of introducing European taxes to pay for fiscal assistance are rather vague regarding the democratic procedure that will be followed to empower the Union and to actually approve the regulations creating the taxes. Trichet simply avoids the issue, and pretends that a European Treasury could issue debt without collecting taxes (which defies the law of gravity of public finance). Maduro appeals to the need of avoiding transfers between states, because the latter will undermine the European “we feeling”, and that that would require collecting revenue directly from those profiting most from European integration. But leaving aside whether it is wise to fund financial assistance, the need of which will be pro-cyclical, with taxes which are bound to be pro-cyclical (as profits, whether to those profiting from integration or not, are cyclical), it is obvious that no matter how progressive a tax, it should be democratically approved. Maduro also avoids that key issue. Finally, the proposals come at the wrong time. The way in which the crises have been governed, and very especially, the way in which the pile of widow risks stemming from cross border capital flows have been dealt with has strengthened (and even recreated) national cleavages. In such a context, European taxes could only be forced upon Europeans in an authoritarian fashion. This would not only be unacceptable. Moreover, it is likely to result in an outcome opposite to that apparently wished by the advocates of new European taxes now, as the non-democratic imposition or dissimulation of such taxes is likely to feed disintegration.

Fourthly, European tax norms could play a major role in *rescuing* the power of Member States to take autonomous decisions. Instead of European law hollowing national tax autonomy, European law should be an instrument at the service of recreating the political space for democratic national tax choices. To achieve those three things could be done:

- For one, the institutional and procedural means should be created to render tax authorities capable of identifying and quantifying all income,

wealth and consumption flows. This requires mutual, automatic and complete exchange of tax information among the Member States of the European Union. All relevant tax data should be shared (Zucman 2013: 74ff). The new framework of automatic exchange recently adopted is a much better starting point than previous legislation. This is the only way of stopping some states (at present including some Member States) literally selling their sovereignty in exchange of a fraction of the proceedings of tax evasion on the side of multinational corporations and wealthy individuals (Palan 2002; Palan et al. 2009). Moreover, the European Union should make use of its collective bargaining power and subject free movement of capital and goods to uncooperative third countries to the said countries accepting in full automatic exchange of tax data (Zucman 2013 :87ff).

- For two, economic freedoms should be recalibrated. The recreation of the effective capacity to tax requires re-characterising economic freedoms as the operationalization of the principle of non-discrimination when it comes to tax matters (and not only). The Social and Democratic Tax State was fiercely opposed in the name of the right to private property and to freedom of enterprise. Its consolidation implied a re-characterisation of both rights, a re-characterisation which was very much at the core of the identity of post-war constitutions. It is high time we stand by what is still the deep constitutional identity of most European constitutions. The ECJ should reorient its case law and return to a less abrasive understanding of economic freedoms when coming into conflict with national tax laws (Menéndez 2011).
- For three, some key national tax laws should be harmonized. The objective should not be to homogenise national tax laws but, on the contrary, to create the conditions under which *different* political choices could be possible. The VAT template could be of use. Wide harmonisation of the definition of the tax base (with room for specific national rules) could be combined with the widest possible latitude in the setting of tax rates.

Fifthly, when, and only when, European law would have proven useful in the recreation of the autonomous power to tax of Member States, the time would have come to discuss granting the European Union further collecting tax powers. I have argued that we should distinguish two rather different cases for granting different tax collecting powers to the European Union (Menéndez 2004). For one, there is a very strong case to act upon the decision taken in 1970 to fund the current European budget through taxes, not state contributions. At present less than 15 per cent of the European budget is funded from genuine European taxes, and less than a quarter comes from that and the European share of VAT. Paying for Europe via taxes is indispensable if we want to finally foster democratic debate about what Europe does and what it

should be doing (and not doing). Secondly, there is a very good case for having European taxes capable of redistributing revenue across Europe and of serving as a supranational macroeconomic lever. But these very good reasons should be validated *democratically*. Not imposed in an authoritarian manner. In the present political, economic and legal context the assignment of new tax collecting powers to the European Union that simply is impossible.

## Conclusions

In this paper I have shown that the power to tax has been influenced by European law since the very beginning of the process of European integration. The myth of the Member States retaining an effective exclusive competence on tax matters is largely the result of the shift in the pattern of Europeanisation of national tax laws that took place in the late 1970s and early 1980s. The original tax project of the Communities expected tax laws to be slowly but steadily harmonized by supranational regulations and directives and the power to collect taxes to be partially transferred to the European Communities. Both goals were abandoned after the monetary and economic crises of the 70s. But that did not entail a retreat of European law when it came to taxes, as the myth of the national exclusive competence assumes. On the contrary, what followed was a deeper and wider Europeanisation of national tax systems, only by less conspicuous means than regulations and directives. Private actors (largely multinational corporations) were empowered by the case law of the European Court of Justice and given the means (economic freedoms understood as operationalizations of the right to private property and freedom of enterprise, and very especially the rights to freedom of establishment and to free movement of capital) to challenge one national tax law after the other. Instead of tax integration through politically mediated harmonisation, we got tax integration through homogenisation of tax systems triggered by scores of private challenges to national tax laws in the name of their being obstacles to economic freedom within the European Union. The single market project and asymmetric economic and monetary union exerted a decisive influence. The net result of the shift from integration through tax harmonisation to integration through the removal of tax obstacles was that the Social and Democratic Tax State was pushed off balance. The opportunities to evade taxes grew exponentially but very asymmetrically: it was capital, especially mobile capital, that saw its chances of escaping taxation grow. The unleashing of capital could be regarded as a secular trend of the seventies and eighties. But it was a secular trend to which the decision to fully liberalise capital movements by the United Kingdom (by then a member of the European Communities) in 1979, and by the European Communities collectively in 1988 (through Directive 88/361) contributed decisively. The stagnation of tax receipts at a time at which expenditure was increased by the conjunctural and

structural consequences of the crises forced states to adapt their tax systems so as to maximize revenue (partially renouncing to realise the full set of goals characteristic of the Social and Democratic Tax State) or to rely on debt as either the means to fill the gap between taxation and expenditure (something which implied a return of the debt state through the growth of public debt to pay for ordinary expenditure) or as the means through which to foster economic activities creating alternative tax bases (paradigmatically, through fostering and tolerating the rapid growth of private debt). The Social and Democratic Tax State started to morph and hybridate. We could speak of a Social and Democratic cum capitalism enabler tax state, a compromise between the (downsized) social agenda of the old Social and Democratic *Rechtsstaat* and the facilitation and support of the growingly financialised capitalist economic order. This hybrid played an important if far from exclusive role in fostering the structural weakness that turned into a manifold crisis in 2007. The crises suddenly revealed the many tensions and contradictions underpinning the hybrid pattern of tax integration. The hidden tax costs of the exponential growth of financial assets was revealed. The dissimulation of the erosion of the tax bases through the unsustainable tax revenue generated by the growth of private debt was no longer possible. What however made the crises especially deep in Europe was the way in which the widow risks cumulated during the first ten years of EMU were transformed into public liabilities. By forcing the states who had been recipients of capital flows to absorb the financial risks associated to the pile of cross-border debt, debtor states were turned into indebted states. A crisis which had its roots in the growth of private debt and of external debt was diagnosed as a fiscal crisis caused by the profligacy of exchequers. Internal devaluation and growth through austerity were imposed upon the now indebted states. The tax systems of the indebted states were put at the service of fiscal consolidation. Paradoxically, this entailed rehabilitating the use of the tax system as a means of income redistribution and economic steering. But, contrary to what was the case in the Social and Democratic Tax State, the tax system was made into a tool of reverse redistribution (by means of increasing the income share of the better off to the detriment of the worse off) and of fiscal dirigisme (of the micromanaging of the economy to ensure increased national competitiveness). This was ironic, but not unprecedented. The long arc of transformation of the European framework of taxation can thus be seen as vindicating Fritz Neumark. The rejection of the active fiscal interventionism characteristic of the Social and Democratic Tax did not result in a liberated market economy, but has ended up condemning Europeans to the fiscal dirigisme of the *consolidating tax state* (on the crucial distinction between interventionism and dirigisme, see Neumark 1964 in dialogue with Ludwig Erhard). Self-stabilising capitalism does not result into economic freedom, but into authoritarian liberalism (Polanyi 1944; Heller 2015).

The crises of Europe are deep and structural. Economic and monetary union as we know will not last. The European Union may collapse as a result. Or, far worse, it may slowly keep on transforming itself into the liberal authoritarian direction that underpins the consolidating tax state. We need a very different Europe. It would be ludicrous to claim that this different Europe can be engineered by a collection of tax policies only; or for that matter a combination of tax and expenditure policies. The problems of Europe are structural and require tackling not only the stock of debt, but also the generation of income and wealth; not only redistribution, but also changes in production and distribution (Berman 2006; Wade 2014; Piketty 2015). But changes into the European framework of taxation could play its role. In the fourth section of this paper I made a case *against* the transfer of tax collecting powers to the European Union *as part* of the government of the crises. That would be the wrong prescription for the wrong reasons at the wrong time. The assignment of new taxing powers to the European Union *in this political context* is a democratic non-starter. If done (unavoidably through a non-democratic authoritarian imposition or dissimulation) it is bound to backfire very badly.

We do not need more Europe when it comes to taxes, but a very different Europe. What can and should be achieved through action at the European level is to *rescue* the capacity of Member States to tax the income, expenditure and wealth of their citizens and of those economically active in their territory, by means of drastically reducing the chances of evading the tax net. The European rescue of the Social and Democratic Tax State is an ambitious a task. But is one that, contrary to the transfer of tax collecting powers to the supranational level of government to postpone the day of the reckoning, has a realistic chance of recreating the cohesion between European citizens without which the European Union is bound to become the nemesis of the *Social and Democratic Rechtsstaat*.

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