

*Martha Caziero*

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# The Taxing Powers of the European Union

A Legal Analysis of the Levying  
of EU Taxes

IBFD DOCTORAL SERIES

80



# The Taxing Powers of the European Union

## Why this book?

This book discusses the question of whether the European Union (EU) can introduce its own taxes and examines the policy and legal limitations it faces when doing so. "EU tax" is intended as unrequited, mandatory pecuniary contribution to the government, levied on individuals, companies or products - not on the Member States; whose essential elements are designed at EU level; and whose goal is, at least in part, to raise revenues, which go, at least in part, to the EU budget. In Chapter 2, the book investigates the existence of a legal basis in the EU Treaties by using historical and teleological interpretation techniques. It concludes that for an EU tax with a predominant revenue raising goal the legal basis should be article 311 of the Treaty on the Functioning of the European Union (TFEU). However, if the EU tax has multiple equally relevant goals, there needs to be a supporting legal basis. The book then shifts to discussing the policy considerations the EU legislator should take into account when transforming certain revenue streams into EU own resources. Each type of revenue is tested against three criteria: proportionality, allocation and efficiency. Performing positively from the perspective of one criterion does not necessarily entail similar results for the other criteria, highlighting the complex policy trade-offs involved in designing a coherent system of EU own resources. Shifting from the choice of revenue streams to tax design, the book then uses the principle of equality as the primary benchmark. It concludes that the EU general principle of equality constrains the design of an EU tax differently depending on whether the tax has the main goal of raising revenues or other, parallel goals. Whereas in the first case there needs to be an objective justification for treating products or producers in competition with each other differently, in the second case comparability is assessed considering the wider objectives of the provision, thereby granting more leeway to the EU legislator for discrimination. This book provides a foundational analysis of the EU's taxing powers for both legal scholars and policymakers, offering a deep dive into the complex intersection of EU law, taxation and public finance concepts.

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A Legal Analysis of the Levying of EU Taxes

Martha Caziero

This book is based on the thesis submitted for a doctoral degree  
at the Vienna University of Economics and Business



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## Abstract

The European Union has the power to introduce an EU tax, intended as an unrequited, mandatory pecuniary contribution to the government, levied on individuals, companies or products rather than on Member States. Its essential elements are designed at the EU level, and its goal is, at least in part, to raise revenues that contribute, at least partially, to the EU budget. The legal basis for introducing an EU tax with the primary goal of raising revenues for the EU budget is article 311 of the TFEU. However, if an EU tax has more than one equally relevant goal, a supporting legal basis is required. The types of revenue suitable for becoming EU own resources are tested against three criteria: proportionality, allocation and efficiency. Performing positively from the perspective of one criterion does not necessarily entail similar results for the other criteria. The EU's general principle of equality constrains the design of an EU tax differently, depending on whether its primary purpose is raising revenues or achieving parallel goals. In the first case, there must be an objective justification for treating competing products or producers differently. In the second case, comparability is assessed in light of the broader objectives of the provision, allowing for greater flexibility in permitting discrimination.



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# Chapter 1

## Introduction

### 1.1. Context and research questions

The revenue side of the financing system of the European Union is governed by article 311 of the Treaty on the Functioning of the European Union (TFEU). According to article 311(1) TFEU, the Union should finance its budget through own resources,<sup>1</sup> supplemented, by way of exception, by “other revenue”. The provisions relating to these own resources are adopted by the Council in accordance with a special legislative procedure through a decision. This decision enters into force only upon approval by the Member States, in accordance with their constitutional requirements.<sup>2</sup> On the basis of this decision, the Council then issues implementing measures after consulting the European Parliament.<sup>3</sup>

The own resources set forth by Council Decision 2020/2053<sup>4</sup> are the following: customs duties on imports and other levies established in relation to trade with third countries; a portion of the Gross National Income (GNI) of the Member States; a percentage of the VAT revenues collected by the Member States;<sup>5</sup> and a contribution based on the amount of non-recycled plastic packaging consumed by the Member States. The total amount of own resources allocated to the EU for covering its annual payments shall

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1. Article 311 TFEU provides that “without prejudice to other revenue, the budget shall be financed wholly from own resources”. Own resources are different from other revenue because the first enters the general budget, while the latter is earmarked to finance a certain expenditure. On this distinction, see the study of the Directorate General for Internal Policies Policy Department C: Citizens’ Rights and Constitutional Affairs, *Implementation of the Lisbon Treaty – Improving functioning of the EU: Economic and Monetary Policy*, available at: <http://www.europarl.europa.eu/studies>.

2. Article 311 (3) of the TFEU.

3. Article 311 (4) of the TFEU.

4. Council Decision (EU, EURATOM) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, *OJ L 424*, 15.12.2020, p. 1–10.

5. However, when the contribution from VAT would be higher than 50% of the Member State’s GNI, the base for calculating the contribution becomes the GNI and not the VAT revenues.

not exceed 1.40% of the sum of the GNI of the EU Member States (the so-called “ceiling”).<sup>6</sup>

In 2020, the European Commission was authorized to issue common debt in order to finance Next Generation EU (NGEU),<sup>7</sup> a financial assistance instrument aimed at helping Member States recover from the economic crisis caused by the COVID-19 pandemic. The Recovery and Resilience Facility (RRF) is the centrepiece of this package and is worth EUR 650 billion, divided into EUR 291 billion for loans and EUR 359 billion for grants.<sup>8</sup> In

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6. Article 3(1) of Council Decision (EU, EURATOM) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, *OJ L 424*, 15.12.2020, p. 1–10.

7. Next Generation EU is built on several legal instruments: Regulation 2020/2094, which sets out the purpose of the funds, and the Regulation 2021/241 on Recovery and Resilience Facility, which sets out the criteria for the distribution of the funds. The combination of these two instruments has been defined as “creative”, as well as “legal high-tech masterpiece”, see P. Leino-Sandberg, M. Ruffert, Next Generation EU and its Constitutional Ramifications: a Critical Assessment, *Common Market Law Review* 59: 433–472, 2022, p. 443. Similarly, De Witte criticized the stretched use of articles 122 and 175(3) of the TFEU as legal bases, see B. De Witte, The European Union’s COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift, *Common Market Law Review* 58: 635–682, 2021, p. 652–659. The third instrument is the Commission’s authorization to borrow from the markets, which is found in the Own Resources Decision, 2020/2053. The other instruments are the following: Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 sets out the multi-annual financial framework for 2021–2027; Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget establishes the rule of law conditionality regime to access EU funds and Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources sets out a roadmap for the introduction of new own resources to repay the common EU debt.

For a deeper analysis of the legal structure of Next Generation EU, see F. Fabbrini, ‘EMU because of Covid-19’, in: *EU Fiscal Capacity: Legal Integration After Covid-19 and the War in Ukraine* (Oxford, 2022; online edn, Oxford Academic, 15 Dec. 2022).

For an overview of previous borrowing by the EU see C. Heber, European Legal Limits for the Recovery Fund, (December 7, 2020). Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2020-16, Available at SSRN: <https://ssrn.com/abstract=3743969>.

8. This figure is taken from the European Commission’s website <[commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility\\_en](https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en)>, last visited on 6 January 2025. Doubts were raised as to whether NGEU breaches the budgetary principles of universality and equilibrium; See G. Bizioli, Building the EU Tax Sovereignty: Lessons from Federalism, 14 *World Tax J.* 3 (2022), *Journal Articles & Opinion Pieces IBFD* (accessed 28 July 2022), sec. 3.2; The explanation provided by the Council Legal Service was that, being “external assigned revenue”, they cannot by definition jeopardize budgetary balance; see Council Legal Service, Opinion 9062/20 of 24 June 2021, para. 34, available at <https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf>.

this context, the own resources ceiling was temporarily increased by 0.6% to cover exclusively the liabilities deriving from the borrowing.<sup>9</sup>

The July 2020 European Council<sup>10</sup> agreed on introducing new own resources to finance the early repayment of the NGEU borrowing,<sup>11</sup> for which the Interinstitutional Agreement of 2021<sup>12</sup> provided a concrete roadmap.<sup>13</sup> As a result, in 2021, the Commission adopted a proposal for the first basket of own resources (COM(2021) 570 final),<sup>14</sup> and in 2023, a second basket (COM(2023) 331 final/2).<sup>15</sup> These proposals included the introduction of own resources based on the Emissions Trading Scheme (ETS), the Carbon Border Adjustment Mechanism (CBAM), Pillar One, and a statistical contribution based on the gross operating surplus of the corporate sector.

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9. Article 6 of Council Decision (EU, EURATOM) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, *OJ L 424*, 15.12.2020, p. 1–10.

10. Special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, Conclusions, p. A29. A29:

The Union will over the coming years work towards reforming the own resources system and introduce new own resources. As a first step, a new own resource based on non-recycled plastic waste will be introduced and apply as of 1 January 2021. As a basis for additional own resources, the Commission will put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy, with a view to their introduction at the latest by 1 January 2023. In the same spirit, the Commission will put forward a proposal on a revised ETS scheme, possibly extending it to aviation and maritime. Finally, the Union will, in the course of the next MFF, work towards the introduction of other own resources, which may include a Financial Transaction Tax. The proceeds of the new own resources introduced after 2021 will be used for early repayment of NGEU borrowing.

11. Special meeting of the European Council of 17, 18, 19, 20 and 21 July 2020, Conclusions, p. A29.

12. Interinstitutional Agreement between the European Parliament, the Council and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap for the introduction of new own resources, *OJ L 433I*, 22.12.2020.

13. De Witte explains that Interinstitutional Agreements can be binding; as a result, not only can the Parliament argue that the Commission has a legal obligation to propose a new basket of own resources (which it did by the time of writing) but also that the Council should consider it. See B. De Witte, *The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift*, *Common Market Law Review* 58: 635–682, 2021, p. 666.

14. Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union, COM (2021) 570 final.

15. Amended proposal for a COUNCIL DECISION amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union {SWD (2023) 331 final}.

The third step of the concrete roadmap agreed through the Interinstitutional Agreement of 2021 requires the Commission to propose a second basket of own resources by June 2024. These might include a Financial Transaction Tax, a financial contribution linked to the corporate sector, or a new common corporate tax base.<sup>16</sup>

Against this background, the question of a genuine EU tax, and more specifically, whether the EU is competent to levy a tax of its own right, has come to the fore again. It has been argued that “COVID-19 has accelerated the creation of a fiscal Union in a dramatic way”.<sup>17</sup> NGEU, the possibility of issuing common debt and the debate on new potential own resources have accelerated the debate on the need for a more central fiscal Union.<sup>18</sup>

The stream of literature calling for genuine EU taxes to address the budgetary challenges posed by the COVID-19 health crisis has been defined as functionalist;<sup>19</sup> i.e. given the EU debt incurred to finance borrowing, there is a need to introduce genuine EU taxes for the repayment of EU expenses.<sup>20</sup> Despite its great support, this perspective has also been criticized in the literature for considering greater European integration as dogmatically

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16. Interinstitutional Agreement between the European Parliament, the Council and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap for the introduction of new own resources, OJ L 433I, 22.12.2020.

17. Editorial Comment: “Is it time to talk about genuine EU taxes and the reform of the EU’s ‘tax architecture’?” 20th OCTOBER 2020, EU Law Live.

18. Editorial Comment: “Is it time to talk about genuine EU taxes and the reform of the EU’s ‘tax architecture’?” 20th OCTOBER 2020, EU Law Live.

19. F. Farri, *Between Form and Substance: At the Root of the Limits of the EU Taxing Powers*, in: *The Power to Tax in Europe*. Ed. Johan Lindholm and Anders Hultqvist. Oxford: Hart Publishing, 2023. 83–122. Swedish Studies in European Law. Bloomsbury Collections. Web. 8 Jun. 2023., p. 101.

20. E. Traversa, G. Bizioli, *Solidarity in the European Union in the Time of COVID-19: Paving the Way for a Genuine EU Tax?*, *Intertax*, Volume 48, Issue 8 & 9; Declaration of European tax law professors P. Pistone, F. Vanistendael, G. Bizioli, I. Burgers, F.A. García Prats, D. Gutmann, P. Essers, W. Haslechner, G. Kofler, H. Kube, A. M. Jiménez, E. Reimer and E. Traversa, *European Solidarity Requires EU Taxes*, *EU Law live*, 21 April 2020; C. Fuest, J. Pisani-Ferry, *Financing the European Union: new context, new responses*, *Policy Contribution 2020/16*, Bruegel; D. Canè, *Profili di un’imposta sui redditi d’impresa come risorsa propria dell’Unione Europea*, *Riv. Ital. Dir. Pubbl. Comunitario* 2020; A. Cordewener, *The COVID-19 Crisis: An Opportunity for EU Budget and Tax Reform*, *EC Tax Review* 2020/6; A. P. Dourado, M. Poiares Maduro, *A Plead for the European Union Fiscal Autonomy*, 48 *Intertax*, 2020, p. 695; F Vanistendael, *Will the Coronavirus Pandemic Cure the EU Budget?* 100 *Tax Notes International*, 2020, p. 1417; G. Bizioli, *Quale sovranità fiscale per l’Unione Europea?* *Rivista di Diritto Finanziario e Scienza delle Finanze*, 2021; See G. Bizioli, *Building the EU Tax Sovereignty: Lessons from Federalism*, 14 *World Tax J.* 3 (2022), *Journal Articles & Opinion Pieces IBFD* (accessed 28 July 2022).

good.<sup>21</sup> As a result, its opponents claim that although the reasoning behind the functionalist doctrine is understandable, it should not necessarily lead to attributing additional direct taxation powers to EU authorities.<sup>22</sup>

Against the background of this academic debate, the goal of this book is to assess the extent of the EU's taxing powers by addressing both the legal possibility of introducing an EU tax (or, in other words, whether there is a legal basis for it in the Treaties) and the role played by certain policy and legal criteria in shaping its exercise. These questions are timely and relevant for the potential next step in the development of the European Union as a fiscal union because a structured study can help shape the future of EU financing from a legal perspective. The legal-philosophical meaning of "tax sovereignty",<sup>23</sup> and the policy question of whether we *should* introduce an EU tax to finance the EU budget are outside the scope of this contribution.<sup>24</sup>

21. F. Farri, *Between Form and Substance: At the Root of the Limits of the EU Taxing Powers*, in: *The Power to Tax in Europe*. Ed. Johan Lindholm and Anders Hultqvist. Oxford: Hart Publishing, 2023. 83–122. *Swedish Studies in European Law*. Bloomsbury Collections. Web. 8 Jun. 2023., p. 101.

22. F. Farri, *Between Form and Substance: At the Root of the Limits of the EU Taxing Powers*, in: *The Power to Tax in Europe*. Ed. Johan Lindholm and Anders Hultqvist. Oxford: Hart Publishing, 2023. 83–122. *Swedish Studies in European Law*. Bloomsbury Collections. Web. 8 Jun. 2023., p. 101.

23. De la Motte defines tax sovereignty as the competence to exercise legislative competences or to freely attribute them to another authority and to take them back, and the power to exercise the powers or to attribute them to another authority and to take them back. Cartou had defined it as a combination of autonomy and territorial exclusivity, whereby technical autonomy is intended as the freedom of a state to design all the elements of a tax (taxable event, base, person, rate, etc.) the way it deems fit, and territorial exclusivity as the exclusive power of a body to create and apply a certain tax system in that territory. See respectively A. Maitrot de la Motte, *Droit Fiscal de l'Union européenne*, Paris Bruylant 2016; A. Maitrot de la Motte, *Souveraineté Fiscale et Organisations Internationales à Vocation Economique*, in N. Baccouche (dir.), *Les implications financières, fiscales et douanières de l'Union euro-méditerranéenne*. Tunis: Revue Tunisienne de Fiscalité, 2009, n° 11, pp. 181-227; V. Louis Cartou. *Droit Fiscal International et Européen*. Paris: Dalloz, 1981, pp. 14-15.

24. C. Fuest, J. Pisani-Ferry, 'Financing the European Union: new context, new responses', Policy Contribution 2020/16, Bruegel, (2020); P. Cattoir, Tax-based EU own resources: An assessment, Working paper No 1/2004, DOC TAXUD/2004/2007; R. Caesar, An EU tax? —Not a good idea. *Intereconomics* 36, 231–233 (2001); A. Maitrot de la Motte, A European Tax Legal and Political Issues, *Revue de l'OFCE / Debates and policies* – 134 (2014); H. Rui, R. Alves, O. Afonso, Reforming the EU Budget: How to Increase Financial Autonomy?, (2008), available at: [https://www.researchgate.net/publication/228915798\\_Reforming\\_the\\_EU\\_Budget\\_How\\_to\\_Increase\\_Financial\\_Autonomy](https://www.researchgate.net/publication/228915798_Reforming_the_EU_Budget_How_to_Increase_Financial_Autonomy); De Feo, Laffan (Editor/S), *EU own resources: momentum for a reform?*, Florence: European University Institute, RSCAS, 2016, *Global Governance Programme*[*Global Governance Programme*], [European, Transnational and Global Governance] - <https://hdl.handle.net/1814/39112>; M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016;

To this end, this book is divided into two parts. The first part presents the pillars of a theoretical framework, while the second part tests actual proposals for own resources against it. Thus, the questions this book aims to answer are:

1. What is the legal basis for the introduction and design of an EU tax (dealt with in chapter 2.)?
2. What are the most suitable tax revenues to become EU own resources (dealt with in chapter 3.)?
3. What are the limits imposed by the general principle of equality on its design (dealt with in chapter 4.)?

The remainder of chapter 1. will first delimit the scope of the research (sections 1.2.2.; 1.2.3. and 1.2.4.) and explore possible definitions of an EU tax (section 1.2.5.), before outlining the method used and the structure of the research (section 1.3.).

## 1.2. Scope of the research

### 1.2.1. Introductory remarks

Over the years, the academic and political discussions related to the possibility of the EU introducing an EU tax have been closely connected to the EU's competence to harmonize the tax laws of the Member States<sup>25</sup> and to the concept of own resources. This necessitates two differentiations to delimit the scope of this book.

The first is the relationship between harmonization and centralization of revenues (section 1.2.2.), and the second is the distinction between genuine own resources and financial contributions (section 1.2.3.), which is interrelated with the concepts of inter-individual and inter-nation equity (section 1.2.4.).

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F. Heinemann, P. Mohl, S. Osterloh, Reform Options for the EU Own Resources System, ZEW Economic Studies Publication Series of the Centre for European Economic Research (ZEW), Mannheim, Germany, Physica-Verlag, 2008.

25. Looking at the question of the EU's sovereignty from the perspective of its competence to harmonize in field of direct taxation see M. Isenbaert, EC Law and the Sovereignty of the Member States in Direct Taxation, Vol. 19 Doctoral Series, IBFD, 2010, Chapter F.

## 1.2.2. Harmonization and centralization of revenues

The divergences between the domestic systems of Member States that are likely to create obstacles to the internal market or distortions of competition can be reduced through harmonization. Tax harmonization is concerned with market integration but is not an instrument of budgetary policy.<sup>26</sup> As Vanistendael explains, even with full harmonization of tax rules, revenue-raising and spending could still vary across the Member States.<sup>27</sup>

From a conceptual perspective, the goals behind the harmonization of the tax rules across Member States and those behind the creation or transformation of certain tax revenues into EU own resources differ. While the former meets market objectives, the latter addresses budgetary needs. The “centralization” of a certain type of revenue typically does not serve the goal of removing obstacles or distortions of competition in the internal market.<sup>28</sup> Similarly, the harmonization of tax rules does not, in itself, generate revenues to finance the EU budget.<sup>29</sup>

However, there are indirect and direct connections between the two in certain scenarios. The competence to harmonize tax laws of the Member States is part of the wider array of tools to achieve market integration. The competence to raise own resources belongs to the realm of financial autonomy, which allows a political body to achieve its budgetary objectives, including

26. From a different perspective, Bizioli affirms that fiscal harmonization is not concerned with tax justice goals, intended as redistributive function of taxation. The reason is that the Treaties see taxation primarily as an obstacle to the development of the internal market, thus taxation is essentially a regulatory tool. G. Bizioli, *Building the EU Tax Sovereignty: Lessons from Federalism*, 14 *World Tax J.* 3 (2022), *Journal Articles & Opinion Pieces IBFD* (accessed 28 July 2022), sec. 3.3. Also claiming that European integration should not in itself be a reason for increasing the EU budget or a supranational EU tax area, see H. O. C. R, *Ruding, Fiscal Sovereignty in the Internal Market*, *Intertax*, 1991/5, p. 250.

27. Even if all the tax laws were fully harmonized at EU level, Vanistendael explains that different levels of efficiency and administration of the tax system would have an impact on the budget results, see F.J.G.M. Vanistendael, Chapter 15: *The European Union in Tax Aspects of Fiscal Federalism: A Comparative Analysis* (G. Bizioli & C. Sacchetto eds., IBFD 2011), *Books IBFD* (accessed 23 July 2023), p. 626-627.

28. According to Vanistendael, “to achieve a fully integrated internal market there is no need for the Member States to transfer vital parts of their fiscal and budgetary sovereignty.” See F.J.G.M. Vanistendael, Chapter 15: *The European Union in Tax Aspects of Fiscal Federalism: A Comparative Analysis* (G. Bizioli & C. Sacchetto eds., IBFD 2011), *Books IBFD* (accessed 23 July 2023), p. 642.

29. Vanistendael makes the example of VAT to make the point that its harmonization did not intend to pursue budgetary goals. See F.J.G.M. Vanistendael, Chapter 15: *The European Union in Tax Aspects of Fiscal Federalism: A Comparative Analysis* (G. Bizioli & C. Sacchetto eds., IBFD 2011), *Books IBFD* (accessed 23 July 2023), p. 626.

redistribution (both through the design of a tax and through the use of tax revenues to finance expenditure).

Market integration triggers increased mobility of production factors, which, in turn, calls for shifting the realization of redistributive policies among individuals<sup>30</sup> (either through tax design, tax revenue expenditure or a combination of both) to the upper federal level of government.<sup>31</sup> As a result of this reasoning, the higher the level of European market integration, the more tax revenues need to be centralized at the EU level for the realization of redistributive policies.

More directly, as will be explained in chapter 3., section 3.5.3., a harmonized tax base is a useful starting point for transforming certain tax revenues into EU own resources. Value Added Tax (VAT) was considered a good candidate for an own resource because its basis of assessment had already been harmonized at the EU level. As a result, contributions from Member States would have been broadly equal.<sup>32</sup> Second, as explained in chapter 3., section 3.5.2., a high level of regulatory harmonization at the EU level can lead to a mismatch between the place of the taxable event and the country that collects the tax revenues (defined as regional arbitrariness), which is one of the primary reasons to “centralize” certain types of tax revenue at the EU level. Third, as explained in chapter 3., section 3.3.2., transforming

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30. There is a difference between realizing redistribution among individuals or between Member States. As the MacDougall Report explains, at the earlier stages of integration, redistribution in the form of inter-governmental grants is necessary to compensate those states that – taken individually – lose from integration. In later stages of integration, however, when one can assume higher mobility, redistribution can be realized through an EU-wide tax and individualized forms of expenditure like social security systems. See Report of the Study Group on the Role of Public Finance in European Integration - Volume I General Report, Brussels, April 1977, known as the “MacDougall Report”, p. 59-60.

31. The theory behind this statement is that taxpayers choose their jurisdiction depending on the level of (re)distribution that they prefer. If the redistribution function is left to the local state level and we assume full mobility of the taxpayers, the high-income taxpayers would prefer the countries with lower redistributive policies, while the low-income taxpayers would prefer the countries with higher redistributive policies. The result, however, would be that countries with higher redistributive policies would lose their financing due to the rich fleeing the country (with the poor chasing them). See W. E. Oates, An Essay on Fiscal Federalism, *Journal of Economic Literature*, Sep. 1999, Vol. 37, No. 3, American Economic Association, p. 1121.

32. Rapport fait au nom de la commission des finances et des budgets sur les propositions de la Commission des Communautés européennes au Conseil » (docs. 99/69 et 147/69) Relatives à l’institution des ressources propres aux Communautés et à l’accroissement des pouvoirs budgétaires du Parlement européen, 8 December 1969, p. 59-60; BAC 2/1971 N° 120 1969 – 1970, Historical Archives of the European Union.

certain tax revenues into EU own resources might enhance the functioning of the internal market.<sup>33</sup>

Despite the connection between these two aspects,<sup>34</sup> this book does not aim to discuss the EU's taxing powers by assessing the extent of its competence to harmonize the tax laws of the Member States in and of itself. Rather, the competence to harmonize tax rules becomes relevant only when it is a necessary condition for introducing an EU tax. As explained in chapter 2., section 2.4., whenever a tax measure aims to realize two goals simultaneously – substitution of the divergent national standards and revenue-raising for the EU budget – the EU tax would be based on two legal bases: article 113 or 115 TFEU (the so-called harmonization legal bases) and article 311 TFEU.

In conclusion, the topic of tax harmonization falls within the scope of this contribution only when it serves the creation of an EU tax with a dual purpose of harmonization and revenue-raising.

### 1.2.3. Own resources and financial contributions

Article 311 TFEU, as a legal basis for introducing an EU tax, leads to the second differentiation: between own resources and financial contributions. Article 200 of the 1957 Treaty of Rome established that the Community would be financed by the Member States' financial contributions. Article 201 stated that the Commission would study the conditions under which the Member States' financial contributions could be substituted by own resources.

Eventually, financial contributions were substituted by the system of own resources created by Council Decision of 21 April 1970,<sup>35</sup> and article 200 was abolished with the Treaty of Maastricht.<sup>36</sup> However, the ghost of financial contributions has since then inhabited the discussions on the financing of the EU, including under the new category of “own resources”.

33. F. Vanistendael, An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and “Tax Abuse”? *Bulletin for International taxation*, 2021, IBFD.

34. A. Cordewener, EU Budgetary Reform and Tax Harmonization: Becoming Brothers in Arms, *EC Tax Review* 2022–2.

35. Council Decision of 21 April 1970 on the Replacement of Financial Contributions from Member States by the Communities' own Resources (70/243 ECSC, EEC, Euratom), *OJ L 94*, 28.4.1970, p. 19–22.

36. Treaty on European Union, 29 July 1992, 92/C 191 /01, *OJ C 191*, 29.7.1992, p. 1–112.

As early as 1978, the Commission drafted a report on the future financing of the EU, where given the need to increase revenues for the size of the budget at that time, two options were proposed.<sup>37</sup> While the second was to introduce new types of own resources for the EU budget, the first was to revert to financial contributions by Member States.<sup>38</sup>

In the 1990s, the regressive results yielded by the VAT-based own resource channelled the discussion towards the introduction of an own resource that would take into account the relative prosperity of Member States. The Commission's Report of 1987<sup>39</sup> and the resolution of the European Parliament of 1990<sup>40</sup> emphasized the need to introduce some elements of progressivity<sup>41</sup> into the systems of contributions that take into account the financial capabilities of Member States.<sup>42</sup>

These inter-jurisdictional equity concerns among Member States have influenced political discussions on EU financing. In the absence of the former article 200 TEC on financial contributions, they have also blurred the original meaning of own resources, which originated as a clear opposite to the idea of Member States' financial contributions.

While financial contributions were lump-sum taxes imposed on Member States for financing the Communities, the GNI-based own resources introduced in 1988 are proportional to national income. Yet, they are both obligations imposed on Member States. Thus, all current adjustments and forms of financing that take into account for the overall prosperity of Member States are (more proportional or progressive) substitutes for financial contributions.

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37. Bulletin of the European Communities, Supplement 8/78, Financing the Community budget: The way ahead (sent by the Commission to the Council on 23 November 1978), COM (78) 531, 21 November 1978, p. 6.

38. However, according to the Commission, this would have gone against the spirit of the Treaties. See Bulletin of the European Communities, Supplement 8/78, Financing the Community budget: The way ahead (sent by the Commission to the Council on 23 November 1978), COM (78) 531, 21 November 1978, p. 7.

39. Report by the Commission to the Council and Parliament on the Financing of the Community Budget, COM (87) 101 final/2. Brussels, 5 March 1987, p. 2.

40. Resolution on the future financing of the European Community, European Parliament, 22 November 1990, OJ L 185, 15.7.1988, C 324/244.

41. According to point 2 of the Resolution, the European Parliament "Considers that the new system of own resources should mainly take account of the relative prosperity of Member States and of citizens of the Community". See Resolution on the future financing of the European Community, European Parliament, 22 November 1990.

42. Not surprisingly, in 1988 the new GNI-based own resource was introduced: Council Decision of 24 June 1988 on the system of the Communities' own resources (88/376/EEC, Euratom), OJ L 185, 15.7.1988, p. 24–28.

Given that the term “own resources”, as used in the current article 311 TFEU, encompasses all types of contributions, genuine own resources and financial contributions-like own resources, it is not possible to distinguish between the two without a structured analysis of the essential characteristics of each item labelled as “own resource”.

For the purposes of this book, distinguishing between genuine own resources and financial contributions is essential, as only genuine own resources can be considered EU taxes, and only EU taxes reflect the EU’s taxing powers. While financial contributions are “taxes” on Member States, genuine own resources are taxes on individuals, companies or products.

Treating the two as if they belong to the same category of “own resources” leads to a conflation of the characteristics of genuine own resources and financial contributions under a general label. This, in turn, results in a mixed realization of policy objectives.

#### 1.2.4. Inter-individual equity and inter-nation equity

Equity is among the compromised policy objectives: whereas a tax on individuals, companies or products might aim to realize equity among taxpayers, a “tax” on Member States (i.e. financial contribution-like own resources) seeks to realize inter-nation equity.<sup>43</sup> Referring to the realization of equity in the system of own resources without distinguishing between genuine own resources (i.e. deriving from an EU tax) and financial contribution-like own resources might generate some confusion. In fact, since it is not clear who is the subject of the obligation, it is also not clear what type of equity is sought.

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43. Both dimensions of equity reflect the dual dimension of the EU: a Union of Member States and a Union of citizens. As stated in the landmark judgement *Van Gend en Loos*, the Treaties are

more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.

Affirming that the political and legal legitimacy of the EU has to be found primarily in the European citizens see G. Bizioli, *Building the EU Tax Sovereignty: Lessons from Federalism*, 14 *World Tax J.* 3 (2022), *Journal Articles & Opinion Pieces IBFD* (accessed 28 July 2022), section 3.3.

If, for instance, one takes the example of financial contribution-like own resources, the subject of the “tax” would be the Member States, i.e. Member States contribute a percentage of their GNI to the EU budget. As a result, the manifestation of equity that a tax system might adopt, such as the principle of ability to pay, must apply to Member States as collective entities.<sup>44</sup> The type of own resource used to realize this equity might be calculated progressively based on the countries’ GNI.<sup>45</sup>

In contrast, if one takes the example of genuine own resources (deriving from an EU tax), the subjects of the tax would be European individuals or companies. As a consequence, following the example of the paragraph above, the ability to pay as a potential manifestation of equity must be referred to the European individuals or companies subject to the tax.<sup>46</sup> The type of EU tax to realize this equity might be a European progressive personal income tax.<sup>47</sup>

However, an EU tax does not play any relevant role in the realization of equity among Member States, as a financial contribution-like own resource does not have any direct role in the realization of inter-individual equity.<sup>48</sup> Thus, an own resource that shows features of an EU tax and a financial contribution compromises the realization of inter-individual equity to the advantage of inter-nation equity, and vice versa.

From this perspective, a distinguishing feature of financial contribution-like own resources is that they realize equity by looking at the overall prosperity

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44. M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016, p. 34-37. Whereas Schratzenstaller; Krenek, Nerudová and Dobranschi consider it debatable to refer a concept like ability to pay to a country, Heinemann, Mohl and Osterloh consider it undisputed. See F. Heinemann, P. Mohl, S. Osterloh, Reform Options for the EU Own Resources System, ZEW Economic Studies Publication Series of the Centre for European Economic Research (ZEW), Mannheim, Germany, Physica-Verlag, 2008, p. 150.

45. M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016, p. 34-37. See also the Spanish proposal for a progressive contribution to the EU budget explained in section 1.2.5.2.3.

46. M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016, p. 34-37.

47. M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016, p. 34-37.

48. M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016, p. 34-37.

of a Member State. The adjustments introduced by contribution caps or abatements respond exactly to the need to realize vertical equity among Member States (inter-nation equity).<sup>49</sup> However, the overall prosperity of a Member State is not necessarily a reliable proxy for the prosperity of its citizens,<sup>50</sup> which can justify differences in their contributions to the EU budget in light of inter-individual equity concerns.<sup>51</sup>

In conclusion, identifying the type of equity sought by an own resource helps to distinguish whether it is a genuine own resource or a financial contribution-like own resource. This distinction is relevant because only genuine own resources, as expressions of the EU's taxing powers, fall within the scope of this book.

## 1.2.5. Definition of EU tax

### 1.2.5.1. Literature review

The literature offers various definitions of what constitutes an EU tax. For De la Motte, for instance, a European tax needs to have five cumulative elements: it needs to be a monetary payment, collected by a European authority, from European taxpayers, definitive and allocated to finance EU public expenditures.<sup>52</sup> For him, the fact that the European authorities do not have a direct claim on individuals and companies and cannot collect their taxes directly from them is a determining factor. Similarly, Farri considers the element of tax collection as a determining element, thereby excluding taxes whose revenues are collected by national authorities from the definition of "EU tax".<sup>53</sup>

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49. See section 1.2.4. of this chapter.

50. See chapter 4., section 4.2.3. for an analysis of this topic.

51. Referring to intergovernmental grants, W. E. Oates, *An Essay on Fiscal Federalism*, *Journal of Economic Literature*, Sep. 1999, Vol. 37, No. 3, American Economic Association, p. 1127. One can make a comparison with financial contributions based on the overall prosperity of a Member State and conclude that even if, on average, one can assume that income would be transferred from the wealthier individuals in the wealthier jurisdiction to the poorer individuals in the poorer jurisdiction, this might not always be the case. Depending on the way in which each Member State decides to raise its share of financial contribution-like own resource, the result may be that the income of poorer individuals living in wealthier Member States is transferred to wealthier individuals in poorer jurisdictions.

52. A. Maitrot de la Motte, *A European Tax Legal and Political Issues*, *Revue de l'OFCE / Debates and policies* – 134 (2014), p. 142.

53. F. Farri, *Between Form and Substance: At the Root of the Limits of the EU Taxing Powers*, in: *The Power to Tax in Europe*. Ed. Johan Lindholm and Anders Hultqvist. Oxford: Hart Publishing, 2023. 83–122. *Swedish Studies in European Law*. Bloomsbury Collections. Web. 8 Jun. 2023., p. 90.

In his study on the most suitable forms of EU financing, Cattoir equates the concept of “EU tax” with “genuine” or tax-based own resources.<sup>54</sup> Similarly, Schratzenstaller, Krenek, Nerudová and Dobranschi appear to use the term “EU taxes” interchangeably with “genuine own resources”.<sup>55</sup>

Iozzo, Micossi and Salvemini, on the other hand, propose that “EU taxes” should satisfy five criteria: (i) they must have a broad base, (ii) be simple and uniformly assessed, (iii) be automatically transferred to the EU budget, (iv) be transparent for EU citizens and (v) not address redistributive goals that can be addressed through expenditure programs.<sup>56</sup>

The High-Level Group on Own Resources defines “a real” EU tax as one decided and levied by the European Union, with tax rates set by the EU legislative authority and revenue accruing directly to the EU budget.<sup>57</sup>

*A contrario*, the High-Level Group on Own Resources argues that own resources based on harmonized taxes are improperly called “EU taxes”.<sup>58</sup> This error arises because the harmonized taxes underlying the own resource are “based upon taxes existing or created at national level”.<sup>59</sup> Furthermore, such taxes are decided through unanimity voting<sup>60</sup> under articles 113 or 115 TFEU, with Member States also collecting the revenues.<sup>61</sup> The accrual of revenues to the EU budget occurs through the adoption of a decision based

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54. P. Cattoir, Tax-based EU own resources: An assessment, Working paper No 1/2004, DOC TAXUD/2004/2007, p. 5.

55. M. Schratzenstaller; A. Krenek; D. Nerudová, M. Dobranschi; EU taxes as genuine own resource to finance the EU budget – Pros, cons and sustainability-oriented criteria to evaluate potential tax candidates, FairTax WP-Series No.3, June 2016, p. 6.

56. Further, in light of these criteria, they consider that corporate tax would not be a valid candidate for an EU tax, whereas VAT or an energy tax would. A. Iozzo, S. Micossi, M. Salvemini, A New Budget for the European Union? Centre for European Policy Studies (CEPS) Policy Brief No. 159, May 2008, p. 6.

57. Future Financing of the EU, Final report and recommendations of the High-Level Group on Own Resources, December 2016, p. 24.

58. Future Financing of the EU, Final report and recommendations of the High-Level Group on Own Resources, December 2016, p. 24.

59. Future Financing of the EU, Final report and recommendations of the High-Level Group on Own Resources, December 2016, p. 24.

60. According to Vanistendael, “The European Council acting unanimously is a communitarian organ and therefore its unanimous decision is a decision by the EU and not by the Member States”, see F. Vanistendael, “Does the ECJ have the power of interpretation to build a tax system compatible with the fundamental freedoms?”, EC Tax Review, 2008, Vol. 17, Issue 2, p. 56.

61. Future Financing of the EU, Final report and recommendations of the High-Level Group on Own Resources, December 2016, p. 24.

on article 311 TFEU.<sup>62</sup> More recently, Scherleitner and Traversa have supported this interpretation.<sup>63</sup>

Thus, we can divide the positions described in the literature review into four main groups. The first includes those who equate the expression “EU taxes” with “genuine own resources”, without requiring further criteria for an EU tax to qualify as such (Cattoir, Schratzenstaller, Krenek, Nerudová and Dobranschi). The second includes authors who consider tax collection by European authorities as necessary (De la Motte, Farri). The third comprises authors who consider a broad tax base, simple and uniform assessment, automatic transfer to the EU budget and no redistribution to be necessary for an EU tax to qualify as such (Iozzo, Micossi and Salvemini). The fourth (the High-Level Working Group and Scherleitner and Traversa) excludes harmonized taxes that bring revenues to the EU budget from the definition of an EU tax.

Among the requirements considered necessary in the literature review above, there are two that are not considered relevant for the purposes of the definition of “EU tax” used in this manuscript, which are discussed in sections 1.2.5.2.1. and 1.2.5.3. These elements are the necessity for an EU tax not to be an EU measure that merely harmonizes the base of pre-existing national taxes (discussed in section 1.2.5.2.1.) and the necessity for tax collection to be conducted by European authorities (discussed in section 1.2.5.3.).

## 1.2.5.2. Definition of EU tax for the purposes of this book

### 1.2.5.2.1. *Introductory remarks*

It is here submitted that neither of these elements is determinative. According to the High-Level Working Group on Own Resources, harmonization is realized “based upon taxes existing or created at national level”.<sup>1</sup> This statement seems to suggest that harmonized standards necessitate that diverging rules exist at the national level and that, as a result, the policymaking role of the EU legislature in harmonizing such diverging standards is somehow limited by the existing national regulations in the matter. These

62. Future Financing of the EU, Final report and recommendations of the High-Level Group on Own Resources, December 2016, p. 24.

63. M. Scherleitner, E. Traversa, Involving the Corporate Sector in EU Financing – A Two-Tier Model for a Corporate Income Tax Based Own Resource, (January 15, 2024). European Law Review (forthcoming June 2024), available at SSRN: <https://ssrn.com/abstract=4695242>.







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