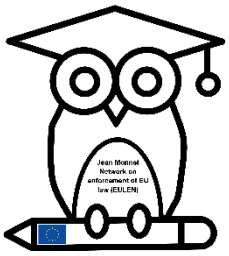

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The New Conditionality Regime (Regulation (EU, Euratom) 2020/2092) – The Rule of Law as a meta-principle and the emergence of a Law of execution in tax matters

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Abstract

The Regulation 2020/2092 states the special relevance of the protection of the financial interests of the Union and the importance of respect for the Rule of Law. The Rule of Law, as a meta-principle, is able to unite the entire European legal system. The European Union should not be satisfied with an approach that only emphasizes the efficiency of the performance of its institutions and of its Member States. In the light of the Rule of Law, all public power actions should be based on a democratic legal framework and they must also be guided by "good values". The Rule of Law asks for public actions in accordance with the Law and, more than that, in accordance with *good Law*, particularly in repressive matters, such as taxation. And the Regulation assumes, precisely, Rule of Law and taxation as two essential dimensions in the fight against tax avoidance and tax fraud. The abusive and illegal behaviour of taxpayers has a direct and negative impact on the collection of tax revenues that constitute the Union's own resources and that are part of its budget, compromising the implementation of the European project. The realization of the purposes underlying the Regulation presupposes, therefore, an integrated fiscal policy, which implies the addition of greater vitality to basic fiscal dimensions, removing false fears of loss of fiscal sovereignty. The effectiveness of the Regulation, in its tax dimension, would then be strengthened, namely, by prioritizing the emanation of hard law instruments in fiscal matters, especially through regulations, assuming a Law of execution. The effectiveness of the protection of the Union budget does not seem to be enough, from a fiscal point of view, with a Law of creation by the Member States.

Keywords:
Rule of Law; Conditionality regime; Tax fraud; Fiscal federalism

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I. Introduction – Rule of Law and democracy in a federative context

The European Union (EU) has faced several crises in the last ten years: the euro crisis; the refugee or migrant crisis; the Brexit; and the pandemic crisis, being driven, at all times, by a natural survival instinct. And these crises, not being existential crises of the EU (without questioning its very existence), are challenges that test the limits of the EU. And today we are experiencing one of the crises that best tests the borders of the Union's values: the crisis of the Rule of Law, especially in its dimension '*democracy'*.

Democracies are fragile and cases of democratic backsliding exist. And in order to correct situations of democratic back-sliding, the EU is called upon to respond to such situations, in line with the level of integration already achieved. Democracies are not always able to protect themselves internally, demanding the adoption of external discipline mechanisms and it was precisely in this context that Regulation (EU, Euratom) 2020/2092 emerged, on a general regime of conditionality for the protection of the EU budget (hereinafter, Conditionality Regulation).

With regard to episodes of internal democratic deficit, several Member States have witnessed the birth and the development of populist movements, mainly associated with a loss of confidence on the part of many citizens in the functioning of democracy. Such movements are essentially based on the conception of *illiberal democracy*, which exhausts democracy in the electoral process - that is, in the choice of those who assume power -, in an understanding of the concept that opposes the will of the people to the elites that, theoretically, assume it. This, in our opinion, is a very poor conception of democracy, especially when compared to what the EU has defined as the one that underlies the process of European integration. *Liberal democracy*, in the EU, is based on the Rule of Law, assumed as a meta-principle, and which supports a plurality of values. The creation of efficient and effective mechanisms in response to the threat of the Rule of Law is, therefore, essential, not only for the maintenance of the national stability of the different Member States, but also for the maintenance of relations and the functional stability of the EU itself.

In any case, the emergence of this crisis can also be understood as an expression of the nature of the Union. As is well known, it is possible to look at the EU in the light of the theory of the Federal Constitution, assuming the Union not as a State, not as an international organization, but as a structure very close to a federation of States. In other words, this crisis of the Rule of Law seems to be easily perceptible if we start from the recognition that a federative structure is at stake. Federal systems are, by their nature, unstable, living in an existential imbalance between the interests of the States, of each of the States, and the interests of the federation. This imbalance will continue until it is decided where, in fact, the power of normative creation is. And as can be seen, the EU is facing this problem, and has managed to solve it through what the doctrinal constructions point out as the *systemic harmony* between the constitutional order of the Union and the constitutional orders of the States, in the light of principles of *constitutional tolerance*, of a *contrapunctual Law*, in the sense of taking the best advantage of the existing legal pluralism[1]. *Constitutional pluralism* is typical of federal constitutional orders, in a systemic harmony that presupposes *substantial axiological homogeneity*. Knowing that among the Member States such homogeneity does not relay in religion, language or ethnicity, then homogeneity could be based on agreement on essential dimensions which, in the case of the EU, could very well lead back to agreement on the elevation of the Rule of Law to a meta-principle, which is even assumed as a condition of access to the Union itself, as follows from article 49 of the Treaty on European Union. In the light of this provision, two criteria for membership are established: a geographical criterion, based on European territory, and a political criterion, based on the Rule of Law.

Despite the pluralism of cultural styles, the diversity of circumstances and historical conditions that underlie the concept of the Rule of Law[2], it is possible to see a common core, which allows it to be associated with a State that is founded and that acts limited, nothing more, nothing less, than the Law. And the Rule of Law calls for public action not only in accordance with the *Law*, but especially in accordance with a *good Law*. This action, guided and limited by legal norms (by rules and principles), is extended to all dimensions of State' actions, among them is the one that will serve as the object of our attention: the fiscal sphere.

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[1] *Vide* Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003).

[2] For example, 'Rule of Law', in the British expression, found in the Magna Charta of 1215, which refers to fair process, to the prominence of laws and customs, to the subjection of the executive to parliament and to equal access to the courts; 'The Reign of Law', in the United States, which associates the expression with a strong idea of 'always under law'; 'L'État legal', conceived by the French constitution and which is essentially based on a hierarchical legal order and the rule of law; 'Rechtsstaat', in German constitutionalism, which began to be seen as the State of Reason, as the State limited in the name of the self-determination of people.

As far as the fiscal sphere is concerned, the concept of the EU as a federation ends up, in our view, even being reinforced through the adoption of the Conditionality Regulation. Indeed, a federation must be guaranteed the opportunity to reserve to itself the competence to react against attempts to defeat purposes of fiscal solidarity, especially when considering the problems of opportunism that the sharing of tax revenues can generate[3]. If, until now, the power of the EU to intervene in this area could be questioned, and in the absence of a solution such as the one found in the American Constitution (which, since 1787, in its article 4, section 4, provides for the possible intervention of the federation for the preservation of the republican form of government of the States)[4], the Conditionality Regulation appears exactly as a way for the Union to reserve to itself the control over the terms in which its resources are used.

II. The relevance of tax revenues for the European Union

The conditionality Regulation provides a clear link between *respect for the Rule of Law* and the *efficient implementation of the Union's budget and available resources*. Part of these resources come from the collection of taxes, in accordance with Council Decision (EU, Euratom) 2020/2053, of December 14, 2020 (European Union's own resources system).

The connection between the Rule of Law and the financial and fiscal dimensions resulting from the Regulation - and which was already reflected in the provisions of articles 317 and 325 of the Treaty on the functioning of the EU -, is the result of the observation that the fundamental values for the realization of the European project - such as the balance of accounts, budgetary stability and the sustainability of the Union -, depend on the existence of financial resources. The implementation and maintenance of the European project has costs and the unjustified decrease in revenue, due to artificial behaviour by taxpayers, can mean the irregular functioning of the Union's institutions and can make the attribution of social benefits difficult. Such behaviours, based on the individual interests of taxpayers, are fiscally abusive – evasive or fraudulent – illegally assuming tax savings purposes. The non-payment, the reduced payment or the deferred payment of taxes in a context of dubious legality or complete illegality, put at risk, as a consequence, the realization of the European project, and, in the light of the Conditionality Regulation, it is up to the Member States to guarantee the existence of mechanisms that avoid and repress fiscally abusive actions.

Taxes are a true guarantor of the Democratic Rule of Law and are one of the essential dimensions of the construction of a welfare system[5], provided for and guaranteed in the treaties of the Union. Without taxes, the EU would hardly be able to guarantee legal benefits (e.g., approval of secondary law – regulations and directives) and material benefits (guarantee of social benefits). In this context, and for these reasons, tax avoidance or tax evasion, in addition to signifying, on the part of European citizens, the violation of a fundamental duty, shows an *ethical pathology*, since the persons or entities that do so often adopt a free rider behaviour, as they do not fail to benefit from the public and semi-public goods produced by the EU (and its Member States), which, in the vast majority of cases (e.g., sustainable development actions), assume non-excluding characteristics and produce utilities of an indivisible nature[6].

Even though the EU is an area of freedom, and even though taxpayers must be guaranteed the greatest possible freedom in the conduct of their lives[7], by choosing the means that seem most appropriate to them in terms of taking into account savings criteria, including tax savings, it cannot be exercised in a context of

[3] *Vide* Nazaré da Costa Cabral, *The european monetary union after the crisis – From a fiscal union to a fiscal capacity* (Routledge, 2021).

[4] Two basic norms have preserved America's checks and balances: mutual toleration (or the understanding that competing parties accept one another as legitimate rivals) and forbearance (or the idea that politicians should exercise restraint in deploying their institutional prerogatives, to act with patient self-control, restraint and tolerance) – *vide* Steven Levitsky and Daniel Ziblatt, *How democracies die – What history reveals about our future* (Penguin 2019), 8, 102 and follows.

[5] '*Ein Staat ohne Steuern mag auf den ersten Blick paradiesisch anmuten, in der Realität bedeutet es das Ende staatlicher Ordnung*' – *vide* Dieter Birk, Steuerrecht (8th edn, C. F. Müller, 2005), 1.

[6] *Vide* Daniel Sutter and Lee Coppock, 'The Tax Man Cometh: Constitutional Principles for Tax Enforcement, *in Constitutional Political Economy*, 14, 2003, 108.

[7] 'Die Größtmögliche Freiheit gewähren' (although in another context) – *vide* Helmut Köhler, *Allgemeiner Teil* (28th edn, C.H. Beck, 2004), 39.

illegality, going beyond the scope of the right to tax planning[8]. Tax planning, therefore, presupposes, and unlike abusive behaviour, the minimization of taxes through appropriate legal structures[9].

It is in this sense that, under the terms of the Conditionality Regulation, good financial management is associated with a *'holy trinity'*, calling for: (i) the action of public authorities in accordance with the law; (ii) the investigation and prosecution of cases of fraud, including tax fraud, tax evasion, corruption and conflict of interest, or other breaches of the law; and (iii) subjection to effective judicial review (by independent courts and by Court of Justice of the EU) of arbitrary or illegal decisions by public authorities.

Among the dimensions of this triad, we will focus, of course, on the second, directly associated with the tax dimension, which is implemented in the provisions of article 4 (2), c) and e) of the Regulation.

III. Combating abusive tax behaviour as a dimension of the Rule of Law

The Rule of Law principle is repeatedly assumed as a guiding criterion for fiscal policies and for the design of fiscal rules, establishing the limits to be observed by the tax legislator. However, this principle does not assume relevance on a merely abstract-substantive level, and could, on the contrary, also be used in an adjective approach, applying legal norms to specific situations, among them being those that lead to abusive tax behaviour, considered as harmful to the community.

In this context, the Rule of Law is, therefore, capable of taking on a formal dimension, which requires that the acts of public authorities (in particular, the tax administration and tax courts) be authorized by a prior law, issued in accordance with democratic requirements, and a material dimension, which requires respect for good values (in particular, those that lead, in the fiscal sphere, to the pursuit of the public interest). It is especially in the latter sense that the Rule of Law principle assumes relevance in the Conditionality Regulation.

The national legislator must act not only in the light of efficiency, but also in accordance with a fundamental core of values, based on the protection of collective well-being.

In the light of the article 4 (1), (2) of the Conditionality Regulation, appropriate measures shall be taken where it is established that breaches of the principles of the Rule of Law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. And breaches of the principles of the Rule of Law shall concern:

i) to the proper functioning of investigation and public prosecution services in relation to the *investigation and prosecution* of fraud, including *tax fraud*, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union; and

ii) to the *prevention and sanctioning* of fraud, including *tax fraud*, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities.

Therefore, the implementation of the Rule of Law is directly dependent on the way in which the Member States guarantee the construction of a legal-tax framework (necessarily, hard law) capable of ensuring that the fiscally abusive behaviour of taxpayers finds in the legal system a response that allows it to implode with its illegitimate pretensions, in a triple line of action: in the *investigation*, in the *prevention* and in the *sanction* of behaviours.

However, the Regulation is not clear about the abusive behaviour that is covered by it. There is an evident terminological difference between what is stated in recital 8 of the Regulation and the provisions of article 4 (2), (c) and (e), which difference may not be located merely on the theoretical-discursive level. This is because, while in the aforementioned recital 8, in some of its versions, reference is made to both cases of "tax fraud" and "tax avoidance" (for example, in the German version, "Steuerbetrug", "Steuerhinterziehung " and in the Portuguese version, "fraude fiscal" and "evasão fiscal"), in article 4 the reference is made only to the (more serious) cases of "tax fraud", "Steuerbetrug", "fraude fiscal".

The question is whether the European legislator intends to refer to only those cases in which the set of voluntary acts of taxable persons that, practiced in a context of illegality, aim to achieve a result of removal,

[8] *Vide* Francesco Tesauro, *Istituzioni di Diritto tributario, I – Parte generale* (9th edn, UTET, 2009), 248.

[9] "Werden Steuern durch angemessene rechtliche Gestaltung minimiert, so liegt keine Steuerumgehung vor" – Joachim Lang in Tipke/Lang, *Steuerrecht*, (5th edn, Verlag Otto Schmidt, 2005), 156

exemption or tax deferral (cases of tax fraud), or whether it also intends to cover the voluntary acts of taxable persons that, although practiced within a generic framework of lawfulness, are qualified by the tax rules as anomalous or abusive, in view of the purpose they seek to achieve (cases of tax avoidance). Considering the consequences arising from the application of the Regulation, this issue should not, in our view, remain unresolved, but the Commission's guidelines on the application of the Conditionality Regulation do not refer to it[10].

Since the purpose is *good financial management* and the *protection of Union resources*, and knowing that in both cases (tax avoidance and tax fraud) the purposes of tax revenue collection can be frustrated, we conclude that it is more in line with the ratio of the diploma to consider that a State violates the principles of the Rule of Law when it does not guarantee, in an *effective, proportionate and dissuasive* way, the investigation, prevention and sanction against both cases of tax avoidance and tax fraud. This is an analysis that only seems to be conceivable on a case-by-case basis, especially in the absence of hard law instruments of EU law, tending to establish a common or uniform regime regarding the terms of reaction against these behaviours. There are, in fact, several resolutions, communications and action plans that have been developed in this context, but in terms of the adoption, by the EU, of effective legal norms, there is still a long way to go[11].

In any case, and in an attempt to define the scope of the provisions of article 4 of the Conditionality Regulation, the activation of the mechanism provided for in the Regulation will be justified, especially when the aforementioned abusive behaviour may result in the non-collection of taxes that directly affects the resources needed for the Union to achieve its objectives and implement its policies, such as VAT and customs duties, both European Union's own resources. Since it is at stake here, taxes that already know a high level of harmonisation, the differences between the legal systems in terms of reaction against abusive behaviour (especially through the coercive tax collection and criminalization of behaviours) create a lack of mutual trust between administrations and undermine a level playing field for economic operators in the EU.

Moreover, the absence of an analysis mechanism of a jurisdictional (rather than a political) nature, which would make it possible to assess whether such violations (the absence of control and repression of fiscally abusive behaviour) actually exist, is questionable. The assessment of compliance with the Rule of Law, particularly in spheres such as taxation, which are particularly demanding in terms of legality, must be assessed judicially, not politically. Should the Council have the possibility, even before deciding on the application of the measure, to raise the question of whether the internal measure complies with the requirements of the Regulation with the Court of Justice of the EU? The fact that the Regulation does not provide for judicial control – neither in tax matters nor in others – seems to contradict the foundation on which it was established. Are the requirements of legality and representativeness in tax matters compatible with an *'expertocratic base'*? Is the possibility of intervention by the Court of Justice - merely *a posteriori* -, compatible with such requirements?

IV. From a *Tax Law of creation* to a *Tax Law of execution*

The Conditionality Regulation is, therefore, not conclusive as to the terms of implementation of the fiscal measures capable of guaranteeing the necessary effectiveness, since it does not establish an evaluation or monitoring mechanism that identifies objective criteria that allow a better assessment in which circumstances the measures nationally adopted are not adequate to prevent or to sanction tax avoidance or tax fraud behaviour. This silence can be seen as a symptom of the existing fear in assuming the need to transition, at the European level, from a *Tax Law of creation* to a *Tax Law of execution*, in what would be a model increasingly closer to a *fiscal federation*.

[10] *Vide Communication from the Commission,* Brussels, 2.3.2022, C(2022) 1382 final.

[11] In 2016, Directive 2016/1164 emerged, which establishes rules against tax avoidance practices that have a direct impact on the functioning of the internal market. However, in addition to having a mere harmonizing effect, it has a limited scope of application to the tax on profits produced by legal persons, a limitation that is incompatible with the extent to which the abusive behaviour of taxpayers can take.

The European Commission has released, as well, a draft of a European Taxpayers´ Code, containing the guidelines to be followed by the different tax systems. But actually, it is not a genuine 'Code' and it has no real legal effect, since according to its own words "[i]t is a non-binding document and should be considered as a model to follow, to which Member States could add or adapt elements to meet national needs or context" - *Vide* Guidelines for a Model for a European Taxpayers' Code, European Union, 2016.

In this regard, we believe that it is legally misleading to continue to emphasize the need to protect the sovereignty of States in order to avoid further advances towards an effective fiscal federation. It seems questionable to us that one can speak, strictly speaking, of a loss of fiscal sovereignty.

Tax harmonization has been understood as a long-term objective, of gradual and progressive implementation, which has known numerous interruptions, precisely because it is seen, recurrently, as a limit to the fiscal sovereignty of the Member States. In this regard, it is said[12] that in the context of the EU there is a 'true Europeanization of tax law', the establishment of an 'effectively multilevel tax law', to which is added a 'schizophrenia' attributable to the jurisprudence of the Court of Justice, which boycotts the exercise of fiscal sovereignty[13]. In this sense, it is said, then, that fiscal sovereignty is moving towards becoming a more theoretical than an effective concept[14], since there are many constraints imposed from abroad in the determination of state fiscal policy. In the light of this understanding, globalization and integration into the EU have brought about a limitation of the autonomy of States, in a reinforcement of the convergence of national policies, but with damage to democracy and, consequently, to the legitimacy of national political systems, altering the nature of sovereignty and transforming the fundamental structures of international politics into a system of global governance.

In our view, the conclusions that go in the direction of the loss of fiscal sovereignty assume *sovereignty* according to a classic conception, as autonomy and self-determination in the power to create the normative framework that will be in force in a specific legal order, in fulfilment of the principle of independence of the State. Thus, fiscal sovereignty appears associated with the power of decision to establish taxes (focusing, therefore, on the figure of legislative fiscal sovereignty)[15], covering two dimensions:

i) As a response to the problem of the foundation or justification of taxes – the tax is demanded because the State is sovereign;

ii) As a response to the problem of the distribution, among public entities of territorial base, of the power to create, modify and extinguish taxes, through legal rules[16].

Based on the understanding that the EU is recognized as a 'new legal order', which acts in light of the attribution and abdication of portions of sovereignty by the Member States, the loss of fiscal sovereignty would be, in this line of reasoning, evident, given the loss of material powers and effective prerogatives in the field of taxation – more evident in the context of indirect taxation.

However, it seems to be possible to conclude in the sense of the *absence of loss of sovereignty*, appealing to the classical conception of the term, when it embraces only the normative dimension. So it is, essentially based on four lines of thought:

i) First, any heteronomous rule is valid only in the cases and under the terms allowed by the constitutional texts of the Member States. That is to say that, even in cases where legal discipline is created by European institutions, sovereignty will remain in the sense that the respective application in the internal order takes place *only because the Constitution, as an internal Fundamental Law, so admits*. Sovereignly, States allow EU law to be applied internally;

ii) The second line of argument to be pointed out corresponds to the procedural terms in which legislative measures of a fiscal nature are adopted within the EU, which lead us to conclude that it is only indirectly that we witness a restriction of fiscal sovereignty, when understood as autonomy. Under the terms of articles 113, 114 and 115 of the Treaty on the Functioning of the EU, deliberations on tax matters, both with regard to indirect taxation and direct taxation, must be taken *unanimously*. Although the maintenance of the unanimity rule is being discussed (due to the obstacles that arise from it to the opportunities for harmonizing tax legislation), in favour of European efficiency at an economic level, the fact is that, in accordance with the current European framework, fiscal legislative measures are only approved and applied by Member States after all of them have agreed. We consider, in any case, and in this regard, that European integration is less and less compatible with the rule of unanimity in this field;

[12] *Vide*, for instance, Balaguer Callejón, 'El Tratado de Lisboa en el diván. Una reflexión sobre estatalidad, constitucionalidade y Unión Europea', in *Revista española de Derecho Constitucional*, 83, 2008.

[13] *Vide* José Casalta Nabais, 'Crise e sustentabilidade do Estado fiscal', in *Estudos de Direito Fiscal*, 4 (Almedina, 2015), 114, 115, 116.

[14] *Vide* Ben Terra and Peter Wattel, *European Tax Law*, (5th, Kluwer Law International, 2008), 146.

[15] On the various dimensions of the concept of sovereignty – legislative, administrative, judicial and in terms of revenues, *vide* K. Vogel and C. Waldhof, *Grundlagen des Finanzverfassungsrecht* (Heildeberg, 1999), 214 - 227.

[16] *Vide* Perez Royo, *Derecho Financiero y Tributario. Parte General* (5th edn, Civitas, 1995), 46 and follows.

iii) The third line of thought to be taken into account is one of the dimensions associated with the *principle of openness to the EU*, in the light of which the Member States declare themselves open to the exercise in common, in cooperation with the institutions of the Union, the necessary powers to build and deepen the EU. There is no transfer of ownership of powers, with the consequent loss of sovereignty. What happens is that the Member States, by means of a 'treaty' (subject to approval and ratification), and without abdicating the powers they hold, declare themselves open to such powers being implemented using the same means and assuming the same purposes (exercise in common), in collaboration and interdependence (exercise in cooperation) with the Union or delegating to its bodies the appropriate powers for the objectives of the European project (exercise by the institutions of the Union);

iv) Finally, the European Union's intervention in tax matters is shaped by the principle of subsidiarity, only acting when two elements are gathered: one, of a negative nature - when the legal discipline created by the Member States is insufficient to meet the European project – the other, of a positive character – when the ability of the EU to better pursue the objectives of the Treaties in a given case is evident.

These four lines of thought have in common the fact that they start from the concept of sovereignty as self-determination and autonomy, revealing that, even when understood in this way, it does not suffer true and direct limitations. Although they start from a formal sense of sovereignty – as the ultimate power of internal and external self-determination – they are an expression that sovereignty is not based only on a set of typified powers, but essentially on an *attribute of will*. It is the *Kompetenz-kompetenz* that emerges as the fundamental core of sovereignty.

This reasoning enhances the acceptance, at least abstractly, of an effective fiscal federation[17] , in the context of which the respective Member States implement the Law centrally created, reflecting what practice already demonstrates, given the way in which Union law, when issued, exhausts the regulation of tax matters, in a solution that counteracts the negative tax competition effect that has been witnessed. The existence of divergences in the legal-tax solutions can be seen as measures that have an *equivalent effect to restrictions of the free movement* of people, goods, services and capital, which collides with the European project itself.

However, we should recognize that the issue of fiscal federalism has been an academic debate, without particularly relevant connection with reality. Even though fiscal federalism in not equal to political federalism, which means that the EU is not obliged to transform itself into a federation, it still requires some kind of *political support*. This is the main reason why for EU it is so difficult to admit that the prescription of fiscal federalism, probably, can ever be a reality[18].

In fact, there are several general limitations to the conception of the EU as a fiscal federation:

i) The EU ontological ambiguities, related with EU's nature, with the complex and bicephalous legislative procedures and with the supranational delegation to informal and 'expertocratic' bodies;

ii) The fact that the EU is not an all-purpose structure, which means that, when it comes to identifying, on a normative basis, which collective goods should be allocated to the highest decision level (the EU level), the normative criteria fails to be applied, simply because the EU has not been assigned any 'constitutional powers' regarding those issues (for instance, defence);

iii) The circumstance that the EU has de power to issue money, but has no political sovereignty – a currency without a State; and

iv) The fact that the European integration process has created a disjointed territory where monetary policy is mostly restricted to the Eurozone; while tax collection and expenditure commitments correspond to a territory with a larger dimension (the EU territory).

[17] The main features of fiscal federalism theory were defined more than 60 years ago, in the works of Tiebout (1956), Stigler (1957), Mus-grave (1959, 1983), and Olson (1969). In the early 1990s, the subject regained interest and, since then, important studies were undertaken under the auspices of international organizations, such as the IMF, OECD and the World Bank. For an in-depth analysis of the theoretical constructions related to fiscal federalism, see Wallace Oates, 'The Economic of Fiscal Federalism and Local Finance', in Edward Elgar (ed.), Fiscal Federalism (Harcourt Brace Jovanovich, 1965).

[18] *Vide* Nazaré da Costa Cabral, *The european monetary union after the crisis – From a fiscal union to a fiscal capacity* (Routledge, 2021).

Considering all these limitations, a *more flexible integration model* gains strength. In the context of a union with 27 members at different stages of economic development, preferences, geopolitical concerns and diverse policy priorities, the model for a future integration could rely precisely on a flexible model of *functional integration,* henceforth overcoming the traditional national State model[19].

V. Conclusions

In a purposely summary way, the main conclusions that we consider pertinent to point out are the following:

i) The fulfilment of the requirements arising from the Rule of Law presupposes the existence of financial resources, which, to a large extent, are the result of the collection of taxes;
ii) The protection of the European Union's own resources is essential to guarantee the realization of the European project;
iii) The Rule of Law is not compatible with abusive tax schemes – both tax avoidance and tax evasion – which frustrate the pursuit of the supranationally considerable public interest;
iv) The Conditionality Regulation, despite the limitations that affect it, enhances the construction of an effective tax federation, even if the political support of the States appears as an essential condition for this purpose;
v) The terms of reaction against tax avoidance and tax evasion behaviour should meet regulatory uniformity at the EU level;
vi) The EU should develop a common approach regarding the enforcement of the tax legislation and Member States should be committed to work towards two objectives: (i) interaction and performance of tax administrations as efficiently as if they were one administration; (ii) protection of the financial interests of the Union;
vii) The internal tax system must be, increasingly, a Law of execution.

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[19] *Idem.*

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