

The Political Economy of the European Constitution

Some General Observations

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I. Definition of the object and general research questions of the working package

1. Of RECON in general

RECON is a research project aimed at elucidating the ways and means through which democratic government¹ could be “reconstituted” in Europe.² This requires the combination of description, reconstruction and normative assessment of the institutional set up, the decision-making processes, the common action norms, and the socio-economic configuration of the European political order.

Research under RECON is grounded on specific claims about both the normative standards to be applied when passing legitimacy judgments, and about the present legitimacy credentials of the European Union as a whole.

On what concerns the standards of democratic legitimacy, two are the basic premises. The first is that “democratic legitimacy” is not only the fundamental source of legitimacy of any modern political order, but also that the operationalisation of the democratic principle calls for the combination of a representative institutional set up with a properly ordered array of democratic decision-making processes through which the existence of a general will supportive of collective action norms and decisions is to be properly ascertained. This implies that the democratic legitimacy of the political order cannot be ascertained by exclusive reference to the formal constitution of political power, but has to be assessed by reference to the normative ideal of deliberative democracy, which is concerned with the

¹ In the paper, the term “democratic government” is intentionally used in lieu of “democratic governance”. A full explanation of this choice is not appropriate here for reasons of space, but suffice to say that I assume that there cannot be proper democratic legitimacy without democratic government, and that, consequently, “governance” mechanisms, the legitimacy of which stems from a different source than the identity between the authors of and the subjects to common actions norms, are “parasitic” on an encompassing institutional and decision-making framework which can redeem its claim to democratic legitimacy. Governance mechanisms can be very necessary to exploit in democratic terms specialized knowledge and to render efficient the democratic division of social labour, but they are not and cannot be self-sufficient in democratic terms. It must also be said that the term “democratic government” is understood in encompassing terms, comprising not only the legally formalized institutions and decision-making processes, but also the role played by general publics in democratic will-formation. However, the term is not conflated with the idea of democratic social order, which refers to democracy as a form of life. On this, see Norberto Bobbio, ‘Il futuro della democrazia’, Torino: Einaudi, 1984.

² Indeed RECON is an acronym standing for the complete title of the project, *Reconstituting Democracy in Europe*.

generation and circulation of political power in strong and in general publics. The second is the design of a democratic political order at the regional, national or European levels is impossible without considering the way in which the other levels of government are structured and ordered; in brief, democracy in Europe cannot be realized in one level of government without considering the constitution of all levels of government simultaneously.³

On what regards the legitimacy credentials of the European Union as it stands, it is assumed that national political institutions and decision-making processes are autonomous, and consequently, can take decisions which are both efficient and legitimate without considering the substantive content and implications of decisions taken at other levels of government or by other equivalent institutions and decision-making processes, it is very likely that the democratic legitimacy of all levels of government in Europe will tend to decrease, and consequently, result in social turmoil.⁴ The project departs from the assumption that the core of the legitimacy problem of the European Union results from an inadequate constitution of the institutional setup, the decision-making processes, and the processes of mediation between strong and general publics; or what is the same, that what is required is a reconstitution of European democracy.

2. Of Working Package 7 *The Political Economy of the European Constitution*

Working Package 7, *The Political Economy of the European Constitution*, aims at the description and normative assessment of socio-economic configuration of the Union as resulting from both the activities of production and distribution of goods and services, and the public and private regulation of such activities (and in particular, fiscal, tax, labour and social policies). By taking seriously both the economic and the political dimensions of the socio-economic configuration of the emerging European political community, the working package undertakes research at the core of

³ This does not necessarily entail that the core legitimacy of all levels of government must go back to democratic legitimacy, however, as we will see *infra*, especially in §15. However, the massive set of common interests which bind Europeans together, not only as collective political communities (that is, in inter-state or inter-polity terms) but also as individuals in a horizontal sense (through economic and non-economic relationships, the latter on the increase due to the easiness and cheapness of travel and due to the very process of Europeanisation) creates the presumption that the democratic legitimacy cannot be understood as a complete question but if one considers the European political system as a whole, that is, including all levels of government, and not only the national or regional ones.

⁴ As a consequence, a substantial part of the research effort is aimed at elucidating the institutional and decision-making reforms necessary to ensure the democratic legitimacy of the European political order.

the long-standing tradition of “political economy”;⁵ in the double sense of focusing on the interplay between political decision-making and economic activities; and in the sense of aiming at elucidating and exposing the actual principles which constitute and govern the socio-economic structure of the European Union.

The working package is designed on the assumption that the design of the European socio-economic structure is amenable to democratic decision-making. This amounts to saying that the concrete configuration of the socio-economic structure of the European Union is not fully predetermined by forces beyond the reach of existing or potential political will. However, the refusal of “determinism” does not entail the endorsement of a blind economic *volontarisme*. The democratic malleability of the socio-economic constitution is clearly compatible with the acceptance of the premise that the present shape of the socio-economic structure and the general social and political dynamics already unfolding determine the scope within which political choice is indeed possible, and the level of government at which decision-making can be both efficient and legitimate. Politics matters, democratic legitimacy matters, because there is room for meaningful and transformative choice based on arguments about what is just and correct to do.⁶ But the status quo, and the ways in which it has been reached, set limits to the choice of means of reform and to the actual outcomes which can be achieved through reform.

The core research object of the working package is the reconstruction and assessment of the constitutional framework of the European socio-economic order, with a view to determine the extent to which it limits or facilitates the democratic reconstitution of the European Union; and on such a basis, to determine the proper reforms to be undertaken according to each of the

⁵ The phrase “political economy” is an ancient one, which has been used to design rather different contents and approaches to the study of the subject. But its core meaning necessarily circumscribes it to research on the economic structure of society or of a given society which highlight the links between the political and the economic structure. Thus is only fitting that authors such as David Hume, Adam Smith or Turgot are regarded as pioneers in the field. See [Chavegnaux](#); [Dahl and Lindblom](#)

⁶ Or to put it otherwise. There could very well be reasons why the constitutional design of these policies should reflect not only specific or peculiar principles and values, but also specific or peculiar historical choices or institutional patterns. It may also well be that specific idiosyncratic decision-making procedures should be followed in specific areas, so that it may wise that different policy areas be governed by different constitutional arrangements. But the individuation of this field as one case study of RECON already implies assuming that it makes sense to talk of democratic decision-making in this policy area. Indeed, it could very well be that democratic decision-making in this area is especially appropriate and normatively urgent once we assume a certain basic institutional set up, such as the combination of private property, corporations and market exchange of goods and services, as is the case in the material constitutional law of the European Union.

three conceptions of how the European Union should be democratically reconstituted.

The focus on the constitutional elements of the socio-economic structure of the European Union has two major implications.

Firstly, that research aims at clarifying the fundamental guiding principles of the socio-economic constitution of the European Union, or what is the same, the essential elements of the institutional set up and of the decision-making processes through which economic relationships and activities are constituted and regulated. Such an analysis can only be undertaken through concrete and rather detailed empirical research, which is the object of each of the specific subprojects within the working package. The description and assessment of the European constitution is bound to be over-general and over-optimistic or pessimistic if conducted in abstract, decontextualised terms. Proper attention should thus be paid to the substantive content of concrete norms, and the substantive implications of the institutional set up and the decision making process to avoid such risks. Still, the focus on the constitutional dimension implies that the consideration of minute details is undertaken without losing of sight the “larger” picture, the only way to render empirical research relevant to all members of the working package and of the research project in general. The technical “density” of the regulatory frameworks of each policy field has led to the progressive disconnection in politics and scholarship of the analysis of fiscal, tax, labour and social policies. Research under the working package aims at exposing the mutual dependency of policy choices across the board. As a way of illustration, it is assumed that the democratic configuration of tax policy is closely dependent on the policy choices made when defining the breadth and scope of economic freedoms (and very particularly, the free movement of capital) and when deciding, implicitly or explicitly, the range of public goods to be delivered and funded at the European level, or to be decided at the European level and funded at the national level. This explains the simultaneous emphasis on the specificities of the constitutional norms governing each sector being studied, and on the analysis of the mutual interactions of such constitutional frameworks. Indeed, the working package aims at *reconnecting* both each of the policy fields being considered, and the package as a whole to the general research on the democratic legitimacy of the European Union being conducted under RECON. The critical instrument of the “reconnection” is indeed the set of indicators to be considered in all policy fields.

Secondly, the “constitutional” focus of the research project underlines the attention paid to interdisciplinary research in the working package. The

research conducted in this package, as in the project as a whole, takes seriously the integrative role played by law in European societies, while opening up the reconstruction, description and assessment of legal norms to multidisciplinary enrichment. Thus, a good deal of the research in the package will analyze the political economy of the European Union from a legal perspective, still conscious of the relevance of other standpoints and methodologies, also integrative of the research team.

3. General Research Questions

The application of the general research questions of the RECON project to the working package requires all researchers to consider how the constitutional norms governing each policy field could be amended so as to increase the democratic legitimacy of decisions being taken in such a field, while contributing to the increased democratic legitimacy of the European Union as a whole.

In particular, the working package aims at **elucidating the actual nature of the so-called “social deficit”**, a vague notion by means of which reference is made to the deficiencies in the constitution of the European socio-economic order which hamper the democratic legitimacy of the European Union. While there is almost perfect consensus on the existence of a “social deficit” of the European Union, the remedies proposed to overcome it are so disparate that they betray the lack of a clear diagnosis of the problem. By means of reconstructing and assessing the actual institutional set up and decision-making processes through which socio-economic decisions are taken, the working package will establish which of the two definitions of the “social deficit” is more adequate, namely (1) whether there is a substantive “social deficit” of the European Union, the source of which will be the specific principles governing the socio-economic constitution of the Union, which would require the actual change (whether democratic or not) of the said principles (by, for example, reducing the weight assigned to economic freedoms when in conflict with wider collective goods or policies); (2) or whether the “social deficit” is but a concrete manifestation of the wider democratic legitimacy problems of the European Union, and in particular, results from the lack of consistency in the institutional setup and decision-making processes governing market-making and market-correcting decisions (in which case, the correction of the “social deficit” of the European Union is but one concrete aspect of the general democratic legitimacy problems of the Union). **In other terms,**

the reconstruction and assessment of the institutional set up and the decision-making process of the Union can clarify whether the “social deficit” is a matter of the substance of constitutional norms governing the European socio-economic structure, or of the procedure through which such norms are decided upon.

This research strategy is premised on the critique of the acritical assumption that the preservation of the generation of democratic legitimacy at the national level requires exclusive competence on the side of national decision-making processes over specific competences, said to be essential to preserve both the “constitutional identity” of each Member State, and the “vibrancy” and “relevance” of national decision-making processes. The partial reconstruction of the actors and processes through which some socio-economic decisions are taken which was undertaken in CIDEL revealed a degree of Europeanization of such powers far beyond what is assumed by such theories, and requires the **thorough reconsideration of the democratic implications of divisions of powers among levels of government** without unsupported assumptions about which of those are critical for the maintenance of democratic politics at all levels of government. In particular, the research package will aim at determining what degrees and levels of Europeanisation of the institutional set-up and the decision-making process of each policy field are sufficient and required to reconstitute European democracy, thus being compatible with the overall democratic legitimacy of the Union at all its levels of government? And what are the interrelationships across policy fields? Are there specific configurations which are incompatible with the democratic legitimacy of the Union as a whole? In particular, can democratic legitimacy be achieved if a very different institutional set up and decision-making processes are applied to the constitution of socio-economic relationships (market-making) and to the rectification of distributional outcomes in order to realize specific social goals (of social justice, to ensure a certain pattern of distribution of economic resources)?

This will necessarily lead researchers to the applied part of the RECON project, that is, the consideration of what specific reforms are necessary to reconstitute European democracy according to each of the three major conceptions outlined in the project. In particular, the working package aims at determining **whether European integration be stable in the absence of major institutional and decision-making reforms, on the assumption that the persistent lack of democratic legitimacy of the**

Union will undermine the stability of the European political order, as postulated in the first section of this paper. **But the specific policies being researched under the working package require complementing this question with the reverse one, namely, whether constitutional reforms can be undertaken in the absence of stabilizing procedures and outcomes which establish the necessary preconditions for the social acceptance of such transformations.** In particular, focus on taxation, labour and social policies will lead to the critical consideration of the stabilizing role played by mutual interest, civic commitment and pre-political membership, and the extent to which such stabilizing factors can be mobilised in favour of European constitutional reform.

II. Application of the research strategies to the working package

1. Defining the three RECON strategies in the politico-economic field

The research design is based on the specification of the three RECON strategies in such a way as to render them analytically powerful and normatively salient when reconstructing and assessing the socio-economic structure of the European Union.

In concrete, we supplement the general definition of each strategy at the general project level with the definition of the relationship between the community of economic risks (the market communities), the community of social insurance (the welfare communities) and the processes of collective decision-making (the state and other collective- public and non-public-institutions) supported by each RECON conception on socio-economic matters.⁷ This results in a direct *translation* of each RECON conception to the socio-economic field, and the distinction (in two cases) of two variants. This distinction is not intended to put into question the triadic model of the general project, but only serves the purpose of fine-tuning the analytical capacities of the general conceptions to the specificities of the politico-economic field.

The *renationalizing strategy* affirms that it is possible to establish a supranational community of economic risks (the single European market)

⁷ Quite obviously this implies assuming a minimum degree of normative legitimacy of market arrangements.

without Europeanising the national communities of insurance fleshed out in national welfare arrangements. This assumes that the democratic legitimacy of the European political system is sufficiently established if market-correcting, but not market-making norms, are approved through national democratic decision-making processes. This necessarily entails a clear-cut distinction between the legitimacy requirements of market-making versus market-correcting norms. The legitimacy of market-making norms can be obtained either indirectly or simply derived from the *cognitive* superiority of the (non-political) process through decisions are taken. In the former case (variant a), what is needed is a definition of the general European will as the unanimous aggregation of national general wills. In the latter case (variant b), what is needed is the constitution of *governance* institutions capable of collecting and applying specialized technical knowledge to the institutional definition of markets.

The ***federalizing strategy*** assumes that the Europeanisation of communities of economic risk needs to proceed hand in hand with both the Europeanisation of insurance arrangements and of decision-making processes for highly interrelated functional and normative reasons. The argument goes that a supranational market distributing economic risks and opportunities among European citizens cannot be neither normatively justified nor functionally stabilized (among other reasons, precisely because of its lack of normative legitimacy) unless there is an overlap between the community of economic risk, the scope of insurance arrangements and the community of citizens. There is thus a need for forging a common general European will governing the definition of both communities of economic risk and of communities of insurance. The federalizing argument entails that even if it is possible to draw a clear analytical line between market-making and market-correcting norms, both sets of norms are so intertwined that it can be properly said that in substantive terms the distinction is extremely fuzzy if not inexistent.

The federalizing strategy is compatible with two structurally similar but substantively antithetic conceptions. Firstly, the federalizing strategy is supported by those who claim that the legitimacy of the socio-economic structure requires a wide range of insurance arrangements (variant a) because the legitimacy of markets cannot be ensured without sizeable countervailing provisions of public goods and services and the redistribution of economic resources (the market is not the source of its own legitimacy, but can only be legitimate if embedded in strong welfare institutions); given that redistributive tasks correcting market allocations need to be partly

discharged at the higher level of government to ensure the equality of all members of the political community, then federalizing should result in the sharing of such powers among different levels of government (including the supranational one), and shielding the transfer of structural powers to non-political decision-making processes. Secondly, the federalizing strategy is also supported by those who argue that the legitimacy of the basic socio-economic institutions depends on the proper limitation of political power by a robust acknowledgment of the right to private autonomy by means of the proper acknowledgment of the right to private property (variant b). Given that such affirmation can only be effective at the supranational level, there is a strong case for affirming negative supranational constitutional principles limiting the power of national public institutions. Federalizing results in the limitation of national discretion to limit the right to private property as embodiment of the right to private autonomy.

The *cosmopolitan strategy* claims that the Europeanisation of economic risks and of insurance arrangements can proceed without the need of fully Europeanising decision-making processes. Or what is the same, that the progressive supranational opening of national communities of economic risk and of insurance can be launched and governed without having resort to processes of formation of a general European will necessarily result in the “fusion” of the national communities. Opening national economies and national welfare states without fusing them can be done by means of defining a general European will alternative to the mere aggregation of general wills or the full-blown articulation of an autonomous European general will unmediated by national political processes. This “alternative” general will results from process aimed at “compatibilising” national general wills (by means of ensuring that they are compatible with certain substantive principles, such as the principle of non-discrimination on the basis of nationality, reflecting the existence of relevant interests beyond those articulated through national political processes; or by creating procedural devices through which they can be reflexive of interests expressed in other national political arenas) or by means of creating new, non-hierarchical collective decision-making processes (such as supranational governance arrangements which have the integrative capabilities required without impinging upon the pluralistic character of a cosmopolitan European Union).

TABLE 1 AROUND HERE

2. The four indicators

Given the applied vocation of the research, which entails the combination of reconstruction, description and normative assessment, the working package is concerned not only with the positive socio-economic constitutional structure of the European Union, but also with the policy discourses around it, both those that justify the actual structure and those which propose its reform.⁸

This renders especially important the task of specifying indicators with the help of which *translate* policy discourses into strategic claims on how to democratize the European Union. At this stage of research, and on the basis of the research conducted by the leading partner of the package, four indicators are proposed: (1) purpose of economic integration; (2) purpose of each policy or institution (3) procedure through which decisions are taken in the policy field, which implies distinguishing the relevant actors and the relevant steps through which a common will is forged; (4) stabilizing factors through which decision is rendered stable in the long run.

A) Purpose of economic integration

It is very well-known that the key means through which European integration has proceeded has indeed been economic integration. In particular, the three founding Treaties of the European Communities set as their purpose the creation of common markets through the establishment of a set institutional structures and decision-making procedures, the main purpose of which to realise the famous four economic freedoms (plus free and undistorted competition) in their respective areas. Not by chance the shorthand by which the European institutional framework was known until relatively recently was the “common market”; and not by chance most legal and political analysis has tended to concentrate on the economic aspects of the process of integration.

Still, there are two rather contrasting conceptions of what is the purpose of economic integration, which we could label as the “self-contained single market” and the “embedded market”.

⁸ Research in the working package proceeds in three steps. First, we reconstruct the present constitutional setup, combining the research lenses of the constitutional lawyer and the political scientist. Second, we offer a democratic assessment of the constitutional status quo by reference to the three RECON democratizing strategies; that is an effort which clearly requires recruiting the tools and concepts of the political philosopher. Third, we reconstruct and complete the different policy reform discourses around the three RECON democratizing strategies, which is a multidisciplinary task with an eye on the pragmatically achievable.

The “self-contained” conception of economic integration assumes that the founding Treaties of the Communities did enshrine a transcendental definition of the “single market”, the validity of which is a precondition of democratic legitimacy, and not the reverse. The “self-contained” conception of the common market indeed amounts to an updated version of Lockean constitutionalism, with the four economic freedoms playing the starring role assigned to the right to private property in the older versions of the theory. The Treaties would have identified the four economic freedoms as the core substantive content of the European socio-economic constitution, as the necessary guarantees of private autonomy, and consequently, of the respect of the individual preferences of citizens, of their realisation immune from any kind of coercion or force other than the one deriving from the limited character of economic resources and the actual cost of life plans. As a consequence, this conception overstates the limits set upon legislators (both European and national) by the four economic freedoms; it is for this reason that it is closely associated with “negative” integration, that is, with the active overruling of European and national norms which in one way or the other set limits to market freedoms. The “embedded” conception of economic integration presupposes that the economic sphere is but a part of the overall social order; very critically, its legitimacy cannot be established by exclusive reference to its substantive traits, but depends on the legitimacy of the political order (thus the idea of “embeddedness”). Thus, setting economic integration as the goal of European integration necessarily implies a program of reform which goes beyond economic regulations, and necessarily covers those aspects of social and political regulation which are necessary preconditions for the legitimacy of the economic order as a whole. The creation of a single market thus implies recreating at the European scale the embeddedness of national markets, and thus requires combining not only negative and positive integration, but also highlights the key importance of temporary and exceptional measures to shelter the fabric of the socio-economic order from dangerous stress in the phases of adaptation.

The complex character of the European political order renders possible that some would claim that “economic integration” at the national level must be structured around the embedding of market institutions, while at the supranational level the only option is to establish a “self-contained” market. One line of defence of such a position could be that the “embedding” of the market calls for a decision-making process carrier of democratic legitimacy which would be simply not available at the supranational level. It

still remains to be seen whether the inner logic of a supranational self-contained market will not render impossible to sustain the “embedded” market at the national level.

B) Purpose of each policy or institution

The purpose of each policy or institution corresponds to the societal role or roles which the policy or institution is expected to discharge. For example, economic literature distinguishes three tasks that can be potentially assigned to the tax system, namely, (1) the funding of public goods and services, technically defined by reference to their non-rival and non-exclusionary consumption (*taxes as prices*)⁹; (2) the funding of public goods and services, normatively defined by reference to a conception of distributive justice, and serving the purpose of correcting the allocation of economic resources resulting from the operation of market forces (excluded under option one) (*taxes as insurance premia*); (3) the management of economic activity with a view to realise societal objectives such as sustainable growth, full employment, economic, monetary and price stability, or even balance of payments (*taxes as macro-economic tools*).¹⁰ Different conceptions of the purpose of the tax system are characterised by the different set of tasks which consider the tax system should perform.

Although there are several potential combinations, actual discourses on taxes revolve come under two main variants. Firstly, *liberist* conceptions of taxation claim that taxes should be first and foremost serve to fund public goods and services understood in a technical sense, and consequently, serve as proxies of prices in the absence of the conditions under which supply and demand can fix them. Liberists only reluctantly admit the use of taxes with a redistributive purpose,¹¹ and most of them (or at least, the most consistent among them) also oppose the use of taxes as macro-economic tools. The second variant is the *liberal one* according to which the tax system should

⁹ A standard definition can be found in Paul A. Samuelson and William D. Nordhaus, *Economics*, New York: McGraw-Hill, 1998 (16th edition), p. 36 “Public goods are commodities for which the cost of extending the service to an additional person is zero and which it is impossible to exclude individuals from enjoying”.

¹⁰ The classical locus is Richard A. Musgrave, *The Theory of Public Finance*, New York: Mc-Graw Hill, 1959.

¹¹ Although the degree of opposition is variable. It was rather mitigated in Henry C. Simons, *A Positive Program for Laissez-Faire: Some proposals for a liberal economic policy*, Chicago: Chicago University Press, 1934 (advocating quite comprehensive redistribution of economic resources); and even in the first Hayek, as in *The Road to Serfdom*, London: Routledge, Kegan and Paul, 1944, where the state was expected to establish a social safety net. The standing of both authors as liberists is however contested among those following the Mises’ tradition. See Walter Block, ‘Henry Simons is not a supporter of Free Enterprise’, 16 (2002) *Journal of Libertarian Studies*, pp. 3-36 and ‘Hayek’s Road to Serfdom’ 12 (1996) *Journal of Libertarian Studies*, pp. 327-50. See also Daniel Coldwell III, ‘The Compatibility of Laissez Faire with Distributive Justice’, 38 (1979) *American Journal of Economics and Sociology*, pp. 309-318.

fund public goods and services, including those intended to ensure a level of justice in the distribution of economic resources, and it should be a major lever in the conduct of macro-economic policy.

In complex and interlocking political orders, the analysis of the purpose of each policy or institution is complicated by the fact that one may advocate differentiated tasks for each level of government. To put it differently, we may hold that certain tasks should be reserved to, or interdicted from, one of the levels of government. As a consequence, it is proper and convenient to distinguish the question of the *purpose of policy or institution* as a whole, and the purpose of policy or institution at *the European, national or regional levels of government*.

Thus, to consider again the case of tax policy, the very limited role assigned to tax systems under the liberist view, those supporting such a conception tend to pursue the confinement of all tax powers (European, national and regional ones) to the establishment of taxes capable of funding what in strict economic sense are public goods and services. This makes a very strong case for assigning strong negative tax constitutional powers to the European level of government, as the more encompassing one, to establish the basic principles framing the exercise of legislative and collecting tax powers. As will be discussed in more detail when considering the substantive elements of taxation, it is still the case that if limited and exceptional redistributive taxation would be undertaken, liberist (at least, contemporary ones) would prefer to see it occur at the more local levels of government; so that one could conclude that liberist conceptions support that the European and even perhaps the national levels of government are precluded from using the tax system for redistributive purposes, while the interdiction is weaker at the local level. The liberal conception of taxation accommodates two contrasting views, depending on whether the European tax subsystem is or is not charged with the task of funding the redistribution of economic resources. Some may argue, in line with the “classical” fiscal federalism, that redistribution of economic resources should take place at the more encompassing level of government, as indeed seems to be required if the purpose is to ensure equality among European citizens qua European citizens. This necessarily comes hand in hand with the claim that macro-economic management through taxation should mainly correspond to the European level of government, given that the taxes that play a key role in that regard are indeed those with a clear redistributive potential (i.e. personal and corporate income taxation). But others may argue, for a rather wide variety of reasons discussed in the literature of the “new” fiscal

federalism (including the insufficient democratic legitimacy of decision-making procedures at the supranational level), that redistributive taxation should take place only at the national and regional levels of government. This entails that macro-economic management through taxation needs to be undertaken through some form of coordination of national tax policies. Indeed, the use of taxes as a lever of macro-economic policy can only be really effective within an integrated economic area if orchestrated at the highest level of government. Still, the assignment of the competence to shape redistributive taxes to national and regional governments forces to seek an alternative to the direct discharge of such a task by the supranational level of government, which cannot be but coordination.

C) Procedures of decision-making

Decision-making concerns the procedures through which a democratic will is forged and concretely operationalised. This requires considering three different questions: (1) the sets of procedures and of institutional actors which are part and parcel of the overall decision-making processes; (2) the principles governing the relationship between different decision-making procedures; (3) the relationship in which different procedures stand to each other.

Decision-making on socio-economic matters takes places through a set of different and differentiated decision-making processes, in which a range of institutional actors participate.¹² In that regard, we can distinguish three main alternatives:

¹² The still frequent assumption that democracy requires the allocation of all legislative powers to a single institutional actor ("The Parliament") does not correspond (and indeed, never corresponded) to the actual practice of any democratic state, and more critically, it simply a poor alternative from a normative standpoint. Actual decision-making procedures are underpinned by the premise that democratic legitimacy can only be instilled on a decision if the decision-making process ensures a sufficient degree of participation and of critical exchange of views which necessarily calls for participation of a set of institutional actors other than Parliament; even if the final decision takes place through a process of will-formation in Parliament, it has to be surrounded by other processes for the decision to be legitimate (see for example Bruce Ackerman, 'The New Separation of Powers', 113 (2000) *Harvard Law Review*, pp. 633-729) Moreover, there are very good normative reasons why decision-making labour should be divided through the standard stages of constitution-making, law-making and act-making, captured by the analytical distinction between different dimensions of the power to tax.

It must be said that by means of focusing primarily on procedures in which institutional actors participate rather than on institutional actors which decide through certain procedures, we avoid the risk of neglecting the actual power exercised by non-political and non-collective actors. Indeed, legal analysis of tax phenomena has tended to ignore the constitutional assignment of negative tax powers to private actors and the exercise of tax powers through governance mechanisms. And because there is an empirical correlation between wealth and capital income, the redistribution of economic resources critically depends on the ability to effectively tax capital income. It is important to notice that the concrete mix of principles governing the distribution of tax powers *and* other key competences over the basic socio-economic structure of the political community may result in further limits to the "overall" power to collect taxes in a

A) Decision-making trusted exclusively to political and collective actors. This is the case when the constitutional design and practice is premised on the exercise of all powers by political institutions which are democratically accountable to individual citizens. This was indeed the classical assumption of public law, which assumes a monopoly of the exercise of public powers by public actors. The model is not contradicted by the attempt of specific organised private actors to influence the shape of the policy or institution, provided that the constitutional setup does not necessarily result in the empowering of such actors (the determining factor here being whether private actors can only get influence by means of persuading political actors that what the private actors defend is indeed reflective of the general will and interest).

B) Decision-making is trusted to both political and non-political collective actors. This is the case when constitutional design and practice assumes a division of competences between political institutions accountable to individual citizens and non-political institutions, either acting as (1) agents of political institutions, in discharge of a constitutionally established task fixed by the said political institutions, but with a considerable degree of autonomy in the selection of the means through which the said task is to be discharged; (2) as alternative means of establishing a general will combining the will of both public and private actors (as is typically the case in actual cases of “multi-level” governance).¹³

C) Decision-making is trusted to both political/collective actors and non-political/non-collective actors. This is the case when constitutional design and practice assumes a division of competences between political institutions accountable to individual citizens and private actors, acting either

given political community. In concrete, it may empower non-public procedures or actors to wield their influence and shape the exercise of tax powers, rendering *de facto* impossible to take tax decisions which are perfectly legitimate *de jure*. Consider the consequences which derive from a competence mix in which Member States are competent to collect personal and corporate income taxes, and the institutionalised mechanisms to monitor compliance with such taxes remain exclusively national ones; but in which Member States are prevented from imposing any limit whatsoever on the flow of capital to and from the state. This results in depriving any level of government from the power to effectively tax and monitor compliance in many cases, in the cases of those smart enough as to organise their flows of income around different Member States or third states, so as to render them opaque to national authorities whose informational basis remains basically national. See Thomas Piketty, *Les hauts revenus en France au XX^{ème} siècle Inégalités et redistributions, 1901-1998*, Paris: Grasset, 2001. That is how things are in the European Union since the approval of the 1988 Directive on the movement of capital, which resulted in a structural limitation of the actual power to tax capital income, to the extent that such income can be rendered mobile. Similarly, consider the mix of competences according to which Member States remain competent to define and collect corporate income taxes, but in which Member States are prevented from setting any limit whatsoever either in the importation of goods or the provision of services from third countries, and into the decision of companies to transfer their seat to some other jurisdiction. This also creates limits on the power to define the corporate income tax base and rates freely, at the very least vis-à-vis the companies whose threat to wind up and re-establish themselves in a third country is credible.

¹³ Edoardo Chiti, *Le agenzie europee*, Padova: CEDAM, 2002.

individually, or more usually, as private factional organisations. Option C) is constitutionally entrenched when we find a combination of two or more of the following three structural principles: (a) “negative” constitutional principles limiting the scope public decision-making, (b) a division of competences between levels of government which considerably favours the status quo over change by means of multiplying veto points, and (c) a strong power of constitutional review of legislation based on individual complaints to courts.

The picture gets further complicated by the co-existence of different levels of government, as it is perfectly possible that some of the variants will be nuanced in a federal or multi-level context, by means of establishing a different range of institutional actors legitimated to intervene in decision-making in different levels of government. In particular, it is frequent to find option B) concretised in the terms of assigning to political actors *exclusively* powers at the national and regional levels, but considering that decision-making over the competences assigned to the supranational system should be exerted through governance mechanisms of one type or the other.

The second dimension of decision-making on socio-economic matters concerns the kind of relationship in which different decision-making processes stand to each other, and the principles governing the rapport between the collective action norms produced through each decision-making process. Are the processes to be regarded as an overall attempt at defining a coherent democratic will? Or is the system to be the result of the uncontrolled overlap (and eventually conflict) between different decision-making procedures? How are we to conceive the roles of the norms produced through each decision-making process in the overall system? And how are we to solve eventual conflicts between them?

In that regard, we find two main alternatives, the second coming in three different shapes:

A) Competition: It might be argued that the legitimacy of decision-making on socio-economic matters is enhanced by a strict separation of powers between different decision-making processes, which excludes the establishment of clear principles governing the relationships between norms produced in different spheres of competence. Socio-economic powers being the core means for the state to interfere with the right to private autonomy, there is a strong case for a constitutional framework which fosters competition between the different decision-making processes, as this is likely to reduce the chances of socio-economic powers being exercised for

purposes other than the discharge of the constitutional tasks assigned to public institutions.

B) cooperation: It assumes that the division of competences should come hand in hand with the establishment of structural principles governing the relationships between decision-making processes, so as to ensure the formation of a coherent and consistent overall socio-economic system.

There are three options under this variant:

a) *Democratic government*, that is, division of competences and hierarchy; the latter acting as a standard criterion within each sphere of competence, and as a residual principle of solving conflicts across spheres of competence;

b) *Democratic government supplemented by political effectiveness*, or what is the same, assuming that legal criteria (division of competences and hierarchy) may only help us solving part of the conflicts, because either they will not provide a clear solution to all conflicts, or because there would be countervailing political reasons that would result in the setting aside of the legal solution in concrete cases; this calls for non-legal, political criteria to be negotiated and established case by case;

c) *Democratic government supplemented by democratic governance*, or what is the same, it assumes the need of supplementing the legal criteria characteristic of democratic government (division of competences and hierarchy) with non-hierarchical, procedural principles which provide solutions to those cases in which standard democratic principles are either inconclusive or inoperative for political or economic reasons.

D) The stability of the socio-economic order

The final set of indicators corresponds to the stability of the socio-economic system, and in concrete, to the substantive features of the societal order that render possible the establishment of an effective system of allocation and redistribution of resources, and that ensures its reproduction over time.

Indeed, democratic decision-making over socio-economic matters is only possible if most citizens are willing to comply with their obligations (and very especially, tax obligations) spontaneously.¹⁴ Spontaneous compliance cannot be sustained in the long run through coercion because complex socio-economic systems require an active participation of citizens through

¹⁴ At the same time, it has been observed once and again that the fact that most citizens are willing to comply with their tax obligations without being forced to do so explains why democracies can impose not only higher tax burdens but also why the criteria for allocation of taxes can be more complex and sophisticated. On this, see Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990, especially chapter 6.

the self-assessment of their obligations.¹⁵ Propaganda is far from an attractive alternative, as it not only undermines the very basis of democratic legitimacy, preventing citizens from being critically reflexive about political decisions, but may also exhaust itself pretty rapidly once an external shock results in the blatant contradiction of the “official picture”. If coercion and propaganda are out of question, it is still the case that the mere fact that a general law prescribes me to do certain things may not be sufficient to move into compliance. The predisposition to spontaneously comply with the laws democratically decided needs to be further supplemented by some form of collective identity. In that regard, there are three main types of identity relevant for our present purposes:

(A) *an interest-based identity*, or what is the same, a post-political bond between fellow citizens, based on the persistence of common interests and the benefits derived from the enjoyment of a given set of public goods and services; this collective identity results in solidaristic predispositions among strangers, modelled on the economic ideal of the free market; and indeed what is shared is essentially speaking a market, or what is the same, a community of economic risks;

(B) *a thick communitarian identity*, or what is the same, a pre-political bond between fellow citizens based on the common possession of certain traits (language, common historical memories, or even certain “ethnic” commonalities) which nurtures a predisposition to sacrifice one’s personal interest for the sake of the collective as a whole; this collective identity results in kinship-type solidaristic predispositions, modelled on the pre-political association *par excellence*, the family; this presupposes that what is shared is both a community of economic risks and a community of insurance in which entry is based on pre-political traits;

(C) *a thin civic identity*, or what is the same, a political bond between fellow citizens, which nurtures a predisposition to act in such a way as to acknowledge others as holders of fundamental rights and duties, and consequently, as potentially entitled to require from us the sacrifice of our personal interest for the sake of the interest of other citizens; this collective identity results in solidaristic predispositions among strangers, modelled on the political ideal of friendship; this presupposes that what is shared is both a community of economic risks and a community of insurance in which entry is based on political traits.

¹⁵ Personal and corporate income taxes, VAT and other sales taxes rely on the accurate self-assessment of citizens themselves, strategically and not exhaustively monitored by tax authorities.

The federal structure of the European political introduces a higher degree of complexity, given that it is possible to claim either that all subsystems are stabilised by the same form or by different types of collective identity. In particular, it is frequently the case that it is argued that while the national tax subsystems are stabilised by a civic or a communitarian collective identity, which goes hand in hand with contemplating robust tasks for such subsystems, the supranational tax subsystem is exclusively stabilised by an interest-based identity.

Table 1**APPLICATION OF RECON CONCEPTIONS TO THE POLITICAL ECONOMY OF THE EUROPEAN UNION**

RECON GENERAL STRATEGY	CONCEPTION OF THE EUROPEAN UNION	POLITICAL ECONOMY SPECIFIC STRATEGY	VARIANT A	VARIANT B
Renationalisation of Democratic Decision-Making	Functional Organisation or Supranational Administration	Europeanisation of the community of economic risks without Europeanising welfare arrangements avoids the need of democratic legitimacy at the European level	<i>Governance Variant:</i> Division of Competences (market-making vs market-correcting) and establishment of governance procedures capable of collecting and applying technical knowledge to the first set of tasks	<i>Indirect Democratic Legitimacy Variant:</i> Subjecting Market-Correcting to unanimous aggregate national will (design of the institutional setup and of the decision-making process)
Federalizing Strategy	Full-Blown Political Community	Europeanisation of the community of economic risk, of insurance arrangements and of political processes; all levels of government grounded on the democratic legitimacy of the institutional set up and of the decision-making processes	<i>Supranational Constitutional Distributive Justice:</i> Establishing supranational insurance arrangements capable of ensuring the legitimacy of supranational markets	<i>Supranational Constitutionalism:</i> Establishing constitutional limits to political power at the supranational level, and structurally empowering non-political decision-making processes
Cosmopolitan Strategy	Supranational Level of Government in a Cosmopolitan Constellation	Progressive Europeanisation of the communities of economic risk and of insurance arrangements governed by the aggregation of reflexive national political processes or by smart multi-level governance arrangements		