§ 3 The long and winding road towards a tax-financed EU budget
Constraints and design proposals from a legal prospect

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I. Introduction

When addressing the topic of EU taxes from a legal perspective, it is important from the outset to distinguish between two situations. On the one hand, it may refer to the creation of genuine European taxes by EU institutions, whose revenues would flow in the EU budget. This would require a major overhaul of the EU Treaties, by granting the EU level a constitutional power to tax and would de facto but also de iure transform the European Union in a fully-fledged federation, like the United States of America. On the other hand, it may also refer to a broader range of options for reform within the current Treaty framework through which the proportion of EU own resources deriving from tax-based revenues would be significantly increased. Genuine EU taxes are not indeed the only way to make the own resources system more dependent on tax resources. On this premise, the recent developments at the EU level as to the adoption of a new Multiannual Financial Framework for the period from 2021 to 2027 and the Next Generation EU instrument leave some room for cautious optimism.

This contribution is divided into three parts. First, it addresses the reason why the debate on the reform of EU tax-based own resources is important today. It is not just a matter of timing and of the need to compensate for the cost of the EU recovery program. There are other issues that have been pending for years, sometimes decades now, that justify opening this debate again. Then, it discusses legal-constitutional issues, such as the appropriate

legal basis to reform EU tax-based own resources. Art. 311 TFEU, which entrusts the EU with the capacity to be funded by self-defined own resources and not by mere voluntary contributions of Member States, like other, more traditional, international organisations, is indeed not suitable to adopt legal instruments in the area of tax policy and tax harmonization, which are regulated by other provisions, with other procedures. The third part is a small policy contribution from a legal perspective regarding the discussion of the different options of new EU taxes on the table.

II. Constitutional reasons to reform the own resources system

So why should one discuss the reform of tax-based own resources now? A first reason is conjectural. The Next Generation EU (NGEU) program was politically approved, together with the new Multiannual Financial Framework 2021-2027, after a marathon of negotiations in July 2020, and finally adopted on 17 December 2020[84]. To finance this program, the EU Commission will issue bonds up to 750 billion euros. The repayment of NGEU will require additional own resources to the EU budget.

According to the 2020/2053 decision on own resources:[85]

> 'The economic impact of the COVID-19 crisis underlines the importance of ensuring that the Union has sufficient financial capacity in the event of economic shocks. The Union needs to provide itself with the means to attain its objectives. Financial resources on an exceptional scale are required in order to address the consequences of the COVID-19 crisis without increasing the pressure on the finances of the Member States at a moment where their budgets are already under enormous pressure to finance national economic and social measures in relation to the crisis. An exceptional response should therefore take place at Union level. For that reason, it is appropriate to empower the Commission on an exceptional basis to borrow temporarily up to EUR 750 000 million in 2018 prices on capital markets on behalf of the Union. Up to EUR 360 000 million in 2018 prices of the funds borrowed would be used for providing loans and up to EUR 390 000 million in 2018 prices of

[84] Council Regulation (EU, Euratom) 2020/2093 of 17.12.2020 laying down the Multiannual Financial Framework for the years 2021 to 2027, OJ LI 433, 11–22.

[85] Council Decision (EU, Euratom) 2020/2053 of 14.12.2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 1–10.

> the funds borrowed would be used for expenditure, both for the sole purpose of addressing the consequences of the COVID-19 crisis.'

As a consequence, 'to bear the liability related to the envisaged borrowing of funds, an extraordinary and temporary increase in the own resources ceilings is necessary.' However, since the funds borrowed will have to be reimbursed, other measures to strengthen the financial capacity of EU institutions, such as a reform of the own resources system, need to take place. This needs to be done even if Member States agree on a modification of the original agreement as to the duration of loans, for example by authorizing a rollover. The commitment of the EU institutions and the Member States to increase and diversify the basket of EU own resources is indeed unconditional.

From a constitutional perspective, such a reform could require important changes to the current EU constitutional framework, despite the fact that Art. 311 TFEU allows – through a rather cumbersome but democratic procedure – the establishment of 'new categories of own resources or abolish an existing category'.

Unlike the exercise of taxing powers in Member States, there is no parliamentary involvement at the EU level in the area of tax policy. There is therefore no real link between the EU regulatory action of the European institutions – in particular the Council – in tax matters and the representative body, which is generally associated with the adoption of tax laws in domestic constitutional orders.

Then, there is the question of the legitimacy of the requirement of European unanimity in tax matters. It is very much like any type of international organization. When it comes to decisions that have a direct impact on citizens like taxes or tax policies, we should take the arguments put forward by the European Commission in 2019 seriously, in its attempt to move gradually to qualified majority voting in taxation. This is not an issue of efficiency, because as we have seen from the last years, many acts in the area of taxation have been adopted at the EU level despite the unanimity requirement. It is an issue of democracy and of legitimacy. Although the democratic legitimacy of the European Parliament may be questioned in the light of the differences in the electoral processes in the various Member States used to elect their MEPs, the current procedure according to which the tax directives and regulations are currently adopted by the Council alone do not guarantee effective democratic control despite the limited control mechanism by national parliaments on draft legislative act's non-compliance established by the Protocol on the application of the principles

of subsidiarity and proportionality (Protocol No 2)[86]. In 2019, the Commission has proposed to move progressively towards a qualified majority voting in taxation matters, a reform that would be possible without changing the Treaties under the so-called 'passerelle clause' (Art. 48(7) TEU); the Commission's arguments seem to be even more compelling regarding the adoption of a truly EU tax or even of new tax-based EU own resources.[87]

But there is also a stringent argument from an efficiency perspective to reform the EU own resources system. One should not just look at the number of acts that have been adopted by the Council within the area of taxation, but also consider which level of government carries the budgetary consequences, at least partly, of tax policy choices made at the EU level. Tax policy decisions are indeed split between the EU and the Member States while the budgetary consequences of those decisions lie exclusively with the Member States.

Finally, another reason to justify a reform towards more tax-based EU own resources is solidarity. Only EU taxes can achieve solidarity, which is an essential component for the internal stability of the European Union. In an internal market where economic factors are free to move from one member state to another, the increase of inequality between regions as well as between people can only be compensated by vertical intergovernmental transfers from the EU central level to the Member States. But solidarity is a difficult goal to achieve because as soon as it becomes too visible, or when it is presented as a single direction mechanism (from some clearly identified 'contributors' to other clearly identified 'beneficiaries'), it loses legitimacy. This consideration is to be found in the famous Spaak report[88] which paved the way towards the Treaty of Rome in 1957. The report recommended among other things the institution of a European fund that was about helping in certain areas and industries in Europe to meet the transition of the economies. And it explicitly specified that '[f]or the European Fund to be worthy of its name and to be able to play the part expected of it, there must be no territorial link between the origin of the funds and their utilisation'. Interestingly enough, in a much more recent report written for

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86 Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ 2008 C 115, 206-209.

87 EU Commission, Communication of 15.1.2019, Towards a more efficient and democratic decision making in EU tax policy, COM(2019) 8 final.

88 Report of the Heads of Delegation to the Foreign Ministers 'Spaak report' (Brussels, 21.4.1956).

the 2020 German presidency about the future of the EU own resources reform, *Clemens Fuest* and *Jean Pisani-Ferry* also address the relationship between Member States regarding contributions to and benefits from the EU: 'Dominance of GNI contributions encourages thinking about the EU budget in terms of net balances, though EU spending creates added value that benefits the EU economy as a whole.'[89]

In conclusion, reform towards new tax based own resources is certainly necessary, today more than ever. However, at the same time those resources should have a strong link with the European Union policies and – having an eye at the recent international debates on the digital economy[90] – with the European territory, but not a too tight link with the territory of single Member States in order to avoid fostering resentments between Member States.

III. Legal basis for tax-based own resources

In the political discussion on future EU own resources, the issues of the legal bases play an important role, since they significantly limit the room for maneuver of EU decision-makers. In some cases, they seem to even preclude the possibility of adopting certain types of EU taxes without changing the Treaties.

1. Legal basis and typology of EU own resources

According to Art. 311 TFEU

> 'The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.
>
> Without prejudice to other revenue, the budget shall be financed wholly from own resources.
>
> The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it

[89] *C. Fuest/J. Pisani-Ferry* 'Financing the European Union: new context, new responses', Policy Contribution 2020/16, Bruegel 2020.

[90] See in particular the ongoing work of the OECD on the BEPS Action 1 and the Pillar I and II proposals (https://www.oecd.org/tax/beps/beps-actions/action1/).

> is approved by the Member States in accordance with their respective constitutional requirements.
>
> The Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's own resources system in so far as this is provided for in the decision adopted on the basis of the third paragraph. The Council shall act after obtaining the consent of the European Parliament.'

The determination of the EU own resources is a matter reserved for the Council acting unanimously with a mere consultation of the Parliament except for the adoption of implementing measures. It is on the expenditure side that the Parliament's powers have increased over time and it is now placed on an (almost) equal footing with the Council regarding the establishment of the Multiannual Financial Framework[91] and of the annual EU budget[92].

The first Own Resources Decision dates from 1970, and no major substantial changes to the system have been made since the 1980s (with the addition of the GNI-based own resource).[93] The current system provides for four main sources of revenues: Traditional own resources, a Value Added Tax-based own resource, the Gross National Income-based own resource, and since 2021, a plastic contribution.

Moreover, an overall cap for resources and expenditures has been established: Under the rules agreed to for the period 2014-2020, the EU could mobilize own resources for payments up to a maximum amount of 1.2 % of the sum of all Member States' gross national income (GNI). The cap will

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91 Art. 312 TFEU.

92 Art. 310 and 314 TFEU. However, it could be argued that the abolition of the distinction between compulsory expenditures and non-compulsory expenditures in the EU budget by the Treaty of Lisbon has reduced the autonomy of the European Parliament as regards the latter type of expenditures (over which the EP used to have the final say).

93 Seven own resources decisions have been adopted since 1970. The first six were Council Decisions: Council Decision of 21.4.1970 on the Replacement of Financial Contributions from Member States by the Communities' own Resources, OJ L 94/19, 224; Council Decision of 7.5.1985 on the Communities' system of own resources, OJ L 128, 15; Council Decision of 24.6.1988 on the Communities' system of own resources, OJ L 185, 24; Council Regulation No 2729/94 of 31.10.1994 amending Regulation (EEC, Euratom) No 1552/89 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, OJ L 293, 5; Council Decision of 29.9.2000 on the Communities' system of own resources, OJ L 253, 42; Council Decision of 7.6.2007 on the Communities' system of own resources, OJ L 163, 17; see EU Commission, Commission Staff Working Paper of 27.10.2011 on Financing the EU budget: Report on the operation of the own resources system, SEC(2011) 876 final, 2.

be raised to 1.4 % for 2021-2027, with temporary increases allowed, to be determined at a later stage according to a formula contained in Art. 3 of Council Decision (EU, Euratom) 2020/2053.[94]

Traditional own resources are customs duties. Customs duties are currently the closest thing to a genuine EU tax. The EU has exclusive competence regarding the determination of the scope and structure of customs duties, and the revenues that are collected accrue directly to the EU budget after a 25 % (since 2021) deduction, which is supposed to remunerate for collection costs. Moreover, as an essential element of the internal market and the external commercial policy, legislation in the area of customs duties, like the Union Customs Code and its implementing regulations[95], is not considered as having a fiscal nature and is therefore jointly adopted by the Council (with a qualified majority) and the Parliament under ordinary legislative procedure. Customs duties represent 158,6 billion euros, which is around 12,7 % of the total EU resources (2018).

The other two EU resources take the form of compulsory national contributions by the Member States to the EU budget.

The VAT-based own resources are calculated on the basis of a uniform rate of 0.3 % applied to the corrected Value Added Tax base of each member state with the VAT base capped at 50 % of each country's GNI.

According to the Commission

> 'the VAT based contribution is complex, requires an important administrative work necessary to harmonize the calculation basis, and offers little or no added value compared to the GNI based own resource. Furthermore, due to the statistical nature of the basis, the resource is fully independent of- and does not support VAT policies at EU or Member States level.'[96]

Its financial relevance has steadily declined since the 1980s, and it accounts for approximately 12 % of total EU own resources. Despite proposals from

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[94] Council Decision (EU, Euratom) 2020/2053 (supra n. 2), OJ L 424, 1–10.

[95] Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9.10.2013 laying down the Union Customs Code, OJ L 269, 1; Commission Delegated Regulation (EU) 2015/2446 of 28.7.2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L 343, 1; Commission Implementing Regulation (EU) 2015/2447 of 24.11.2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code, OJ L 343, 558.

[96] EU Commission, SEC(2011) 876 final (supra n. 10), 4.

the Commission,[97] the Council has not seized the opportunity to transform it into a truly tax-based own resource, which would, at least in part, directly accrue to the EU budget.[98]

The Gross National Income-based own resource – which was originally supposed to have a purely complimentary role – currently accounts for more than 70 % of the EU budget. It is calculated by applying a uniform rate to Member States' gross national income. This rate is adjusted each year in order to achieve a balance between revenue and expenditure. Several exceptions have been established; in the wake of rebates for the United Kingdom, which is no longer a member state, some other EU Member States benefit from flat-rate corrections: for the period 2021-2027 there will be benefits of 565 million euros for Austria, 377 million euros for Denmark, 3,671 million euros for Germany, 1,921 million euros for the Netherlands and 1,069 million euros for Sweden.[99]

2. Interaction with existing EU legal bases in taxation matters

Although the Union has legislative powers in the area of taxation, these powers do not pursue a financial or budgetary objective. They are exercised with a legal and economic objective which is the achievement of the internal market. As Art. 113 TFEU on the harmonization of indirect taxation explicitly states – similarly to Art. 115 TFEU which serves as a legal basis to adopt acts in the area of direct taxation – the Union may adopt acts 'to the extent that [they are] necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition in a way that is functional to the completion of the internal market'[100].

Both provisions provide for a special legislative procedure with the Council acting unanimously as the sole legislative body and a mere consultative role for the European Parliament. Therefore, a clear separation exists – with

[97] See EU Commission, Proposal of 29.6.2011 for a Council Decision on the system of own resources of the European Union, COM(2011) 510 final and EU Commission, Proposal of 2.5.2018 for a Council Decision on the system of own resources of the European Union, COM(2018) 325; see also EU Commission, Report of 14.7.2004 on the Operation of the Own Resources System, Volume I and II, COM(2004) 505 final.

[98] The relation between the EU budget and the taxpayer is not direct, but indirect, since the VAT-based resource is a contribution of the Member States.

[99] Council Decision (EU, Euratom) 2020/2053 (supra n. 2), OJ L 424, 1–10.

[100] See *G. Kofler*, in: C. Panayi/W. Haslehner/E. Traversa (eds.), Research Handbook on European Union Taxation Law, 2020, p. 11.

minor overlaps – between the rules defining the extent of the powers in the area of taxation and those determining the own resources through which the EU budget is financed. The nature of these own resources and their relationship to taxation is quite different. Customs duties are the closest thing that we know today to a genuine EU tax. Because, also from a constitutional perspective, customs duties remain national taxes, the EU has exclusive competences regarding the structure of the customs duties, the rates, the way they are collected and the revenues generated by customs duties and by different Member States to the EU budget. Moreover, there is a clear link between customs duties and the competence transferred to the EU, in particular trade policy, the customs union and the internal market. Customs duties currently represent approximately 12 % or 13 % of the total EU budget. Then there is the VAT-based resource, which has little to do with VAT. It is not part of the VAT revenue collected by the Member States and it is fully independent from EU or domestic VAT policies. Furthermore, GNI-based resources have nothing to do with European taxation.

As the precedent of customs duties shows, nothing in the Treaty prevents a new EU own resource from being tax-based. However, this would require the adoption of common, if not identical, rules on the structure of the tax at the EU level, which could only be achieved by using legal bases existing in the Treaties. Art. 311 TFEU is indeed not a valid legal base to harmonize or to create taxes; it merely deals with the attribution of financial means to the European Union.

Currently, those are Art. 113 TFEU for indirect taxes, Art. 115 TFEU for direct taxes and Art. 192 TFEU for environmental taxes, which all provide for unanimity of the Council and a mere consultation of the European Parliament. The question may however be asked whether such a procedure is appropriate for establishing the base and the rate of a future EU tax, since Art. 113 and 115 TFEU enable the Council to adopt tax legislation for a specific purpose. Indeed, Art. 115 TFEU confers powers to the Council to 'issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'. Moreover, such directives should comply with the subsidiarity and proportionality principles laid down in Art. 5 TEU. It appears legitimate to raise the question whether new legislation aiming at harmonizing the structure of a future EU tax

would help to attain the objective of the achievement of the internal market, and whether their adoption at the EU level would meet the subsidiarity and proportionality criteria.[101]

We should be careful about using these legal bases to create a new tax that would be justified only because its revenues would fund the EU budget. There must always be a link with the internal market. The only exceptions are environmental levies because, in that case, there is a specific legal basis with Art. 192 TFEU, which also provides for unanimity, but which does not require a connection with the internal market.

Anyway, it seems clear that a move towards EU tax based own resources should be accompanied by introducing qualified majority voting for the adoption of harmonization measures. If there would be drawn a clearer link between tax harmonization and the own resources system, the argument based on the 'No taxation without representation' principle would be even more stringent, more compelling. That shows that the path towards EU tax-based own resources is a relatively complicated one.

IV. Assessment of potential options

Previous studies[102] have discussed the pros and cons of introducing new own resources based on existing or new taxes, such as Value Added Tax,

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[101] Similar doubts have been expressed as regards the adoption of the ATAD, which can be seen as an empowerment to Member States to strengthen their domestic tax systems and to adopt anti-abuse measures even in a EU cross-border context without harmonizing or coordinating their corporate tax systems. Under such a perspective, the question may be asked as to whether the ATAD really services the purpose of achieving the internal market. See *E. Traversa*, The prohibition of abuse of rights in European Tax Law: sacrificing the internal market for the fight against base erosion and profit shifting?, Studi Tributari Europei, Vol. 9, no. 1 (2019), p. 1-14, in particular p. 13 (https://ste.unibo.it/Art./view/10682/11222).

[102] See European Parliament, Working Document of 30.10.2015 on improving the functioning of the European Union building on the potential of the Lisbon Treaty, para. 42 and the works of The High-level group on own resources established in 2014 by Monti (EU Commission, High-level group on own resources, http://ec.europa.eu/budget/mff/hlgor/index_en.cfm, last accessed: 27.05.2020); among scholarly literature, see *F. Heinemann/P. Mohl/S. Osterloh*, Reform options for the EU own resource system, Research project 8/06 commissioned by the German Federal Ministry of Finance (18.1.2008); *I. Begg/H. Enderlein/J. Le Cacheux/M. Mrak*, Financing of the European Union Budget, Study for the EU Commission, Directorate-General for Budget (29.4.2008); *Linde,* in: Lang et al. (eds.), Introduction to European Tax Law on Direct Taxation (2008); *Ph. Cattoir*, Options for an EU financing reform, Notre Europe (2009);

customs duties and other border levies, excise duties and special taxes on certain goods and services, corporate tax, transport tax, especially car taxes and air transport taxes, financial transaction tax and carbon tax. Some scholars have also argued for the introduction of a Pan-European wealth tax[103]. In a resolution of 15 May 2020, the European Parliament reaffirmed its position supporting the Commission's previous proposals regarding the list of potential candidates for new own resources. Those were 'a common consolidated corporate tax base, digital services taxation, a financial transaction tax, income from the emissions trading scheme, a plastics contribution and a carbon border adjustment mechanism.'[104]

From a lawyer's perspective, future EU tax-based own resources should have certain characteristics that would ensure that they respect constitutional and legal principles whether based on EU law or on the common constitutional tradition of the Member States and that can be easily implemented, limiting legal uncertainty.

First, as the French saying '*Un bon impôt est un vieil impôt*' ('A good tax is an old tax') tells, creating a completely new tax has always been quite a difficult task and was usually made possible by extraordinary events, such as wars.[105] Moreover, besides the – rather understandable – natural aversion that people and countries could show against the introduction of new levies (which prompted several revolutions), the administrative costs associated with the introduction of a new tax in 27 states should not be overlooked,

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 Working Paper 3 (6.2016), (http://ec.europa.eu/budget/mff/Library/hlgor/selected-readings/40-DOC-COMM-EuTaxes-Schratzenstalle.pdf, last accessed: 27.05.2020); *A. De Feo/B. Laffan*, EU Own Resources: Momentum for a Reform? European University Institute (2016), (http://ec.europa.eu/budget/mff/hlgor/library/selected-readings/01-DOC-COMM-EUORMomentumForReform-EUIDeFeoLaffan-Feb2016.pdf, last accessed: 27.05.2020).

[103] *C. Landais/E. Saez/G. Zucman*, A progressive European wealth tax to fund the European COVID response, VOX (3.4.2020), (https://voxeu.org/Art./progressive-european-wealth-tax-fund-european-covid-response, last accessed: 27.05.2020).

[104] European Parliament, Resolution of 15.5.2020 on the new Multiannual Financial Framework, own resources and the recovery plan, P9_TA-PROV(2020)0124; see also European Parliament, Interim report of 14.11.2018 on the Multiannual Financial Framework 2021-2027 – Parliament's position with a view to an agreement, P8_TA(2018)0449.

[105] See, for example, the adoption of the income tax in the United Kingdom in 1799 as a temporary tax to finance Napoleonic wars or in France in 1914 to support the WWI effort.

also considering the significant disparities due to the different tax cultures. It should be borne in mind that the Commission, over the years, has unsuccessfully proposed a carbon tax[106], a CO_2-based car taxation[107], a financial transaction tax (including under enhancement cooperation)[108] and, more recently, two types of digital taxes[109]. In this context, it would seem wise not to add administrative implementation hurdles to the already considerable political obstacle to the introduction of a direct transfer of tax revenue from the Member States to the Union and to adapt models already existing at the level of the Union or at least inspired by experiences common to all or at least a majority of Member States.

In addition, as already mentioned earlier, the resource should be able to provide the European budget with significant and stable revenue, to reimburse the loans taken by the Commission in the framework of the Next Generation EU, and there is always a haze of uncertainty regarding the revenue-raising capacity of 'untested' taxes.

A last element to be taken into consideration is the fact that a truly European tax-based own resource, by its very nature, cannot create territorial divisions that would foster resentments between Member States, as it is currently the case when it comes to determining the net contributors and the net beneficiaries to the budget of the European Union.

Therefore, trying to use an existing tax to transform it totally or partially into an EU tax-based own resource seems to be the safest way forward from a legal perspective. For these reasons, plastic taxes, financial transaction taxes, digital taxes, but also corporate taxes (which, given the disparity between Member States' corporate income taxes, would require a considerable harmonization effort) cannot reasonably be first (and not even second) -best choices in the short-term: before they can be considered workable options, significant issues as to the EU competence to adopt them, but also

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106 EU Commission, Proposal of 2.6.1992 for a Council Directive introducing a tax on carbon dioxide emissions and energy, COM(1992) 226 final.

107 EU Commission, Proposal of 5.7.2005 for a Council Directive on passenger car related taxes, COM(2005) 261 final.

108 EU Commission, Proposal of 28.9.2011 for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM(2011) 594 final and EU Commission, Proposal of 14.2.2013 for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final.

109 EU Commission, Proposal of 21.32018 for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final.

as regards their implementation and administration will have to be properly addressed.

The two candidates that offer more reliability from a legal viewpoint are a (truly) VAT-based own resource and own resources based on an excise tax on certain services connected to the digital economy.

Value Added Tax is besides customs duties the most European tax and is already used as a basis to calculate one of the own resources. In comparison with all the other taxes, not much would be needed to it becoming the most significant own resource, both in terms of yield and visibility for EU citizens. It is certainly worth remembering the solution devised in the Commission's 2011[110] proposal, which unfortunately remained a dead letter by the Member States. The idea concerned a slight modification of the current system of own resources in addition to a single innovation, which the Member States were not ready to discuss at the time, namely that of transforming the VAT resource into a (quasi) European tax, with the establishment of a specific European rate on top of the national one, with a maximum of 2 %. This proposal by the Commission has merits in terms of simplicity, feasibility and the link with the internal market. The EU VAT system is indeed largely harmonized, instruments for cooperation between Member States exist, and a common VAT culture between national administrations is slowly developing. Moreover, the impact in terms of revenue of such a solution can be precisely estimated. This solution would certainly require changes, such as further harmonization as regards exemptions and exclusions (which could be achieved by amending the 2006/112/CE Directive) and increased cooperation between Member States' VAT administrations and the Commission, as well as a modification of the structure of the VAT-based own resource in the Own Resources Decision. But this would not constitute a legislative revolution, rather an evolution in a process that started decades ago. And last but not least – and even if that argument is often used against such a solution – VAT is a tax that is paid by everyone: every consumer, rich or poor, but also every business, in one way or the other. A VAT-based own resource could give a stronger sense of European citizenship, in comparison to other, more sectoral, levies that would give the impression that the EU has been created for large businesses, such as digital companies or banks.

The second option would be an excise tax on certain services. Digital taxes are in the air. While some Member States have already adopted the digital

110 COM(2011) 510 final (supra n. 14).

service tax, intense discussions are taking place at the international level (Pillar 1 and Pillar 2 OECD initiatives). If there is no agreement at the OECD level, the Commission has announced that it would introduce a digital levy. The structure of that levy could be a top-up tax on certain transactions already subject to VAT, without a right to deduct so as to cover both B2B and B2C services (there to be considered as a sort of excise on digital transactions), with a threshold for smaller providers. Alternatively, if the determination of the services subject to this new levy would prove to be too difficult, a small percentage of the total turnover of large multinational firms (which are those who benefit the most from the EU single market) could also be an option. There would also be a precedent: for almost 50 years, the European Coal and Steel Community, which was created in 1951 and then later absorbed by the European Economic Community, has been financed through a levy on the production of coal and steel, at a rate (less than 1%) fixed by the High Authority – the forerunner of the European Commission – and directly collected by it from undertakings active in those sectors.[111]

And if at the end, due the constitutional and legal constraints described above and/or political factors, a compromise on tax-based own resources would prove too difficult to achieve or if it would not yield enough revenues, it would be wise not to cast all the EU eggs in the same tax basket, and to also develop other forms of EU financing. Alternatives outside the field of taxation exist, like resources based on the Emission Trading System[112] or the setting-up of obligations to contribute to Pan-European funds aiming at protecting against specific risks, such as those linked to climate change, along the lines of the EU regulatory bank levy in the framework of the Single Resolution Fund.[113]

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[111] Art. 49 of the Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris on 18.4.1951. See also High Authority Decision No 2-52 ECSC of 23.12.1952 determining the mode of assessment and collection of the levies provided for in Art. 49 and 50 of the Treaty and High Authority Decision No 3-52 ECSC of 23.12.1952 on the amount of and methods for applying the levies provided for in Art. 49 and 50 of the Treaty, available on www.cvce.eu.

[112] This appears to be the solution favored by *C. Fuest/J. Pisani-Ferry*, 'Financing the European Union: new context, new responses', Policy Contribution 2020/16, Bruegel.

[113] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15.7.2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225, 1. In 2019, the Single Resolution Fund (SRF) received 7,8 billion euros from 3,186 institutions and investment firms. It is important to stress that

The road towards a more sold financing of the European Union has never been straight, and side paths could turn out to be the smartest manner to continue the journey, waiting for the right time to go back on the main track.

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the calculation and collection of the contributions by the Single Resolution Board is subject to review by EU Courts: see for example GC, Judgment of 23.9.2020, Cases T-411/17 Landesbank Baden-Württemberg v Conseil de résolution unique (CRU), T-414/17 Hypo Vorarlberg Bank AG v CRU and T-420/17 Portigon AG v CRU.

Discussion

Moderator: Ekkehart Reimer

Ekkehart Reimer

Thank you, Edoardo, that was really an unorthodox ending. It seems no one is considering VAT although it has been so close, so common and so customary to EU tax law since the late 1960s. For these reasons it is just astonishing to me that we have not been talking more about VAT as an EU tax in the past. Again, thank you very much for this well-structured lecture.

We will now enter into a discussion with everyone. Once again, I would like to encourage all participants of our worldwide audience to join the discussion and to intervene on any topic that may or may not have been addressed by *Edoardo Traversa*.

I may start with just a short question myself. There is one EU tax already and this is the tax on income of public servants of the EU, of all the people in Brussels, Luxembourg and Strasbourg who earn their money from EU budgets as civil servants or employees of the Union. Can we learn anything from those EU own resource taxes or is it something that you just not find helpful from an academic viewpoint to compare, for instance regarding assessment and enforcement of those taxes, with your six candidates?

Edoardo Traversa

Yes, you are right to mention that there is at least this tax. Well, there are two reasons why it is not really relevant to the debate. First, unless we transform the EU into a super state which would integrate most of the existing administration of the Member States – I am not sure that this is a perspective that is particularly rejoiced – the volume of the revenue collected will remain quite negligible. We can also certainly increase the taxes on the existing civil servants, but it will remain a negative source of revenue.

And the second element is more, let's say, legal. I am not really sure that this levy has the constitutional nature of a tax in the EU legal order. It is of course something that the EU does but the question is whether this model can be used to adapt other types of levies. Actually, I do not think it can. So it is a precedent that can be used in order to say we are ready for a new tax,

but I am not sure that we can use something from it to expand and enlighten the debate on future forms of own resources.

Ekkehart Reimer

I am afraid you are right, Edoardo. Any other questions, any points? *Matthias Valta* from Düsseldorf, the floor is yours.

Matthias Valta

Thank you very much, Edoardo, for this very nice presentation. If I understood you correctly, you said that there is no need for a further general legal basis for raising taxes besides the *Eigenmittelbeschluss* and the specific legal bases you mentioned, and I would generally agree with that. But if I remember correctly, this has been disputed in the German discussion. And beyond this discussion there is some unease because of the alleged lack of democratic legitimation of the European Union, especially with regard to the restricted role of the European Parliament. Could you elaborate a little bit on that? Not from the German point of view, but from a general, institutional point of view? How would the European Parliament, how would the principle of democracy, how would democratic legitimation play out in your assessment of the constitutional setting of the European Union?

Especially if we think of 'No taxation without representation'. Do we have enough representation for taxation? I very much liked your example with Wendy. Because 'No taxation without representation' can also be turned around: 'No representation without taxation'. Like Wendy felt herself more as a part of society because of being taxed, collecting a European VAT on our everyday bills could make us all feel more like European citizens. If we are burdened with visible European taxes and thus feel more like European citizens, does this amount to a new awareness that leads to more democratic legitimation and representation? Thank you.

Edoardo Traversa

Yes, thank you, Matthias. Well, from an EU constitutional perspective you could always strive towards more clarity and add provisions in the Treaty for the possibility to adopt a new tax. But since we have this precedent of the customs duties which seems to work in the sense that, according to even the most optimistic scholars asking for a budget of the EU, this budget would be around 4 or 5 % of the European GDP. So we do not need – except if there is an institutional big bang – to reach these figures or half of them,

to have true European taxes, in the sense of a new personal income tax or a new corporate tax. The way it works for the customs duties is a relatively acceptable arrangement, as long as we are dealing with smaller taxes or shared taxes, because advocated are taxes that collect shared revenues between the Member States and the European Union.

As regards the democratic argument, it is true but that is more of a purely constitutional issue. It is true that the issue whether the European Parliament can be considered as the European equivalent of the national parliaments is a real issue. Particularly the fact that the way Members of the European Parliament are chosen varies depending on the different Member States. Do we have true European representation in the European Parliament? That is clearly an open question and it is something that probably should be addressed somehow. The situation that we now have is a problem not only as regards democratic involvement of the European Parliament: it is the fact that there are no bodies, whether domestic bodies or the European Parliament, with representatives of the citizens which are directly affected by European tax provisions. There is no democratic body that has its say in the process and on the adoption of tax rules. That is not something that can last, if we go forward with the tax integration process.

When it is just about adopting coordination measures, for example to make sure that we avoid double taxation, or certain cross-border operations, it is something that can be accepted, even if we could argue about it. But when it comes to the entire structure of the tax, discussing even raids, it is something that I personally think we should have in mind for the debate and use that as a justification to have more transparent approaches in the adoption of tax rules.

Irene Burgers

Of course, VAT is a very good candidate and I fully agree with you that people on the street will feel that Europe comes closer to them and that is always good as one of my old professors once told me. He was professor in tax law and history and he said you really need a tax as a clue between people. You make a country function because it has a tax. If you want the EU to move forward, we need a tax, an EU levy.

But do we also need an EU tax administration or would it be preferable to keep going on the way we are doing it right now, with a percentage of VAT going to the budget of the European Union and keeping a separate tax administration. Because if you want to have an EU tax administration, then

you should also try to come up with all those procedurals which would require again new legislation and harmonized legislation also in the procedural field. So how do you feel about that?

Edoardo Traversa

I perfectly agree. At the moment, we are in a very uncomfortable situation when it comes to taxpayers' protection as regards VAT, because we have the common rules. We are supposed to have a coordinated system where there is no discrimination between cross-border transactions and domestic transactions.

What we observe is, first of all, that there is no efficient and quick procedure in order to avoid double taxation between Member States. We have to go to the Court of Justice and there is a lack of coordination regarding assessment, collection and the criminal prosecution of VAT-related crimes. However, we are moving towards a more coordinated approach concerning the procedural aspects. When it comes to the criminal prosecution of VAT cases, we now have the European Public Prosecutor's Office which is oddly competent for VAT crimes. There are principles in the Treaties. The equivalence principle requires Member States' tax administrations to pursue VAT crimes and ensure VAT collections as if it was a purely national tax, but we should probably go further. This is independent from the fact that VAT finances the EU budget. There is a more compelling argument to go in that direction, if it would be the case to have a kind of a VAT taxpayer charter, to have some common framework for collection and sanctions. The level of harmonization of VAT is currently so high at the EU level that things cannot remain like this from a purely procedural perspective.

As for the European VAT administration, I am not sure that we need a fully-fledged EU VAT administration, but we need something more than what we have now. We need a tax administration in charge of coordinating the domestic administration. Probably, looking at the German model which has tax authorities that are at the level of the *Länder* with a coordinating body at the federal level. That could be a source of inspiration.

Ekkehart Reimer

Thanks very much, Edoardo, for the answers. For the time being, I would like to give the floor to *Aikaterini Pantazatou* from Luxembourg for a short intervention.

Aikaterini Pantazatou

Thank you very much, Edoardo, for the presentation. I have a question on spending. How would an EU tax, no matter the form, affect the spending? We have talked about democratic legitimacy: It is very likely that if people feel they are paying to the EU and the spending is invested as it is now when it comes to distribution policies, people will not want this money to be spent on a remote region, for example in the north of Greece or somewhere else. Could this very much affect the spending process as well? And the way the revenue of the EU budget is spent in terms of procedure and also in terms of substance? Thank you very much.

Edoardo Traversa

Shortly, I am not sure that a change of structure in the VAT own resource, which would be calculated on each transaction with top rates, would affect rules on spending and the way money is spent or the legitimacy of spending because we would have probably the same arguments that we have today as regards potential net contributors. But I think that the VAT resource is linked more to the internal market, to cross-border dimensions and hence could raise less issues than a purely national resource calculated on the GNI, but that is with a maybe only. I am not sure to have fully answered your question. I do not think that there will be money spent in all Member States. It will not exactly be in the same proportion to the money that is collected and so the situation would not change. It would be interesting to see how using VAT much more than the GNI own resource would impact the distribution between Member States as regards the proportion of the VAT collected between Member States.

Ekkehart Reimer

Well thanks, Edoardo. Next one in our line is *Gianluigi Bizioli* from the University of Bergamo. And then we hope to have *Frans Vanistendael*, followed by *Christoph Wicher*.

Gianluigi Bizioli

Thank you, Ekkehart, and thank you, Edoardo, for this really challenging presentation. I have two brief questions. The first one goes back to the legal basis for an EU tax. I wonder whether Art. 311 TFEU provides the sufficient competence to the Council and the Member States. I support this position, although I am fully aware that paragraph 2 of this provision is

rather generic. The decisive issue is that the procedures that regulate EU own resources do not wholly belong to the realm of EU law but they require the domestic ratification of the Council decision, according to the Member States' constitution. In this sense, my first point is whether Art. 311 TFEU is a sufficient legal basis for an EU tax.

Secondly, I would like to know your position about the Commission's statement in the Next Generation document in which the EU calls for a connection between the new EU taxes and the competences of the European Union. Is this requirement between the EU tax and the competences of the EU a necessary link or not? Thanks in advance for your answers.

Edoardo Traversa

Thank you. Shortly, I do not think Art. 311 TFEU can serve as a legal basis. Nonetheless, this can be formulated in a very close way so that the additional resources can be established. I do not think it can be reasonably interpreted as allowing the EU to establish EU taxes. I think it would be an interpretational revolution, it would be too much. I think a change to the Treaty is needed.

To answer your second question: As long as there is no general EU competence to establish EU taxes, you have to rely on other legal bases and those legal bases are constrained by the objective to which they can be used, whether for the internal market or for environmental policy purposes. That is why the Commission draws the link. It can also be a political reason, an argument in order to enhance the acceptance of the general public or of the Member States of those taxes, but I think there is also a legal reason to stress the link between EU competences and potential new EU taxes and EU own resources.

Christoph Wicher

Thank you very much, a very warm 'Hello' to Heidelberg and thank you to Professor *Traversa* for this very interesting presentation. I keep pondering about a question regarding the digital levy. Why did the European Council use the phrasing of a digital levy rather than a digital tax? Should we directly jump on to the idea of reducing it to a digital tax rather than continue thinking on what such a levy could also be, especially in regard to the very tight time frame? The European Council expects legislative action enforced by 1 January 2023. I would be very keen to know what your ideas on this issue are. Thank you very much.

Edoardo Traversa

Thank you very much for the question, it is a fundamental one. My first answer would be jesuitical, it is not because you call something a levy that it is not a tax from a legal perspective. My second answer is that it is true if we use the term levy, it opens up some possibilities, but I believe only if you try to link the levy with the destination of the funds collected which is basically the idea of the EU banking levy. Basically, the objective is a general interest to protect the EU against a collapse of the banking system. It is not really an insurance premium that single banks pay to be insured, they are rather contributing to something that is linked to them. That is why banks pay the levy and other actors do not.

However, you could imagine a digital levy that would be levied on digital companies with a general interest objective which is related to the activities of those undertakings. For example a levy to fund a digitalization fund at the EU level. This would maybe also be in the interest of companies, especially in times of COVID-19 and teleworking: to make sure that every European citizen gets access to a stable internet connection and to digital devices. If you would be able to build such kind of program, you could maybe escape the definition of the tax because of this link. Even if the link between the levy and the spending is not a direct one in the sense that the taxpayer or the companies on which the levy is levied gain a direct benefit from paying that levy.

Ekkehart Reimer

Thanks very much, Edoardo. I think we have had a really fruitful and colorful morning session. I wish to express my thanks again to *Edoardo Traversa* for his statement, to *Martin Nettesheim* for his lecture of great analytic insight and to all those who have contributed to the discussions.