Involving the Corporate Sector in EU Financing: A Two-Tier Model for a Corporate Income Tax-Based Own Resource

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Involving the Corporate Sector in EU Financing: A Two-Tier Model for a Corporate Income Tax-Based Own Resource

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Abstract

To address the consequences of the COVID-19 crisis, the European Union (EU) has taken out a significant amount of debt. As agreed in a 2020 Interinstitutional Agreement, efforts are being made to ensure its repayment through new own resources, including a financial contribution linked to the corporate sector or a new common corporate tax base. In this article, we present a two-tier model for a corporate income tax-based own resource that should be levied as an EU surcharge on a broadly harmonised corporate tax base. In doing so, we aim to balance competing interests among taxpayers, administrations, the EU, and Member States, thereby proposing an alternative to the current Commission's proposals.

1. Unprecedented pressures create a window for opportunity

Much thought has been put into the question as to whether the financing architecture of the EU should undergo structural changes away from the dominance of Member States' Gross National Income (GNI) contributions that mirror the intergovernmental dimension of the EU on the revenue side[1] towards revenue sourcing that better reflects the idea of the European Union as a commonwealth.[2] Those arguing in favour

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[1] Approximately 70% of EU financing came from GNI-based own resources. See M. Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625, *https://www.europarl.europa.eu/RegData/etudes/STUD/2022/731895/IPOL_STU(2022)731895_EN.pdf*; Eurostat, "Verification of GNI for Own Resource Purposes" (7 January 2024), *https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Verification_of_GNI_for_own_resource_purposes#:~:text=Commission's%20(Eurostat's)%20verification%20of%20GNI,and%20the%20Reports%20on%20Quality*.

[2] For a discourse on the topic, see, for instance, the contributions in J. Lindholm and A. Hultqvist (eds), *The Power to Tax in Europe* (Oxford: Hart Publishing, 2023); E. Traversa, "The Long and Winding Road towards a Tax-Financed EU Budget" (2021) *Heidelberg Working Paper Series on Public Finance and Tax Law*; H. Kube, "EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten" in M. Lang (ed.), *Europäisches Steuerrecht* (Cologne: Verlag Dr Otto Schmidt, 2018), p.69; C. Waldhoff, "Legal Restrictions and Possibilities for Greater Revenue Autonomy of the EU" in T. Buettner and M. Thöne (eds), *The Future of EU-Finances* (Tübingen: Mohr Siebeck, 2016); F. Heinemann P. Mohl and S. Osterloh, *Reform Options for the EU Own Resources System*,

of such a substitution mourn the current system to give rise to a "net balance instinct"[3] that underlies Member States' tiresome—and pointless because, by definition, synergy effects cannot be apportioned—practice to attempt to maximise their directly measurable backflows from the Union's budget while cutting down on funding with a genuine but hard to attribute European benefit.[4] Those arguing against such a transition instead emphasise that GNI-based own resources are fair, predictable, efficient,[5] and therefore superior.[6]

A new impetus to the debate was given during the negotiations of the last Multiannual Financial Framework in 2020. To address the consequences of the COVID-19 crisis, art.5(1) of the Own Resource Decision (2020–2053) empowers the Commission to borrow €750 billion from the capital markets through the European Union Recovery Instrument (EURI).[7] This is a remarkable moment in the Union's history. Although the Union has taken out debt on various occasions before, such a significant amount has never been at stake.[8] This has drawn some commentators to regard this as Europe's Hamiltonian moment[9]—the

Vol.40 (Dresden: Physica-Verlag HD, 2008). See further the discussion in "Mario Draghi on the Path to Fiscal Union in the Euro Zone", *The Economist* (6 September 2023).

[3] J.N. Ferrer et al, *Study on the Potential and Limitations of Reforming the Financing of the EU Budget* (Report for the HLGOR 2016), *https://commission.europa.eu/system/files/2018-10/future-financing-hlgor-final-report_2016_en.pdf*.

[4] This is widely known as the "juste retour dilemma". Member States aim for a minimisation of their national contributions and a maximisation of their measurable flowbacks from the EU budget. The latter then tends to include EU funded projects in the field of agriculture or a cohesion policy that have only very limited additional EU value. To stress an illustrative argument brought forward in literature, while it makes good sense to provide for investments into drinking water reservoirs in Brandenburg, there is, but for potential redistributions targets, no pressing reason for doing this via the EU budget. However, Member States tend to prefer such investments as, in colloquial terms, they form something tangible that they get back for their money. This way of thinking is at risk to result in an under provision of truly European goods, i.e. goods that benefit the EU as a whole and do not directly give to ex ante predictable flowbacks to the specific Member States. One may expect that increasing the share of EU tax based own resources and the resulting decrease in the GNI-based own resources may help in overcoming this thinking. Compare, also further going, e.g. C. Fuest, F. Heinemann and M. Ungerer, "Reforming the Financing of the European Union: A Proposal" (2015) 50 *Intereconomics* 288–293; HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017), pp.37–39; critical, with further references, C. Neumeier, "Political Own Resources: Towards a Legal Framework" (2023) 60 C.M.L. Rev. 324. To be clear, the overcoming of just-retour thinking requires a broader approach including, especially, giving more spending power to the European Parliament. While the latter accepts the Multiannual Financial Framework (MFF), it remains that, currently, the Council is providing for the first draft and has the actual power. See further going, including proposals for change, Fuest, Heinemann and Ungerer, "Reforming the Financing of the European Union: A Proposal" (2015) 50 *Intereconomics* 288–293. Compare further also, e.g. V. Rant and M. Mrak, "The 2007–13 Financial Perspective: Domination of National Interests" (2010) 48 J.C.M.S. 347–372.

[5] E.g. C. Fuest and J. Pisani-Ferry, "Financing the European Union: New Context, New Responses" (2020) 4 *EconPol Policy Report* 1–21, or HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017), pp.37–39.

[6] Kube, "EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten" in Lang (ed.), *Europäisches Steuerrecht* (2018), p.69.

[7] Regulation 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433I/23.

[8] For an overview of earlier EU borrowing, see, e.g. C. Heber, "European Legal Limits for the Recovery Fund" (2020) *Working Paper of the Max Planck Institute for Tax Law and Public Finance Paper* No.2020-15, pp.7–9, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3743969*.

[9] This refers to the 1790 agreement between the US Treasury Minister Alexander Hamilton, Thomas Jefferson, and James Madison which allowed the US Federal Government to take out the first stock of American public debt that was seen as a key step in the process of US state building. See in more detail, e.g. D.L. Lionello, "Next Generation EU: Has the Hamiltonian Moment Come for Europe?" (2020), *Eurojus*, *https://rivista.eurojus.it/wp-content/uploads/pdf/lionello-nextgen.pdf*. On a more detailed historical and critical account on the use of the Hamiltonian comparison,

dawn of a new era.[10] While we are careful not to overstretch such historical comparisons, it is clear that, at a minimum, the EURI debt constitutes a strong push to rethink the financial structure of the Union.[11] The EU's current budget is too small to absorb the burden of its repayment; already the mere interests would represent a disproportionate amount compared to its actual size,[12] and it appears very unlikely that Member States would agree to support it out of their general budgets by increasing their GNI contributions. Moreover, the agreement by European Parliament to the MFF 2021–2027 was made conditional on a reshuffle of the own resources system. The pressure for reform by adding new forms of financing is thus high.

The political direction as to how these extraordinary financing needs should be stemmed seems set. Based on the 2020 Interinstitutional Agreement between the European Parliament, the Council of the European Union, and the European Commission, the EURI debt should be repaid with new own resources (in order to avoid a last resort intervention of the Member States).[13] It is agreed that, over the coming years, the Commission will propose a series of these and, with the plastic levy already implemented,[14] the process is already well underway.[15] The tides thus seem to be turning.

The starting point for this article is the apparent political readiness to provide a contribution linked to the corporate sector or a new common corporate tax base.[16] Combined with the fact that through the recently implemented EU Minimum Tax Directive rules on corporate tax base calculation already exist, we believe that there is an unprecedented opportunity to reach an agreement. So far, this has proven very difficult. In fact, the potential introduction of an own resource based on a harmonised corporate income tax base has been discussed for a long time[17] and was already the object of a number of Commission

see C. Georgiou, "Europe's 'Hamiltonian Moment'? On the Political Uses and Explanatory Usefulness of a Recurrent Historical Comparison" (2022) 51 *Economy and Society* 138–159.

[10] See, for further going discussions and references, for instance, G. Bizioli, "Building the EU Tax Sovereignty: Lessons from Federalism" (2022) 14 *World Tax Journal* 407–433; Heber, "European Legal Limits for the Recovery Fund" (2020) *Working Paper of the Max Planck Institute for Tax Law and Public Finance Paper* No.2020-15, p.2; Georgiou, "Europe's 'Hamiltonian Moment'? On the Political Uses and Explanatory Usefulness of a Recurrent Historical Comparison" (2022) 51 *Economy and Society* 138–159; M. Nettesheim, "Next Generation EU: The Transformation of the EU Financial Constitution" in *Heidelberger Beiträge zum Finanz- und Steuerrecht*, Vol.16 (2021), p.9; Lionello, "Next Generation EU: Has the Hamiltonian Moment Come for Europe?" (2020) *Eurojus*.

[11] J. Lindholm, "Squaring the Constitutional Circle: An Overview of EU Fiscal Powers" in J. Lindholm and A. Hultqvist (eds), *The Power to Tax in Europe*, 1st edn (Oxford: Hart Publishing, 2023), pp.3, 16.

[12] The 2021–2027 MFF calculated the borrowing cost for the EURI of around €15 billion. This was based on an assumption of interest rates for borrowing gradually increasing from 0.55 % in 2021 to 1.15 % in 2027. Yet, interest rates rose beyond 3% which causes the cost of borrowing to increase. See European Parliament, "Impact on the 2024 EU Budget of Increasing European Union Recovery Instrument Borrowing Costs" (May 2023) 2023–2037(BUI), *https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/747130/EPRS_ATA(2023)747130_EN.pdf*. The total expenditure of the EU for the years 2021–2027 is €1,824.3 billion, which includes the €750 billion for the NGEU. For an overview, see European Parliament, "The EU's Expenditure, Fact Sheets on the European Union" (28 February 2023), *https://www.europarl.europa.eu/factsheets/en/sheet/28/the-eu-s-expenditure*.

[13] Interinstitutional Agreement on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources Interinstitutional Agreement on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources [2020] OJ L433I/28.

[14] See Section 2.

[15] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28. See further Section 2.

[16] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28, p.19.

[17] Compare, e.g. the discussion in Ferrer et al, *Study on the Potential and Limitations of Reforming the Financing of the EU Budget* (2016); F. Candau and J. Le Cacheux, "Taming Tax Competition with a European Corporate Income Tax" (2018) 128 *Revue d'économie politique* 575–611; Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625; F. Vanistendael, "An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and

proposals—each unsuccessful.[18] On the other hand, however, EU law also includes examples of payment obligations imposed on certain economic players—most relevantly, the levies that banks of participating Member States need to contribute to the Single Resolution Fund (SRF).[19] Furthermore, the Commission has recently launched another attempt to achieve a harmonisation of corporate tax rules for (mainly) large corporations via the Business in Europe: Framework for Income Taxation (BEFIT) proposal.[20] In addition, or as an alternative thereto,[21] the Commission has proposed a statistical own resource on corporate profits.[22] Moreover, the Commission's proposal to base an own resource on the taxable profits of certain very large multinational enterprise groups (MNEs) that are to be reallocated under the OECD/G20 Pillar 1 proposal[23] has a relation to corporate taxation.[24]

That said, we are surprised that relatively little attention in literature has been devoted to the legal design of such a new contribution even though this dimension appears to be of primary importance due to the peculiarity of the EU fiscal framework. This is problematic because the window for action that is now open should be used to implement—potentially after interim solutions[25]—measures that provide for an optimal outcome in the difficult task of balancing the interests of the three involved stakeholders: taxpayers, Member States, and the Single Market overall. In particular, it is a unique chance to more strongly align corporate taxation—an extremely powerful policy tool[26]—with the endeavours of European

'Tax Abuse'?" (2021) 75 *Bulletin for International Taxation* 749–761, *https://www.ibfd.org/sites/default/files/2021-11/European%20Union_International%20-%20An%20EU%20Corporate%20Income%20Tax%20Filling%20the%20Hole%20in%20the%20EU%20Budget%20An%20End%20to%20Tax%20Competition%20and%20"Tax%20Abuse"%20-%20IBFD.pdf*; P. Schweizer, *Die Körperschaftsteuer Als Eigene EU-Steuer—Finanzwissenschaftliche Untersuchung Möglicher Modellcharakteristika Einer Europäischen Körperschaftsteuer* (Vienna: WU Wien, 2012). See comprehensively, including references to earlier contributions.

[18] See, for 2008: "Proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB)" COM(2011) 0121 final. For the 2016 proposal: "Proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB)" COM(2016) 0685 final. See further already the 1975 proposal: European Commission, "Proposal for a Directive Concerning the Harmonization of Systems of Company Taxation and of Withholding Taxes on Dividends" COM(1975) 392 final.

[19] Council of the European Union, Agreement on the transfer and mutualisation of contributions to the Single Resolution fund 2014; Regulation 806/2014 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 1093/2010 [2014] OJ L225/1; Commission Delegated Regulation 2015/63 supplementing Directive 2014/59 with regard to ex ante contributions to resolution financing arrangements [2014] OJ L11/44; Council Implementing Regulation 2015/81 specifying uniform conditions of application of Regulation 806/2014 with regard to ex ante contributions to the Single Resolution Fund [2014] OJ L15/1. Until 2002, a so-called montane levy (ECSC levy) was levied. See Treaty establishing the European Coal and Steel Community 1951, ECSC Treaty arts 49–50.

[20] See Section 4 and "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final.

[21] "Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053 on the System of Own Resources of the European Union" SWD(2023) 331 final.

[22] See Section 4 and "Proposal for a Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union" COM(2023) 331 final, as well as SWD(2023) 331 final.

[23] See Section 4. See most relevantly, OECD/G20, "The Multilateral Convention to Implement Amount A of Pillar One Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" (2023).

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

[25] The statistical levy on corporate profits could, according to the Commission, also have only a temporary character until further progress is reached on BEFIT.

[26] See further, e.g. J.-C. Defraigne et al, "Introduction to EU Industrial Policy in the Multipolar Economy: Past Lessons, Current Challenges and Future Scenarios" in J.-C. Defraigne et al (eds), *EU Industrial Policy in the Multipolar Economy* (Cheltenham: Edward Elgar Publishing, 2022).

industrial policy.[27] The EU's high ambitions towards achieving a green transition and strengthening industrial and strategic autonomy could be decisively supported via setting supportive corporate income tax (CIT) policies. Against this background, we think that a broader discussion on different ways of involving the corporate sector in EU financing is required—going beyond the agreement/or disagreement to an own resource based on BEFIT, Pillar 1 and/or statistical values that, ultimately, do not provide for a comprehensive corporate sector contribution.[28] The increase in the need for EU financing is a reality and, in addressing these challenges, it pays to step back and think about how to not waste this crisis in terms of it not being used to optimise EU financing towards, as far as is feasible, also supporting other policy goals and social cohesion.

As part of a larger research project aiming at providing different models of corporate sector involvement in EU financing, this article aims to contribute to the debate on corporate sector contributions via CIT based own resources.[29] We intend to do so by proposing an EU surcharge on a domestic tax on a harmonised tax base that applies to all corporations in the EU irrespective of their size. In the design of the tax base and rate, we aim to take proper account of the, in part, competing interests of taxpayers, Member States, and the EU. Thereupon, we will inquire into whether it is feasible to use this system to provide the EU with some budgetary responsibility. The article will proceed as follows. Section 2[30] introduces the reader to the core principles and dynamics of EU financing. Based on this, and embedded into a set of starting assumptions, we will, in section 3,[31] build up our model. Section 4[32] will briefly compare this to existing proposals linking own resources to corporate profits, them being the above mentioned temporal statistical own resource based on corporate profits, as well as initiatives to link own resources to existing legislative proposals dealing with corporate taxation, namely Pillar 1 and BEFIT.

2. Setting the scene

The financing of the EU via the own resource decision

Although not exclusively, the EU is mainly financed via so-called own resources.[33] The legal basis for this is formed by art.311 TFEU based on which the Council unanimously agrees on the financing of the EU after which national parliaments have to ratify it.[34] This own resource decision has two functions. On the one hand, it sets out how the EU is to be financed. The current own resource decision, valid from 2021 onwards, is based on four pillars. The first one concerns traditional own resources that are customs and

[27] See Section 3.
[28] See on this Section 4.
[29] In a companion paper, we aim to inquire into possibilities for involving the corporate sector in EU financing outside the own resource decision.
[30] See Section 2, "Setting the scene".
[31] See Section 3, "A two-tier model of corporate contribution to EU financing".
[32] See Section 4, "Comparison to existing policy initiatives".
[33] Parts of EU funding comes from so-called other revenue. Traditionally, these have been relatively small amounts consisting of, for instance, fines to be paid to the Union. However, other revenues also include the amounts for non-repayable support assigned to the EURI and borrowed for the NGEU. "Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053" SWD(2023) 331 final.
[34] This is a rare form of decision making at the EU level that is regarded to lie in between primary and secondary EU law. See Kube, "EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten" in Lang (ed.), *Europäisches Steuerrecht* (2018), p.69. U. Häde, "Die Finanzordnung der Europäischen Union" in A. Hatje and P.-C. Müller-Graff (eds), *Europäisches Organisations- und Verfassungsrecht* (Baden-Baden: Nomos, 2014), p.795. However, it is not fully unique. See similarly, TFEU art.48(6) and further going, e.g. Heber, "European Legal Limits for the Recovery Fund" (2020) *Working Paper of the Max Planck Institute for Tax Law and Public Finance Paper* No.2020-15.

agricultural duties.[35] They are levied by the Member States and, except for compensation for the collection costs amounting to 25%, go directly to the EU budget.[36] The second pillar is the value added tax (VAT)-based own resource which—although calculated differently than earlier forms of the VAT-based own resource[37]—does not directly attribute a part of Member States' VAT revenues to the EU but sets a contribution based on a formula applied to total VAT receipts.[38] Third, the new own resource decision introduced a so-called plastic levy pursuant to which Member States must pay to the Union a contribution of €0.80 per kilogram of non-recycled plastic waste.[39] The fourth pillar is so-called GNI-based own resources.[40] These are, by far, the most relevant (in 2020 its share of overall revenues was 71.9%) and serve as a residual revenue source.[41]

On the other hand, via the own-resource ceiling and in combination with the prohibition to take out debt for financing operating expenditure,[42] the own resource decision also sets a limit for EU expenditures.[43] Article 3(1) of the own resource decision imposes a cap at 1.4% of the sum of Member States' GNI which amounts to an EU budget of approximately €160–180 billion per year.[44]

The current own resource decision also includes the legal basis for the establishment of the EURI for the purposes of which the Commission is empowered to borrow up to €750 billion on behalf of the EU which is passed on to Member States as grants (€390 billion) as well as loans for which Member States can apply (€360 billion).[45] To repay these funds, the above-mentioned own resource ceiling is increased by 0.6% until the debt is repaid which should happen at the latest by the end of 2058.[46] Despite being part of the own resource decision, these EURI funds do not count as an own resource but as other revenue.[47]

As already mentioned, the European Parliament, the Council, and the Commission entered into an interinstitutional agreement that includes a roadmap for the introduction of new own resources.[48] Based on this (legally binding) act,[49] institutions commit to working towards introducing sufficient new own

[35] Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/1 art.2(1)(a).

[36] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.9(2).

[37] See the version before the amendment taking effect in 2021, Regulation (EEC, Euratom) 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax [1989] OJ L155/9. For the amendment, see Regulation (EU, Euratom) 2021/769 amending Regulation (EEC, Euratom) 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax [2021] OJ L165/9.

[38] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.2(1)(b). A ceiling is set for 50% of the GNI.

[39] See Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.2(1)(c), with certain lump sum reductions for certain Member States being outlined in art.2(2).

[40] See Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.2(1)(d) with certain annual lump sum reductions applying. See art.2(4).

[41] Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625, p.26.

[42] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 arts 3(1) and 4.

[43] E.g. HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017), p.11.

[44] This corresponds, approximately, to the budget of Denmark. See European Commission, "Fact Check, EU Budget Publications" (9 August 2023).

[45] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.5(1).

[46] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1, p.6.

[47] Which comes as they have to be repaid. European Council, "Opinion of the Legal Service Proposals on Next Generation EU, 9062/20" (2020), *https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf*; European Commission, "Q&A: Next Generation EU—Legal Construction" (9 August 2023).

[48] Interinstitutional Agreement [2020] OJ L433I/28.

[49] An Interinstitutional Agreement, based on art.295 TFEU is not necessarily binding, but can be binding if this is what the institutions want. See, e.g. J. Saurer, "Artikel 295" in M. Pechstein, C. Nowak and U. Häde (eds), *Frankfuter Kommentar EUV GRC AEUV* (Tübingen: Mohr Siebeck 2017). In the above-mentioned interinstitutional agreement,

resources that should cover the repayment of the borrowed funds.[50] The intention is to implement a basket of new own resources for the sake of limiting GNI-based own resource payments and to facilitate the attainment of better spending policies at the EU level.[51]

A first wave foresees a plastic-based own resource (which is, as mentioned, already implemented)[52] as well as new own resources based on the carbon border adjustment mechanism (CBAM, recently proposed).[53] A part of the share of residual profit of multinational enterprises will be reallocated to Member States pursuant to the envisaged directive implementing the OECD/G20 IF Pillar 1 Agreement, and the EU Emission Trading System (ETS).[54] In a second wave, the Commission should then make additional proposals that could include a financial transaction tax and the—here underlying—financial contribution linked to the corporate sector or a new common corporate tax base.[55] Due to delays occurring, the Commission, published a staff working document in June 2023 that underlines the urgency to act and to find additional resources.[56]

The (missing) taxing power of the EU—how to levy taxes for the EU without instituting a genuine EU tax?

Cutting it short, the EU cannot levy tax for the sake for raising revenues.[57] In the current treaty framework, there is no legal basis for doing so.[58] Apart from that, the institutional structure of the EU does not grant sufficient representation of EU taxpayers. The latter is particularly an issue with respect to national constitutional law that may prohibit the transfer of genuine taxation rights to the EU.[59] What the EU can

this will is clearly visible already in para.2 stating that: “This Agreement is binding on the Institutions for as long as it is in force. The Annexes to this Agreement form an integral part thereof.”

[50] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28, Annex 2, part A, para.2(1), in which context it is emphasised that this does not involve the earmarking or assignment of any particular own resource to cover a specific type of expenditure, i.e. the universality principle is upheld.

[51] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28, Annex 2.

[52] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.2(1)(c).

[53] “Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism” COM(2021) 564 final.

[54] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28, Annex 2, part B. See also “Proposal for a Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union” COM(2021) 570 final.

[55] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28.

[56] “Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053” SWD(2023) 331 final.

[57] In more detail and with further references, see Kube, “EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten” in Lang (ed.), *Europäisches Steuerrecht* (2018), p.69; Waldhoff, “Legal Restrictions and Possibilities for Greater Revenue Autonomy of the EU” in Buettner and Thöne (eds), *The Future of EU-Finances* (2016); Traversa, “The Long and Winding Road towards a Tax-Financed EU Budget” (2021) *Heidelberg Working Paper Series on Public Finance and Tax Law*.

[58] The own resource decision does not form the grounds for the EU to tax, nor does any other provision in EU primary law allow for the implementation of a tax that is primarily aiming to raise revenues. See, e.g. Kube, “EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten” in Lang (ed.), *Europäisches Steuerrecht* (2018), p.69; Waldhoff, “Legal Restrictions and Possibilities for Greater Revenue Autonomy of the EU” in Buettner and Thöne (eds), *The Future of EU-Finances* (2016); Traversa, “The Long and Winding Road towards a Tax-Financed EU Budget” (2021) *Heidelberg Working Paper Series on Public Finance and Tax Law*.

[59] For the German discussion, see Kube, “EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten” in Lang (ed.), *Europäisches Steuerrecht* (2018), p.69; Waldhoff, “Legal Restrictions and Possibilities for Greater Revenue Autonomy of the EU” in Buettner and Thöne (eds), *The Future of EU-Finances* (2016). See further on questions of legitimacy of EU taxation.

do instead is to impose financial obligations on businesses and individuals within the framework of other policies for which it has assumed competence.[60]

Against this background, a financial contribution of the corporate sector to EU financing cannot take the form of a direct EU corporate tax (in tax jargon, a separation system). As long as not all corporate tax revenues are to be attributed to the EU, it would not make much sense in policy terms.[61] What would be legally possible is a so-called revenue sharing system under which a part of the national CIT revenues (without harmonisation of the scope and the taxable base) is based on the own resource decision allocated to the EU. Yet, the less CIT revenue belongs to the Member State, the lower the direct cost of engaging in tax competition.[62] Thus, such a solution could increase CIT competition in the EU. Apart from that, Member States could strive towards reducing the personal scope of corporate taxation and having more income from business activity being taxed under personal income taxation of which the revenue would belong solely to them. Although this would also have positive effects in terms of increasing the neutrality in business taxation,[63] it would increase uncertainty regarding the yield of that contribution.

Therefore—to avoid the challenges described above—we will merely concentrate on discussing surcharge systems that start from some form of a common base, instead of systems that put a surcharge on the revenue. From an institutional viewpoint, such a reform would require two separate legal acts. The first is harmonisation of corporate tax rules (under art.115 TFEU) based on which taxpayers pay CIT to Member States. The second is an amount equal to the application of a fixed EU rate to the harmonised base representing the surcharge to be attributed from the Member States to the Union based on the own resource decision. Thus, the general assumption is that there is a link between: (i) what taxpayers pay to the Member States based on the harmonised rules; and (ii) what the Member States pay onwards to the Union's budget. Economically, but not formally, this comes very close to an EU tax.

From a legal viewpoint, this does not necessarily imply a change of the treaties. In 2011, the Commission proposed an analogous surcharge system as a reform to the VAT own resource that unfortunately remained a dead letter because Member States did not agree. According to that proposal, the EU would have been entitled to "a share of the Value Added Tax (VAT) on supplies of goods and services, intra-Community acquisitions of goods and importation of goods subject to a standard rate of VAT in every Member State pursuant to Council Directive 2006/112/EC18, with the rate applicable (…) not exceeding two percentage points of the standard rate".[64]

3. A two-tier model of corporate contribution to EU financing

The starting point

This chapter aims to build a framework for an alternative model of a CIT-based own resource. For this purpose, we will elaborate on the structural features of a potential system. In doing so, we will be guided

[60] See, e.g. Regulation 443/2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO 2 emissions from light-duty vehicles [2009] OJ L140/1.

[61] When some corporate tax revenue remains with the Member States and some is attributed to the Union, a separation system would mean that there are two different corporate tax systems that exist at the same time. Although this is theoretically possible, it would not appear to be a prudent option. Critically, also, Schweizer, *Die Körperschaftsteuer Als Eigene EU-Steuer—Finanzwissenschaftliche Untersuchung Möglicher Modellcharakteristika Einer Europäischen Körperschaftsteuer* (2012), pp.98–105.

[62] Schweizer, *Die Körperschaftsteuer Als Eigene EU-Steuer—Finanzwissenschaftliche Untersuchung Möglicher Modellcharakteristika Einer Europäischen Körperschaftsteuer* (2012), pp.98–105.

[63] This would help solving the problem of some Member States taxing businesses in the scope of the CIT that fundamentally does not belong there, such as, e.g. corporations owned by a single natural person that carries out highly personal services.

[64] "Proposal for a Decision on the system of own resources of the European Union" COM(2011) 510 final art.2(1)(c).

by, on the one hand, the criteria that have been brought forward in literature regarding the evaluation of own resources.[65] In a synthesis of contributions on the topic, Schratzenstaller et al identify 14 different criteria that, while differing in importance, can be used to judge the favourability of different kinds of own resources.[66] We regard three factors as being of increased relevance, namely, the possibility to create steering effects desirable from a European perspective, the visibility to citizens, as well as the more efficient enforcement of the tax through a European approach.[67]

In addition, we aim to take account of the Member States' interests. Ultimately, the possibility to impose financial obligations on the corporate sector is a key policy vehicle. Particularly, Member States that are endowed with fewer location-specific advantages might have a legitimate reason to use corporate tax policy as an instrument also with a view to increasing their attractiveness. This is especially true for Eurozone countries that are restricted in using monetary policies to this end. Although there would be good arguments in favour of stronger coordination of EU monetary policy with an (emerging) EU fiscal policy, it would also not appear wise to aim for completely evening out tax differences, not in the least as some amount of tax competition also has positive effects.[68] Against this background, it appears unrealistic to expect that Member States will be prepared to give up on any leeway they have in CIT-policy making; neither would we expect that this is what would be demanded by the Commission. At the same time, however, we assume that some Member States will explicitly regard the harmonisation of CIT rules as a key opportunity to address more aggressive forms of tax competition from other Member States and will exert pressure to this end. While we cannot know how these forces play out, we aim to take into account these diverging preferences.

Moreover, what we believe crucially affects the readiness and the extent of the reform is the easiness with which the rules can be adapted and kept up to date. While the own resource decision and thus the

[65] Other than in Commission, "Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053" SWD(2023) 331 final we do not regard the fast mobilisation of revenue sources to be a criteria that should guide this work.

[66] See for a synthesis, Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625, who, emphasising that they differ in scope and importance, define the following criteria: (i) has a link to a European policy; (ii) creates sectoral co-benefits and steering effects; (iii) cannot be attributed to individual Member States; (iv) cannot be enforced/implemented efficiently at Member State level; (v) is linked to a tangible basis, visible to citizens/taxpayers; (vi) does not lead to an excessive administrative burden for EU institutions, national administrations, and taxpayers; (vii) causes no harm/mitigates environmental problems; (viii) does not (significantly) harm economic performance; (ix) revenues are not distributed too unevenly across Member States; poorer Member States are not disproportionately burdened; (x) supports equal distribution of income and wealth, gender aspects, employment, poverty eradication, and population health; (xi) contributes to fiscal integration in the EU; (xii) does not interfere with Member States' tax systems ('fresh money'); (xiii) revenues are not subject to short-term fluctuations and are predictable, and (xiv) generates stable revenues in the longer run.

[67] Questions on the revenue and distribution effects of a single tax based own resource do not seem to be of primary importance because it is expectable that a new tax based own resource is part of a basket solution that evens out different distributions effects. See, e.g. HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017). Furthermore, as long as GNI-based own resources constitute a residual own resource, the presence of short-term fluctuations becomes less relevant. Compare, e.g. Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625. This also leads to short term fluctuations being less important. Considerations of administrability and economic efficiency seem relevant, but their importance is much more prevalent at the level of technical detail. Stated differently, while the creation of an EU CIT system can improve the administrability and efficiency of corporate taxation, it will depend on the applicable rules whether this, indeed, happens. Concerning the promotion of fiscal integration, we think that, in the context of the CIT, this corresponds widely to steering effects which presuppose tax base harmonisation and thus fiscal integration.

[68] Fundamentally, see, e.g. J.R. Hines, "Corporate Taxation and International Competition" in A.J. Auerbach, Jr. Hines and J. Slemrod (eds), *Taxing Corporate Income in the 21st Century* (Cambridge: Cambridge University Press, 2007), p.268.

decision to attribute CIT revenue to the EU is based on current practice renewed every seven years, the harmonisation of the tax base is principally not. Rather, when it is—as expected—implemented on the basis of art.115 TFEU and hence based on unanimity in the Council, it would need another unanimous decision to adapt or cancel the rules. As more than 60 years of experience with VAT harmonisation based on art.113 TFEU (also requiring unanimity) have shown, this is not workable since it does not give the tax system the sufficient ability to adapt and single Member States the possibility to block necessary reforms out of pure budgetary self-interest. We assume that Member States will be hesitant to sign up for any further reaching harmonisation that risks petrification of rules with the risk of the system becoming outdated.

Moreover, we assume that new tax-based own resources are to be introduced via a basket solution.[69] This should even out potential unfavourable redistributive effects of certain tax-based own resources on single Member States.[70] Hence, we assume that CIT-based own resources would not come alone. Given that it requires unanimity in the Council as well as the consent of national parliaments to introduce and maintain tax-based own resources, we think that it is prudent to assume that, overall, the introduction of this basket will not give rise to major redistributive effects among Member States. Ultimately, a Member State that would be worse off in terms of it having to contribute relatively more to EU funding can and likely will refuse to agree until there is some compensation mechanism found. This allows us to assume that, whatever basket a CIT-based own resource is coming with, the distribution of the relative burden of the Member States in the financing of the EU budget will not significantly change. Thus, in our model, we will simply disregard the distributional effects of CIT-based own resources on a Member State level.[71,72]

Further, when having regard to the great importance of GNI-based own resources as a residual source of financing for a budget with an overall ceiling,[73] it is prudent to assume that the introduction of tax-based own resources, including the CIT-based own resource, will only give rise to a decrease in GNI based own resources (taken as a whole, not on a state-per-state, individual basis).[74] This spares us having to find a

[69] See the discussion and references provided for in Section 2.

[70] See, e.g. HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017); Schratzenstaller et al, “New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits” (2022) *WIFO Studies*, Working Paper No.69625.

[71] See, in this context, also earlier work on tax-based own resources with a rather critical stance on the distributive effects of EU taxes that creates winners and losers. Heinemann, Mohl and Osterloh, *Reform Options for the EU Own Resources System* (2008).

[72] It should, nevertheless, be noted that holding constant the relative burden sharing on a Member State level does not mean that there are no redistributive effects on the level of the respective citizens. We do not have sufficient information to cover this dimension. Still, it may be worth sensitising readers to the fact the effects can be very different at these levels. In fact, GNI-based own resources are considered fair as they are progressive on the level of the Member States. This is an effect weakened by the granting of rebates and correction mechanisms. See, Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1; and e.g. Schratzenstaller et al, “New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits” (2022) *WIFO Studies*, Working Paper No.69625, p.2. E.g. Kube, “EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten” in Lang (ed.), *Europäisches Steuerrecht* (2018), p.64. However, at the level of the citizens, as underlined by the High-Level Group on Own resources (2016), GNI-based resources may even have a regressive effect because Member States with a lower GNI per capita do not contribute a lower share of “national contributions” expressed as a percentage of their GNI. See for that, HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017), p.38. Compare further also Fuest, Heinemann and Ungerer, “Reforming the Financing of the European Union: A Proposal” (2015) 50 *Intereconomics* 288–293 or; Schweizer, *Die Körperschaftsteuer Als Eigene EU-Steuer—Finanzwissenschaftliche Untersuchung Möglicher Modellcharakteristika Einer Europäischen Körperschaftsteuer* (2012).

[73] See Section 2.

[74] Which is sometimes used as a general point of critique regarding the use of the term “tax” in this context. See, e.g. Kube, “EU-Steuern: Zuständigkeit Zur Regelung Und Erhebung Sowie Ausgestaltungsmöglichkeiten” in Lang (ed.), *Europäisches Steuerrecht* (2018), p.69; German Federal Ministry of Finance, “Reform der EU-Finanzierung:

mechanism for reimbursing tax-based own resources to Member States in the event of these kinds of own resources exceeding, by themselves, the overall revenue ceiling.[75]

Due to the unanimity requirement, the unsuitability of art.115 TFEU as a legal basis for tax harmonisation is well known, and recent attempts to address the issue through changing to qualified majority voting in tax matters via the passerelle clause have failed.[76] We will take account of this fact in the following form. Against the background of the two major crises of (COVID-19) and the Ukraine war that happened after the last decision on the passerelle clause, we urge Member States to reconsider their position. Yet, to be prepared for this not happening, we assume that Member States would not sign up for a system that runs the risk of petrification of outdated policy choices. Our goal will thus be to inquire into what flexibility can be provided in an art.115 TFEU framework.

As mentioned above, we will work out a surcharge model which means that both Member States and the EU can levy a charge on a certain base. In our elaboration, we will begin with concentrating on the first dimension, that is, the taxpayers that, based on harmonised rules, pay CIT to the Member States. Thereby, two key design questions have to be answered. First of all, we need to define the scope. A decision has to be made whether the CIT-based own resource covers the whole corporate sector or, as it seems to be more frequently demanded, only large companies. In our view, the better reasons speak for the former option. With this assumption being set, we will discuss the extent to which tax base harmonisation is required. We will propose a solution that aims to balance the above interests. Thereupon, we focus on the second dimension, that is, the relationship between the Member States and the Union. We will discuss the setting of the rate as well as the possibility to grant the EU budgetary responsibility.

Scope—applicable to the whole corporate sector or just large companies?

When looking at EU taxation from a broader perspective, one can observe that indirect taxes—such as value-added and excise duties—have been subject for many decades to rather strong harmonisation endeavours.[77] To a major extent, this comes as a result of there being rather high pressure for common action in this field. The Internal Market without a certain minimum level of harmonisation in indirect taxation and particularly the field of VAT would function poorly.[78] The harmonisation of direct taxes, such as corporate and personal income taxes, on the contrary, has long been "virtually inexistent".[79] While the pace of action has changed rapidly in the last 10 years, what has been reached so far in terms of substantial direct tax law rules remains rather punctual: provisions on certain cross-border transactions

Subsidiarität und Transparenz stärken" (2016), p.10, *https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Ministerium/Geschaeftsbereich/Wissenschaftlicher_Beirat/Gutachten_und_Stellungnahmen/Ausgewaehlte_Texte/2016-04-12-Gutachten-EU-Finanzierung.pdf?__blob=publicationFile&v=2*.

[75] See *Council of Ministers of the European Communities v European Parliament* (C-284/90) EU:C:1992:154; [1992] 2 C.M.L.R. 824 at [31]. Concerning the fewer VAT-based own resources being called upon due to less expenditure being necessary to cover in the financial year; see further Heber, "European Legal Limits for the Recovery Fund" (2020) *Working Paper of the Max Planck Institute for Tax Law and Public Finance Paper* No.2020-15.

[76] European Council, "Outcome of the Council Meeting: 3671st Council meeting Economic and Financial Affairs" (12 February 2019), *https://www.consilium.europa.eu/media/38505/st06301-en19.pdf*.

[77] P. Wattel, "Taxation in the Internal Market" in P. Koutrakos and J. Snell (eds), *Research handbook on the law of the EU's internal market* (Cheltenham: Edward Elgar Publishing, 2017), p.319.

[78] Wattel, "Taxation in the Internal Market" in Koutrakos and Snell (eds), *Research handbook on the law of the EU's internal market* (2017), p.319.

[79] Wattel, "Taxation in the Internal Market" in Koutrakos and Snell (eds), *Research handbook on the law of the EU's internal market* (2017), p.319.

between related parties,[80] the harmonisation of certain anti-abuse rules[81] as well as a minimum tax regime for large MNEs.[82] More far-reaching harmonisation efforts have been planned as well, but this is also mostly relevant for large and/or cross-border active companies.[83] Without us attempting to downplay what was achieved, there is thus a remarkable difference in the stage of harmonisation of indirect tax and direct tax, particularly from the perspective of small and medium-sized enterprises (SMEs). The latter will have to deal with EU-made rules on indirect taxation but, at best, they occasionally come in touch with EU-made rules on direct taxation.

This obviates the following question: When there has so far been no apparent need to take increased account of SMEs in direct tax harmonisation, why should we bother to expose them to the transition costs of having to adapt from a national to a European CIT base? Are we about to harmonise tax rules for the beauty of it and forego decades of experience, jurisprudence, and expertise for little benefit? Or is there a tangible case for providing one EU CIT system covering all EU corporations regardless of their size?

That there is no easy answer to this question may be well suggested by the fact that (even) the powerful and passionately pro-European voice of Vanistendael demanded in his very last article to harmonise CIT and to attribute the revenues to the EU but to limit this to large companies only.[84] It is they, he emphasised, that are active cross-border and that benefit from the internal market. For local businesses, on the other hand, the existence of different national tax burdens simply does not matter.[85]

We find this hard to deny. A different corporate tax burden suffered by a corporate barber shop in Helsinki, and, say, a corporate barber shop in Lisbon is unlikely to create distortions.[86] They will not be impacted by the foreign rules on the calculation of a corporate tax base unless they expand abroad via founding a foreign subsidiary or triggering a permanent establishment. Yet, it may not provide for the full picture. Although it may be true that these barber shops may be hesitant to expand, other businesses of the same size might not. If harmonisation is a benefit limited only to those that are *already* of substantial size, the actual idea of the Internal Market of easing cross-border business and providing for economic integration is emptied. Even more relevantly, a recent study of the Commission demonstrates “the obligation to comply with national tax rules that have not been aligned is a cost for companies, which disproportionally affects SMEs. In fact, the burden of complying with CIT rules can be substantially higher for SMEs than

[80] Directive 2011/96 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] OJ L345/8.

[81] Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market [2016] OJ L193/1.

[82] Directive 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union [2022] OJ L328/1.

[83] The withdrawn CCCTB proposal as well as its successor, the BEFIT proposal, are limited (CCCTB) or most likely limited (BEFIT) to large companies. Proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB). In the latest document available at the time of writing a final decision on the scope has not yet been made. See further, European Commission, “Call for Evidence for an Impact Assessment—Business in Europe: Framework for Income Taxation (BEFIT)” (2022). What concerns the DEBRA proposal, on the other hand, this is different. This concerns a reform towards a more equal treatment of debt and equity in corporate taxation. Expectably, it would be relevant also for SMEs.

[84] Vanistendael, “An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and ‘Tax Abuse’?” (2021) 75 *Bulletin for International Taxation* 749–761.

[85] Vanistendael, “An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and ‘Tax Abuse’?” (2021) 75 *Bulletin for International Taxation* 749–761. It may be mentioned that these considerations appear to be particularly true with respect to the personal income tax that is, for good reason, almost immediately disregarded when it comes to discussion of potential EU taxes. See, e.g. Ferrer et al, *Study on the Potential and Limitations of Reforming the Financing of the EU Budget* (2016).

[86] Ultimately, these two businesses do not compete with each other (but for a few tourists that may consider getting their hair cut in one or the other place). Furthermore, these businesses are immobile and are thus not specifically competed for by governments.

for large companies."[87] This clearly challenges the above conception that the assumed unwillingness of prototype SMEs to expand is enough of a reason to deny the need for harmonisation of CIT rules across the whole corporate sector.

Second, it has been argued that an EU CIT-based own resource on the profits of large companies is justified because it is precisely these companies that benefit from the Internal Market and its functioning.[88] The underlying logic of this claim appears to be traceable back to 19th century literature on public finance theory.[89] According to Lorenz von Stein's justification of taxes, it is the tax potential of the private economy that enables taxation and, in turn, administration that again furthers tax potential.[90] Translated into the current setting, it means that the European added value (and the European tax potential) can and should underlie a CIT-based own resource of which the revenues are used to further enhance the European value added and tax potential.[91] Given that this European added value is particularly enjoyed by large companies it is, according to this argument, especially them that ought to pay.[92] We are very sceptical of this argument. While it is obvious that large MNEs benefit from the Internal Market, it is equally obvious that small companies do so as well. The improved factor mobility and the resulting increase in wealth, purchasing power, stability, and peace give rise to a European economic rent from which everyone benefits.[93] In our view, and following the same von Stein logic, this then also justifies attributing an obligation to the whole corporate sector to contribute to the financing of the EU budget—here via compensating the Member State for the surcharge on the corporate tax base that it has to pay to the EU.

Third, the scope of harmonisation of corporate tax may also convey a message sent to citizens. While this is mere speculation, it would seem conceivable that a limitation of harmonisation to large companies may foster beliefs that the EU is mainly a project for large businesses. This is, of course, incorrect—as, not in the least, the far-reaching harmonisation in indirect tax shows. Yet, the extension of the harmonisation of the CIT to the whole corporate sector could be a positive sign towards all of them belonging and contributing to the Union.[94] Whether this increases the feeling of participation and commitment to the Union or only increases Euro-scepticisms seems to be debatable.[95] Data nevertheless suggests that an EU business tax would be rather popular; in a 2021 survey covering 13 EU Member States, 50% of respondents

[87] European Commission, *Tax Compliance Costs for SMES: An Update and a Complement* (2022), p.55.

[88] Vanistendael, "An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and 'Tax Abuse'?" (2021) 75 *Bulletin for International Taxation* 749–761.

[89] For a more detailed elaboration, see J. Jaakkola, "From the Governance of National Tax Systems to Governing Through European Taxation: A Justification for the EU's Power to Levy Taxes" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023), p.59.

[90] Jaakkola, "From the Governance of National Tax Systems to Governing Through European Taxation: A Justification for the EU's Power to Levy Taxes" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023), under reference to L. von Stein, *Lehrbuch der Finanzwissenschaft. Theil 2, Abt. 1* (Nachdr d Ausg Leipzig 1885, Adamant Media Corp, 2005).

[91] Jaakkola, "From the Governance of National Tax Systems to Governing Through European Taxation: A Justification for the EU's Power to Levy Taxes" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023).

[92] Jaakkola, "From the Governance of National Tax Systems to Governing Through European Taxation: A Justification for the EU's Power to Levy Taxes" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023).

[93] See for principled considerations, M.P. Devereux et al, *Taxing Profit in a Global Economy*, 1st edn (Oxford: Oxford University Press, 2021). See for an interesting discussion from the perspective of the US E. Fox and Z. Liscow, "A Case for Higher Corporate Tax Rates" (2020), *Tax Notes Federal*, *https://www.taxnotes.com/special-reports/corporate-taxation/case-higher-corporate-tax-rates/2020/06/19/2cm2x*.

[94] Compare also the elaborations and references provided in Jaakkola, "From the Governance of National Tax Systems to Governing Through European Taxation: A Justification for the EU's Power to Levy Taxes" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023).

[95] Compare, e.g. the discussion in, F. Brantner et al, "Panel Discussion" in *Heidelberger Beiträge zum Finanz- und Steuerrecht* Vol.16 (2021).

would support an EU business tax while only 32% opposed it.[96] Interestingly, data points towards such a tax being less popular in the Nordic countries and rather popular in the southern Member States as well as eastern European Member States.[97] To be clear, the same survey reveals that the support for a tax on the revenue of large internet cooperations would be even higher. In 2021, 60% of respondents were in favour and only 23% opposed it.[98] While it is again the Nordic countries that tend to express relatively less support the values are nonetheless clearly positive.[99] We interpret these numbers as suggesting there is a feeling of legitimacy with respect to both variants, i.e. a broader as well as a narrower personal scope. Conceivably, the introduction of such a set of rules could increase the social legitimacy of the EU as a whole.[100]

Fourth and maybe most importantly, the limitation of harmonisation of the CIT to merely large companies gives rise to the existence of two separate tax systems: the national one for SMEs and the EU one for large companies. This is expensive. Companies are faced with borderline cases and cliff effects that result from falling out of one system into another. While this problem is, per se, manageable by granting SMEs the possibility to opt into the EU system,[101] for tax administrations, it remains that they need to be able to enforce both systems. At this stage, one could refer to international tax developments that, particularly via the seminal Inclusive Framework compromise on a two pillar solution, precisely demonstrate the need to build global rules for global firms.[102] However, we emphasise that, in the context of harmonisation of CIT rules, at stake is not the implementation of some additional set of sophisticated rules that apply to more sophisticated taxpayers in addition to ordinary national CIT law. Rather, it is about the harmonisation of the CIT code as such. Even though the latter may well include differentiations based on the level of sophistication, it remains that the very principles of the CIT enshrined in the code are the same for all companies. Thus, instead of having one EU-wide corporate tax system for large companies and 27 separate corporate tax systems for SMEs, we would prefer one EU-wide corporate tax system that, within itself, aims to address, when necessary, the specifics of companies of different sizes.

Finally, the wider the personal scope, the higher the reach of the EU when using corporate taxation for steering purposes. With the alignment of own resources with Union priorities being declared as a guiding

[96] A. Hemerijck et al, "SiE Survey Dataset on Solidarity in Europe" (2021), with the rest, i.e. 18% being undecided. In 2020, the support was roughly the same, with 50% support, 31% opposition and 19% undecided. These values are rather similar to the previous year. A. Hemerijck, P. Genscheland and L. Cicchi, "SiE Survey Dataset on Solidarity in Europe" (2020).

[97] According to Hemerijck et al, "SiE Survey Dataset on Solidarity in Europe" (2021), the net support would be negative in Denmark (32% vs. 43%), and only slightly positive in Sweden (39% vs. 38%) and Finland (43% vs. 37%). On the other hand, there would be overwhelming support in Greece (61% vs. 26%), Spain (62% vs. 27%), and Hungary (59% vs. 27%). Support would also be high in Lithuania (57% vs. 31%) and in Germany (54% vs. 24%).

[98] Hemerijck et al, "SiE survey dataset on solidarity in Europe" (2021), with the rest, i.e. 18% being undecided. These values are rather similar to the previous year. See 2020.

[99] Hemerijck et al, "SiE survey dataset on solidarity in Europe" (2021). The least support is found in Sweden (45% vs. 31%). The highest support is found in France (71% vs. 16%).

[100] For further going discussions involving the question of legitimacy, see, e.g. Jaakkola, "From the Governance of National Tax Systems to Governing Through European Taxation: A Justification for the EU's Power to Levy Taxes" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023); F. Farri, "Between Form and Substance: At the Root of the Limits of the EU Taxing Powers" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe*, 1st edn (2023), pp.83–122. See also, F. Barreau, "The Legitimacy of the EU's Tax-Based Own Resources" in Lindholm and Hultqvist (eds), *The Power to Tax in Europe* (2023), p.37. and J.H.H. Weiler, "The Transformation of Europe" (1991) 100 *Yale Law Journal* 2403–2483, 2468.

[101] Which, for sure, again raises costs because it may lead to companies calculating which of the systems is more favourable to them.

[102] Inclusive Framework, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" (8 October 2021).

principle for the establishment of a basket for new own resources,[103] this is a significant advantage that speaks in favour of the harmonisation covering the whole corporate sector. In fact, one can rarely think of a better vehicle for setting revenue-side economic policies than the corporate tax base. Not only would the EU be enabled to further their tax related priorities[104] but, in addition, would be able to support broader environmental and economic policies (e.g. the digital transition) via the setting of corporate tax policies. In particular, a common CIT can be a very powerful vehicle for common industrial policy.[105]

Against this background, we regard the overall better reasons to speak in favour of a wide scope of harmonisation of the corporate tax base, including the whole corporate sector. An easy way to give effect to such a policy is to apply the rules similar to the systematic of the Anti-Tax Avoidance Directive to all taxpayers that are subject to national corporate income tax.[106] Our further elaborations are based on the assumption of such wide harmonisation happening.

With the above said, we would like to stress that, in the case of there being insufficient political support for applying the system to the whole corporate sector, it would, of course, be possible to introduce a size threshold. Should this, in our view, second best design option be chosen, we urge policymakers to abstain from using rather high thresholds. For instance, the frequently used size threshold in international taxation of a group level turnover of yearly €750 million or above would be too high.[107] Rather, we suggest choosing a revenue threshold around €50 million as this is already an amount that will typically go in hand with cross-border activities.

Tax base harmonisation—what balance to strike?

Stronger and weaker forms of tax base harmonisation have different advantages and disadvantages. On the one hand, the stronger the harmonisation, the fewer the distortions caused by differences in the tax base. When all corporate tax bases in the EU are completely the same, it suffices to understand and adapt to one set of rules regardless of whether engaging in cross-border activities or not. Furthermore, the greater the harmonisation, the stronger the taming effect on harmful tax competition that happens in the form of states granting loopholes and special treatment in the tax base.

On the other hand, however, more sophisticated and targeted tax policies can be made via the tax base than via the tax rate.[108] While it is not unseen that states try to differentiate between taxpayers in the application of the tax rate,[109] it remains that it is a rather blunt instrument: reductions in the tax rate affect all taxpayers subject to it regardless of what they do.[110] When the tax base is fully harmonised, any tax

[103] Interinstitutional Agreement on budgetary discipline [2020] OJ L433I/28, p.18.

[104] Which, according to the Interinstitutional Agreement, is fair taxation and strengthening the fight against tax fraud and tax evasion.

[105] See, e.g. Defraigne et al, "Introduction to EU Industrial Policy in the Multipolar Economy: Past Lessons, Current Challenges and Future Scenarios" in Defraigne et al (eds), *EU Industrial Policy in the Multipolar Economy* (2022).

[106] See Directive 2016/1164 laying down rules against tax avoidance practices [2016] OJ L193/1 art.1. This comes with the desirable side effect of Member States having incentives to narrow the scope of corporate taxation towards not including in it businesses such as, most importantly, one person's corporations executing highly personal services that do not belong in corporate taxation.

[107] See, e.g. Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1.

[108] For empirical evidence on the effects of tax base incentives, see, instead of many, G. Maffini, J. Xing and M.P. Devereux, "The Impact of Investment Incentives: Evidence from UK Corporation Tax Returns" (2019) 11 *American Economic Journal: Economic Policy* 361–389.

[109] See further A.J. Weichenrieder and F. Xu, "Are Tax Havens Good? Implications of the Crackdown on Secrecy" (2019) 127 J. Econ. 147–160.

[110] See further, e.g. W. Schön, "International Tax Coordination for a Second-Best World (Part II)" (2010) 2 *World Tax Journal* 65–94. While this can stimulate overall economic activity and constitute an attractive competitive policy for countries with a rather small immobile tax base relative to which the amount of mobile foreign capital to attract

base policy has to run via the Union legislature. This is problematic for at least two reasons. First, as experiences with VAT harmonisation show, making changes to the tax base through unanimous decision-making is burdensome and may come with the risk of gridlock leading to an outdated system. This raises democratic concerns, because later majorities will find it very difficult to change the rules imposed by earlier majorities,[111] which may, as mentioned, cause Member States to be reluctant to give out of their hands any possibility for designing CIT-based policy.[112] Second and relatedly, when accepting that Member States have heterogeneous needs with respect to tax policy setting, they would, without the possibility to provide for tax base policy, be forced to react to their location-specific needs via making adaptions to the rate and would thus have to choose an inferior policy instrument.

As a result, we think that a mixed approach may be most suitable. On the one hand, the overarching aim should lie in the maximisation of harmonisation. To the extent feasible, rules that determine the tax base should be the same throughout the Union. Relatedly, it is recommended to broaden the tax base as far as possible.[113] Achieving this standard advice by economists—that, by itself, increases efficiency[114]—has never been easy for politicians as it usually means that some benefits awarded to special interest groups have to be taken away. Yet, with the momentum of a broader reform on the EU level, this may be more easily possible. On the other hand, however, the two major concerns of Member States must be addressed, that is: (i) the system must be adaptable to changing realities giving a voice to future generations of voters; and (ii) the Member States must be able to adapt the CIT system to their specific situation. This includes the use of tax base policy instruments as a part of Member States' economic policy as well as the ability of Member States to take swift reactions if external factors require it. At the same time, the primary purpose of the reform, namely the creation of a common corporate tax language and getting a hold of tax competition, should not be counteracted. Balancing these different factors is challenging but, so we think, principally possible. While we cannot offer a full solution, we can provide some initial suggestions as to how these issues may be addressed.

Holding constant the current treaty framework and the assumed political unwillingness to change to qualified majority voting,[115] what needs to be searched for is a system that is stable in its systematic and founding principles but flexible in terms of providing instruments that allow incentivising or disincentivising certain behaviour upon there being an acceptable reason to do so. A possible way to achieve this is to provide within the directive a certain list of tax incentives that Member States can use. Doing so would be subject to state aid control and, should it be considered necessary, may also be bound to the fulfilment of certain predefined criteria that should safeguard that choosing the option happens for policy reasons upon which Member States could unanimously agree.[116] For instance, the directive could include a list of three types of incentives that can be used for the purpose of stimulating the economy, three types of incentives to foster research and development, etc. In addition, it can specify objective criteria that must be met for states being able to choose such an option. This can also be limited to tax incentives that are

is large, this usually risks going in hand with significant windfall gains, i.e. mere giveaways of revenue to taxpayers without them changing their behaviour as a consequence of the tax benefit.

[111] Which is, notably, different with respect to national tax law, where later majorities can simply change the rules imposed by earlier majorities.

[112] See Section 3.

[113] See with further references, e.g. also Schweizer, *Die Körperschaftsteuer Als Eigene EU-Steuer—Finanzwissenschaftliche Untersuchung Möglicher Modellcharakteristika Einer Europäischen Körperschaftsteuer*, p.123; European Parliament, "Arbeitsgruppe Einheitliche konsolidierte Körperschaftsteuer-Bemessungsgrundlage" (2018).

[114] Inefficiencies are related to the magnitude of price distortions and hence to the marginal effective rate of taxation. When a broad base goes hand in hand with a lower marginal rate, this increases efficiency. See on that Ferrer et al, *Study on the Potential and Limitations of Reforming the Financing of the EU Budget* (2016), pp.79–82.

[115] See on this assumption, Section 3.

[116] An alternative would be to subject this to commission approval without the explicit outline of predefined reasons.

notoriously connected with harmful tax practices, such as, e.g. tax incentives targeting intangible property. While this means that differences in tax bases are possible, it happens only within clear delimitations. Thus, it may not take much to understand and, as the case may be, adapt to them. The gains to flexibility seem significant in this setting, and the drawback for harmonisation is rather small. Furthermore, the risk of the options serving as a loophole for Member States to engage in undesirable tax competition is low given the common agreement on the incentives and the criteria for them being used.

Should the above not suffice in terms of flexibility, further measures are possible. Member States could, for instance, be given the opportunity to establish further tax incentives upon a sufficient number of them agreeing on a design and upon notification to the Commission, for example, in order to foster pre-defined policy focus areas, such as research and innovation, to favour employment in general or specific groups, or incentivise investment in green technology.[117] While this would have the downside of further dispersion of the system, it would come with the advantage of granting Member State the opportunity to: (i) react to developments that are yet unknown; (ii) without there being a need to get all on board. This way, the political horse-trading problem long known in the area of VAT could be at least partly overcome.[118]

With the above said, what remains is the question as to how to reconcile the above considerations favouring a far-reaching harmonisation but combined with the provisions of options to Member States with the need to establish a common base for the calculation of the EU-surcharge that flows into the EU budget. When Member States can choose options to narrow down the tax base and thus the basis for the EU-surcharge, they will only bear the national share in forgone tax revenue but enjoy the full range of positive spillover effects that come with the lower corporate tax burden as a consequence of choosing the options. With all else being equal, this would incentivise them to make use of the options and thus create a distortion in the system. Apart from that, it would result in the surcharge being calculated based on different tax bases that can result in unequal contributions and thus resistance to the whole idea. Yet, there are several ways out of the dilemma. The easiest one maybe would be to structure the above-mentioned tax incentives as tax credits against the national share of the corporate tax burden. This way, the corporate tax base remains the same, and the policy of the incentive is given effect to it by directly reducing the ultimate national tax liability.[119] Another possibility would be to allow crediting the surcharge against national GNI-based own resource payment obligations. This would, however, not take away all distortions, as Member States are, due to differences in spillover effects, unlikely to be indifferent on the margin in paying their contributions in the form of a CIT surcharge or GNI-based payment. Rather, they would prefer higher GNI-based contributions as this can be levied from immobile sources while the CIT surcharge directly increases the cost of capital of companies and thus decreases investment, including the positive side effects coming with it. A third option would be to set off potential inequalities resulting from different tax bases with a system of rebates. The clear problem with this system lies in its absence of transparency.

[117] Further going on the topic, see C. Heber, *Enhanced Cooperation and European Tax Law* (Oxford: Oxford University Press, 2021).

[118] Based on anecdotal evidence, it may well happen that Member States not having an increased interest in the outcome of a certain tax political decision may use their veto power to push through another in which they do have a genuine interest.

[119] To be clear, this logic would, mutatis mutandis, also allow for Member States to impose disincentives. In our model—suggesting relying on a broad tax base—tax disincentives do not play a role. Yet, this can easily be changed, should this be intended.

The rate

In a surcharge system, the Member States will set their rate, and the EU will set its rate. These dimensions, of course, interact, i.e. the height of the national rate is dependent on the surcharge and vice versa.[120] Ultimately, it is a political decision. Still, we think that certain arguments should be taken into account in this context. We will provide some remarks regarding, first, the setting of the national rates, and, second, with respect to the EU rate. For the sake of giving the reader a rough understanding of the amounts of money at stake in this regard, we shall note that in 2021 the aggregated CIT base of all EU Member States amounted to about €422 billion.[121]

To begin with, the national rate will determine what Member States get in their budget. Depending on their preferences, this can be set higher or lower. It would, however, be sensible to set a floor. This is, on the one hand, a matter of political consistency. After all, the EU has just introduced a minimum taxation system for MNEs.[122] While this system only applies to large MNEs and merely imposes top-up taxes in the event of the effective tax burden being below 15% (and does not create any form of harmonisation of the tax base), it would seem rather odd if a harmonised EU tax base would trigger minimum taxation under the minimum tax directive due to the combined EU and national rate falling under the effective tax rate of 15%. Thus, unless the surcharge is already high enough to avoid this outcome, it might be recommendable to ensure overall taxation above 15% by setting a floor to the national rate. Apart from that, the setting of a sufficiently high minimum is also important from another perspective. As it will be the Member States that enforce the tax, it is necessary to incentivise them to do so in a proper way. For that purpose, they must benefit from putting enough effort into enforcing the tax and suffer from not doing so. In the context of the traditional own resources that are likewise levied by the Member States, this is achieved by allowing them to retain 25% of the levied amounts as compensation for collection costs[123] that, on purpose, is considerably more than the actual collection costs.[124] In the context of CIT-based own resources, it is the sufficiently high national rate that should create the same incentives.

Regarding the setting of the EU surcharge, it must, as a starting point, be emphasised that a higher EU surcharge leads to more revenue being attributable to the EU while the room for national rates diminishes.[125] This means that the EU surcharge interferes with national budgets.[126] Nonetheless, while the EU surcharge

[120] At the core of this lies the problem that with corporate taxation being too high, the loss in benefits attributed to mobile capital leaving the country as a reaction to tax, will not be compensated for the increase in revenue achieved through the increased corporate tax. In corporate tax policy making, countries have tended to be rather sensitive on that. See, e.g. Devereux et al, *Taxing Profit in a Global Economy* (2021), as well as on the phenomenon also e.g. M. Keen and K.A. Konrad, "The Theory of International Tax Competition and Coordination" in A.J. Auerbach et al (eds), *Handbook of Public Economics*, Vol.5 (Amsterdam: Elsevier, 2013), p.257.

[121] European Commission, "Data on Taxation Trends—Taxes on the Income or Profits of Corporations Including Holding Gains" (2021).

[122] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1.

[123] Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1 art.9(2).

[124] See for a discussion, e.g. U. Häde, "Artikel 311 AEUV (Eigenmittel)" in Pechstein, Nowak and Häde (eds), *Frankfuter Kommentar AEV GRC AEUV* (2017), para.31.

[125] Which, again, comes as for corporations the overall rate matters. The higher it is, the greater the pressure for mobile capital to move out from, or not come into, the EU.

[126] Due to tax competition pressures, Member States may not be able to keep their national rates equal, upon an EU surcharge being added on top of it. To the extent the Member State has to decrease the rate, it will—compared to the scenario without an EU surcharge—lose budgetary revenue. This is referred to as interference with Member States' budgets, and the non-interference with national budgets is a separate evaluation criterion for own resources. See Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625.

does not have the creation of "fresh money"[127] as a primary purpose, this does not mean that it does not create such at all. On the contrary, it can well be assumed that a Europeanisation of the CIT makes the tax much more robust against avoidance and downward tax competition pressures. It is the harmonisation of the tax base that takes away loopholes and frictions that Member States may offer and that taxpayers may exploit.[128] Furthermore, when there is a floor set for the national rate, the achievable tax savings through profit shifting within the EU decreases. This diminishing rate differential has a chilling effect on intra-EU tax planning[129] and thus the willingness of states to engage in tax competition.[130] When achievable tax benefits become less, it becomes less likely for taxpayers to bear high implementation costs for setting up structures that aim to exploit these tax benefits.[131] This could induce countries positioning themselves differently.[132]

In addition, the sharing of the tax base introduces into the picture forces of vertical tax competition that can be observed in federations, namely competition between the different government levels involved.[133] Literature suggests that this vertical tax competition tends to mitigate the downward pressures that are associated with horizontal tax competition, that is, the well-known competition for investment by governments of the same level.[134] This taming effect on horizontal tax competition is put forward by commentators as a key argument in favour of the implementation of a two-tier corporate tax system with parts of corporate profit being taxed at the EU level.[135]

However, in this regard, we urge for carefulness. As long as an increase in tax base resources merely results, as in the current framework of the own resource decision, in a decrease in GNI-based own resources, only the composition of the own resources changes.[136] This could well assert an influence on the dynamics of vertical competition because the EU (i.e. the upper level of government) does not, overall, get more by

[127] Some of the existing (customs) and some of the proposed own resources (ETS and CBAM) are of a genuine European character that cannot be mobilised by single Member States. See Fuest and Pisani-Ferry, "Financing the European Union: New Context, New Responses" (2020) 4 *EconPol Policy Report* s.2. They create fresh money, i.e. money for which Member States and the EU do not compete. See Schratzenstaller et al, "New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-Benefits" (2022) *WIFO Studies*, Working Paper No.69625.

[128] While the ATAD addresses certain forms of tax arbitrage, this does not cover all possibilities and only applies to intra-group transactions. See Directive 2016/1164 laying down rules against tax avoidance practices [2016] OJ L193/1 art.9.

[129] See further also Ferrer et al, *Study on the Potential and Limitations of Reforming the Financing of the EU Budget* (2016).

[130] This logic, ultimately, also underlies Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1.

[131] These costs may include, for instance, consultant fees or costs associated with the relevant adaption of the business structure.

[132] Some countries are more aggressively involved in tax competition than others. When the tax benefits achievable by companies become smaller and, consequently, their motivation to react to them decreases, it becomes more difficult for countries to attract mobile capital through offering such favourable taxation. As engaging in tax competition comes with costs by itself (e.g. forgone tax revenue, but also reputational costs), a country may change its policy.

[133] For an overview of literature on both horizontal and vertical tax competition as well as their interaction, see, F. Lachet-Touya, "Horizontal and Vertical Tax Interactions in a Common Agency Game" (2016) CATT Working Paper No.12.

[134] See on this, e.g. Candau and Cacheux, "Taming Tax Competition with a European Corporate Income Tax" (2018) 128 *Revue d'économie politique* 575–611; M.J. Keen and C. Kotsogiannis, "Does Federalism Lead to Excessively High Taxes?" (2002) 92 *American Economic Review* 363–370.

[135] See, particularly, Candau and Cacheux, "Taming Tax Competition with a European Corporate Income Tax" (2018) 128 *Revue d'économie politique* 575–611.

[136] See "On the possibility and sensibility of budgetary responsibility".

setting a higher rate.[137] Rather, it merely gets the same revenue from other sources. Thus, a change in the relevant own resource decision towards scoping out the CIT-based own resource from the own resource ceiling would be necessary. In the below, we will inquire into legal and policy arguments against and for that.

On the possibility and sensibility of budgetary responsibility

When, (i) there is an overall ceiling to own resources; (ii) GNI-based own resources work as a residual source of funding; and (iii) all own resources are spent; any additional tax levied will result in fewer GNI-based own resources being necessary. In essence, this means that the EU always gets as much money; only the source differs.[138] This has both, advantages and disadvantages.

On the one hand, this mechanism ensures stability.[139] Instead of being dependent on the performance of the various own resources, the EU will, via the residual GNI-based own resources, always get enough funds to finance its policies. This was a major step forward in the whole system of EU funding.[140] Furthermore, when the introduction of a new tax-based own resource replaces GNI-based own resources, it is possible that overall welfare increases. For this to happen, the assumption must hold that the levies funding the tax-based own resource—in this model, the EU CIT surcharge—are less distortive than the levies that fund GNI-based own resources, and the latter are reduced due to the decreasing obligations to make GNI-based payments.[141] While we do not have data on that, we understand that literature regards this effect to be likely.[142]

On the other hand, however, the system may not allow the above-mentioned forces of vertical tax competition to unfold.[143] Relatedly, it goes in hand with the EU not having any budgetary responsibility.

[137] Which is the usual driving force of vertical tax competition. See further going, e.g. Lachet-Touya, "Horizontal and Vertical Tax Interactions in a Common Agency Game" (2016) CATT Working Paper No.12; R.S. Sobel, "Optimal Taxation in a Federal System of Governments" (1997) 64 *Southern Economic Journal* 468–485.

[138] With GNI-based own resources being the residual source of financing, its amount decreases to the extent the funds going to the EU come from elsewhere.

[139] HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017), p.38; Fuest and Pisani-Ferry, "Financing the European Union: New Context, New Responses" (2020) 4 *EconPol Policy Report* 1–21.

[140] C. Waldhoff, "AEUV Art. 311" in C. Calliess and M. Ruffert (eds), *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar* (Munich: C.H. Beck, 2022).

[141] See on that already HLGOR, *Future Financing of the EU—Final Report and Recommendations of the High Level Group on Own Resources December 2016* (2017), p.37. To be clear, for this to happen, one may assume that the amount of tax-based own resources that replaces GNI-based own resources is significant enough to prompt a reduction in national taxes. On distortions caused by taxation see, e.g. Devereux et al, *Taxing Profit in a Global Economy* (2021).

[142] While the relevant weighing of these effects is to be left for economists, we are inclined to believe that this effect may be especially prevalent with respect to environmental tax-based own resources that are used to lower GNI-based own resource payments and, in this context, the taxation of labour. While the introduction of environmental taxes can, in the short run, be challenging due to their negative distributive effects, it remains that their introduction combined with a reduction in labour taxes can give rise to a so called "double dividend" in terms of both environmental and economic gains. Compare European Commission, "Tax Wedge on Labour: Shifting Tax Burden from Labour to Other Forms of Taxation" (2020), *https://www.consilium.europa.eu/media/42557/eg-thematic-discussion-on-growth-and-jobs-tax-wedge-on-labour.pdf*, and more substantially J. Freire-González, "Environmental Taxation and the Double Dividend Hypothesis in CGE Modelling Literature: A Critical Review" (2018) 40 *Journal of Policy Modeling* 194–223. For sure, this is also possible with respect to corporate taxation. On the one hand, an EU corporate tax gives this possibility to steer and thus the possibility to implement welfare enhancing policies to the EU. On the other hand, an EU approach to the CIT can help overcome the common action problems attached to national CITs and thus give rise to a more robust taxation of capital that leads to higher CIT revenues and, as such, a related possibility to reduce national taxes on labour. In such case, a similar double dividend logic as presented above could be possible.

[143] See Section 3 .

This is not unproblematic because it means that, while the EU makes the relevant rules, it is the Member States that bear the risk.[144] This has again drawn commentators into demanding to hold the EU accountable for its tax policy and to have it carrying the related (positive and negative) risks.[145] At the moment, at least, the Union legislator does not have a direct disincentive to refrain from making uncompetitive tax policy as it does not bear the cost. [146]

In an attempt to get the best out of both sides, it could be a possibility to detach certain tax-based own resources from the own resource ceiling but keep the GNI-based own resource as a residual up to a certain point. Whether this would be sensible with respect to a CIT-based own resource is not immediately clear. While the above positive effects of vertical tax competition presuppose that the upper level of government sees the possibility of getting more by levying more, one could also stress that the positive (negative) spillover effects of good (bad) CIT policy are not so much reflected in CIT revenue as they are in non-CIT revenue.[147] In fact, as decades of tax competition have shown,[148] it is not an issue for a country to renounce some CIT revenue when, in return, they get mobile capital that employs people and creates economic activity that goes in hand with sufficient amounts of other revenue such as personal income tax, consumption tax, additional corporate tax from increased local economic activity, or a lower need for social security payments, etc.[149] To be clear, taxation is by far not the only factor that is decisive as to where mobile capital is situated,[150] and the lower the tax differential, the less attractive the relocation of capital for saving CIT becomes.[151] Ultimately, so it seems, the question as to whether it is sensible to attach budgetary responsibility to the EU with respect to the CIT is a function of the amount of money that can be gained by exploiting vertical externalities of corporate tax competition[152] and the upsides risk of the EU tax policy being, on a

[144] This concerns, for instance, the risk of the rules not adequately living up to their purpose, creating, for example, revenue shortages or distortions. On the other hand, it is the Member States that need to enforce the rules and their judiciary that, in a first step, is confronted solving interpretational conflicts between the taxpayer and the state. This gives rise to costs, which are, likely, higher when the underlying European rules are poorly drafted.

[145] Traversa, "The Long and Winding Road towards a Tax-Financed EU Budget" (2021) *Heidelberg Working Paper Series on Public Finance and Tax Law*.

[146] One could point to the different involvement of the European parliament that has a say in spending but is not involved in the harmonisation based the special legislative procedure. Thus, voters' control of the European parliament only extends to spending policies and not harmonisation.

[147] See on this topic, e.g. G.R. Zodrow, "Capital Mobility and Capital Tax Competition" (2010) 63 *National Tax Journal* 865–901; P. Genschel and L. Seelkopf, "Winners and Losers of Tax Competition" in P. Dietsch and T. Rixen (eds), *Global Tax Governance: What Is Wrong with It and How To Fix It* (Colchester: ECPR Press, 2016); Keen and Konrad, "The Theory of International Tax Competition and Coordination" in Auerbach et al (eds), *Handbook of Public Economics* (2013), p.257.

[148] For an overview, see, e.g. Devereux et al, *Taxing Profit in a Global Economy* (2021), pp.6–12.

[149] See on this topic, e.g. G.R. Zodrow, "Capital Mobility and Capital Tax Competition" (2010) 63 *National Tax Journal* 865–901; Genschel and Seelkopf, "Winners and Losers of Tax Competition" in Dietsch and Rixen (eds), *Global Tax Governance: What Is Wrong with It and How To Fix It* (2016); Keen and Konrad, "The Theory of International Tax Competition and Coordination" in Auerbach et al (eds), *Handbook of Public Economics* (2013), p.257.

[150] On the influence of taxation on FDI see, e.g. L.P. Feld and J.H. Heckemeyer, "FDI and Taxation: A Meta-Study" (2011) 25 *Journal of Economic Surveys* 233. On further influences see for an overview e.g. F. Carril-Caccia and E. Pavlova, "Foreign Direct Investment and Its Drivers: A Global and EU Perspective" (2018) 4 *Economic Bulletin Articles* 60–78.

[151] E.g. G.R. Zodrow, "Capital Mobility and Capital Tax Competition" (2010) 63 *National Tax Journal* 865–901. For an overview of literature see also M. Scherleitner, *Addressing Tax Arbitrage with Hybrid Financial Instrument* (Amsterdam: IBFD, 2020), pp.108–127.

[152] Which may mitigate the downward pressure caused through horizontal tax competition and, thus, partially restore an optimal level of public good production. See e.g. Candau and Cacheux, "Taming Tax Competition with a European Corporate Income Tax" (2018) 128 *Revue d'économie politique* 575–611; Keen and Kotsogiannis, "Does Federalism Lead to Excessively High Taxes?" (2002) 92 *American Economic Review* 363–370.

worldwide scale, competitive[153] versus the downward risk of the latter not being the case with Member States having to suffer negative spillover effects.[154] Whether this is sensible policy-wise is left for policymakers to decide.

In this regard, we also want to urge for not ignoring the signal that is sent out in this context. If the EU wants to be perceived as taking responsibility for its action, this would be a good opportunity to demonstrate that by granting some limited budgetary risk to the EU. Should this be desired, the CIT own resource would appear to be a rather suitable candidate for this endeavour.

From a legal perspective, this would be possible as well but requires some adaptions. Should it be intended to give the EU budgetary responsibility with respect to the CIT-based own resource, it would be necessary to carve it out from the overall revenue ceiling. To ensure more predictability, this could be combined with the fixation of a cap to the EU surcharge rate. This would not be enough, however. As already mentioned above it would make little sense for the EU to be allowed to levy more resources than it is authorised to spend.[155] Thus, for the EU to ultimately accrue an increased amount of CIT revenue, the expenditures ceiling must be increased by the same height as the additional CIT. Likewise, this ceiling should be adapted whenever the EU would decide to lower the rate of the surcharge.

4. Comparison to existing policy initiatives

The statistical based own resource on company profits

In June 2023 the Commission proposed a statistical based own resource on company profits.[156] It would be calculated by multiplying a 0.5% call rate with each Member State's gross operating surplus for the sectors of financial and non-financial corporations.[157] The latter is a statistical value that reflects the surplus (or deficit) on production activities before accounting for interest, rents or charges paid or received for the use of assets (property income) and, as a result of this, is claimed to roughly approximate company profits.[158] The levy is expected to raise about €16 billion,[159] and may be phased out with BEFIT being introduced.[160]

Compared to our model, two key differences exist. First, the statistical based own resource on company profits does not involve a direct contribution of the corporate sector. Rather it calculates a payment obligation for the Member States, who are free to decide as to where to take the money from. There is no obligation—and given the rough values used, also no possibility—to pass on the levy to corporations. Second, the proposal does not foresee any harmonisation of corporate tax rules. Instead it, simply, leads

[153] All else being equal, a competitive EU CIT system, that is, a system that is more advantageous than the relevant CIT system of peer-regions in terms of the effective tax burden and other related compliance costs, could create an incentive for mobile capital to flow into the EU.

[154] This can concern capital leaving certain Member States and going to others that are superior despite the common "bad" policy, for instance, because a certain element of tax policy does not affect all states equally. In addition, it can concern capital leaving the EU overall.

[155] See, *Council of Ministers of the European Communities v European Parliament* (C-284/90) EU:C:1992:154 at [31] as well as; Heber, "European Legal Limits for the Recovery Fund" (2020) *Working Paper of the Max Planck Institute for Tax Law and Public Finance Paper* No.2020-15, p.6.

[156] "Proposal for a Decision amending Decision (EU, Euratom) 2020/2053" COM(2023) 331 final.

[157] "Proposal for a Decision amending Decision (EU, Euratom) 2020/2053" COM(2023) 331 final; "Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053" SWD(2023) 331 final.

[158] "Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053" SWD(2023) 331 final, p.34. See further, Regulation 549/2013 on the European system of national and regional accounts in the European Union [2013] OJ L174/1 and for the precise calculation of the "Proposal for a Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union" COM(2023) 331 final arts 9(a), 16(a)–(b).

[159] "An Adjusted Package for the next Generation of Own Resources" COM(2023) 330 final.

[160] "Proposal for a Decision Amending Decision (EU, Euratom) 2020/2053" SWD(2023) 331 final.

to countries with a higher surplus on production activities contributing more. The desirability of this is mainly a political question that is of no increased interest to corporations.

The connection of own resources to legislative proposals: Pillar 1 and BEFIT

OECD/G20 inclusive framework Pillar 1 proposal

The OECD/G20 Inclusive Framework Pillar 1 proposal is a global initiative aiming at reallocating parts of the profits of certain in scope MNEs to end market jurisdictions.[161] Provided there will be sufficient support on a global level—which is currently unsure[162]—the Commission plans to propose a directive implementing the rules in the EU.[163] If this is successful, the Commission, already in 2021, proposed to declare as own resource 15% of the share of residual profit reallocated to Member States under these rules.[164]

This proposal has little in common with our proposal. On the one hand, the area of application of the rules is very small, with only MNEs from certain sectors and consolidated global turnover of at least €20 billion and pre-tax profit margin above 10% being in scope of the rules. World wide this amounts to roughly 100 companies.[165] Yet, not even for this small scope would an EU directive implementing the relevant rules amount to a harmonisation of CIT rules. Rather, it would be the mere implementation of a global consensus that provides for an additional regime for the allocation of certain profits.[166] On the other hand, it would not give rise to an equally strong direct contribution by the corporate sector—not even with respect to those few companies in the scope of the rules. In fact, the reallocated profit would only serve as a basis for calculating an obligation of Member States towards the EU and not create, as in our proposal, a formal obligation of the corporate sector to contribute a certain amount. Nevertheless, and differently to the statistical levy discussed above, there would still be a factual connection between the reallocated profits that are to be taxed on a national level and the amount to be paid onwards to the EU. Differences occur, when the amount paid by the respective corporations to the Member States is smaller

[161] The great number of documents relating to this proposal can be found at OECD, *https://www.oecd.org/tax/beps/beps-actions/action1/*.

[162] Although the proposal enjoys the principal support by 140 countries, it ultimately depends on whether the United States supports the proposal. In fact, as stated in OECD/G20, "The Multilateral Convention to Implement Amount A of Pillar One Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" (2023), art.48, it needs a certain amount of qualified jurisdictions for the Convention to enter into force. One of them has to be the United States, whose position may strongly depend on the outcome of the next Presidential elections. For the members of the Inclusive Framework, see OECD, "Members of the OECD/G20 Inclusive Framework on BEPS That Have Approved the July 2023 Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy" (11 July 2023), *https://www.oecd.org/tax/beps/outcome-statement-on-the-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2023.pdf*.

[163] "Taxation for the 21st Century" COM(2021) 251 final 2021.

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

[165] OECD, "Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy Frequently Asked Questions" (October 2022), *https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf*.

[166] When all Member States anyway adhere to the global rules this would, strictly speaking, not be necessary. However, the implementation of global rules through EU directives can have decisive advantages, most relevantly, the possibilities to rely on EU institutions to enforce the agreement. See for related consideration in the context of the minimum taxation regime included in Pillar 2 of the OECD/G20 Inclusive Framework, M. Scherleitner, "Should the EU Implement a Minimum Corporate Taxation Directive?" (2022) *Oxford Working Paper*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697903*.

than the amount to be paid by this state to the EU under the Pillar 1 own resource.[167] To the extent this is the case, the contributions made under the Pillar 1 own resource would not actually be made by the corporations in scope of the rules.

The EU Commission's BEFIT proposal

In September 2023 the European Commission proposed the BEFIT Directive.[168] Meant to be obligatory for large groups,[169] and optional for small ones,[170] the BEFIT framework aims at achieving a harmonisation of essential features of the CIT base. The starting point is formed by the financial accounts of the BEFIT group members, which need to be reconciled with the accounting standard of the ultimate parent entity.[171] These so calculated entity level accounts are subjected to tax adjustments that "are kept to the minimum necessary, rather than putting together a detailed corporate tax framework".[172] This gives rise to preliminary tax results at the level of BEFIT group members, which are then aggregated into the so-called BEFIT tax base.[173] Differently to the prior CCCTB proposal, which relied on formulary apportionment based on pre-defined factors,[174] this BEFIT tax base should then be allocated to each Member State where the group is present on the basis of the average of the taxable results in the previous three fiscal years.[175] This allocated part can thereupon be subjected to further additional adjustments on a Member State level, after which the respective Member State can apply its tax rate.[176]

The key advantage of the BEFIT proposal vis-a-vis our model lies in it granting the possibility to offset profits and losses cross-border.[177] Under our suggested two-tier model combining a national and an EU rate, this is not foreseen beyond the extent of the European Court of Justice (ECJ) doctrine on final losses

[167] In this case the money would have to come from elsewhere. Yet, and particularly having regard to Decision (EU, Euratom) 2020/2053 [2020] OJ L424/1, this is unlikely to be the case.

[168] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final.

[169] The mandatory scope of BEFIT comprises the same groups covered by the minimum tax directive, i.e. groups with an annual revenue exceeding €750 million (art.2(1) of the BEFIT proposal). The ownership threshold to be included in the BEFIT group is 75% (art.5). For groups headquartered in third countries, a materiality threshold applies with respect to applicability of BEFIT to the EU entities of the group (art.2(2)).

[170] The precondition for smaller groups to apply BEFIT is that they prepare consolidated financial statements.

[171] If the group is headquartered outside of the Union, the accounting standard of the filing entity in the EU matters.

[172] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final, p.13. The relevant adjustments are included in s.2 of the BEFIT proposal, and include positions that are to added back in case they were deducted or not already recorded in the financial accounting statements (e.g. financial assets held for trading (art.11), certain excessive borrowing costs (art.13), or fines (art.16), as well as items that are subtracted from the financial net income or loss if they were in the financial accounts (e.g. dividends and capital gains or losses on shares or ownership interests, in the case of significant ownership (arts 8–11), profit or losses from permanent establishments (art.12)). Section 3 includes a set of depreciation rules; and section 4 addresses timing and quantification issues.

[173] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final arts 42–44.

[174] "Proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB)" COM(2011) 0121 final. Note, however, that the BEFIT proposal states that this is to function as a transitional rule, which may pave the way for a permanent allocation method that could be based on a formulary apportionment.

[175] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final art.45.

[176] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final.

[177] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final art.42.

demanding it.[178] It would, nevertheless be, in principle, possible to extent the model towards demanding a similar aggregation and re-allocation of the tax base onto which Member States then apply their national rates, as well as the EU surcharge.

The key disadvantage of BEFIT compared to our model lies in it providing only for a rather light level of harmonisation. In fact, in the course of the additional adjustments at a Member State level it is allowed for Member States to further apply any deductions, tax incentives, or base increases to their allocated parts.[179] This exception, included in art.48(2) of the proposal, is remarkable and leads to harmonisation achievable through BEFIT being, ultimately, very low. Our proposal, instead, provides for far reaching harmonisation and, thus, simplification,[180] while still reasonably awarding Member States the possibility to conduct tax base policy through choosing among a pre-defined (and extendable) set of incentives.

What concerns the scope of the rules, we accept that opinions may diverge. Yet, for the reasons already outlined above,[181] we consider the better arguments speaking in favour of creating one EU corporate tax system rather than, as it would be the consequence of BEFIT, adding a 28th system to apply aside the 27 domestic systems. While under the logic of the BEFIT system towards first aggregating and then re-splitting a tax base, it appears well justified not to include standalone SMEs into the scope,[182] it remains that they are—as the Commission emphasises itself—the ones in most need of harmonised tax rules.[183] Thus, we consider this narrow scope of BEFIT to be a disadvantage when compared to our model.

That said, we recognise that the Commission's home office taxation (HOT) proposal[184] released simultaneously with BEFIT is meant to remedy this deficit. It proposes to grant standalone entities the possibility to calculate their tax liability triggered in Member States in which it has a taxable presence through a permanent establishment (PE) in accordance with the tax rules of the home office state, whereby the tax rate of the PE Member State will apply. However, these rules come with the conceptual disadvantage of them leading to businesses active in the same Member State calculating their tax base following different tax rules. Taken to the extreme, it would be theoretically possible that 28 businesses active in the same street calculate their CIT base pursuant to 28 different tax rules.[185] Furthermore, a structural weakness of HOT lies in there being little incentive for the Member State of the home office to effectively enforce the tax, given that the revenues are to be paid to the PE-State. Another challenge for the HOT proposal lies in it having to draw a line between instances that ought to be covered by the simplification, and those that are not. While on the one hand, the HOT directive is meant to ease SMEs' expansion abroad, it is must,

[178] *Marks & Spencer Plc v Halsey (Inspector of Taxes)* (C-446/03) EU:C:2005:763; [2006] 1 C.M.L.R. 18. It is worth stressing that this case law has developed towards the Court applying a particularly restrictive approach, meaning that instances in which a taxpayer can rely on the final loss doctrine and deduct the losses incurred by a foreign subsidiary, or, under certain circumstances, a permanent establishment are rather rare. For a concise overview, including an account on recent case law, see, e.g. A. Cordewener, "We Need to Know When Previous Case-Law Has Been 'Overruled'!—A Plea for More Legal Certainty in EU Tax" in (2023) 32 *EC Tax Review* 144–151.

[179] "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final art.48(2).

[180] Note that the in discussing the—ultimately withdrawn—option 1 of the design of the BEFIT proposal, the Commission itself notes: "(Option 1) would propose rules that are mandatory to all taxpayers, and it would involve the highest degree of harmonisation as well as immediate application. This combination of options would ensure the broadest scope possible and, as a result, the most extensive simplification for businesses in the Union and Member State tax authorities, considering that it would replace current national rules on group taxation in the Union." "Proposal for a Directive on Business in Europe: Framework for Income Taxation (BEFIT)" COM(2023) 532 final, p.9.

[181] See Section 3.

[182] Although it would not seem impossible to apply the mechanism to standalone SMEs that have permanent establishments abroad, it may, nonetheless, be too burdensome for these entities.

[183] European Commission, *Tax Compliance Costs for SMES: An Update and a Complement* (2022), p.55.

[184] "Proposal for a Directive establishing a Head Office Tax system for micro, small and medium sized enterprises, and amending Directive 2011/16" COM(2023) 528 final.

[185] Which are the CIT rules of the 27 Member States, as well as, should it be implemented BEFIT.

on the other hand, be avoided that SMEs artificially shop into the jurisdiction with the most favourable tax base rules.[186] We, however, doubt that the rules included in the proposal give effect to this logic. Rather, it is foreseen that: (i) SMEs moving residence; and (ii) SMEs with the joint revenue of its PEs exceeding, for two years, an amount equal to triple the turnover of the head office, are automatically excluded.[187] To see that this goes too far and produces arbitrary results consider an individual working as a coder through her own corporation. She may move to another Member State to live with her spouse. This changes the place of effective management of the company and, thus, its tax residency. Thereupon, the entity becomes excluded from the HOT-simplification,[188] which is hard to understand given that the business is completely the same and in equal need for the simplification.[189] Alternatively, assume that this one-person company has three projects, each active for a year, and each time involving triggering a fiscal presence in another Member State than the home office state. We dare to say that the HOT directive is meant to apply precisely here, because it would ease such growth-enhancing expansion to other Member States. Yet, it does not, since the turnover of the PEs is too high relative to the turnover of the head office.[190] Abstaining from opening up further examples, the point we like to make is that business is too complex for it to be governed by three different tax regimes (HOT, the ordinary national tax systems, and BEFIT) that are, in part, designed on the basis of the assumed needs of prototype taxpayers. This can create difficult line drawing problems, distortions and, particularly, cause additional administrative costs to the tax authorities that have to enforce these systems in addition to the already existing minimum tax regime and the potentially to be introduced Pillar 1 rules. This downside would be avoided by our proposal of creating a single CIT system.

What concerns the linking of an own resource to the BEFIT tax base, it is not yet clear as to how it would be structured. A surcharge would, in principle, be possible as long as a basis before national adjustments is used. The latter adjustments would then—similarly to our proposal—have to be made against the national tax liability. Nonetheless, it seems more likely that a call rate may be used, meaning that a unified BEFIT base would underly the calculation of payment obligations of Member States to the EU. In this case, again, there is a factual connection between what is paid by corporations to the Member States and what is paid onwards to the EU. However, and particularly because of the possibility for unlimited national adjustments, it is unlikely that the payments made by the corporations to the Member States correspond to what is paid to the EU under a BEFIT own resource. In our model this is, as mentioned also in respect of Pillar 1, different as every euro paid under the EU surcharge is going into the EU budget and is coming from a corporation.

[186] Under such a scheme, the head office would be set up, or moved to, a jurisdiction with favourable rules on the tax base calculation, while the business is conducted elsewhere. Note that here it is not the tax rate that matters, because the applicable rate will be the one of the source states.

[187] "Proposal for a Directive establishing a Head Office Tax system for micro, small and medium sized enterprises" COM(2023) 528 final art.4.

[188] "Proposal for a Directive establishing a Head Office Tax system for micro, small and medium sized enterprises" COM(2023) 528 final art.8(a).

[189] The company can apply for the system in the new Member States, but must, for this purpose, fulfil the relevant residency requirements. The addressed tax avoidance strategy created to artificially move the seat of a company into a Member State with more favourable tax base rules can also be addressed through the general anti-abuse doctrine given effect to via Directive 2016/1164 laying down rules against tax avoidance practices [2016] OJ L193/1 art.6. See on the latter provision, including further references, and instead of many, M. Scherleitner and J. Korving, "Article 6 of the Anti Tax Avoidance Directive—Living a Life on Its Own?" (2023) 34 *European Business Law Review* 1069–1102.

[190] "Proposal for a Directive establishing a Head Office Tax system for micro, small and medium sized enterprises" COM(2023) 528 final art.8(b).

Conclusion

At the time when the EU is trying to develop an own industrial policy, harmonisation of corporate taxes acquires a new signification that goes beyond the approximation of diverging tax systems resulting in hindering free movement of businesses throughout the union or in tax avoidance practices.

A common industrial policy would imply a transfer, at least partial, of new tools to the European level in order to steer innovation and to develop production in the European territory. This can be made through subsidies, either direct in the form of financial transfers to the Member States or to undertakings or indirectly through tax incentives, as the Commission recently recognised in its 2023 communication "A Green Deal Industrial Plan for the Net-Zero Age".[191] In both cases, corporate taxation plays a key role. It can be a very efficient tool to levy own resources and, at the same time, is a recognised instrument to steer the behaviours of economic actors. However, smart policy requires also diversification in order to cope with the differences and economic industrial development across Member States.

In this article, we propose different models that aim at striking a balance between common policy and tax autonomy. We believe that the current framework is not adapted and could be improved significantly by adopting a two-tier approach with a combination of European and a domestic rate on the same base.

The system should also be flexible enough to allow the adoption, modification or, if necessary, suppression of corporate tax incentives that, despite all of the shortcomings that they have been observed to have, will remain an important policy tool at the disposal of public authorities in economic policy.

[191] "A Green Deal Industrial Plan For The Net-Zero Age" COM(2023) 62 final ("Member States can align their national fiscal incentives along a common scheme that the Commission stands ready to prepare, and thereby create a common scheme offering greater transparency and predictability to businesses across the EU").