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The Harmonization of Indirect Taxes

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I. Origin and Importance of Indirect Taxes in Europe

The term 'indirect taxation' generally refers to levies collected on transactions on goods and services. It includes value-added taxes (also known as goods and services taxes), customs and excise duties, transfer taxes on immovable and movable property, also known in some countries as registration or stamp duties, as well as energy and environmental taxes. Historically, those taxes appeared well before direct, personal taxes on income and wealth, in the form of taxes on imports (customs duties) or levies on specific goods and products.[1] Convenience and simplicity were their main rationales. Unlike taxes on income and capital, they did not require a complex administration. Taxation of foreign goods only necessitated controlling access to the territory (ports, roads and bridges, city gates). Taxes on transactions concerning first-necessity goods (such as salt, wine, and beer) or services (the use of roads, bridges, and other infrastructures), together with taxes on the transmission of immovable property, ensured a broad base and little possibility of avoidance: either no substitutes were available, or goods could not be easily dissimulated. The reason why those taxes are referred to as indirect taxes is related to their collection mechanism and—presumed—economic incidence: they are usually included in the price along the production/consumption chain and are therefore economically borne by another person, usually the consumer, rather than the person liable to pay the tax under the applicable law.[2]

[1] As Edwin Seligman said: 'Direct taxation ... generally forms the last step in the historical development of public revenues.' See Edwin Seligman, *Essays in Taxation* (Macmillan 1895) 9. There are, however, some examples of direct taxes in earlier civilizations, in particular land taxes, usually assessed on the basis of their (estimated) yield, but that could not be compared to the currently existing taxes on income. On the history of taxation see Aaron Wildavsky and Carolyn P Webber, *A History of Taxation and Expenditure in the Western World* (Simon and Schuster 1986); Gabriel Ardant, *Histoire de l'impôt* (Fayard 1972); Hironori Asakura, *World History of the Customs and Tariffs* (World Customs Organization 2005).

[2] According to John Stuart Mill, 'Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs. The producer or importer of a commodity

Revenues from indirect taxes formed the biggest part of public revenues until the beginning of the twentieth century.[3] Military efforts during the two world wars caused a significant increase in public spending, financed through the adoption of new levies, mainly income taxes. The development of social security systems and other public services in the second half of the twentieth century led to a further increase of (para)fiscal levies.[4] As of today, overall tax revenues in EU Member States account on average for around 40 per cent of gross domestic product (GDP) (with significant variations between Member States), with indirect taxes representing more than a third of them and even half in some Member States.[5] Beyond their revenue-raising capacity and their (relative) administrative simplicity, today, indirect taxes constitute an essential component of a modern and resilient tax system. On a more negative side, they are regularly regarded as less fair than direct taxes (taxes on income and capital) from a redistribution perspective. The main argument is that they do not take into account the taxpayers' personal characteristics, in particular their fiscal capacity (or ability-to-pay) because they are equally applicable to everyone, independent of their income or capital.[6] Even if that argument holds true in certain cases, much depends on the design of single taxes (even income and wealth taxes can be unfairly implemented), the way they interact within a system, and the destination of the revenue they generate.[7]

is called upon to pay tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price'. See John Stuart Mill, *Principles of Political Economy* (John W Parker 1885) bk V, ch II. The real incidence of indirect taxes and the distribution of their burden between producers and consumers depends however on several factors, in particular the conditions of demand and supply in the relevant markets. See eg James E Meade, *Trade and Welfare*, vol 2 (OUP 1955).

[3] For example, in the United Kingdom, in 1900, total tax revenues amounted to around 10 per cent of GDP, with indirect taxes yielding revenues equal to 7 per cent of GDP. See Brian R Mitchell, *British Historical Statistics* (CUP 2011).

[4] For a brief history of the evolution of Western tax system after the Second World War see Ken Messere, 'Half a Century of Changes in Taxation' (1999) 53(11) Bull Intl Taxation 340.

[5] Commission, 'Taxation Trends in the European Union' (EU Publications 2019).

[6] Thomas Piketty and Emmanuel Saez, 'Income Inequality in the United States, 1913–1998' (2003) 118(1) QJ Econ L, 37.

[7] See Kathryn James, *The Rise of the Value-Added Tax* (CUP 2015) 17–35; Ian Crawford, Michael Keen, and Stephen Smith, 'Value Added Tax and Excises' in James Mirrlees and Stuart Adam (eds), *Dimensions of Tax Design: The Mirrlees Review* (OUP 2010) 275, 280–83; Robert F van Brederode, *Systems of General Sales Taxation: Theory, Policy and Practice* (Kluwer Law International 2009) 333. Moreover, as the IMF pointed out, 'Policymakers should focus on developing a broadly based, efficient, and easily administered tax system with moderate marginal rates. Although the primary goal of the tax system should be to promote efficiency, policymakers also need to consider how to distribute the burden of taxation so the system is seen as fair and just. The expenditure side of the budget offers better opportunities than the tax side for redistributing income.' See IMF's Fiscal Affairs Department, 'Should Equity Be a Goal of Economic Policy?' Finance & Development (September 1998) 2, 4 https://www.imf.org/external/pubs/ft/fandd/1998/09/pdf/imfstafl.pdf (accessed 20 March 2022).

II. Justifications for and against Indirect Tax Harmonization in the European Union

Another drawback of indirect taxes is that, in open economies heavily dependent on international trade, they may have negative effects on imports or exports or affect the production or consumption of certain goods and services. In particular, the multiplication of domestic taxes in a unified economic area composed by independent sovereign jurisdictions may hinder the development of cross-border activities and reduce competition. Hence comes the question of the coordination/harmonization of such taxes at a supranational level.

The attribution of the power to levy indirect taxes at a central or supranational level has played an important role in the shaping and evolution of federal systems, in particular its external and internal cross-border dimension (duties on imports and taxes on cross-border trade). In the *Federalist Papers*, which were written in support of the US Constitution, Alexander Hamilton strongly advocated both in favour of indirect taxation[8] and for transferring powers of taxation to the federation. The most notable example in European history of political unification through indirect tax harmonization is the German *Zollverein*, a customs union between German states, promoted by Prussia, which would set the foundations of the German Empire.[9] From a political perspective, allocating taxing powers at the level of the (con)federation fundamentally alters the balance between the central and the state/regional level. Owing to centralization, states/regions have fewer policy instruments available, suffer additional constraints imposed by the central level, and, potentially, face reduction in their spending powers. The central level, however, may develop its own tax policy and apply it uniformly on the whole territory of the federation (although centralization does not per se exclude differentiation), as well as increase their spending power to fund other (non-tax) policies.

The economic theory of fiscal federalism addresses the attribution of functions and fiscal instruments between different levels of government from both positive

[8] 'It is a signal advantage of taxes on articles of consumption that they contain in their own nature a security against excess. They prescribe their own limit, which cannot be exceeded without defeating the end proposed, that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty, that, "in political arithmetic, two and two do not always make four". If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them. Impositions of this kind usually fall under the denomination of indirect taxes, and must for a long time constitute the chief part of the revenue raised in this country.' See Alexander Hamilton, 'The Same Subject Continued: Concerning the General Power of Taxation' *The Federalist* No 31, New York Packet 1788).

[9] Other examples of Customs Unions are the Austrian Custom Union (1854) or the Customs Union between Moldavia and Wallachia (1847), which later became Romania. See Leopold Kohr, 'The History of the Common Market' (1960) 20(3) J Econ History 441.

and normative perspectives.[10] Taxation and debt are the main instruments which allocate revenues to levels of the public sector. Intergovernmental grants, which result from a transfer of tax revenues collected by one level of government to another, also play an essential role in trying to reach an equilibrium between financing and spending in a multi-level governance structure. Under this perspective, tax harmonization is an instrument that belongs to the fiscal federalism toolkit but with a hybrid nature. According to Peggy B Musgrave, 'fiscal harmonisation may be viewed as the process of adjusting national fiscal systems to conform with a set of common economic aims.'[11] From a constitutional perspective, harmonization centralizes the power to set tax rules, but without granting the central level a genuine 'power to tax', i.e. the power to collect tax revenues for its own functions. As such, it may be seen as a constraint on decentralized entities, which totally or partially lose the power to determine the constituting elements of the taxes they collect, which is not balanced by a correlative empowerment of the central level.

Under the public finance approach to fiscal federalism,[12] the role of government is to correct allocation of taxing and spending powers across levels of government in the general interest. Harmonization is desirable because it ensures neutrality of trade between different entities of the federation. Under the public choice approach, interventions by the state, including in the tax area, are regarded as motivated by individual or group interests within public authorities. Applied to fiscal federalism, such a perspective, whether exit-based (the power of subjects to move to or from a regulating jurisdiction), or voice-based (the power of subjects to influence decision-making processes), tends to favour decentralization.[13] Another slightly different argument in favour of fiscal decentralization is that it represents a useful mechanism to limit the size of government and its tendency to grow by increasing taxation levels, as the metaphor of *Leviathan* suggests.[14] According to this view, granting tax and spending powers to decentralized entities within a single state characterized by interjurisdictional mobility of persons leads to vertical and horizontal competition between public authorities, which in turn acts as a constraint on both central and decentralized governments budgets.[15] A similar view on this limiting effect of the powers of both decentralized and centralized public authorities in federations in which free movement is ensured is one of the

10 For an overview of the different economic theories on fiscal federalism see Ehtisham Ahmad and Giorgio Brosio, *Handbook of Fiscal Federalism* (Edward Elgar Publishing 2006); Wallace E Oates, 'An Essay on Fiscal Federalism' (1999) 37(3) J Econ Lit 1120.

11 Peggy B Musgrave, 'Harmonisation of Direct Business Taxes: A Case Study' in Carl S Shoup (ed), *Fiscal Harmonisation in Common Markets*,vol 2 (Columbia UP 1967) 210.

12 The most authoritative representative of the public finance approach to fiscal federalism was Richard Musgrave. See James Buchanan and Richard A Musgrave, *Public Finance and Public Choice: Two Contrasting Visions of the State* (MIT Press 1999).

13 Roderick Hills, 'Federalism and Public Choice' in Daniel Farber and Anne J O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar Publishing 2010) 207–33.

14 Geoffrey Brennan and James Buchanan, *The Power to Tax* (CUP 1980).

cornerstone of Hayek's liberal programme,[16] and has been labelled as a 'trap' to be overcome in the European Union integration process.[17]

Although most of the academic literature on fiscal federalism envisages the setting of a nation state with decentralized entities, its lessons can be transposed to the European Union—with some caution, however.[18] Unlike other international organizations, the EU has indeed created a supranational legal framework whose goal and effect is to ensure the mobility of persons and production factors across the Member States. The internal market aims at creating between the Member States the conditions of a unified economic area, similar to what is occurring within a sovereign state. As a result, modifications of domestic tax systems may lead to significant shifts in production and consumption patterns. This holds especially true as regards taxes on consumptions (on goods and services), because they affect cross-border trade. Contrary to taxes on less mobile factors, for example land taxes, their absence of homogeneity is likely to cause distortions, spillover effects, and increased (harmful) tax competition. This risk is not only observable in border regions between neighbouring countries, but also on a larger scale, due to the development of online commerce and digital services.[19] Under an internal/common market objective, harmonization consisting in the adoption of design and allocation rules based on principles such as neutrality and free movement may minimize the risk of protectionism by Member States, reduce tax competition, and facilitate cross-border activities of economic actors.[20] Again, the overall welfare gains resulting from indirect tax harmonization will depend on the design

16 Friedrich A von Hayek, 'The Economic Conditions of Interstate Federalism' in Friedrich A von Hayek, *Individualism and Economic Order* (University of Chicago Press 1948) 255.

17 Philippe H van Parijs, 'Hayek's Trap and the European Utopia We Need' in Renato Carmo, Márton Medgyesi, and Cédric Rio (eds), *Reducing Inequalities: A Challenge for the European Union?* (Palgrave Macmillan 2018) 213–23.

18 See eg Charles Wyplosz, 'The Centralization-Decentralization Issue', European Economy Discussion Papers, EU Commission No 14/2005; Pierre salmon, 'Decentralization and Supranationality: The Case of the European Union' in Ehtisham Ahmad and Vito Tanzi (eds), *Managing Fiscal Decentralization* (Routledge 2002) 99–121; Richard Hemming and Paul B Spahn, 'European Integration and the Theory of Fiscal Federalism' in Mario Blejer and Teresa Ter-Minassian (eds), *Macroeconomic Dimensions of Public Finance: Essays in Honor of Vito Tanzi* (Routledge 1997) 110–28.

19 See eg the issue of the exemption of low value consignments under the Council Directive (EC) 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1 (VAT directive), which has been abolished as of 1 January 2021, according to Council Directive (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods [2017] OJ L348/7, after Member States observed large magnitude fraud phenomena (under-valuation) and channelling through certain jurisdictions (for example, concerning the UK, the Channel Islands).

20 On the reasons for tax harmonization in the EU see Simon James and Lynne Oats, 'Tax Harmonisation and the Case of Corporate Taxation' (2018) 8(1) Revenue LJ 36, art 3; Malcom Gammie, 'Corporate Tax Harmonisation – Stage I: The Struggle for Progress' in Christiana HJI Panayi, Werner Haslehner, and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) 241; Frans Vanistendael, 'An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and "Tax Abuse"?' (2021) 75(11/12) Bull Intl Taxn, Journal

of the harmonized rules, and notably whether the system will be origin-based or destination-based.[21]

However, harmonization also has other effects on tax and fiscal policies which should not be underestimated. On the positive side, since it forces Member States to adopt certain types of taxes (for example a value-added tax) with compulsory minimal levels of taxation, harmonization contributes to stabilizing sources of tax revenues by shielding them against competition with other Member States. This has allowed them to increase public spending while being part of the internal market and, at the same time, reduce taxes on more mobile economic factors such as capital (corporate taxes but also inheritance and wealth taxes).

On the negative side, (indirect) tax harmonization reduces the room for manoeuvre for Member States. Modifying fundamental policy orientations contained in an EU directive requires unanimity in favour of an alternative, even if there is a wide consensus that the current legislation is no longer adapted to the present situation.

III. Legal Basis and Purpose of Indirect Tax Harmonization in the EU Treaties: The Relationship with the Customs Union and the Internal Market

According to Article 113 TFEU, the EU has the competence 'to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition'.[22] This article is only applicable to indirect taxes; existing directives in the area of direct taxation have been adopted on the basis of the general internal market clause of Article 115 TFEU.[23]

Harmonization provisions have to be adopted according to a special legislative procedure, requiring the sole consent of the Council (unanimity) after consultation of the European Parliament and of the European Economic and Social

[21] See Michael Keen, Sajal Lahiri, and Pascalis Raimondos-Møller, 'Tax Principles and Tax Harmonization under Imperfect Competition: A Cautionary Example' (2002) 46(8) Eur Econ Rev 1559; Christos Kotsogiannis, Miguel Lopez-Garcia, and Gareth D Myles, 'The Origin Principle, Tax Harmonization and Public Goods' (2005) 87(2) Econ Letters 211.

[22] On the (rather theoretical) differences between tax harmonization and tax coordination see Angelo GA Faria, 'Tax Coordination and Harmonization' in Parthasarathi Shome (ed), *Tax Policy Handbook* (IMF 1995) 229; Edoardo Traversa, *L'autonomie fiscale des Régions et des collectivités locales des Etats membres face au droit Communautaire* (Larcier 2010) 32; Paolo Stancanelli, 'Le competenze dell'unione Europea' in Michele Colucci and Salvatore Sica (eds), *L'unione europea: Principi-Istituzioni, Politiche, Costituzione* (Zanichelli 2005) 23–25.

[23] Georg Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation' in Christiana

Committee. Despite the unanimity requirement, the Council has adopted numerous directives—and even regulations—on that legal basis in the areas of value added tax, excise duties, energy taxes, and indirect taxes on the raising of capital.[24] The Council also enacted several directives providing exemptions from indirect taxes in case of certain cross-border transfers of goods (travellers, temporary introduction of means of transport, transfer of residence to another Member State).[25] The Commission also unsuccessfully attempted to harmonize car taxation,[26] financial transaction taxes (including under enhancement cooperation),[27] and, more recently, digital taxes.[28] In 2019, the Commission proposed to use the *passerelle* clauses of Article 48(7) TFEU (general) and 192(2) TFEU (environmental taxes) to shift the ordinary legislative procedure gradually, with qualified majority within the Council and co-decision of the European Parliament.[29]

Article 113 TFEU is one of the few 'tax provisions' included in a title together with provisions dealing with competition and approximation of laws,[30] but its purpose cannot be properly understood unless put in a more general context. Indeed, the necessity to adopt a common taxation framework directly flows from the principles of the Customs Union[31] and the internal market. Since the Treaty of Rome,

[24] On VAT and excise duties see below. See also Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital [2008] OJ L46/11, which is the recast of the original 1969 directive (Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital [1969] OJ L249/25).

[25] Council Directive 2009/55/EC of 25 May 2009 on tax exemptions applicable to the permanent introduction from a Member State of the personal property of individuals [2009] OJ L145/36; Council Directive 2009/132/EC of 19 October 2009 determining the scope of Article 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods (codified version) [2009] OJ L292/5; Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries [2007] OJ L346/6; Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries (codified version) [2006] OJ L289/10; Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another [1983] OJ L105/59.

[26] Commission, 'Proposal for a Directive of 5 July 2005 on passenger car related taxes' COM(2005) 261 final.

[27] Commission, 'Proposal for a Directive of 28 September 2011 on a common system of financial transaction tax and amending Directive 2008/7/EC' COM(2011) 594 final; and Commission, 'Proposal of 14 February 2013 implementing enhanced cooperation in the area of financial transaction tax' COM(2013) 71 final.

[28] Commission, 'Proposal for a Directive of 21 March 2018 on the common system of a digital services tax on revenues resulting from the provision of certain digital services' COM(2018) 148 final.

[29] Commission, 'Towards a more efficient and democratic decision making in EU tax policy' (Communication) COM(2019) 8 final.

[30] The other tax provisions are TFEU, art 100 (prohibition of tax discriminations – see below), TFEU, art 111 (excessive repayment of internal taxation on exports), and TFEU, art 112 (other remissions and repayments in respect of exports to other Member States and countervailing charges). For a comment see Paul Farmer and Richard Lyal, *EC Tax Law* (Clarendon Press 1994) 53.

[31] See also GATT 1994, art XXIV (8), which states: 'For the purposes of this Agreement: A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially

the harmonization of indirect taxes has indeed always been considered instrumental to the achievement of the common market and later the internal market, together with the abolition of customs duties and quantitative restrictions between Member States, the creation of a common external customs tariff, and the adoption of common policies on various areas, such as agriculture and competition.[32]

In their external dimension, those principles translate into a uniform tax treatment of goods entering the Union. In their internal dimension, they imply the abolition of levies that specifically target imports and exports between Member States to ensure free movement.

The Customs Union was established in 1968 with the abolition of internal customs duties and the introduction of a uniform system for taxing imports from outside the EEC by applying a common external tariff,[33] although the elimination of customs formalities at internal borders of the EU didn't occur until 1993, with the establishment of the Internal Market. The EU customs territory incorporates the territories of Member States, including territorial sea and space, with minor exceptions listed in the Union Customs Code (UCC),[34] such as certain French overseas countries and territories,[35] the Faroe Islands, Greenland, the Island of Heligoland and the territory of Büsingen, Ceuta and Melilla, the municipality of Livigno, and the non-European territories of the Kingdom of the Netherlands.[36] On the other hand, it includes Monaco, a state which is not part of the EU, and territory of the United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia.[37] Moreover, the EU has entered into bilateral Customs Unions with Andorra, San Marino, and Turkey (except for certain agricultural products),[38] while Northern Ireland has

substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.'

[32] Treaty establishing the European Economic Community (EEC Treaty) (Treaty of Rome), art 2.

[33] Council Regulation (EEC) No 950/68 of the Council of 28 June 1968 on the common customs tariff [1968] OJ 172/1.

[34] Council Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L269/1 (UCC Regulation).

[35] New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Saint Pierre and Miquelon, Saint-Barthélemy; cf Part Four of the TFEU and Annex II to the TFEU.

[36] UCC Regulation, art 4. See the Protocole relatif à l'application du Traité instituant la Communauté économique européenne aux parties non européennes du Royaume des Pays-Bas annexed to the Treaty of Rome 1957 and the Declaration by the Kingdom of the Netherlands on Article 355 of the Treaty on the Functioning of the European Union.

[37] Defined in the Treaty concerning the Establishment of the Republic of Cyprus, signed in Nicosia on 16 August 1960 (United Kingdom Treaty Series No 4 (1961) Cmnd 1252). The sovereign base areas are part of the customs territory of the Union, despite the withdrawal of the United Kingdom from the EU; see Article 2 of the Protocol relating to the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

[38] Council Decision 90/680/EEC of 26 November 1990 on the conclusion of the Agreement in the form of an exchange of letters between the European Economic Community and the Principality of Andorra [1990] OJ L374/13; Agreement on Cooperation and Customs Union between the European

specific status governed by the 2020 withdrawal agreement of the United Kingdom from the EU.[39]

From a fiscal federalism perspective, customs duties are currently the closest thing to a genuine EU tax. The EU has exclusive competence in regards to the determination of the scope and structure of customs duties and the revenues collected accrued to the EU budget, after a 25 per cent deduction supposed to cover collection costs.[40] As an essential element of the internal market and the external commercial policy, legislation in the area of customs duties is not considered as having a fiscal nature and is therefore jointly adopted by the Council (at qualified majority) and the Parliament under the ordinary legislative procedure (Article 294 TFEU). The Union Customs Code and its implementing regulations[41] provide detailed legislation concerning the various aspects of the customs duties:

- the classification of goods,
- the rules of the origin,
- the value to be taken into consideration as a taxable base,
- the tariff,
- the determination of the persons liable to the payment,
- the events giving rise to the payment (mainly the crossing of the EU customs borders),
- the rules on temporary or permanent suspension and exemption from duties.[42]

EU legislation also determines the procedural aspects, including the relationships between domestic customs administration, with the exclusion of criminal sanctions, which remain within the competence of the Member States.

Decision No 1/95 of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1.

[39] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ CI384/1; esp Protocol on Ireland/Northern Ireland [2019] OJ C384I/92, art 8.

[40] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L424/1; Communication from the Commission to the European Parliament, the Council and the Court of Auditors – Consolidated Annual Accounts of the European Union for the financial year 2021, COM/2022/323 final. Customs duties represent around 12 per cent of total EU resources in 2021.

[41] Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code [2015] OJ L343/1; Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015] OJ L343/558.

In its internal dimension, the Customs Union entails both a general prohibition to levy internal customs duties and charges having equivalent effects (Article 30 TFEU) and an obligation of equal treatment between domestic goods and goods from other Member States (Article 110 TFEU). Both provisions have been recognized to be directly effective.[43] While customs duties are defined in detail through EU and domestic legislations, the concept of a tax having equivalent effect has been clarified by the Court of Justice as 'a pecuniary charge, however small, unilaterally imposed, whatever its name and technique, which affects domestic or foreign goods crossing the border'.[44] This applies even if the pecuniary charge 'is not collected for the benefit of the State and has no discriminatory effect and the product imposed does not compete with domestic production'. As the Court said in *Carbonati Apuani*, a case concerning (indirect) municipal taxes on goods, 'the very principle of a customs union, as provided for by Article 23 EC, requires the free movement of goods to be ensured within the union generally, not in trade between Member States alone, but more broadly throughout the territory of the customs union'.[45]

However, Article 110 TFEU—which is almost identical in wording as an equivalent provision in the GATT agreements[46]—contains a clear and precise prohibition of discrimination, which is not subject to any conditions or to the adoption of specific measures for its implementation. By enshrining the principle of parity of tax treatment of domestic and imported products, it does not refer to a particular tax or levy, nor to a specific tax mechanism. It extends to any form of tax advantage enjoyed by domestic products, to the detriment of products from other Member States. Articles 30 and 110 TFEU are specific provisions implementing the principle of free movement of goods as regards (indirect) taxation, which are complementary to each other, while having a distinct and not overlapping scope of application.[47]

[43] On TFEU, art 30 see Case C-26/62 *Van Gend en Loos* [1963] ECR 1; Case C-469/93 *Chiquita Italia* [1995] ECR I-4558, para 37. A similar prohibition is contained in the GATT–WTO agreements (art 2, s 1(b) and (c)). However, it has no direct effect and does not apply between Member States, but only between them and the other third countries that have signed the agreements. For TFEU, art 110 see Case C-17/91 *Lornoy* [1992] ECR I-6523; and Joined Cases C-144/91 and C-145/91 *Demoor* [1992] ECR I-6613.

[44] Case 24/68 *Commission v Italy* [1969] ECR I-193. This was a tax, known as the 'statistical fee', for the compilation of statistical information on the flow of goods to and from Italy, and collected on imported and exported goods of a minimal amount.

[45] C-72/03 *Carbonati Apuani* [2004] ECR I-08027.

[46] GATT, art 3(2). Both provisions are also interpreted similarly. See Graínne de Burca, 'Unpacking the Concept of Discrimination in EC and International Trade Law' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 181.

[47] Case 94/74 *IGAV Ente nazionale per la Cellulosa* [1975] ECR-00699; Case C-266/91 *CELBI* [1993] ECR I-4357, para 9; Joined Cases C-78/90, C-79/90, C-80/90, C-81/90, C-82/90, and C-83/90 *Compagnie commerciale de l'Ouest v Receveur principal des douanes de La Pallice-Port* [1992] ECR I-01847, para 22. The Treaty does not contain similar provisions as regards the other freedoms of movement. Therefore, obstacles to free movement that would arise from the tax legislation of the Member

Beyond the abolition of taxes specifically targeting goods originating from other Member States, the internal market also requires an alignment of levies equally applicable to domestic and 'imported' products (as well of taxes applying to services). This alignment cannot simply stem from the application of common principles, but requires common rules, hence the existence of Article 113 TFEU and the directives and regulations adopted by the Council.

IV. The Harmonization of Value Added Tax and Its (Partial) Justification under the EU Own Resources Scheme

Today, the value added tax (VAT or also known in many countries as goods and services tax (GST)) is a general tax on consumption implemented in more than 170 countries around the world[48] and has become a significant source of revenue for governments (around 20 per cent of total global tax revenues).[49] One of the main features of the VAT is neutrality with its different facets.[50] Neutrality mirrors the idea that VAT is a general tax on consumption (not production) levied on a broad base regardless of the number of transactions taking place in the production and distribution processes before the stage at which it is charged. This implies that businesses—even if identified as the taxable persons—should not bear the burden of the VAT (borne instead by the consumers) through the deduction of input tax on purchases. The same concept of neutrality towards the origin of the goods or services is also discerned in the application of VAT to international trade, as exports are exempt and imports are taxed at the same rate as local production.[51]

During the first years of the EEC, technical studies were carried out by working groups and experts on EEC Commission's mandate, which led to two important reports published in 1962: the 'General Report of the Subgroups A, B and C

TFEU. However, as the abundant case law of the Court shows, those provisions are more likely to apply to direct taxes, which are not harmonized at the EU level.

[48] OECD, 'Consumption Tax Trends 2022: VAT/GST and Excise, Core Design Features and Trends' (OECD Publishing 2022) Annex A https://doi.org/10.1787/6525a942-en (accessed 27 March 2023). See also Ine Lejeune, 'Designing VAT/GST Law to Be Effective and Efficient: A Global Benchmarking of VAT/GST Systems' in Thomas Ecker, Michael Lang, and Ine Lejeune (eds), *The Future of Indirect Taxation: Recent Trends in VAT and GST Systems Around the World* (Kluwer Law International 2011) 724–27; Jean-Jacques Philippe, *La TVA à l'heure européenne* (Litec 1993) xi.

[49] Lejeune (n 48) 728. See also Richard M Bird, 'Value-Added Taxes in Developing and Transitional Countries: Lessons and Questions' (2005) Rotman School of Management International Tax Program Papers 505, 4

[50] For an in-depth analysis of this principle see, among others, Charlène A Herbain, *VAT Neutrality* (Larcier 2015).

[51] Before 1991, the terms importations and exportations referred to both transactions between EEC member states and between EEC member states and third countries. Nowadays, they only refer to the

established to study different possibilities for the harmonisation of the turnover taxes' ('General Report of the Subgroups'), and the 'Neumark Report'.[52]

The first report specifically focused on turnover taxes and analysed how domestic turnover tax regulation could be reformed in the interest of the common market. The report first assessed the possibility of abolishing the physical border controls on goods traded between Member States, without harmonizing the structure of turnover taxes. In that context, it pointed out that, since difficulties could arise in the cross-checking of the taxpayer accounting documents, efficiency of administrative cooperation and exchange of information between national customs and tax authorities would be paramount. The report then set out different scenarios of harmonization of turnover tax at the European level, among which is a common VAT system, analysed under the following aspects: fiscal capacity, competition neutrality, and impact on prices and productivity. The development of a common turnover tax system should therefore take into account the need for sufficient and stable tax revenues,[53] which would imply a broad tax base (including not only the supply of goods but also the supply of services and covering all stages of production and distribution, including the retail) and low rates, a limited number of exemptions and a cost-saving collection process, for both the tax administration and taxpayers. Moreover, the system should be framed to avoid international and domestic competition distortions and to eliminate obstacles to free movement of goods and services within the common market, by ensuring equality of treatment between imported and domestic transactions and between long and short production chains.[54]

The Neumark Report instead took a more general economic perspective on what a European tax policy should entail. As regards turnover taxes, it asserted the necessity and urgency of harmonizing turnover tax systems and specified that it should be carried out gradually, beginning with the abolition of the *cumulative* multi-stage turnover taxes which existed in most Member States[55] and which caused competition distortions both domestically and in international trade.

The EU harmonization of the VAT effectively started in 1967 with the adoption of the First and Second VAT Directives[56] on the basis of Article 99 of the Treaty of

[52] Communauté Economique Européenne, 'Rapport du groupe de travail n 1 du 17 décembre 1959, doc IV/5285/59 (doc IV/1359/60) approved on 23 February 1960; Communauté Economique Européenne, 'Rapport Général des Sous-groupes A, B et C crées pour examiner différentes possibilités en vue d'une harmonisation des taxes sur le chiffre d'affaires' (Services des Publications des Communautés Européennes 1962); Communauté Economique Européenne, 'Rapport du comité fiscal et financier' (Services des Publications des Communautés Européennes 1962) (Neumark Report). These reports, among others, have been criticized for having hardly addressed 'the normative legal nature of the European VAT'. Cf Frank Nellen, *Information asymmetries in EU VAT* (Wolters Kluwer 2017) 65.

[53] Communauté Economique Européenne, 'Rapport Général' (n 52) 20–21.

[54] Ibid 22–25.

[55] Neumark Report (n 52) 41.

Rome.[57] Those Directives aimed at replacing the existing cascading (or cumulative) turnover taxes[58] applied in five of the six EEC Member States, with a harmonized tax inspired by the non-cascading turnover tax that France had implemented in 1954.[59] As mentioned in the above-mentioned preparatory reports and in the two VAT Directives, the drivers of this harmonization were, among others, the importance of turnover tax revenues in the Member State budgets, their direct impact on price formation and competition conditions, as well as the political dynamics of EU integration.[60] At the time, indeed, a relatively optimistic feeling existed, according to which 'it must be assumed that in the course of the progressive realization of integration as foreseen by the Treaty of Rome, the common market itself will give rise to powerful forces which will push the Member States to harmonize their fiscal and financial policies to some extent'.[61]

Directive 67/228/EEC of 11 April 1967 on the harmonisation of legislation of Member States concerning turnover taxes: Structure and procedures for application of the common system of value added tax [1967] OJ L71/1303 (Second VAT Directive). The preambles to the First and Second VAT Directives emphasized the necessity to 'proceed by stages', bearing in mind that 'the harmonisation of turnover taxes will lead in Member States to substantial alterations in tax structure and will have appreciable consequences in the budgetary, economic and social fields'.

[57] Treaty of Rome, art 99, para 1 set out the following: 'The Commission shall consider in what way the laws of the various Member States concerning turnover taxes, excise duties and other forms of indirect taxation, including compensatory measures applying to exchanges between Member States, can be harmonised in the interest of the common market.'

[58] Those pre-VAT turnover taxes were: *taxe de transmission sur les ventes* or *belasting wegens overdracht* and related taxes (all together called *taxes assimilées au timbre*) in Belgium, *Allphasen-Bruttoumsatzsteuer* in the Federal Republic of Germany, *imposta generale sull'entrata* (IGE) in Italy, *impôt sur le chiffre d'affaires* in Luxembourg, and *omzetbelasting* in the Netherlands. The first turnover taxes were mainly introduced to deal with the financial difficulties following the First World War and, in the Netherlands, to counter then the effects of the global economic crisis ensued after the Wall Street Crash of 1929. See Ad van Doesum, Herman van Kesteren, Gert-Jan van Norden, and Frank Nellen, *Fundamentals of EU VAT Law* (Kluwer Law International 2020) 3; Rita de la Feria, *The EU VAT System and the Internal Market* (IBFD 2009) 45; A Peter Lier and others (eds), *Tax and Legal Aspects of EC Harmonization* (Kluwer Law and Taxation Publishers 1993) 80.

[59] The French VAT of 1954 replaced the former non-cumulative *taxe à la production* which it resembled—at the beginning it still applied only to producers and wholesalers, excluding the small retailers, but from which it diverged since it also allowed the deduction of the investments as the purchase of equipment. Maurice Lauré, *La taxe sur la valeur ajoutée* (Librairie du Recueil Sirey 1953); Maurice Lauré, *Aspects économiques et techniques de la taxe à la production* (Librairie du Recueil Sirey 1952). The French VAT did not exactly correspond to the European criteria and the French legislator took into account the EEC works in amending the act of 1954 and enacting the act of 6 January 1966 (Loi n 66-10 du 6 janvier 1966 portant reforme des taxes sur le chiffre d'affaires), which entered into force on 1 January 1968, following the approval of the 1967 First and Second VAT Directives. Philippe (n 48) 13, 30–31. On the origin of EU VAT see Charlène A Hebain, 'Origin and Merits of the EU VAT: A Critical Appraisal' in Christiana HJI Panayi, Werner Haslehner, and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) 320.

[60] Neumark Report (n 52) 25, 32, 40.

[61] Ibid 9. See also Dominique Berlin, *Politique fiscale*, vol 1 (Editions de l'ulb 2012) 8; Rita de la Feria, 'VAT and the EC Internal Market: The Shortcomings of Harmonisation' (2009) Oxford University Centre for Business Taxation Working Paper 0929, 1–2 https://www.sbs.ox.ac.uk/faculty-research/tax/

However, domestic turnover taxes were approximated only insofar as it was deemed necessary to eliminate discrimination towards cross-border trade. Quantitative and qualitative differences among the Member States remained, reflecting heterogeneous political preferences and consumption habits between countries.[62]

Whereas the First Directive mainly stated the replacement of the domestic system of turnover taxes by a VAT, the Second Directive described the general structure of the 'common system' of VAT, i.e. the scope of application (taxable transactions, territory and taxable persons), the tax base, the application of a standard rate, with reduced rates, the exemptions (only the exports), the principles around the right to deduct ('when goods and services are used for the purposes of his undertaking', the taxable person may deduct from the tax for which he is liable (i) 'the value added tax invoiced to him in respect of goods supplied to him or in respect of services rendered to him', (ii) 'the value added tax paid in respect of imported goods'), and the compliance obligations of taxable persons (accounting, invoices, declaration and payment). Member States were granted 'substantial autonomy in determining the rates' and the exemptions.[63] VAT was then progressively introduced in the EEC: France and the Federal Republic of Germany in 1968, the Netherlands in 1969, Luxembourg in 1970, Belgium in 1971, and Italy in 1973. Article 1 of the First Directive laid down the deadline for the entering into force of the VAT legislation in Members States on 1 January 1970, but Belgium and Italy were granted a prorogation (three times).[64]

In the meantime, the Member States' financial contributions were replaced by the so-called 'own resources',[65] that is, the revenue from agricultural levies and from the common customs tariff. Since these two were not considered sufficient 'to ensure that the budget of the Communities is in balance',[66] there were talks about adopting an additional resource calculated on the basis of VAT.

The VAT own resource was not implemented before 1980, in part because it required a more thorough harmonization of the structure of the VAT, which

[62] Neumark Report (n 52) 6, 8–9. Several disparities due to differences in the national economies, as well as to different economic, social, and health policies grounded on cultural and historic specificities were considered acceptable, provided that they would not hinder or distort the competition.

[63] See n 2 of the Second Directive; see also Second VAT Directive, arts 8, 9.

[64] Third Council Directive 69/463/EEC of 9 December 1969 on the harmonisation of legislation of Member States concerning turnover taxes: introduction of value added tax in Member States [1969] OJ L320/34 (Third VAT Directive); Fourth Council Directive 71/401/EEC of 20 December 1971 on the harmonisation of legislation of Member States concerning turnover taxes – introduction of value added tax in Italy [1971] OJ L283/41 (Fourth VAT Directive); Fifth Council Directive 72/250/CEE of 4 July 1972 on the harmonisation of legislation of Member States concerning turnover taxes – introduction of value added tax in Italy [1972] OJ L167/27 (Fifth VAT Directive).

[65] In 1970, the EEC Council adopted the first decision on own resources, followed by the relevant regulation of 2 January 1971. On 22 April 1970, the first budgetary treaty of the Community—the Treaty of Luxembourg—amending several budget provisions laid down in the previous treaties was signed and it entered into force on 1 January 1971.

happened with the adoption of Sixth Directive of 17 May 1977.[67] The recitals of the Sixth Directive expressly refer to '[r]esources [that] are to include those accruing from value added tax and obtained by applying a common rate of tax on a basis of assessment determined in a uniform manner according to Community rules'.[68] The Sixth Directive harmonized the notions of 'taxable person', 'taxable transaction', and 'place of taxable transactions', together with the taxable base, the deduction regime, and taxpayers' obligations, as well as special regimes for small companies and farmers. It also established a common list of exemptions. Nevertheless, Member States were 'temporarily' allowed to keep existing reduced rates, and a set of temporary derogations to the common regime (including exemptions) was laid down.[69]

The Sixth Directive remained in force until 2006, when the Council adopted a recast (Directive 2006/11/EC).[70] In almost thirty years, significant changes were introduced,[71] most of them aiming at progressively eliminating fiscal borders[72] in what would become the single market (i.e. an area in which the free movement of goods, persons, services, and capital is ensured) and the economic, and (for most Member States) monetary union.[73] A new and substantial impulsion to the harmonization was given by the process of completion of the internal market, as described in the 1985 White Paper[74] and implemented by the Single European Act in 1986 and the Maastricht Treaty in 1992.[75] Article 99 of the EEC Treaty was modified by the Single European Act to explicitly state that 'provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation' should be adopted 'to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 8a'.[76] The 1977 Sixth Directive had been

[67] Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ L145/1 (Sixth VAT Directive).

[68] Ibid 2.

[69] Ibid art 28.

[70] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1 (VAT Directive).

[71] For a summary of the amendments see Ben Terra and Julie Kajus, *A Guide to the European VAT Directives. Introduction to European VAT*, vol 1 (IBFD 2014) 338–39.

[72] The most significant reforms were the abolition of tax on imports and the remission of tax on exports in trade between Member States, as well as the abolition of fiscal controls at internal frontiers for both taxable persons and individuals. See Council Directive 91/680/EEC of 16 December 1991 on the abolition of fiscal frontiers [1991] OJ L376/1.

[73] See Resolution of the Council and of the Representatives of the Governments of the Member States of 22 March 1971 on the attainment by stages of economic and monetary union in the Community [1971] OJ C28/1.

[74] Commission, 'Completing the Internal Market: White Paper from the Commission to the European Council' COM(1985) 310 final.

[75] See EEC Treaty, art 8a, which was added by the Single European Act. The provision stated that '[t]he Community shall adopt measures with the aim of progressively establishing the internal market over period expiring on 31 December 1992'; and Single European Act, art 13.

a big step, but a bigger one was needed to complete the VAT common system. Nevertheless, the upgrade was not that easy: a balance had to be struck between, on one hand, the nature of VAT of a consumption tax that is borne by the final consumer, and, on the other, the characteristic that it is levied on the value added at each stage of production and distribution process by single undertakings which can be located in other Member States. Moreover, the thorny issue concerning VAT rates harmonization could not be ignored; even if similar staple goods were subject to reduced rates in the majority of Member States,[77] there were still differences between them which could lead to distortions of competition.

The Commission adopted several proposals in 1987,[78] among which were the harmonization of VAT rates and the generalization of the principle of taxation in the country of origin.[79] As regards the rates, the proposal COM(87) 321 provided that all Member States apply two VAT rates, namely a standard rate between 14 per cent and 20 per cent (which would have included the standard rate of eight countries to twelve)[80] and a reduced rate between 4 per cent and 9 per cent, and established a list of products subject to the reduced rate.[81] Rates harmonization is necessary for the implementation of the principle of origin as, due to the lack of harmonization, a VAT system based on that principle offers a significant advantage to taxable persons established in a state with a low VAT rate. However, two bands of tax rates were proposed rather than two fixed rates and they were determined so that there would have been the minimum of budgetary repercussions for Member States. In addition, in order to compensate budgetary losses of certain Member States due to the abolition of fiscal frontiers, the introduction of a clearing mechanism[82] for intra-Community sales and supplies of services was suggested, in order to allow the redistribution of revenue collected between Member States, through a central account.[83]

77 Philippe (n 48) 52.

78 See the following directive proposal: Commission, 'Proposition de directive du conseil completant le systeme commun de la taxe sur la valeur ajoutée et modifiant la Directive 77/388/CEE' COM(87) 321 final.

79 Taxable persons charge the VAT applicable in their state of residence irrespective of the residence of their customers or the destination of goods and services.

80 Philippe (n 48) 53–54.

81 COM(87) 321 final (n 78), art 1. The list included foodstuffs (excluding alcoholic beverages), energy products for heating and lighting, water supplies, pharmaceutical products, books, newspapers and periodicals, and passenger transport.

82 For further details see Commission, 'Completing the internal market—setting up a VAT compensation mechanism for intra-Community sales' (Working Document) COM(87) 323; which was followed a year later by Commission, 'Proposal for a Council Regulation concerning the definitive uniform arrangements for the collection of VAT own resources' [1988] OJ C128/1, 4.

83 If the place of taxation is the country of destination, countries that export more than they import face potential budgetary losses and vice versa if the principle of taxation at the place of origin is adopted. For example, if the principle of the place of consumption is applied, a taxable person of state A deducts, in the case of purchases from a taxable person in state B, a VAT that is collected by state B. State A loses

Facing the opposition of certain Members States with respect to the proposals mentioned, the Commission had to change its strategy and a transitional regime was adopted in 1991.[84] This supposedly temporary system ensured that intra-EU border controls would be definitively abolished from 1 January 1993, but implied that VAT would be collected in the state of destination through a specific taxable transactions, the intra-community acquisition of goods.[85] New rules were thus adopted with regard to the place of (cross-border) supplies of taxable transactions, and the correlative right of a Member State to collect the tax, which should ensure effective (single) taxation in the EU.[86] Stricter conditions were set as to differentiations as to rates[87] and exemptions among the Member States. Each Member State had to set a standard rate of a minimum of 15 per cent (they are today generally much higher, and range between 17 per cent and 27 per cent) and reduced rates (not lower than 5 per cent) could only apply to a specific list of goods and services.[88] By way of derogation, Member States were allowed to continue to apply lower rates, including zero rates, that existed on 1 January 1991.

After the failure of the first definitive scheme, the European Commission has endeavoured to improve the existing framework on an ad hoc basis. The current VAT Directive entered into force on 1 January 2007, but continued to be regularly modified[89] and was even complemented with an implementing regulation containing some key definitions in 2011.[90] Significant recent reforms concerned the place of supply of cross-border services,[91] anti-fraud and anti-avoidance rules, aspects of trade digitalization,[92] and simplification measures,[93] including at the level of

84 Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers [1991] OJ L376/1.

85 Tax revenue from the imposition of VAT at the final consumption stage should accrue to the benefit of the Member State in which that final consumption takes place.

86 However, double taxation still occurs within the European Union and is mostly caused by a lack of coordination between domestic VAT authorities.

87 They are still not 'uniformized', but only harmonized, or 'approximated'. See Rita De La Feria (2014), 'EU VAT Rate Structure: Towards Unilateral Convergence', in Francis Querol (ed), *La réorientation européenne de la TVA* (Toulouse: Presses de l'Université de Toulouse Capitole), 81–98 for the evolution of EU VAT rates provisions.

88 Council Directive 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending Directive 77/388/EEC (approximation of VAT rates) [1992] OJ L316/1, esp 1–4. See today Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1, Annex III.

89 Lastly, Council Directive (EU) 2018/2057 of 20 December 2018 amending Directive 2006/112/EC on the common system of value added tax as regards the temporary application of a generalised reverse charge mechanism in relation to supplies of goods and services above a certain threshold [2018] OJ L329/3.

90 Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax [2011] OJ L77/1.

91 Council Directive 2008/8/EC of 12 February 2008 amending Directive 2006/112/EC as regards the place of supply of services [2008] OJ L44/11.

92 Council Directive (EU) 2017/2455 (n 19).

93 See the directives on the so-called quick fixes, on simplification measures for small and medium-sized enterprises (SMEs), as well as various measures taken as regards digital services (strengthened

administrative cooperation, where a regulation was adopted.[94] Considering also the relevance of the role of VAT with respect to the EU budget, the fight against tax avoidance and evasion has indeed become one of the main concerns of the European Union, which calls for close cooperation between the competent authorities in each Member State and even with third countries.[95]

In recent years, the European Commission has shown renewed ambition to reform the common VAT system comprehensively and definitively. In particular, on 7 April 2016 the EU Commission presented the so-called Action Plan on VAT, which stresses the need to put in place a definitive unified European VAT regime and to improve cooperation within the EU.[96] Late in 2017, the Council adopted the VAT E-commerce Package[97] and, on 21 November 2019, the Council approved relevant implementing measures,[98] which came into force in 2021.

Some of these initiatives are a continuation of previous ones and aim to make the current system simpler and more efficient: this is the case of measures of simplification for e-commerce and SMEs, as well as the strengthening of administrative cooperation. Others are more innovative and show the ambition of a real break with the past. Reference can be made, for example, to the introduction of a new definitive system for cross-border business-to-business (B2B) trade between

1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States [2018] OJ L311/3. See also the pending document: Commission, 'Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the special scheme for small enterprises of 18 January 2018' COM(2018) 21 final.

[94] Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [2010] OJ L268/1.

[95] The EU is also conscious of the importance of enhancing administrative cooperation with non-EU countries. For example, as regards the European Economic Area, in 2018 the Agreement between the European Union and the Kingdom of Norway on administrative cooperation, combating fraud, and recovery of claims in the field of value added tax was signed. Moreover, the Commission of the EU takes part in the work of the OECD, which has also recently emphasized the role of administrative cooperation and exchange of information within jurisdictions in tackling VAT fraud. Cf OECD, 'The Role of Digital Platforms in the Collection of VAT/GST on Online Sales' (OECD Publishing 2019) 36ff https://doi.org/10.1787/e0e2dd2d-en (accessed 3 June 2022).

[96] Commission, 'Action plan on VAT—Towards a single EU VAT area—Time to decide' (Communication) COM(2016) 148 final. The steps of the Action Plan are outlined in: Commission, 'On the follow-up to the Action Plan on VAT—Towards a single EU VAT area—Time to act' (Communication) COM(2017) 566 final.

[97] Council Regulation (EU) 2017/2454 of 5 December 2017 amending Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax [2017] OJ L348/1; Council Directive (EU) 2017/2455 (n 19); Council Implementing Regulation (EU) 2017/2459 of 5 December 2017 amending Implementing Regulation (EU) No 282/2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax [2017] OJ L348/32.

[98] Council Directive (EU) 2019/1995 amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods [2019] OJ L310/1; Council Implementing Regulation (EU) 2019/2026 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain

Member States, initially for supplies of goods and secondly for services, replacing the current transitional arrangements. This system involves the application of the principle of taxation of cross-border supplies in the Member State of destination (and not the country of origin as the Commission had previously proposed), and the payment of VAT to the supplier in order to reduce the risk of fraud, with the possibility of a reverse charge mechanism where the purchaser would be responsible for the payment of VAT, in case he or she would have the status of a 'certified taxable person'. In addition, important changes were also envisaged in the area of reduced rates, where the Commission—contrary to its traditional, more restrictive position according to which reduced rates are ineffective and distortive—would like to grant more flexibility and room for manoeuvre to Member States in setting VAT rates.[99] In 2022, the Council finally amended the VAT rates regime, without going as far as the original Commission proposal, trying to balance the will to grant more flexibility with the necessity to avoid proliferation of reduced rates for budgetary reasons and the principle of equal treatment between Member States, as well as taking into account health and environmental concerns (namely by phasing out favourable VAT treatment of fossil fuels).[100]

In conclusion, the VAT has been subject to a comprehensive harmonization based on internal market objectives. Even if it has to be regarded as a significant achievement in the EU tax law and policy,[101] at least two important pieces are missing from the puzzle. First, the Commission has not managed to convince Member States to adopt the so-called definitive regime that would ensure full neutrality between domestic and cross-border transactions in the eyes of the taxpayers.[102] This system would require more cooperation between tax authorities (including collecting tax revenues on behalf of other Member States). Secondly, despite proposals from the Commission,[103] VAT is not (yet) a European tax, which would at least in part directly accrue to the EU budget.[104]

[99] Commission, 'Proposal for a Council Directive amending Directive 2006/112/EC as regards rates of value added tax' COM(2018) 20 final. The proposal allows the application of an additional reduced rate between 5 per cent and 0 per cent and replaces the positive list of Annex III by a negative list of goods and services to which reduced rates cannot be applied. This proposal has been criticized in scholarship: Rita de la Feria and Max Schofield, 'Towards an [Unlawful] Modernized EU VAT Rate Policy' (2017) 2 EC Tax Rev 89 https://ssrn.com/abstract=3477386.

[100] Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax [2022] OJ L107/1.

[101] Alexandre Maitrot de la Motte, *Droit fiscal de l'Union européenne* (3rd ed, Bruylant 2022) 512.

[102] See Commission, 'Proposal on the definitive VAT regime of 4 October 2017' COM(2017) 569 final; and Commission, 'Proposal on the definitive VAT regime of 25 May 2018' COM(2018) 329 final.

[103] See Commission, 'Proposal on the system of own resources of the European Union of 29 June 2011' COM(2011) 510 final; and Commission, 'Proposal on the system of own resources of the European Union of 2 May 2018' COM(2018) 325 final.

[104] De la Motte (n 101) 44ff; Edoardo Traversa and Gianluigi Bizioli, 'Solidarity in the European Union in the Time of COVID-19: Paving the Way for a Genuine EU Tax?' (2020) 48 (8/9) Intertax: international tax review 751. The relation between the EU budget and the taxpayers is not direct, but in-

V. The Harmonization of Excise Duties and Environmental Taxes

As mentioned above, Article 113 TFEU also allows harmonization of specific consumption taxes, i.e. excise duties. In contrast with VAT, excise duties are specific indirect taxes. They are applied as an amount per quantity of the product (e.g. per kg, per degree alcohol, etc.)—not *ad valorem* as the VAT—and only determined goods are taxed when used or consumed. In recent times, the objectives underlying excise duties harmonization have been broadened: besides the objective of ensuring the proper functioning of the internal market and the free movement of goods subject to excise duties, health and environment concerns play an increasing role in the shaping of the system.

The distorting effect of an absence of harmonization of excise duties has already been pointed out in the early days of EU integration. The Neumark Report emphasized that the effective charge of excise duties was diversified among the founding Member States; certain goods not subject to any specific tax in several countries, whereas they were in others (e.g. wine, salt, tea, matches)[105]—this convoluted the international trade of taxed goods. Moreover, it stressed that, upon the abolition of fiscal frontiers, the rates should at least be aligned, in order to prevent competition distortions as regards the concerned products, due to different production costs, and—as a consequence—different prices.[106] The Commission fully endorsed those concerns.[107] After several unsuccessful proposals by the Commission in the 1970s, except for manufactured tobacco,[108] the harmonization process as regards excise duties really took off with the single market process. There was indeed a concrete risk that, after the abolition of fiscal barriers, consumers would purchase excise products in the Member States with the lowest excise rates (the so-called phenomenon of 'cross-border fuel tourism', also applicable to tobacco or alcohol products).[109] A general legal framework surrounding excise duties was finally adopted in 1992.[110] A general Directive was approved and specific Directives on tobacco

[105] Neumark Report (n 52) 49.
[106] Ibid 45–46, 50.
[107] See Commission, 'Proposal for harmonizing consumer taxes other than VAT' COM(72) 225 final, 6; Commission, 'Completion of the internal market: approximation of indirect tax rates and harmonization of indirect tax structure' (Communication) COM(87) 320 final, 16–17.
[108] Council Directive 72/464/EEC of 19 December 1972 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [1972] OJ L303/1; Second Council Directive 79/32/EEC of 18 December 1978 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [1978] OJ L10/8.
[109] A literature review on the phenomenon of cross-border shopping can be found in Andrés Leal, Julio López-Laborda, and Fernando Rodrigo, 'Cross-Border Shopping: A Survey' (2010) 16 Intl Adv Econ Res 135.
[110] Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products [1992] OJ L76/1. The Commission issued a first draft framework directive on excise duties in 1972. See Ben JM Terra and Peter J Wattel, *European Tax Law* (Wolters Kluwer 2012), esp ch 7 on 'Excises and Energy Taxation' and,

products, mineral oils, and alcohols followed. The specific Directives determined common definitions of the products subject to excise duties and their basis for assessment as well as set minimum rates.[111] Even if the Member States are solely responsible for collecting excise duties, a common system for the mutual assistance and administrative cooperation is also established 'to ensure the correct application of legislation on excise duties and to combat the evasion of excise duties and the ensuing distortions in the internal market'.[112]

Currently, the general regime applying to all products subject to excise duties is contained in the Council Directive 2020/262,[113] from February 2023 wholly replacing Directive 2008/118/EC,[114] which was a recast of Directive 92/12/EEC. It entails the conditions for chargeability, collection, reimbursement, exemptions, and common provisions concerning the production, processing, holding, and movement of excise goods.

With regard to alcoholic beverages, Directive 92/83/EEC of 19 October 1992 lays down the categories of alcohol and alcoholic beverages subject to excise duty (beer, wine, and fermented beverages other than beer and wine) and the relevant basis on which it is calculated (hectolitre/degrees Plato, or the number of hectolitre/degrees of actual alcoholic strength by volume), and Directive 92/84/EEC of 19 October 1992 sets out the minimum rates of excise duty on these products. Tobacco products are governed by Council Directive 2011/64/EU of 21 June 2011, which defines the categories of manufactured tobacco products (cigarettes; cigars and cigarillos; smoking tobacco), the different principle applying to cigarettes and 'manufactured tobacco other than cigarettes', as well as the minimum rates.

Lastly, Council Directive 2003/96/EC of 27 October 2003 (the 'Energy Tax Directive')[115] replaced the previous two energy directives limited to mineral oils.[116] It provides for harmonized minimum levels of taxation of motor fuels, heating fuels, and electricity[117] and permits exemptions or reduced rates for certain products.[118]

[111] Subsequently, these directives were amended several times and—except those relating to alcohols—repealed and recast.
[112] Council Regulation (EU) No 389/2012 of 2 May 2012 on administrative cooperation in the field of excise duties and repealing Regulation (EC) No 2073/2004 [2012] OJ L121/1.
[113] Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast) [2020] OJ L58/4.
[114] Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC [2009] OJ L9/12.
[115] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [2003] OJ L283/1.
[116] Council Directive 92/81/EEC on the harmonisation of the structure excise duties on mineral oils [1992] OJ L316/12; and Council Directive 92/82/EEC on the approximation of the rates of excise duties on mineral oils [1992] OJ L316/19.
[117] The minimum prescribed levels of taxation vary according to the type of fuels (eg leaded or unleaded petrol, gas oil, kerosene, LPG, natural gas, electricity, coal), their use (ie motor or heating fuel, business, or non-business use) and specific purpose (eg agricultural, public works, vehicles intended for use off the public roadway).
[118] Under certain conditions, Member States are authorized to apply differentiated rates (eg based on product quality or quantitative consumption levels), tax reductions (eg in favour of energy-intensive

The Directive contains explicit references to environmental objectives (the EU's climate commitments), however it cannot (yet) be regarded as an effective instrument of EU environmental and climate policy.[119] Moreover, in some cases, it even constitutes an obstacle to efficient environmental policies at the domestic level.[120] For example, very favourable tax treatment is granted to coal, a highly polluting energy source.[121] For decades, the Commission has tried to modify the taxation framework of energy products to better take into account environmental concerns, in particular the tax treatment of fossil fuels and renewable energies. As far back as 1992, the Commission had proposed the adoption of a harmonized EU CO_2 tax.[122] In a 2011 proposal, the Commission endeavoured to make the level of taxation dependent not only on the type of energy sources but also on their CO_2 emission levels and their net calorific value.[123] However, it encountered fierce opposition by some Member States and the proposal was withdrawn.[124] The difficulty of passing environmental tax legislation at the EU level due to the unanimity requirement is probably one of the reasons why the Commission opted for non-tax instruments to fight against emissions, such as the European Emissions Trading Scheme in 2003.[125] However, the emphasis put by the new Commission on the Green New Deal and its taxation dimension (carbon border taxes) could trigger a long-awaited reform of the EU framework on the taxation of energy products. The Commission's 2021 climate policy package, called 'Fit for 55', adopted in July 2021 includes various proposals, such the application of the EU emissions trading system (ETS) to new sectors, a carbon border adjustment mechanism (CBAM), i.e. a carbon price on a

119 Directive 2003/96/EC (n 111), recital 6 (that refers to the integration clause; article 6 TEC, now art 11 TFEU) and recital 7 (that refers to the EU's commitments in the context of the United Nations Framework Convention on Climate Change and the Kyoto Protocol). See also the even more explicit references to environmental policy objectives in the 1997 Commission Proposal: Commission, 'Proposal for a Council Directive restructuring the Community Framework for the Taxation of Energy Products' COM(97) 30 final.

120 Alice Pirlot, 'Exploring the Impact of EU Law on Energy and Environmental Taxation' in Christiana HJI Panayi, Werner Haslehner, and Edoardo Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar Publishing 2020) 359; Jolanda van Eijndthoven, 'Energy Taxation at the European Level: What Does It Do for the Environment and Sustainability?' (2011) 6 EC Tax Rev 283, 285; Directive 2003/96/EC (n 115), art 2 para 4.

121 The Commission underlined this issue in its 2011 proposal to reform the energy taxation directive (at 3: 'some products are favoured over others, the most favourable treatment being reserved to coal').

122 Commission, 'Proposal of 30 June 1992 for a Council Directive introducing a tax on carbon dioxide emissions and energy' COM(92) 226 final.

123 Commission, 'Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity' COM(2011) 169 final. For a comment see Jacqueline Cottrel and Kai Schlagelmilch, 'Everyone's a Winner with the New Energy Tax Directive' (2012) 22 Intl Tax Rev 55.

124 Commission, 'List of Withdrawn Commission Proposals' [2015] OJ C80/17. The Commission launched a new evaluation of the energy taxation directive in 2017; see Commission, 'Evaluation Energy Taxation Directive' (Commission website) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1478-Evaluation-Energy-Taxation-Directive_en (accessed 2 December 2021).

125 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and

number of energy-intensive goods such as steel, iron, aluminum, cement, fertilizers, and electricity to foreign producers imported from countries with no similar carbon pricing policies as in the EU in order to avoid carbon leakage, as well as a new proposal to revise the Energy Taxation Directive.[126] The latter proposal aims, inter alia, to raise minimum thresholds on fossil products and allow more exemptions/reductions for cleaner energy production.[127]

In the longer run, one could also wonder, as some scholars have proposed, whether climate transition would not also require, besides the adoption of specific indirect taxes, a modification of the structure of VAT for a better impact on production and consumption habits in general.[128]

VI. Conclusion

The harmonization of indirect taxation is inextricably linked to the achievement of the internal market and the Customs Union. Owing to the immediate effects on cross-border trade of national disparities as regards taxes on goods and services, the Commission has been able to convince Member States to adopt common rules in an area where sovereignty concerns are particularly strong. Such a harmonization process has facilitated free movement within the EU.[129] However, it cannot be regarded as a mere technical or legal process but has a clear political dimension.

In both VAT and excises duties, harmonization started slowly in the 1960s and peaked with the single market and the abolition of fiscal frontiers in the early 1990s. Since then, the legal framework has undergone only minor changes. Despite innovative and potentially far-reaching Commission proposals in various fields, such as CO_2 and energy taxation, taxation of financial transactions, or a cross-border VAT, recent reforms concern only relatively marginal aspects of the existing directives—at least as regards the horizontal and vertical division of taxing powers within the EU.

126 Commission, '"Fit for 55": delivering the EU's 2030 climate target on the way to climate neutrality' COM(2021) 550 final. See also Commission, 'Proposal of 14 July 2021 for a Regulation establishing a carbon border adjustment mechanism' COM(2021) 564 final.

127 Commission, 'Proposal of 14 July 2021 for a Directive restructuring the Union framework for the taxation of energy products and electricity' COM(2021) 563 final. For an analysis of the revision of the Energy Taxation Directive, see Marina Bisogno and Elena Masseglia Miszczyszyn, 'La fiscalité au service de la transition écologique de l'UE: le cas de la révision de la directive sur la taxation de l'énergie', in Annales de Droit (Larcier 2022) 139–56.

128 Edoardo Traversa and Benoît Timmermans, 'Value-Added Tax (VAT) and Sustainability in the European Union: A Radical Proposal' (2021) 49(11) Intertax 871; Benoît Timmermans and Wouter MJ Achten, 'From Value-Added Tax to a Damage and Value-Added Tax Partially Based on Life Cycle Assessment: Principles and Feasibility' (2018) 23(11) Intl J Life Cycle Assessment 2217.

129 One should not, however, overestimate the effects of harmonization on intra-EU cross-border trade. For business operators, obstacles still remain. An excellent example is constituted by the absence of a common invoicing system, and more generally the absence of convergence as regards the tax collec-

From a fiscal federalism perspective, paradigm-shifting proposals by the Commission have been rejected, whether introducing innovative forms of cooperation between Member States (such as a joint tax collection mechanism)[130] aiming at deepening tax harmonization in order to create additional tax-based own resources for the EU, or linking tax harmonization with other EU policies, such as environment and climate protection. Despite those setbacks, or maybe thanks to them, harmonization of indirect taxation remains a key area in the deepening of the EU integration, and even more largely an essential tool in allowing the EU and its Member States to play a role in the global shaping of trade and, above all, environmental policies. The Pigouvian nature of environmental taxes—their level should reflect the marginal costs that the use of the products on which they are levied imposes on society as whole, but that are not incorporated in the market prices[131]—makes them ideal candidates for being transferred to the EU level. Moreover, they are prone to important distortionary effects when levied by a single jurisdiction[132] and aim at protecting a general interest common to all Member States and to all EU citizens, and even beyond as the term 'global commons' suggests.[133] Although green taxes do not pursue a budgetary objective, they could also be coupled to a reform of the EU budget, as the recent example of the contribution of non-recycled plastic packaging waste shows.[134] However, from a political perspective, unanimity has and will continue to be a near-impossible hurdle. The Commission's Green New Deal could provide for the long-awaited impetus to move forward in this direction.

130 See the revision of the rules on intra-community trade of goods (so-called definitive system). However, for non-EU traders, a centralized system of collection has been adopted (the mini-one-stop shop). Cf this with Council Directive (EU) 2018/1910 of 4 December 2018 amending Directive 2006/112/EC as regards the harmonisation and simplification of certain rules in the value added tax system for the taxation of trade between Member States [2018] OJ L311/3.

131 Arthur C Pigou, *The Economics of Welfare* (Macmillan 1920).

132 This can be easily observed when looking at the long queues at petrol stations at the Luxembourg border formed by French, German, Dutch, and Belgian cars.

133 See Samuel Cogolati and Jan Wouters (eds), *The Commons and the New Global Governance* (Edward Elgar Publishing 2019); Ourania Karakosta, Christos Kotsogiannis, and Miguel-Angel Lopez-Garcia, 'The Protection of Global Public Goods' (2014) 21 Intl Tax Pub Fin 29.

134 In 2018, the Commission has proposed to introduce new EU own resources in the form of a national contribution calculated on the amount of non-recycled plastic packaging waste, in accordance with the European Strategy for Plastics in a Circular Economy. See COM(2018) 325 final (n 103). A contribution based on the non-recycled plastic packaging waste has been, then, introduced as a new EU revenue source to the 2021–2027 EU budget, as of 1 January 2021; see Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing