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Abstract

The excitement about concluding the Paris Agreement is giving way to the sobering realization that a lot more needs to be done to attain its climate policy objective. More and more Member States in the European Union embrace carbon taxes but the national measures differ strongly. In an integrated European market this challenges the level playing field of competing industries and the transboundary nature of regulating a global pollutant and calls for a solution on EU level (or higher). Past attempts to regulate carbon emissions at EU level by fiscal measures have, however, been markedly unsuccessful. This paper therefore examines introduction issues and barriers of a CO_2 tax at EU level and offers policy suggestions to move forward.

Keywords

EU Law, Carbon taxes, Climate change

JEL codes

H23 Environmental Taxes and Subsidies
K34 Tax Law

1 Introduction

The Paris Agreement has as its objective the strengthening of the global response to climate change in order to keep global temperature rise well below 2 degrees Celsius above pre-industrial levels. It strives to enable the international community to undertake efforts to limit the temperature increase even further to 1.5 degrees Celsius. Despite the US 'election shock waves' that rolled across the Pacific and Atlantic oceans, the international climate coalition still seems to stand. Given that the clean power plan or any other climate policy in the US will not be implemented at the federal level the global climate change efforts will need to be strengthened even further to make up for the faulting US efforts and the possible resignation of the US from the Paris Agreement. But even before the US election the global climate change pledges made in light of the Paris Agreement were lagging far behind of what is necessary. Reilly et al. (2015) have shown that the Intended Nationally Determined Contributions pledges were insufficient to prevent climate change and that even if the pledges were all introduced and maintained, global temperature is likely to rise 3.1-5.2 degrees Celsius above pre-industrial levels by 2100. As a consequence, the international efforts – including the European ones – need to be intensified.

In order to attain the ambitious goals of reducing greenhouse gas emissions in Europe by 80% below 1990 levels until 2050, and in light of the low emission allowance prices under the EU Emissions Trading System of presently around 9 Euros (see https://www.eex.com), it is important to revisit the potential role of other market instruments such as environmental taxation to incentivise a transition towards a sustainable economy. In the last couple of years national carbon taxes have been proliferating in the EU. Currently Denmark, Sweden, Finland, Latvia, Slovenia, Estonia, Croatia, UK, Ireland, Portugal, France but also Norway and Switzerland have a carbon tax.[1] The Dutch government has recently agreed to introduce a carbon tax in some form (Regeerakkord, 2017).

The existing carbon taxes as well as energy taxation in general differ strongly between EU Member States (see Kettner and Kletzan-Slamanig, 2018). In an integrated European market this challenges the level playing field of competing industries and the transboundary nature of regulating a global pollutant and calls for a solution on EU level (or higher). Past attempts to regulate carbon emissions by taxation at EU level have, however, been markedly unsuccessful. This paper therefore examines introduction issues and barriers of a CO_2 tax at EU level. It commences by giving a general background on EU legislative procedures relevant for adopting a carbon tax (section 2) and subsequently addresses several adoption issues and barriers. These include the unanimity requirement (section 3), national legal framework (section 4), national interests (section 5) and institutional memory (section 6). A conclusion will highlight the main findings.

[1] Norway and Switzerland are of course no EU Member States but EFTA countries.

2 EU legislative procedures

The European Union operates on the basis of the 'principle of conferral of power' which is enshrined in Article 5 of the Treaty on the European Union (TFEU). It is a fundamental principle of European law and specifies that the Union can only act within the limits of the competences that Member States have conferred upon it. Since the entry into force of the Lisbon Treaty in 2009 these competences are for the first time listed in the 'catalogues of competence' in Articles 2-6 TFEU. The exercise of these competences is governed by the principles of subsidiarity and proportionality. Member States in turn are bound by the principle of sincere cooperation / duty of loyalty not to distract from the efficacy of EU law (Article 4(3) TEU)).

When the European Union introduces a legislative measure, it requires a legal base. In the context of a carbon measure there are four policy areas were a legal base could be possible: approximation of laws, taxation, environmental policy and energy policy.

In cases where there is a specific or appropriate legal base available within the TFEU, Article 115 TFEU enables the Council, acting unanimously and after consulting the European Parliament and the Economic and Social Committee, to take measures for the approximation of laws that directly affect the establishment or functioning of the internal market. Since 115 TFEU is a general legal base other more specific ones are available and hence more likely to be chosen – especially since some of them also require similar legislative procedures to be followed.

The TFEU (Article 113 TFEU) specifically provides for the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, to adopt provisions for the harmonisation of Member States' rules in the area of indirect taxation. This legal base or its predecessors have for example been used in the context of the 1992 carbon tax proposal (discussed below) and the Energy Tax Directive (Council Directive 2003/96/EC). Article 113 TFEU expressly speaks of indirect taxes – thus, those taxes that are collected at an intermediary from the person who bears the ultimate economic burden of the tax. In light of administrative efficiency it is very possible that a carbon tax at EU level would be designed in the form of an indirect tax. Otherwise the general provision of approximation of laws under Article 115 TFEU or the specific provisions under environmental or energy policy could be used.

When examining the introduction of a carbon tax, especially the areas of environmental policy and energy policy are of interest as they offer the possibility to rely on the ordinary legislative procedure which prescribes qualified majority voting rather than unanimity.

Article 191 TFEU sets out the objectives of environmental policy including combating climate change. The legal base for environmental measures is Article 192(1) TFEU which requires the following of the ordinary legislative procedure (co-decision procedure where the Council and European Parliament decide together) and is decided by qualified majority voting in the Council. In certain situations a special legislative procedure is applied. These cases include inter alia measures that are primarily of a fiscal nature or measures that significantly affect a Member State's choice between different energy

sources and the general structure of energy supply (Art. 192(2)(a) and (c) TFEU). The special legislative procedure requires unanimity voting in the Council and attributes merely a consulting function to the European Parliament. The Economic and Social Committee and the Committee of the Regions are consulted as well.

With the Lisbon Treaty a special legal base for energy policy has been introduced. Before Lisbon energy policies have been based on environmental or internal market provisions. Arguably there is therefore a close relationship between energy and environmental policy (Frenz and Kane, 2010, p. 469). Energy policy in the EU is conducted in the context of the internal market and the need to preserve and improve the environment and solidarity between Member States. It aims to ensure a functioning market and energy security and promotes energy efficiency, renewables and interconnection of energy networks (Art. 194(1)(a)-(d) TFEU) and is following the ordinary legislative procedure. As is the case for provisions falling within the environmental policy realm, also energy measures are subject to the special legislative procedure if they are primarily of a fiscal nature (Art. 194(3)) TFEU).

Given the object and purpose of the EU energy policies enshrined in Article 194, it appears that carbon taxes would in most cases[2] fall within the sphere of environmental policies or in the alternative would be based jointly on the energy and environmental law provisions.

If the proposed measure has a twofold purpose or component with one being predominant while the other one is merely incidental, the measure will be based on the legal basis that is prescribed by the predominant purpose or component.[3] On the other hand, where a measure has several purposes or components which are inseparably linked to each other, and there is no clear 'center of gravity', the measure must be based on the multiple legal bases provided in the Treaty.[4] The legislator cannot rely on multiple legal bases where the procedures laid down for each legal basis are incompatible with each other or where the use of multiple legal bases is liable to undermine the rights of the European Parliament.[5]

It can therefore be concluded that the determination if a carbon tax would fall under energy policy or environmental policy is not a decisive element as multiple legal bases are possible as long as they prescribe the same legislative procedure. What is therefore essential is that the proposed measure does not significantly affect a Member State's

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[2] Unless the legal measure would specifically aim at the functioning energy market, energy security, promotes energy efficiency or renewables and interconnection of energy networks as enlisted in Art. 194 1(a)-(d) TFEU.

[3] Case C-42/97 Parliament v Council [1999] ECR I-868, paras. 39-40; Case C-36/98 Spain v Council [2001] ECR I-779, para. 59; Case C-211/01 Commission v Council [2003] ECR I-8913, para. 39.

[4] Case C-165/87 Commission v Council [1988] ECR 5545, para. 11; Case C-178/03 Commission v European Parliament and Council [2006] ECR I-107, paras 43-56.

[5] Case C-178/03 Commission v European Parliament and Council [2006] ECR I-107, para. 57; Joined Cases C-164/97 and C-165/97 Parliament v Council [1999] ECR I-1139, para. 14; Case C-300/89 Commission v Council ("Titanium dioxide") [1991] ECR I-2867, paras 17-25; Case C-338/01 Commission v Council [2004] ECR I-4829 (Recovery of Indirect Taxes), para. 57.

choice between different energy sources and the general structure of its energy supply (192(2)(c)TFEU) and that the carbon tax that is being proposed constitutes a measure that is 'primarily of a fiscal nature' ((Art. 192(2)(a) TFEU) and 194(3) TFEU).

Cases clarifying the 'primarily of a fiscal nature' provision contained in Art. 192(2)(a) and Art 194(3) TFEU are rare[6] yet the Court will consider the content and the aim of the proposed measure to discern whether to use treaty provisions requiring the ordinary or the special legislative procedure.[7] Measures such as clean energy or environmental taxes are believed to require unanimity in the Council.[8]

There is uncertainty about the meaning of 'primarily' and the meaning of 'fiscal measures'. Each is considered in turn.

In the literature (see Weishaar, 2015, on this) it has been suggested that 'primarily of fiscal nature' would mean that the fiscal aspect of the measure is predominant. This interpretation would prevent fiscal measures to be passed under the ordinary legislative procedure of Article 192(1) or 194(2) TFEU. The effectiveness of Article 192(2) and 194(3) TFEU would however be undermined if the legislator could reduce the importance of the fiscal element so as to circumvent the provision. The main focus of interpreting 'primarily' should thus extend to tax revenue implications to safeguard sovereignty concerns of Member States (see Kreibohm, 2003).

Examining the interpretation of the meaning of 'fiscal measure' in EU law is complicated by the various equally authentic language versions of the Treaty and the differences in national tax laws and legal traditions. At times attempts to interpret 'fiscal measure' are arguing on the basis of national tax law which may not always be very helpful. In any event one can generally distinguish between a narrow interpretation of 'fiscal measures' that only refers to taxes but not to fees and a broad interpretation that encompasses both taxes and fees.[9]

Proponents of a narrow interpretation (only taxes) point towards Articles 192(2) and 194(3) TFEU constituting a derogation to the ordinary legislative procedure[10] and argue that this narrow interpretation safeguards the 'effet utile' (Article 19 TEU) of EU law.[11] Such a differentiation would also be supported by taking note of the conceptual relation of Articles 192(2), 113 and 115 TFEU whereby the latter two expressly refer to tax measures. Consequently 192(2) should therefore also refer to tax measures.

Some authors point out that an inconsistency between environmental fees and fees in other policy areas would arise if the concept of 'fiscal nature' would include e.g.

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[6] No legislative proposals (legislative acts) have been passed under 192(2) TFEU requiring unanimity voting in the area of Environmental policy. Similarly no legislative proposals (legislative acts) have been passed under 194(3) TFEU requiring unanimity voting in the area of Energy policy.

[7] C-36/98 Spain vs. Council [2001] ECR I-779.

[8] Advocate General Léger on C-36/98 Spain v. Council [2001] ECR I-779.

[9] For an elaboration on these concepts, please see Burgers and Weishaar (2018).

[10] Calliess and Ruffert (2011), EGV/EUV Rn 28-32.

[11] Calliess and Ruffert (2011), EGV/EUV Rn 28-32.

regulatory fees since then such measures could be adopted under other treaty provisions with qualified majority but in the area of environment unanimity would be required (Müller, 1994, p. 83). Others suggest that non-tax fiscal charges would in their nature be more selective and hence be less intrusive for the Member States sovereignty than tax measures (Epiney, 1997, p. 57).

There are also proponents of a broad interpretation that subsumes both taxes and fees under the provisions mandating the application of the special legislative procedures (Articles 192(2)(a) and 194(3) TFEU). Freytag (2001) for example argues that the object and purpose of this provision is the safeguarding of the financial autonomy of Member States. The budgetary impact of the measure must thus be considered and consequently a differentiation between different types of measures is not expedient. A broad interpretation of Articles 192(2)(a) and 194(3) TFEU may, however, be obstructed by its function as a derogation to the ordinary legislative procedure (Freytag, 2001, p. 80 ff).

In lieu of the above it can be concluded that there remains some uncertainty about the exact definition of 'primarily of fiscal nature'. This means that in some cases there may be room for discussions on whether a measure proposed by the European Commission should or should not be following the special legislative procedure rather than the ordinary legislative procedure.

3 Adoption barrier: unanimity requirement

If the ordinary legislative procedure can be used the Commission will only require a qualified majority of the Member States but also the support of the European Parliament. In the case that the special legislative procedure is required, unanimity in the Council is required. The European Commission will then need to ensure that its proposal is supported by all Member States of the European Union. This attributes a critical role to each Member State while reducing the importance of the European Parliament to merely being consulted rather than being a co-decision maker.

This affects the impact that these actors have on the legislative process of a carbon tax measure. One should therefore expect that the determination of the legal procedure to be followed would frequently be subject to legal review by the Court of Justice of the EU but there are hardly any cases on clarifying the provision on 'primarily of fiscal nature' in the environmental policy context and none in the energy policy context in light of the legislative procedure to be followed.[12]

The absence of cases in practice can imply several things: 1) it can mean that the determination of the legislative procedure is not important or not contentious; 2) it can

[12] The following cases mention 'fiscal nature' in the environmental context: C-36/98 Spain v Council [2001] ECR I-779, C-211/01 Commission v Council [2003] ECR I-08913, T-210/02 T-210/02 RENV, British Aggregates Association v European Commission , T-156/04 Électricité de France (EDF) v European Commission [2009] ECR II-04503, T-115/94 Opel Austria GmbH v Council of the European Union [1997] ECR II-00039, C-221/06 Stadtgemeinde Frohnleiten en Gemeindebetriebe Frohnleiten [2007] ECR I-09643, C-198/14 Visnapuu, T-106/95 FFSA and Others v Commission [1997] ECR II-00229but only C-36/98 Spain v Council [2001] ECR I-779 touches upon this issue and the court is quite short in its operative part on this point.

mean that there are only few fiscal measures proposed in the environmental policy and energy policy realm; 3) it can mean that in cases that are contentious the European Commission and the respective Member States pursue negotiation rather than a confrontational (Court) approach.

The first point (that legislative procedures would not be contentious) seems unlikely to hold in light of the discussions of the democratic deficit in the EU decision making process and that the European Parliament – as a privileged applicant[13] – can stand for its own interest of being actively involved in important legislative measures. A Member State – itself also a privileged applicant – can challenge a Commission decision if it feels that it should be afforded a veto right in the legislative process. It would also strengthen its bargaining position vis-à-vis the European Commission and other Member States if it held a dissenting position from the other Member States. A Member State might therefore be able to either stop a legislative proposal to introduce a carbon tax or in the alternative might be able to engage in effective logrolling and trade its consent regarding carbon tax legislation for support on another policy issue.

The second point to be examined is if there are only few fiscal measures adopted under the sections of environmental and energy policy that require unanimity voting. An examination of the legislative acts of the European Union shows that there are no measures primarily of fiscal nature that were using Articles 192(2)(a) or 194(3) TFEU as a legal basis.

The third point that the European Commission and the respective Member States pursue a negotiation rather than a confrontational (via the Court) approach seems to be plausible as it would also corroborate the finding above.

The European Commission can resort to informal exchanges of ideas with civil servants from respective Member States (at working floor level) or representatives of the Committee of Permanent Representatives (COREPER) at the Ambassador or Deputy Ambassador level. After 'testing the water' the European Commission can draft a legislative proposal. After discussions at working floor level legislative proposals reach COREPER[14] where often political considerations enter the decision making process and negotiations between Commission and Member State interests can take place.

It appears from anecdotal evidence that in practice the European Commission is prepared to stop initiatives if they are not supported. In March 2015 for example the Commission announced that it withdrew 73 pending legislative proposals contained in its 2015 working program and merely carried 23 new initiatives forward.[15] The power of the European Commission to withdraw proposals is not expressly contained in the Treaty. However Article 293(2) TFEU states that the Commission can alter proposals at any time during the procedure as long as the Council has not yet acted. As presented below the Commission has used this possibility in the context of the Energy Tax Directive.

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[13] See Article 263 TFEU.

[14] The COREPER is based on Article 240 TFEU.

[15] See IP/15/4567 of 7 March 2015.

4 Adoption barrier: national legal framework

The TFEU consists of several equally authentic language versions.[16] These language versions often times employ wording that connects to the national legal systems of the respective Member States. Differences in interpretation of EU law provisions can therefore arise. Moreover, national tax law provisions also differ and therefore a legislative act of the European Union may find different ways of transposition into the national legal framework.[17] Depending on the margin of discretion that is afforded to the Member States and the idiosyncrasies of the national tax law provisions, a proposed measure may be perceived as impacting the sovereignty of a Member State to a varying degree. This in turn may co-determine Council positions of Member States.

5 Adoption barrier: national interests

A Member State's position in the Council is determined by national interests. Examples of energy policy considerations that influence a country's position include its energy mix, endowments with natural resources, transport distances, energy intensity of the economy, export interests, policy sentiments of the electorate, up-coming elections etc. This brief enumeration of elements already outlines that the policy considerations can be quite diverse and so are the relevant actors. State centric models of intergovernmentalism do not adequately reflect such diversity in interests and actors (Hooghe and Marks, 2001 pp. 1-32). Clearly within the framework of unanimity decision making in the Council national governments have a stronger position to decide but they have to balance different interests as they are part of a complex web of interconnected institutions at international, national and subnational organizations and levels of governments. There are various opportunities of public and private interests to enter the policy making process.

National parliaments for example contribute to the good functioning of the European Union (Article 12 TEU). Commission consultation documents (green and white papers and communications) must be sent by the European Commission to national Parliaments upon publication. The same is true for the annual legislative programme or any other instrument of legislative planning or policy.[18] National parliaments may send reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity.[19] It is also up to the national Parliament or each chamber of the national Parliament to

[16] The main legal act governing the official and working languages of the Union, Council Regulation No 1 of 1958, has been amended numerous times. It provides for 24 official and working languages of the EU. See Mańko (2017).

[17] In general see Hartman (2016).

[18] Article 1, Protocol No1 on the Role of National Parliaments in the European Union attached to the Treaties by the Lisbon Treaty.

[19] Article 3, Protocol No1 on the Role of National Parliaments in the European Union. The rules on subsidiarity and proportionality are further described in Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaties by the Lisbon Treaty.

consult regional parliaments with legislative powers.[20] Moreover, national parliaments can also interact and cooperate with each other.[21]

It is, however, not only parliaments that may take an influence on the Council position of a Member State. Even before a legislative proposal reaches the Council the Commission is obliged to consult widely and to take regional and local dimensions of the envisaged action into account.[22] Stakeholders may therefore make their views known and respond to Commission consultations. In practice stakeholders can and do seek to influence various decision makers to shape relevant policy developments. National governments therefore have to balance a multitude of interests of various actors even when they are voting on the basis of a unanimity requirement in the Council. In addition, it deserves mentioning that a Member State's position can alter in exchange for political support for another issue (logrolling).

6 Adoption barrier: Institutional memory

In the past there were several occasions where the European Commission attempted to introduce carbon related (tax) measures and did not succeed. It therefore seems that the European Commission may be inclined to refrain from proposing carbon taxes as they do not seem to be easily accepted. The examples examined below include the 1992 carbon tax, the energy tax directive and the EU ETS auction reserve price.

In 1992 the European Commission proposed a Council Directive introducing a tax on carbon dioxide emissions and energy.[23] Pursuant to this proposal Member States would introduce taxes on the energy content and CO_2 emissions of different forms of energy. Tax rates were to increase over time and the proposal included exemptions for renewable energies and for the most energy-intensive sectors. Its implementation was to be conditional on other OECD competitors following suit.

In the context of the proposed carbon tax in 1992 the Commission relied upon ex-Art. 99 EEC Treaty (now Article 113 TFEU) and ex Article 130s EEC Treaty (now Article 192 TFEU)[24]. At that time, however, Article 130s EEC Treaty on the environment did not yet distinguish between fiscal and non-fiscal measures and required unanimity (as did ex-Article 99 EEC); due to different interests of Member States, (e.g. relating to energy policies) the carbon tax was unsuccessful (Weishaar, 2015).

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[20] Article 6, Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaties by the Lisbon Treaty.

[21] IPEX, the InterParliamentary EU information exchange, may be a useful tool in this regard.

[22] Article 2, Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaties by the Lisbon Treaty.

[23] Proposal for a Council Directive introducing a tax on carbon dioxide emissions and energy. COM (92) 226 final, 30 June 1992.

[24] As amended by the Single European Act, OJ L 169/1, 29.06.1987.

In 1995 the Commission proposed an amendment[25] to its 1992 proposal in order to get it through the Council. The Directive proposed to fix the harmonized structure of the tax but during a transition period Member States could set their tax rates freely and the long-term tax level contained in the 1992 proposal was reduced to a non-binding target.

In the run-up to the Nice summit on Enlargement of the European Union the European Commission issued a communication (COM(2000) 114 final) proposing the introduction of a qualified majority voting for environmental taxes. It was the Commission's view that the accession of new Member States with economies undergoing important structural changes would require an increased recourse to fiscal measures so as to ensure the pursuit of the environmental objectives of the EC Treaty including sustainable development and the preservation and improvement of the environment. Therefore, the Commission considered that taxation measures that have as their principal objective the protection of the environment laid down in particular in Article 174 and have a direct and significant effect on the environment also required qualified majority voting.[26] The Commission proposed to amend Article 93 EC now (now 113 TFEU) making the application of qualified majority voting mandatory in those cases.[27] As it is evidenced by the fact that the legislative change was not taken up into the Nice-Treaty, the Member States have been rejecting it.

Several years after tabling the proposal COM(2000) 114 final, in 2003 and based upon Article 113 TFEU (ex-Article 93 EC) which requires unanimity voting, the European Commission introduced the Energy Tax Directive (ETD)[28] to reduce the distortions caused by divergent national tax rates; to remove competitive distortions between mineral oils and the non-legislated products used in transport and for heating, as well as electricity; to create incentives for energy-efficiency and emission reductions; to allow Member States which so wished to apply a CO_2/energy tax; and to combat unemployment by allowing Member States to compensate increased revenues from energy taxation by lower taxation of labour. The 2003 Directive widened the scope of the minimum excise duty system to include all energy products, including coal and coke, natural gas and electricity. It also updated the minimum rates for mineral oils, which had not been revised since 1992.

The European Council requested the Commission to consider a review of the ETD to bring the Directive more closely in line with the EU's energy and climate change objectives.[29] The Commission proposed a revised ETD[30] in 2011 to remove the

[25] Amended proposal for a Council Directive introducing a tax on carbon dioxide emissions and energy. COM (95) 172 final, 10 May 1995.

[26] COM(2000)114 final of 14 March2000, p.8.

[27] COM(2000)114 final of 14 March 2000, p.13.

[28] The Council Directive 2003/96/EC of 27 October 2003, COUNCIL DIRECTIVE 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283/51, 31 October 2003).

[29] European Council of 13-14 March 2008, Presidency conclusions (7652/1/08 rev.1, 20/05/2008).

[30] See The Proposal for a Council Directive amending Directive 2003/96/EC (COM 2011, 169, p. 3). See also IP/11/468, Energy taxation: Commission promotes energy efficiency and more environmental friendly products, Brussels, 13 April 2011.

imbalances and distortions, and to support the EU's wider environmental and energy goals. A central objective was to have the energy taxes reflect the CO_2 emissions as well as its energy content and to avoid double taxation by taking into account which sectors were already covered by the EU Emissions Trading System (EU ETS). Following the unsuccessful negotiations between the EU Member States in the Council, the proposal was withdrawn by the Commission in 2015.[31] The European Commission was thus unsuccessful in implementing its vision of a stronger carbon orientation of the ETD and the imbalances will therefore continue to exist. It bears mentioning though that at the moment a review of the ETD is under way with the scope to examine if the ETD is adequate to ensure the proper functioning of the internal market, if it is in line with other EU policies (e.g. energy, environment, competition, transport), initiatives or measures (e.g. decarbonisation of transport; the measures taken in the development of the deployment of alternative fuels infrastructure; standards for efficient cogeneration production, etc.) and if its provisions are in line with legal and technological advances.[32] This review might spark a new impetus for discussions to sharpen the CO_2 focus of the ETD.

Another situation that seems to indicate that the European Commission does not easily embrace tax measures in the area of the environment is the way how the structural reform review addressing the oversupply situation in the EU Emissions Trading System (EU ETS) was conducted. When the Commission invited a response to its report on the state of the European carbon market in which the proposed structural reform options were described, it subsumed reserve price auctions under the heading of 'discretionary price instruments'.[33]

In the subsequent stakeholder meetings none of the invited stakeholders in the session on discretionary price instruments was addressing such price instruments. It can of course only be speculated as to why the Commission is so disposed against setting a price trajectory but informal conversations with Commission staff suggested that one element was the fear that it would bring the auctions towards fiscal tax measures and that this was deemed to be undesirable.

7 Concluding remarks

The paper has examined the introduction issues and barriers for a CO_2 tax at EU level. The review of the EU legislative procedures indicated that there is legal uncertainty relating to the actual wording and application of the environmental and energy legal basis and if the ordinary legislative procedure employing qualified majority voting could

[31] COM (2014) 910 final, ANNEX to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015, A New Start Strasbourg, 16 December 2014. The Commission decided on the withdrawal of 73 pending legislative proposals and the list has been published in the Official Journal of the EU (OJ C 80/17, 7 March2015).

[32] Evaluation Energy Taxation Directive available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-4224148_en.

[33] COM (2012) 652 final of 14 November 2012.

be relied upon. If a CO_2 tax would need to be introduced by means of the special legislative procedure, unanimity voting would be required. In practice there has not been an example where a legislative act was based on the unanimity requirement under Articles 192(2)(a) or 194(3) TFEU. It is submitted that the Commission may refrain from taking legislative action under the unanimity requirement if it is apparent from informal pulsing that there is significant Member State opposition.

Additional barriers to introducing a CO_2 tax at EU level stem from national legal systems that influence the transposition of EU rules and co-determine the position of a Member State in the Council. It is of course not only the legal embedding that is important in this respect but also the national interest of a Member State. Even though the Member State government will ultimately have to cast the vote in the Council and represent the 'national interest', interests within a country are very diverse and dependent upon a multitude of factors and actors. Legislative processes in the EU prescribe consultations and that relevant national actors such as the national parliaments are duly informed and part of the discourse. It is therefore submitted that the decision making process even under the unanimity requirement is diverse. Stakeholders can seek out different fora at various levels of government to influence the adoption of a CO_2 tax.

Besides the above mentioned barriers to introduce a CO_2 tax at EU level, it is also pointed out that the European Commission has made several unsuccessful attempts to legislate in the area of climate change regulation and may therefore be reluctant to invest time in a course of action that may not be embraced by the Member States.

While the above would suggest that the prospects of adopting a CO_2 tax on EU level is at best a scant possibility in practice, EU law does provide for a course of action. In specific circumstances a group of Member States may be allowed to act upon a legislative proposal of the European Union and undertake measures that would otherwise fall within the ambit of the competences of the Union. The so-called 'enhanced cooperation' is a procedure where a minimum of nine EU countries are allowed to establish advanced integration or cooperation without the other EU countries being involved. The coalition of the willing Member States benefits from the EU structures. It is regulated by Article 20 TEU and Articles 326 to 334 TFEU. The procedure can help to overcome the dead-lock of proposals which are blocked by an individual country or a small group of countries who do not wish to be part of the initiative.

After obtaining the consent of the European Parliament the European Commission can propose an enhanced cooperation of a group of Member States to the Council. This procedure has already been employed in the fields of divorce law, and patents, and is approved for the field of a financial transaction tax.[34] Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties (Article 20(1) TEU).

The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least

[34] IP/13/115, 14 February 2013, http://europa.eu/rapid/press-release_IP-13-115_en.htm.

nine Member States participate in it (Art. 20 (2) TEU) and will not be part of the *acquis* (Art. 20 (4) TEU). Any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them (Art. 326 TFEU). Member States would therefore need to first petition the Commission to draft a proposal that upon failing to attain sufficient support in the Council, could be pursued by at least 9 Member States. In the alternative Member States could petition the Commission to propose again the proposal to amend the ETD that has been withdrawn since it contains provisions to strengthen the carbon element in energy consumption. Since the ETD is currently under assessment it would, however, need to be seen how the Commission will react.

Support for more environmental taxation may also come from an unexpected direction: the Brexit. Britain's exit leaves a considerable budget gap at Union level. New income bases need to be identified. The Commissioner for the EU Budget recently proposed the introduction of a Plastic tax and a change of the EU ETS (Morgan, 2018). Perhaps a carbon tax could be considered as well.

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