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DIALOGUE AND DEBATE: SYMPOSIUM ON DATA TAX AND DIGITAL CONSTITUTIONALISM

Why EU revenue matters: A case for an EU digital levy

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Abstract

This Article draws upon and connects three different developments: the 'internationalisation' of tax law and EU tax law, specifically; the increasing digitalisation of the economy, and the European Union's need for more revenue to deal with the financial consequences of the COVID-19 pandemic and other policy priorities. It is explained why the taxation of data per se cannot be addressed at the global level at present and why the focus of research has to lie on the taxation of the different business models of the digital economy. In the absence of a global agreement as to how the digital economy should be taxed, the reaction of the European Union to such a fundamental undertaking remains uncertain and politically contingent on the outcomes of negotiation at the OECD level. Most particularly, on the so-called Pillar One agreement. A seemingly temporal solution to the taxation of the digital economy, the so-called DSTs (Digital Services Taxes) have been adopted by Member States of the EU and third countries, but their future remains uncertain. Amidst these developments, the EU has also looked for ways to increase its resources and to finance its post-Covid ambitious recovery plan. This need has led to a reconsideration of whether EU taxes could finance the EU budget (next to the Union's own resources, which remain for the main part transfers from Member States). In this Article, I argue that beyond tax design considerations and potential constitutional impediments, the EU revenue side should be emphasised in the discussion. Therefore, I suggest that the Union should ensure that at least part of the revenue arising from digital taxation should be channeled to the supranational budget. Whether Pillar One gets adopted or not, the potential introduction of an EU digital levy, ideally by way of an EU tax, could help overcoming several shortcomings of the present tax status quo and could result in an increase of the resources at the disposal of the EU in a fashion compatible with the imperatives of democratic legitimacy.

Keywords: data taxation; Pillar One; EU digital levy; EU budget; digital economy

1. Introduction

The fact that both the 'EU (European Union) world' and the 'tax world' are undergoing significant transformations makes it all the more difficult to observe these changes *in tandem*, and even more so to make normative claims that address and comply with both 'worlds'. Taxation is, however, becoming increasingly an 'EU matter', not only because of the harmonised Value Added Tax (VAT) law,[1] but also because of the long-standing interplay between national tax measures and primary EU law, notably the fundamental freedoms and state aid rules as well as the rapidly increasing secondary EU law in direct taxation.[2]

[1]Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax OJ L 347, 11.12.2006, p 1–118.

[2]A series of groundbreaking directives were adopted recently, most prominently Directive 2016/1164 Laying down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market OJL193/1 ('the ATAD') and the

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At the same time, the increasing digitalisation of the economy has undoubtedly affected many different sectors and policy areas at the global level. With respect to international taxation, the Organisation for Economic Co-operation and Development (OECD) identified in the Action 1 Final Report on Addressing the Tax Challenges of the Digital Economy of the Base Erosion and Profit Shifting Project (BEPS), two major challenges that needed to be addressed: (i) where to tax profits in a digitalised economy that does not necessarily entail physical presence in one place and (ii) how to determine value creation and the allocation of profits across different jurisdictions.[3] In other words, how profits should be attributed in new digitalised business models that are driven by intangible assets, data, and knowledge. The 'international tax framework' that still relies on physical presence to allocate taxing rights, does not suffice to deal with these business models. Thus, dealing with these challenges requires several amendments of well-established existing principles, ideally in a coordinated manner.

The taxation of the tech giants in the European Union (EU) may appear to some as foreign to the so-called digital constitutionalism debate. The Union's taxing powers (if any) as well as the constitution and functions of the EU budget have always been considered as 'constitutional questions'. Deciding on the future involvement of the Union in taxing the digital economy should also be seen as a constitutional question. Given that the EU is currently at the crossroads, faced with a choice between coordinating national tax systems, taking the high road and creating an EU digital tax or doing nothing at all,[4] questions about the EU's political, policy (and revenue) choices resurface. Should the Union act at all (a political decision informed by politico-economic considerations), should it introduce an EU tax (internal constitutional, political and economic question) and when/how could the eventual taxes comply with well-established fundamental EU values, such as fairness?

In this Article I will argue that the choice of an EU digital levy will not only allow the Union to meet its international commitments, but to do so in a way that pays due attention to fundamental constitutional values of the EU, like solidarity, redistribution, and fairness. At a normative level, the introduction of such a tax, as will be advocated in this Article, would satisfy all the benefits the levy of a genuine EU tax could bring about, including a more democratically legitimised EU. Due to its nature, such a tax comes with the additional benefit, as it will be shown below, of contributing to the increase of the resources at the disposal of the EU in a way that overcomes the traditional arguments against national contributions, like the '*juste retour*' argument.

As the EU digital levy – a central theme of this contribution, is effectively a digital tax, I will begin by briefly explaining what digital taxes are, how and why they were conceived, how they are technically constructed, and what purposes they serve. The pressing need to tax tech giants has resulted in many existing different digital taxes across the world, as will be discussed in section 2. Because this lack of coordination may create additional tax and administrative burdens for the taxpayers, the OECD has been working in the past years towards finding a fair solution for the allocation of taxing rights in the digital economy. This solution is currently being discussed at a global level, but it appears unlikely to be adopted. Section 3 discusses the EU's reactions to the taxation of the digital economy and the political contingencies the EU and domestic digital taxes hinge upon. If a multilateral solution is adopted at the OECD level, the EU will have to implement it by providing an approximation of laws directive that would follow the global solution. If not, then other solutions on the taxation of the digital economy could be considered at the EU, global, and national levels. This paper attempts to explain why an EU digital levy would be the preferable

Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union OJ L328/1 – 58 (the 'GloBE Directive').

[3]OECD, Addressing the Tax Challenges of the Digital Economy, Action 1.

[4]The proposal for the creation of such an EU digital levy is not alien to the EU. Famously, the EU had announced that it would introduce its own 'EU digital levy' if a global solution did not progress. See, for instance, Matt Thompson, 'EU Countries Committed to Digital Levy, Leaked Doc Says', Law 360, 24 March 2021.

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solution on several accounts, including from a justification of taxes and a fairness perspective. Section 4 will explain why considering the spending side of the revenue matters. It will discuss why an EU digital levy would be a desirable solution for the EU on four grounds: first, for satisfying both an imminent political and revenue need, in the most coordinative way possible. Second, because such a tax would align with both the benefit and the ability to pay principles – the basic principles for the justification of taxation, on the spending side. Third, such a tax would meet several fairness criteria and fourth, because an EU digital levy would make the perfect candidate to introduce the first genuine EU tax. As will be argued in this Article, beyond providing the general benefits of giving the EU fiscal capacity, it also counters commonly used arguments against national contributions to the EU budget. The concluding section will recapitulate the findings.

2. Digital services taxes

A. Challenges of taxing the digital economy

Despite general consensus that 'data is the new oil'[5] and that data is an increasingly important value driver, one can observe highly divergent views across the tax world on whether 'data' can qualify as an asset and, if so, under what circumstances.[6] This does not, however, prevent its taxability;[7] yet it adds to the complexity of the question *if* and if so, *how* data should be taxed as well as how data should be valued. Thus, a specific tax targeted *on data only*, a so-called 'data-tax', despite its many merits,[8] would have to be established based on several contingencies.

In the absence of a sophisticated and granular supranational system of taxation of the digital economy, a more 'general' and open system that would target different digitalised business models and the 'tech giants' especially, would appear more viable – at least in the beginning. The need for such a system resulted in the introduction of Digital Services Taxes (DSTs) by several countries within and outside the Union. Resort to DSTs arose from a combination of two factors: the urgency to deal with the digitilisation of the economy in a meaningful (and profitable) way that would put a halt in tax base erosion – the revenue states were losing due to their inability to tax digital business models, and the lack of a multilateral agreement on how to do so. DSTs would allow different states to raise revenue from several digital services that were 'effectuated' in their territory. These digital services could be data-based, arise from e-commerce activities or otherwise. Given their potential to generate revenue, it comes as no surprise that many national DSTs were introduced as a source of revenue post-Covid.

The activities that would trigger DSTs would require a high level of user participation.[9] Thus, such taxes are not necessarily data-centred, but they can certainly apply to data-driven business models. Accordingly, DSTs have not been targeting the taxation of data per se, neither do they aim at monetising and taxing the value of data. Instead, the idea behind DSTs has been to establish, for the first time, a way to tax businesses that operate in a digital world, even in places where they have no physical presence. Thus, DSTs could be understood more as an exercise of testing well-established tax principles with an adjoining element of (social) justice that builds on the claim that these 'tech giants' do not pay enough taxes because of the obsolete tax rules that target only brick

[5]J Sadowski, 'When Data Is Capital: Datafication, Accumulation, and Extraction' 6 (1) (2019) Big Data & Society, 1–12 at 4.

[6]W Haslehner and M Lamensch, 'General report on value creation and taxation: outlining the debate' in W Haslehner and M Lamensch (eds), *Taxation and Value Creation* (EATLP International Tax Series, IBFD 2021) 25.

[7]Ibid.

[8]For a normative consideration on the characteristics of such a tax see O Marian, 'Taxing Data' 47 (2) (2022) Brigham Young University Law Review 511.

[9]That was the case, for instance, with the EU Commission, Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, 21 March 2018, COM(2018) 148 final (hereinafter the 'EU DST Proposal') at 7.

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and mortar businesses.[10] Therefore, at first sight national DSTs do not come with any 'superior' normative and axiological choices, but rather with revenue considerations and fairness proclamations; as some states' solution to the need for a fair taxation of the digital economy.

These fairness concerns were manifested by the fact that, despite their large market share in the European economy (and beyond), tech companies were subject to a very low effective tax rate.[11] The systematic payment of the lowest effective corporate tax rates by the most valuable and highly digitalised multinational enterprises (MNEs) such as Google, Amazon and Facebook, facilitated the concentration of wealth in a small number of companies and the individuals who control them.[12] This was due to both the nature of digital business models, which do not require physical presence, the inadequacy of international tax principles to deal with this, and the increasingly sophisticated tax planning techniques. The opportunities for many such MNEs to minimise their tax burden had also rendered citizens aware of tax fairness issues. Especially citizens of the source states (where the income arose but could not be taxed) were, effectively, asked to make up the revenue shortfalls for the loss of that potential revenue.[13]

These considerations justify the fact that the groundwork of the OECD on the taxation of the digital economy was directed, after all, to ensuring that multinational enterprises paid their *fair share* of tax wherever they operated.[14] This was perceived as a double (fairness) problem that required a two-step approach. At a first level, an international debate was initiated to develop a consensus about a fair tax system with fair effective tax rates, that resulted in the so-called Pillar Two rules that established a minimum effective tax rate of 15 per cent.[15] At a second level, and once the minimum tax rate had been agreed in step one, internationally agreed rules on the allocation of taxing rights – the so-called Pillar One, would be developed to give effect to this *fair* tax system. The main idea at OECD level was to solve both these multidimensional challenges through international consensus.

DSTs were dealing with the second main question in the international tax debate; where to tax MNEs' profits and what to tax (what value is being created), *on their own terms*. This meant that different national DSTs targeted different digital business models (eg the Hungarian tax on advertising services and the broad Italian DST on digital transactions)[16] or relied on specific criteria and thresholds to identify which business models would fall within their scope (eg scale and level of user participation).[17] The underlying idea was based on the premise that if there was a nexus with these states' territory, ie the territory acting as 'the market', this could give them a taxing right. The basic 'fairness' question of the nexus that gave this right was decided by national legislation on different criteria (eg user participation).

[10]Although this claim is rather questionable, see P Pistone, JF Pinto Nogueira and A Turina, 'Digital Services Tax: Assessing the Policy Reasons for its Introduction in the European Union' International Tax Studies (IBFD 4/2021) 4 ff.

[11]The fairness argument on this ground was also made by the European Commission, see Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM (2017) 547 final (21 September 2017).

[12]European Commission (2018) Impact Assessment accompanying the document Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence.

[13]L Corrick, 'The Taxation of Multinational Enterprises' in Th Pogge and K Mehta (eds), *Global Tax Fairness* (Oxford University Press 2016) 173.

[14]Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy 1 July 2021, OECD/G20 Inclusive Framework on BEPS <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf> accessed 19 September 2024.

[15]The Pillar Two OECD Model Rules suggest that a minimum corporate tax rate, that is a 15 per cent effective tax rate, should apply to multinational corporations that have had consolidated revenue above EUR 750 million in at least two of the last four fiscal years. It has been implemented in the EU through the GloBE directive (supra, n 2).

[16]For a criticism of the tax, see D Deak, 'Hungarian Tax on Digital Advertising Services in the Spotlight of Challenges' 51 (4) (2023) Intertax 309.

[17]Some of these criteria were used in the EU Digital Services Tax Directive Proposal and have been criticised in literature. Indicatively, D Stevanato, 'A Critical Review of Italy's Digital Services Tax' Bulletin for International Taxation (July 2020) 413.

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B. The development and nature of DSTs and Pillar One

In principle, a DST is a destination-based tax applied to the gross revenues of large digital MNEs operating in market jurisdictions, for example, providing social media, e-commerce, or advertising services with users or consumers in the jurisdiction.[18] While national DSTs were already introduced in several countries across the world in 2013 and 2014,[19] an attempt to define the characteristics of DSTs was only very recently included in the OECD's Public Consultation document.[20]

> According to this document, a DST (or a similar measure) is based on three cumulative conditions and includes measures that: (1) impose taxation based on market-based criteria; (2) are ring-fenced to foreign and foreign-owned businesses; and (3) are placed outside the income tax system (and therefore outside the scope of treaty obligations) [. . .] [I]t would not include, among others, value-added taxes, transaction taxes, withholding taxes that are treated as covered taxes under tax treaties, or rules addressing abuse of existing tax standards.[21]

The discussions on a multilateral solution to the allocation of taxing rights in the digital economy, the 'Pillar One project', put into question the survival of national DSTs. The idea behind the OECD's Pillar One proposal, which was part of the BEPS Action 1, was that part of the 'digital' MNE profits would be re-allocated to the countries where they would sell their products and provide their services, in other words, where their *consumers* are. Taxing rights would thus be (re-) allocated – in a coordinated manner – to 'market jurisdictions' even when the MNEs would have no physical presence there. To effectuate this multilateral approach, a multilateral convention (MLC) for allocating taxing rights in the digital economy would have to be concluded.

The suggested tax solutions under Pillar One have been fiercely criticised on several grounds, including their potential problematic relationship and co-existence with domestic tax rules,[22] their complexity[23] and their reflection of the value created or contributed by the market and/or users.[24] In brief, the rules contemplated under Pillar One would introduce a steeply progressive tax system targeting very high revenue MNEs only, which, usually, are not residents of the targeted 'market jurisdiction' at issue.[25] While Pillar One intends to leave aside certain businesses with tangible activities, such as the extraction of natural resources, or banking activities, the imposable 'digital tax' remains a direct tax levied on a specific part of taxpayers' income, defined by a formulaic key of the allocation of gross profits within a market jurisdiction. Tax sovereignty is therefore exercised by the

[18]By 'destination-based' tax is meant a 'market jurisdiction' tax. In other words, a tax imposed by the market state where users or consumers are, or where the services are consumed.

[19]First generation of DSTs include Italy's levy on digital transactions, Hungary's advertisement tax and France's tax on online and physical distribution of audio-visual content.

[20]OECD, Public Consultation Document: Pillar One – Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures (20 December 2022–20 January 2023), available at <https://web-archive.oecd.org/2022-12-20/645902-public-consultation-document-draft-mlc-provisions-on-dsts-and-other-relevant-similar-measures.pdf> accessed 19 December 2024.

[21]Ibid., 2.

[22]J Li, 'The Legal Challenges of Creating a Global Tax Regime with the OECD Pillar One Blueprint' 75 (2) (2021) Bulletin for International Taxation.

[23]See for instance, J Colliard, L Eden and C Georg, 'Tax Complexity and Transfer Pricing Blueprints, Guidelines, and Manuals' 50 (2021) Tax Management International Journal 1.

[24]R Maheshwari, 'Are the Revenue Sourcing Rules of the OECD's Pillar One Fulfilling the Objective of Taxing Value Creation?' 77 (7) (2023) Bulletin for International Taxation.

[25]Amount A that works as an allocative of taxing rights rule applies only to MNEs with revenues higher than EUR 20 billion and with profitability greater than 10 per cent. These thresholds apply at group level (ie to the entire MNE) based on the financial data in an MNE's consolidated financial statements.

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mere access to the domestic (large) market but not on a net income basis that best reflects the ability-to-pay principle.[26]

Should agreement be reached on Pillar One, unilateral measures like national DSTs should be removed in favour of the global solution that Pillar One would introduce.[27] Otherwise, as the OECD has pointed out, the imposition of unilateral DSTs 'can be inefficient and lead to disputes with other countries – both because they may create double taxation and because they can lead to trade retaliation.'[28]

The political sensitivity of the taxation of the digital economy is great, considering that the USA, the driver behind the politics of international taxation,[29] is stalling the Pillar One project. This halt may have detrimental effects for the future of the 'new multilateral approach' and Pillar One, specifically. While the US has been central in building multilateral cooperation in international tax, it has done so with a view to bolstering the US' competitiveness.[30] This shift towards US-centric multilateralism, that has been characterised as a 'hegemonic multilateralism',[31] makes the role of the US pivotal in all upcoming international reforms. If the United States rejects Pillar One why would another country want to adopt the two-pillar solution when unilateral, tailor-made solutions may be available?

However, as there are still hopes that Pillar One may pass, DSTs are still 'on hold'. Unilateral DSTs have not been welcomed, as expected, especially by businesses that would bear the tax and states that are homes to such businesses, most notably, the US.[32] By way of example, the US has attacked unilateral DSTs introduced by Austria, India, Italy, Spain, Turkey, and the UK, on the basis that they excessively burdened US digital companies and, thus, they violated international tax principles and constituted discriminatory trade measures.[33] The US' opposition especially to the famous French 'GAFA tax' in July 2019[34] culminated with the finding by the US Trade Representative that the DST, discriminated against US digital companies and because of its application to revenues unconnected to a presence in France contravened prevailing international

[26]C Brokelind, 'The Power to Tax in International and EU Tax Law: Who is Sitting Behind the Wheel?' in J Lindholm and A Hultqvist (eds), *The Power to Tax in Europe – Swedish Studies in European Law Volume 14* (Hart Bloomsbury 2023) 191 at 199.

[27]OECD, Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy Frequently asked questions (July 2022) p 4, available at <https://www.oecd.org/tax/beps/faqs-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2022.pdf> accessed 19 September 2024.

[28]Ibid.

[29]See, eg, R Eccleston, *The Dynamics of Global Economic Governance. The Financial Crisis, The OECD and the Politics of International Tax Cooperation* (Edward Elgar Publishing 2012), according to whom 'since the 1960s the broad contours of international tax cooperation have been defined by changing US policy references', 134. See also J Sharman, *Havens in A Storm. The Struggle for Global Tax Regulation* (Cornell University Press 2006); L Hakelberg, *The Hypocritical Hegemon – How the United States Shapes Global Rules against Tax Evasion and Avoidance* (Cornell University Press 2020).

[30]US Department of the Treasury, The Made in America Tax Plan (April 2021), available at <https://home.treasury.gov/system/files/136/MadeInAmericaTaxPlan_Report.pdf> accessed 19 September 2024.

[31]J Li, 'China's Rising (and the United States'Declining) Influence in Global Tax Governance? Some Observations' 1 (2021) Bulletin for International Taxation 13.

[32]The US has used Section 301 of the US Trade Act of 1974 against those unilateral DSTs to impose trade sanctions on states that allegedly violate international trade agreements or engage in 'unjustifiable' or 'unreasonable' acts burdening US commerce. In the case of DSTs, the US grievance was not the violation of any trade agreements, but that DSTs effectively discriminated against US corporations: most tech giants that reach the revenue thresholds of DSTs are US tax residents.

[33]Office of the US Trade Representative, 'USTR announces next steps of Section 301 Digital Services Taxes Investigations' (26 March 2021).

[34]GAFA stands for the American multinationals that the tax is primarily targeting Google, Apple, Facebook and Amazon. The French DST consists of a 3 per cent tax on companies that generate more than EUR 750 million in global digital sales and more than EUR 25 million of digital sales in France. The tax is imposed on gross revenue from digital services generated in France. According to French outlets the GAFA tax has brought to France 621 million EUR of revenue in 2022, 700 million in 2023 and is expected to bring 800 million in 2024. See indicatively extracts from the French press: T Sasportas, 'La taxe GAFA va rapporter 800 millions d'euros en 2024' (BFM Business 2023), and J Pelois, 'La taxe Gafa va rapporter gros à la France en 2024: près d'un milliard d'euros!' (Capital.fr, 09 October 2023).

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tax principles and was particularly burdensome for the in-scope US companies.[35] In 2020, the Trump administration announced 25 per cent tariffs on $1.3 billion worth of trade with the EU in response to the French DST.[36] These tariffs had a delayed implementation date and have been on hold. Despite hopes for a multilateral solution, countries, like Canada, have decided not to wait any longer and have moved on with introducing a unilateral DST as of 1 January 2024. With Pillar One being stalled, the USA still has an easier task in opposing unilateral solutions rather than going against a solution that has been endorsed by all states, but her.

C. Pillar One: The impact on the EU

A major consideration in the Union's and Member States' next moves relates to political contingency. After the adoption of the GloBE directive and the Union's expressed and proven commitment to abide by Action 1 of BEPS, Pillar One remains in a limbo state at a global level. The scope of the new rules (targeting primarily US companies) and the re-allocation of taxing rights between 'home' jurisdictions and 'market' states have been contentious issues that prevent the participating states (members of the Inclusive Framework) from reaching consensus.[37] The technical details of the profit allocation and nexus rules have also been disputed.

This failure to secure global consensus has a significant impact on the international tax landscape, as it allows individual states to act independently. The initial deadline the OECD had imposed on the MLC coming into effect was 31 December 2023.[38] According to that statement, if the MLC was not in effect by that date, members of the OECD Inclusive Framework would be free to impose new DSTs. The initial ambition did not materialise and, after several controversies on the technical details of Pillar One (Amount A), the text of the MLC,[39] the Explanatory Statement[40] and the Understanding on the Application of Certainty for Amount A of Pillar One,[41] which reflected the consensus achieved so far among members, was only published in October 2023. As per the texts' cover note, these publications intended to 'ensure transparency; facilitate the ability of some members of the Inclusive Framework to engage in internal processes necessary to enable swift adoption [. . .]; facilitate resolution of remaining differences by the Inclusive Framework; and

[35]Office of the United States Trade Representative Ambassador Robert E. Lighthizer, Report on France's Digital Services Tax Prepared in the Investigation Under Section 301 of the Trade Act of 1974 (2 December 2019) at 77.

[36]D Bunn, 'Digital Taxes, Meet Handbag Tariffs', Tax Foundation, 10 July 2020 <https://taxfoundation.org/blog/us-french-tariffs/> accessed 19 September 2024.

[37]The Inclusive Framework on BEPS brings together over 140 countries and jurisdictions, including many developing countries, to collaborate on implementation of the BEPS Package.

[38]As per the OECD/G20, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (8 October 2021) 3: 'The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC'. Available at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> accessed 15 September 2025.

[39]OECD/G20 Inclusive Framework's Task Force on the Digital Economy (TFDE), 'The Multilateral Convention to Implement Amount A of Pillar One – Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy', available at <https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> accessed 19 September 2024.

[40]OECD Inclusive Framework's Task Force on the Digital Economy (TFDE), 'Explanatory Statement to the Multilateral Convention to Implement Amount A of Pillar One – Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy', available at <https://www.oecd.org/tax/beps/explanatory-statement-multilateral-convention-to-implement-amount-a-of-pillar-one.pdf> accessed 19 September 2024.

[41]OECD Inclusive Framework's Task Force on the Digital Economy (TFDE), 'Understanding on the Application of Certainty for Amount A of Pillar One – Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy', available at <https://www.oecd.org/tax/beps/understanding-on-the-application-of-certainty-for-amount-a-of-pillar-one.pdf> accessed 19 September 2024.

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prepare the MLC for signature'. Despite the lengthy unsuccessful deliberations towards a commonly accepted outcome, members of the Inclusive Framework reaffirmed their commitment to achieve a consensus-based solution and to finalise the text of the MLC by the end of March 2024, with a view to holding a signing ceremony by the end of June 2024.[42] None of these events have come to pass.

This throws some doubts on what the next steps at the European level will be. The Union has so far used the OECD's works on Pillars One and Two as a 'stepping stone' to build on international developments in order to take a more ambitious anti-base erosion step.[43] The initial expectations of the European Parliament's Legislative Train Schedule that the MLC text will be open for signature by the end of June 2024 have been recently removed from the webpage. Instead, in a more tampered down tone, it is proclaimed that '[t]he Commission will propose a directive for the implementation of Pillar One in the EU as soon as the work at the OECD is sufficiently mature.'[44]

The unresolved issues, together with the United States' reluctance to sign the MLC in the near future, make the future of Pillar One bleak.[45] Reportedly, Pillar One has also been blocked by India and Saudi Arabia.[46] Because of the prevailing uncertainty as to the Pillar One outcome, the Union is in a limbo state. This is not only because new unilateral DSTs may be introduced while the old ones are also running, but also because the Union has been withholding different proposals both with regard to revenue ('EU digital levy') and tax-specific (proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT proposal),[47] in anticipation of developments on the Pillar One front. Specifically, the potential introduction of an EU digital levy would be at odds with Article 38 of the OECD's MLC that provides that existing unilateral DSTs should be removed.[48] At the same time, the Union wants to continue to influence and be part of global dynamics and – if the MLC is adopted – of the 'global consensus' solution in digital taxation. While the 'globality' of the consensus is contested on several grounds,[49] at EU level, all Member States appear to be currently in favour of adopting Pillar One. By implementing Pillar One, the EU and the Member States will be bound by the agreed tax design that will define the total revenue to be generated. How this revenue will be distributed would remain an *internal matter* for the EU through which it could pursue its constitutional values, priorities and possibly, a digital strategy. The following section will explore the possible introduction of an EU digital levy under these different lenses.

[42]R Goulder, 'Expectations for 2024: Pillar 1 Finds an Off-Ramp', Tax Notes International (18 December 2023).

[43]M de Wilde, Company Tax Proposals and Tax Policy Initiatives, in Terra/Wattel – European Tax Law. Volume 1: General Topics and Direct Taxation. 8th Student edition at 620 (Wolters Kluwer 2022).

[44]European Parliament, 'The implementation of the OECD global agreement on re-allocation of taxing rights (Pillar One) In "An Economy that Works for People"', available at <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-re-allocation-of-taxing-rights> accessed 19 September 2024.

[45]See for instance, C Peters, 'A Governance Analysis of BEFIT: How the Member States' Wish to Obtain more Regulatory Authority is Driving a Revolution' EC Tax Review 2023/5, 195 at 195. In relation to the US, see G Farris, 'Treasury Secretary Yellen Expects Pillar One Issues to Persist into 2024, US Not Likely to Sign Multilateral Convention in 2023' (IBFD Tax News Service, 19 October 2023).

[46]C Hennaman, 'US, India and Saudi Arabia Are Blocking Pillar One; EU Should Prepare Its Own DST on High-Tech Firms, French Finance Minister Says' (IBFD Tax News Service, 21 February 2023) and G Leali, 'Le Maire: global digital tax is "blocked" by U.S., India, Saudi Arabia' (Politico Pro, 20 February 2023).

[47]For an illustration of the potential incompatibilities between Pillar One and the BEFIT proposal see F Scandone, L Scordo and L Marino, 'Pillar One, Pillar Two and BEFIT – The End of an Unexpected Journey?' 31 (2024) International Transfer Pricing Journal 1 at 10.

[48]According to Art 38 MLC, all measures listed in Annex A should not apply. Annex A includes the DSTs of Austria, France, Italy and Spain as well as other non-Member States' DSTs and equalisation levies. See also M Screpante, 'Digital Services Tax in the European Union: Unsuccessful Implementation of Pillar One? Challenges Ahead' 205 (2023) International Transfer Pricing Journal 205 at 210 and JM Vázquez, 'Digital Services Taxes in the European Union: What Can We Expect?' Kluwer International Tax Blog (14 February 2023), available at <https://kluwertaxblog.com/2023/02/14/digital-services-taxes-in-the-european-union-what-can-we-expect/#comments> accessed 19 September 2024.

[49]Several authors have pointed out how not all participating states in the Inclusive Framework have an equal say in the solutions adopted. See indicatively, R de la Feria, 'The perceived (un)fairness of the global minimum corporate tax rate' in W Haslehner, G Kofler, K Pantazatou and A Rust (eds), *The 'Pillar Two' Global Minimum Tax* (Edward Elgar 2024) 58.

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3. An EU digital levy from a tax, public finance, and EU constitutional perspective

A. A brief history of the discussion

The first reaction of the EU towards the taxation of a digitalised economy came in December 2018, immediately after the release of the 2018 OECD Interim Report on the tax challenges arising from digitalisation.[50] As an immediate reaction, the Commission published proposals for two Council Directives on the taxation of the digital economy and one (non-binding) Commission Recommendation relating to the corporate taxation of a significant digital presence (SDP).[51] One proposal concerned rules relating to the corporate taxation of SDP,[52] while the other established a common system of DSTs on revenues from certain digital services, intended as a *temporary* solution until Member States reached a long-term agreement (EU DST proposal).

The idea behind the DST proposal was to tax *revenues* generated by the supply of certain digital services. Article 3 provided an exhaustive list of services falling within the scope of the proposed Directive, including 'the transmission of data collected about users and generated from users' activities on digital interfaces'.[53] Different rules for determining user location were offered for different types of services. The user's location for each service would be associated with taxable revenue, determining which countries could claim taxing rights and DST revenue.[54]

One aim of the EU DST proposal was to establish an EU-wide DST to prevent fragmentation of the single market due to uncoordinated, unilateral measures and to ensure that competition would not be distorted thereby.[55] It also sought to promote sustainable public finances, ensure social fairness, and combat aggressive tax planning. The preamble acknowledged in 2018 that the issue of taxing the digital economy was global, suggesting that a multilateral, international solution would be ideal.[56] However, the preamble also noted that progress at the international level can be challenging, and Member States were under pressure to act, given the risk that their corporate tax bases were being significantly eroded over time.[57]

The EU DST faced numerous criticisms, many of which mirrored common concerns about DSTs in general, including issues related to tax design, policy, and administrability. It was specifically criticised for adding complexity to an already intricate Corporate Income Tax (CIT) system,[58] the perceived 'mismatch' between value creation and taxation,[59] potential double or multiple taxation, fairness issues resulting from taxes on revenue that ignore profit,[60] and being discriminatory by targeting only a narrow group of digital companies.[61] Critics also argued it

[50]OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018 1, 196 (OECD Publishing 2018).

[51]European Commission Recommendation of 21 March 2018 relating to the corporate taxation of a significant digital presence, COM(2018) 1650 final.

[52]European Commission, Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, 21 March 2018, COM (2018) 147 final.

[53]The other two covered services were: '(a) the placing on a digital interface of advertising targeted at users of that interface; (b) the making available to users of a multi-sided digital interface which allows users to find other users and to interact with them, and which may also facilitate the provision of underlying supplies of goods or services directly between users.'

[54]EU DST Proposal, Art 5.

[55]EU DST Proposal, Preamble, recital 6.

[56]EU DST Proposal, Preamble, recital 5.

[57]Ibid., recital 6.

[58]Y Brauner, 'Taxing the Digital Economy Post-BEPS Seriously' 46 (2018) Intertax 462 at 464.

[59]J Becker and J Englisch, 'EU Digital Services Tax: A Populist and Flawed Proposal' in Kluwer International Tax Blog (16 March 2018), available at <https://kluwertaxblog.com/2018/03/16/eu-digital-services-tax-populist-flawed-proposal/> accessed 19 September 2024; Pistone et al, supra (n 10).

[60]G Kofler and J Sinnig, 'Equalization taxes and the EU's 'digital services tax'' in W Haslehner, G Kofler, K Pantazatou and A Rust (eds), *Tax and the Digital Economy: Challenges and Proposals for Reform* (Wolters Kluwer 2019) 101 at 139, see W Cui, The Digital Services Tax: A Conceptual Defense 73 (2020) Tax L. Rev. 69.

[61]Vázquez, supra (n 48).

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could negatively impact investment, innovation, welfare, and growth, while distorting business decisions.[62]

Despite the many drawbacks of the EU DST proposal, several argued in favour of DSTs as a potential solution for taxing location-specific rents.[63] They argued, specifically that DSTs would allow location-specific rents earned by digital platforms to be captured by the countries in which such rents arose.[64] The need to address the unfairness of states' inability to tax based on digital presence called for an imperfect solution, given the complexities of taxing the digital economy. DSTs, whether temporary or permanent, were seen as a way to remedy this injustice, albeit imperfectly.

The EU DST proposal was abandoned in 2019 when the ECOFIN Council failed to achieve unanimous support, paving the way for an international consensus-based solution. Meanwhile, between 2019 and 2020, several EU Member States, including France, Italy, Austria, and Spain, adopted unilateral DSTs.

B. The EU Digital Levy proposal and the own resources/EU taxes debate

Besides the international advancements in finding a 'global' solution to the taxation of the digital economy manifested by the Pillar One and Pillar Two proposals, the COVID-19 crisis struck the world in 2020. The pandemic not only necessitated 'exceptional measures' in terms of EU expenditure but also served as a catalyst for rethinking EU taxes. Consequently, the EU faced two main concerns regarding the taxation of the digital economy: to follow up on international developments that eventually led to the adoption of the GloBE directive and to find ways to raise additional revenue to address the economic repercussions of the crisis.

In this last bid, the EU adopted the Next Generation EU (NGEU) recovery plan that allows – through different sub-packages and components – to spend up to EUR 750 billion (as per 2021) for the recovery of the Member States in the forms of loans or non-repayable grants over a period of five years.[65] The fact that this amount is equivalent to five times the ordinary annual budget of the EU compelled the EU to issue for the first time massive common debt and to openly express the need for more 'EU revenue' and EU revenue streams to deal with the financial repercussions of the health crisis and the Union's recovery.[66] The EU budget is traditionally financed by the so-called 'own resources',[67] however, growing concerns about the adequacy of these resources to cover recovery repayments and borrowing costs under the NGEU Programme[68] have rekindled discussions at both academic and policy-making levels about the possibility of the EU introducing its own tax.[69]

[62]G Kofler, The Future of Digital Services Taxes, EC Tax Review 2021/2, 50 at 51.

[63]Cui, supra (n 60); YR Kim, 'Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate' 72 (2020) Alabama Law Review 131; D Shaviro, Digital Services Taxes and the Broader Shift from Determining the Source of Income to Taxing Location-Specific Rents, NYU Law and Economics Research Paper No 19–36.

[64]Cui, supra (n 60) 69 at 72.

[65]Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (2020)OJ L433 I/23 (EURI Regulation).

[66]On the legal issues around this debt issuance see B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' 58 (2021) Common Market Law Review 635.

[67]Until recently the only own resources were custom duties from imports outside the EU, Gross National Income (GNI)-based and VAT-based own resources.

[68]The costs are estimated to be at least €15 billion EUR per year until 2058 on average. Regarding these concerns see for instance, European Parliament, 'EU revenue: a new start for EU finances, a new start for Europe Press Release' (10 May 2023) available at <https://www.europarl.europa.eu/news/en/press-room/20230505IPR85010/eu-revenue-a-new-start-for-eu-finances-a-new-start-for-europe> accessed 19 September 2024.

[69]See for instance F Vanistendael et al, 'European Solidarity requires EU taxes' (Op-Ed EU Law Live, 21 April 2020) <eulawlive.com/op-ed-european-solidarity-requires-eu-taxes/> accessed 19 September 2024.

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According to Article 311 TFEU, '[w]ithout prejudice to other revenue, the budget shall be financed wholly from own resources'. In its formal understanding, own resources are all resources that are called own resources in the respective Own Resources Decisions (ORD),[70] while there is no *numerus clausus* of admissible own resources. The distinction between an 'own resource' and a 'genuine EU tax' that has dominated tax and constitutional scholarship recently[71] is not purely semantic. Own resources in their original sense, are fiscal resources levied by Member States on companies and/or individuals, whose proceeds are 'passed' by Member States to the EU, even if the collection is done at national level.[72] In contrast, to qualify as an EU tax, the tax must be:

- established by EU law without any need for legislative action at national level;
- levied by the EU that would also be competent to decide on all constituent elements of the tax at issue, eg the rate;
- the revenues that arise therefrom must accrue at EU level and enter the EU budget directly.[73]

This further and obviously presupposes, from a legality perspective, that the Union has a legislative and revenue competence to raise EU taxes.[74] Such a tax could be administered by Member States or by EU agencies.[75] Midway between a 'genuine own resource' and a national contribution, the High Level Group on Own Resources places the VAT-based own resources, as well as a Financial Transactions' Tax (FTT)-based own resource or a carbon tax.[76] These, as the High Level Group specifies, are often mistaken for 'EU taxes', but they are in fact *a share of national taxes* that Member States decide to transfer to the EU level, once there is a sufficiently harmonised approach concerning such taxes.[77] Indeed, these taxes are levied at the national level; in the VAT example, Member States set the VAT rate and actually collect the tax.

Thus, the main difference, or alternatively, what the existing own resources are lacking to qualify as EU taxes, is that these taxes exist or are created at national level, and they are not levied by the EU directly. The main impediment in introducing such an EU tax lies with the competence of the EU to do so and the (in)existence of the appropriate legal basis/es in the Treaties. A brief overview of the potential legal bases for the adoption of an EU tax suggests that the provisions giving the EU taxing competences (must) serve substantive policy aims, such as environmental protection,[78] regulating the energy industry,[79] or protecting the functioning of the internal market.[80] Thus, tax-related directives (or regulations) based on Articles 192, 194, 113 and 115 TFEU (as well as Article 116 TFEU) may not primarily aim at financing the EU. Therefore, the

[70]Currently, 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, OJ 2020 L 424/1.

[71]See indicatively, J Lindholm and A Hultqvist (eds), *The Power to Tax in Europe – Swedish Studies in European Law Volume 14* (Hart Bloomsbury 2023).

[72]K Pantazatou, 'Revising the Justification for an EU Tax in a Post-crisis Context' in D de Cogan, A Brassey and P Harris (eds) *Tax Law in Times of Crisis and Recovery* (Hart Publishing 2023) 135 at 143.

[73]High Level Group on Own Resources, 'Future Financing of the EU, Final report and recommendations of the High Level Group on Own Resources' (December 2016) 24, <https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/revenue/high-level-group-own-resources_en> accessed 19 September 2024.

[74]C Waldhoff, 'Legal Restrictions and Possibilities for Greater Revenue Autonomy of the EU' in T Büttner and M Thöne (eds), *The Future of EU Finances* (Mohr Siebeck 2016).

[75]Pantazatou, supra (n 72) 143.

[76]High Level Group on Own Resources, supra (n 73).

[77]Ibid.

[78]Art 192 TFEU.

[79]Art 194 TFEU.

[80]Arts 113–15 TFEU.

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measure of the own resource must pursue primarily non-fiscal objectives as, arguably, the recently introduced 'plastic tax' does.[81]

In its conclusions of 21 July 2020, and in recognition of the need to bolster the EU's borrowing and repayment capacity, the European Council tasked the Commission with proposing additional own resources.[82] In December 2020 the European Council introduced another own resource for the EU budget next to the 'traditional' own resources. The new resource was a 'plastic tax', that is, a levy that is based on the weight of non-recycled plastic packaging waste.[83] This 'plastic tax' was celebrated by Frans Vanistendael as a tax that for the first time 'truly belongs to Europe and the scope, base, and rate are all determined exclusively by the EU Council and the European Parliament'.[84]

In February 2021, the European Commission launched a public consultation on the possible introduction of a digital levy at the EU level.[85] In its 'Inception Impact Assessment' on the EU digital levy,[86] which was reminiscent of the 2018 DST Proposal, the Commission suggested that such a levy would 'help address the issue of fair taxation related to the digitalisation of the economy and, at the same time, is intended to not interfere with the ongoing work at the G20 and OECD level on a reform of the international corporate tax framework'.[87] While at an early stage, the Commission foresaw such a levy to take the form of either a direct or indirect tax on social media, online market places, and other digital services and platforms operating in the EU, regardless of where they are established.[88]

Many of the respondents to the public consultation pointed out to the need to align a potential EU digital levy with the OECD/G20 Pillar One developments. Some of them also noted the need to consider what would happen to the national DSTs. In light of these considerations, and in anticipation of an agreement on Pillar One, the EU digital levy was 'put on hold'.

Instead, in December 2021, the European Commission proposed three new sources of revenue for the EU budget: (1) an Emissions Trading System own resource that, in an effort to reduce net greenhouse gas emissions in the EU, would direct 25 per cent of the revenues from emissions trading in the EU to the EU budget;[89](2) a carbon border adjustment mechanism (CBAM) own resource that would transfer 75 per cent of what EU countries collect under CBAM to the EU budget;[90] and (3) the reallocation of profits of large multinational companies (MNEs) that will materialise under OECD's Pillar 1 framework.[91] According to the Commission that third new resource would be equivalent to 15 per cent of the share of the residual profits reallocated to the respective Member States under Pillar One.[92] This own resource would thus be, once again, a

[81]C Sciancalepore, The Reform of EU Own Resources under the Next Generation EU Programme: A Suitable Moment for the Introduction of a European Tax? in *The Power to Tax* (Hart Bloomsbury 2023) 123 at 134.

[82]European Council, Note: Conclusions of the Special Meeting (21 July 2020) EUCO 10/20, available at <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf> accessed 19 September 2024.

[83]Own Resources Decision (n 70).

[84]F Vanistendael, 'Remembering 2020' 101 (2021) 101 Tax Notes International 334. Cf Sciancalepore (supra, n 81) who argues that the 'plastic tax' seems to be configured more as a contribution by the Member States than as a proper tax levied on EU citizens.

[85]European Commission, Public Consultation, A fair & competitive digital economy – digital levy, available at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-competitive-digital-economy-digital-levy_en> accessed 19 December 2024.

[86]Own Resources Decision, para 5.

[87]European Commission, Inception Impact Assessment, Ref Ares(2021)312667.

[88]Ibid.

[89]European Commission, 'The next generation of own resources for the EU Budget' (Communication) COM (2021) 566 final.

[90]European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a carbon border adjustment mechanism' COM(2021) 564 final.

[91]European Commission, supra (n 89).

[92]European Commission Press Release, The Commission proposes the next generation of EU own resources (22 December 2021), available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025> accessed 19 September 2024.

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transfer of national taxes to the EU budget allowed by a sufficiently harmonised legal framework and the contribution would be proportionate to the profits made in each State once the Pillar One rules are in place. The Commission estimates that, once this new resource is in place, revenues for the EU Budget will range from EUR 2.5 to EUR 4 billion per year.

C. An EU digital levy: Constitutional, tax, policy, and political considerations

While the specific design of an EU digital levy was not detailed, the Commission contemplated in its Inception Impact Assessment, an EU tax based either on Article 113 TFEU or on Article 115 TFEU, depending on whether it would take the form of an indirect or direct tax respectively. To use these provisions as a legal basis, it must be demonstrated that the digital levy pursues primarily an internal market objective and subsidiarily, a fiscal one. The current discussion at global level, the need for a coordinated approach and the removal of unilateral measures to facilitate trade and fair competition would certainly back the justification of the internal market legal basis.

While the legal basis has not been disputed in the literature, the most common criticism against an EU digital levy has been its potential interaction with the Pillar One framework and the risk of multiple taxation, along with burdensome administrative and compliance costs if the two were to coexist.[93] These concerns are valid, especially in the absence of a concrete proposal that would allow for more specific criticisms related to the tax's design (eg, tax base, type of tax, scope).[94]

Many commentators have predicted the end of the EU digital levy,[95] but just as many believe that no agreement on Pillar One will be reached.[96] If the latter alternative is the one that comes to pass, we can assume that digital taxes will be introduced *at some level of government* (as already happens with some Member States). In such a case, three main scenarios are possible:

- Member States are left free to decide unilaterally how to deal with the taxation of the digital economy. While it is unquestionable that Member States enjoy fiscal sovereignty in tax matters,[97] the multiple efforts to introduce an EU DST and the ongoing discussion around the EU digital levy do not suggest that the Union, in tandem with Member States, will opt for unilateral national solutions. This is therefore the least probable scenario.
- The introduction of a 'harmonised' EU DST in the sense that the details of the tax would be spelled out in a directive and hence, the distortion of competition and administration difficulties would be minimised. Such a system would be very similar to the EU DST proposal on a common system of DSTs on revenues resulting from the provision of digital services. Such an option would harmonise the different Member States' DSTs under a common DST system, while keeping the proceeds of the DSTs at national level (national budgets).

[93]See for instance CFE Tax Advisers Europe, European Union – Opinion Statement CFE 2/2021 on the EU Digital Levy Consultation, European Taxation, 2021 (Volume 61) No 8.

[94]For an excellent policy and tax design analysis see Pistone et al, supra (n 10).

[95]See for instance, W Redmar, 'The EU Digital Levy is Dead: Long Live a Pillar One Contribution?' 62 (2/3) (2022) European Taxation 132–5.

[96]S Kostić and A Navarro, 'Pillar One and Mobility – A Truly Global Solution?' 51 (12) (2023) Intertax 840–50; J White, 'Opinion: Pillar One Might Already be Doomed' (2023) International Tax Review.

[97]While the extensive legislation in direct taxation proves otherwise, there is still a *theoretical debate* on whether the Union has competence in the area of taxation. The existing directives in direct taxation have been based on Art 115 TFEU and have resulted from the need to ensure the functioning of the internal market. It is highly unlikely that the introduction of an EU digital levy or an EU legislative framework on DSTs would be blocked on grounds of a lack of competence.

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– The introduction of a completely different harmonisation solution at EU level for the taxation of the digital economy, such as a withholding tax,[98] or a virtual PE (the SDP proposal).[99]

Specifically in terms of revenue, the *proceeds* from the different digital taxes could either go to national budgets (as in the previous examples) or the EU could opt for:

– The introduction of an EU digital levy, in a design that would remain to be decided, as an own resource or as a genuine EU tax to finance the EU budget and/or the NGEU specifically.
– The 'revenue sharing' approach, which is the one that is currently proposed as an own resource, that is the contribution by the Member States of a share of the residual profits (re-)allocated to the respective Member States under Pillar One.

In the following section, I will outline how an EU digital levy could address *some* of the problems currently faced by the Union in relation to digital taxes. My aim is to approach this not from the traditional policy and tax design considerations, but from the EU revenue side that could rectify remaining issues through the promotion of *fairness, the single market and redistribution,* all of which are (or should be) constituents of the digital constitutional strategy of the Union.

4. In favour of the 'forgotten' EU digital levy?

A. The relevance of spending and the justifications for an EU tax

The EU's DST proposal was presented as a temporary measure until global consensus would be reached. In contrast to a potential EU digital levy, the EU DST aimed to harmonise domestic tax laws, while the revenue would remain with the Member States levying the DST. Instead, an EU digital levy would qualify as an own resource or – depending on the specifics of its design – even as a 'genuine EU tax' and, hence, the proceeds would go into the EU budget either directly (in case of an EU tax) or through Member States' transfers (in case of an own resource). In the following, I will make the case for the introduction of a digital tax as a revenue-generating instrument for the EU, and not for individual Member States. In this context, I will argue for two plausible ways forward for the Union with regard to digital taxation; the 'genuine EU digital levy', in case the Pillar One MLC does not get adopted; and the 'revenue sharing' possibility, which is, effectively, the current proposition of the Commission, if Pillar One enters into force. This latter hybrid model would add a new own resource equivalent to 15 per cent of the share of the residual profits reallocated to the respective Member States under Pillar One.[100] This would translate to an obligation on Member States (and not on the in scope taxpayer/MNEs) to pay a contribution to the EU that is calculated by applying a rate of 15 per cent on the residual profits attributed to them by the rules of Pillar One.[101] This own resource would thus be, once again, a transfer of national contributions to the EU budget, a somewhat revenue-sharing agreement.

As stated above, the amount (and the impact) of the contribution would depend on which of the two solutions would be promoted. Taxes – at all levels – may serve not only revenue-

[98]In favour of such solution see indicatively, AB Moreno and Y Brauner, 'Taxing the Digital Economy Post BEPS . . . Seriously' 58 (2019) Columbia Journal of Transnational Law 131 ff; Y Brauner and P Pistone, 'Adapting Current International Taxation to New Business Models' 71 (12) (2017) Bulletin for International Taxation 681.

[99]See indicatively, P Hongler and P Pistone, 'Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy, WU International Taxation Research Paper Series No. 2015 - 15 (20 January 2015), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591829> accessed 19 September 2024; Brauner and Pistone supra (n 98).

[100]European Commission Press Release supra (n 92).

[101]Commission's position expressed in the Q&A of December 2021. See The next generation of EU own resources: European Commission, Questions and Answers – Brussels, 22 December 2021.

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generating functions, but also (re)distributive and regulatory functions. So far, the EU has not used its taxing arsenal for any of these functions. Even if one assumes that the recently introduced own resource of the plastic tax is an EU tax, its pursuit of regulatory (environmental) objectives remains at a very small scale, as does its magnitude. Instead, in the past the Union has attempted to ensure, through positive but also negative integration, that *Member States* use *their power to tax* in a manner that does not compromise accomplishing the goals of the EU, such as the proper functioning of the internal market.[102] Regulation (of national tax systems) has been the main tool towards the promotion of the Union's objectives, notably the removal of obstacles in the circulation of goods, persons and capital and the curtailment of the available tax avoidance mechanisms.

Below, I will explain why a *digital tax* would be a very suitable candidate to transform the EU into a tax union.[103] First and foremost, because the introduction of some form of digital tax in the Union in a coordinated manner is essentially a *fait accompli*. Whether Pillar One moves on, or not, the Union will be able to either regulate national tax systems, in order to bring some degree of coordination, or to raise an EU digital levy itself. In the last scenario, while the genuine EU digital levy and the 'revenue sharing' option share many similarities, they also present subtle differences. As already stated, the technical part of the tax design[104] could be the same but the level of the imposition of the tax (Member State or the EU) would be distinct. Obviously, the amounts entering the EU budget would differ; In the case of the EU digital levy, all the proceeds from the EU tax would enter the EU coffers making, quantitatively, a large difference.

The quantitative difference, however, does not justify the establishment of an EU tax (as opposed to an own resource, or even revenues for the national budgets). Even if the 'revenue sharing' option would undoubtedly scale down the contribution to the Union's different objectives, fiscal, regulatory (like the digital transition)[105] and redistributive (as in the cohesion policy), it cannot be assumed (neither entirely excluded) that the remaining revenue would be used by the Member States against the Union's objectives. At the same time, there are no accountability or control mechanisms to ensure that the funds are going to a specific agreed cause (be it redistributive, regulatory or repayment of loans). The transfers of the Member States (in the form of own resources) have no direct allocative or distributive impacts. This is because there is no legal basis in the Treaties to support a nexus between a particular tax base (or own resource) and its spending, as if the revenue levied from x tax will/must be spent on x purpose. This is not particular to the EU, several countries, like Germany disassociate their revenue from their spending.[106] Whether the revenue has been 'properly' allocated will only be judged at a political level in the next elections.

This lack of a nexus challenges the justification for a specific category of an EU tax base, such as the digital levy. If we cannot earmark it towards a particular (relevant) political purpose, then how

[102]The ample CJEU case law on the interaction of fundamental freedoms and direct tax systems has resulted in the removal of discriminatory domestic tax measures, whereas recent secondary EU direct tax law has primarily aimed at combating tax avoidance practices (eg the ATAD directive, supra, n 2).

[103]According to T Woźniakowski '[F]iscalisation is a process through which a certain level of government (supranational, federal, central) expands its power to raise its own sources of revenue, and in so doing it decreases the level of vertical fiscal imbalance' in T Woźniakowski, *Fiscal Unions: Economic Integration in Europe & the United States* (Oxford University Press 2022) 10.

[104]The below mentioned considerations are certainly affected by the tax design. For instance, 'fairness' considerations would seriously be put at risk in case the tax introduced was discriminatory and introduced multiple levels of taxation to the taxpayers. See with regard to this Pistone et al, supra (n 10).

[105]See for instance, Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030, OJ L 323, 19.12.2022, p 4.

[106]Y Bury and LP Feld, Fiscal federalism in Germany in J-F Tremblay (ed), *The Forum of Federations Handbook of Fiscal Federalism* (Palgrave Macmillan 2023) 159.

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to justify the levy of such a tax at first place. This lack of a specific allocative effect of EU taxes to EU spending and the disconnection between EU revenues and expenditures contributes to the detachment of EU citizens from the contributions their Member States make and implies a deficit in democratic accountability.[107] This finding applies indeed to all potential EU taxes' bases. The answer to why an EU *digital tax* should be preferred is primarily a pragmatic one: because the digital levy (in whichever form) is the first tax that must and will be harmonised or levied at the EU level very soon. Secondarily, because from a benefits' theory perspective such a tax could be justified as the 'price' taxpayers pay for the EU's contribution to the 'digital internal market' which has been one of a protective/ rights-based nature.[108] The adoption of a harmonised framework on the taxation of the digital economy, would also prevent a chaotic unilateral response that could fragment the internal market and result in multiple taxation for the taxpayers.

This justification aligns with the general acknowledgment that the levying of EU taxes can be legitimised by the 'European Added Value',[109] in other words, the EU's contribution in creating additional value (for the Member States) through its intervention.[110] It could also be justified, albeit on loose grounds, on all the benefits the taxpayers would receive from the regulatory manifestations of the NGEU's different instruments (eg environmental considerations, promotion of the digital transition), or the re-distributional function of taxes that are embodied in the EU cohesion policy.[111]

Practically, the contribution to the common EU budget could also be justified by the mobile tax base (consumers, users) that affects the allocation of taxing rights across states. In other words, direct or indirect reliance of the proposed tax system on largely mobile consumers and end users will affect the allocation of profits to the MNE jurisdictions. As this could create distortive results given the increased intra-EU mobility of consumers in the EU, it would appear sensible to address this mobility-induced distortive effects through the revenue side.[112] Assuming that the individuals' mobility remains within the EU, it seems more appropriate to transfer this generated revenue to the higher/EU level, for a lack of accurate representation of the residence of people that generate the taxable income. An EU-wide levy would also ensure that the money that goes into the EU budget does not later return to the same taxpayers through domestic loopholes, for example by way of favourable tax rulings.[113]

From a broader perspective, legal scholarship has advocated for the EU to levy taxes on its own right, also as a means of democratising EU institutions. Several authors have argued that if there ought to be no taxation without representation, there cannot be any representation without

[107]C Fuest, Friedrich Heinemann and Martin Ungerer, 'Reforming the Financing of the European Union: A Proposal' 50 (5) (2015) Intereconomics 288.

[108]The benefit theory views taxes as a 'price' or consideration to be paid by all taxpayers for the public goods and services provided in a state. Several different expressions of the benefit principle have been put forward, see J Buchanan, *Fiscal Theory and Political Economy, Selected Essays* (The University of North Carolina Press 1960) 7 ff; J Dodge, 'Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles' 58 (2005) Tax Law Review 399. In this case, the benefit the taxpayers receive would consist of legislation around the digital economy, including the GDPR or the AI Act.

[109]European Commission, 'The Added Value of the EU budget' Commission Staff Working Paper SEC (2011) 867 final, 2.

[110]J Jaakkola, 'A Justification for the EU's Power to Levy Taxes' in J Lindholm and A Hultqvist (eds), *The Power to Tax in Europe – Swedish Studies in European Law Volume 14* (Hart Bloomsbury 2023) 59 at 76.

[111]A Wagner, 'Three Extracts on Public Finance' in RA Musgrave and AT Peacock (eds), *Classics in the Theory of Public Finance*, 4th edn (Macmillan, St Martin's Press 1967) ix.

[112]See also S Geringer, '(In)congruence Between Taxation, Spending, and Representation: The Ambiguous Character of Tax-based Contributions' 52 (8 and 9) (2024) Intertax 558 who argues that although an EU own resources system that is (primarily) financed through tax-based contributions could fundamentally help to mitigate the effects of the declining congruence between taxation, spending, and representation in relation to EU citizens in certain respects, it would itself simultaneously create issues of democratic legitimacy in other contexts.

[113]Although it has to be acknowledged at this stage that this under the current EU legal framework would be a difficult undertaking.

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taxation.[114] This maxim, however, cannot materialise in reality without substantial institutional reforms, most notably granting the European Parliament (EP) the power to tax.[115] Such an institutional, fiscal and financial overhaul could trigger and ensure an appropriate level of accountability of the Union. A 'democratisation' of the taxing powers would also democratise the Union's spending. By granting the EU fiscal capacity, only then can Member States discuss seriously and selflessly the policies to be funded by such resources.[116] In the same vein, it has been argued that a return from the EU budget to EU taxpayers as a whole would increase taxpayers' confidence in the tax system and would enhance the legitimisation of the tax system altogether.[117]

Despite the limited role of the EP in what should be the most 'democratic procedure' of all, procedural justice, political process, and democratic legitimisation would suggest that a potential adoption of an EU digital levy or 'shared revenue' would at least necessitate a double approval process. This 'double requirement' for a uniform EU-wide tax replacing (or 'harmonising') existing unilateral measures and simultaneously acting as an own resource would first require the adoption of a relevant harmonising directive under Article 113 or 115 TFEU. In either case unanimity would be required at the Council and the special legislative procedure would apply. The EU tax should then pass an additional 'barrier' and be included in the own resources Decision that would secure that the revenue collected would go into the EU budget. While it is regrettable that the role of the EP is limited in both cases,[118] the double burden that would have to be satisfied provides an additional safety net in terms of scrutiny and consultation with the EP.

B. Fairness considerations

The Commission's Inception Impact Assessment on the proposal for an EU digital levy placed emphasis on the promotion of 'fairness'. Despite criticism regarding the use of a vague concept like fairness as one of the premises of the EU digital levy,[119] this reference has some merit. Fairness, and tax fairness, in particular are difficult concepts to define. The two predominant theories justifying taxes – the benefit theory and the ability-to-pay theory – provide some guidance on aspects of fairness. In the first case, people contribute to governments based on (and to the extent of) the benefits they receive. In the second case, the tax bill should be distributed in a manner (more or less) proportionate to one's income, and from a spending aspect it should promote some degree of the 'social welfare' function of taxation.[120]

Fairness in this context should be understood as having three parts:

First comes the reconsideration of the 'international tax framework' as we know it that would mandate which states should have a right to tax in the absence of physical presence and on what basis. This inter-nation equity would materialise through a fair allocation of taxing rights among states. The benefit principle in this context is realised in that the state where the taxpayer (multinational corporation) obtains a benefit from (through the use of users' data, for instance)

[114]See indicatively, MP Maduro, A new governance for the European Union and the Euro: Democracy and Justice, RSCAS Policy Papers RSCAS PP 2012/11, p 7; AJ Menéndez, 'Taxing Europe: Two Cases for a European Power to Tax (with some comparative observations)' 10 (2003–04) Columbia Journal of European Law 297 at 311 ff; T Woźniakowski, *Fiscal Unions: Economic Integration in Europe & the United States* (Oxford University Press 2022) at 150 ff; Pantazatou (supra, n 72) at 139 ff.

[115]Woźniakowski, supra, p 150, RG Antón, 'Building up the EU Revenue Side: But What Is a Tax in EU Law?' 11 (4) (2023) Politics and Governance 17.

[116]Woźniakowski, supra, while discussing the Portuguese position, p 123.

[117]C Brokelind, 'EU Tax Law and the Return of the Nation-State' in A Bakardjieva Engelbrekt et al (eds), *The European Union and the Return of the Nation State* (Springer International Publishing 2020) 146.

[118]See the procedure under Art 311 (3) TFEU.

[119]See CFE Tax Advisers Opinion, supra (n 93).

[120]Wagner, supra (n 111).

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acquires a right to tax. This aspect of fairness has been presented by the OECD as a drive behind the BEPS project.[121]

In this case, assuming the removal of unilateral DSTs, the introduction of an EU-wide digital levy would be based on the fair assessment of existing taxes, capitalising on the untaxed base of digital economy that leaves scope for the introduction of a new tax. The imposition of a uniform EU-wide DST while replacing national DSTs would also contribute to overcome problems related to the administration of the tax and the possible distortion of competition because of the many and diverse DSTs. Fairness, in this sense, would manifest through (a) the *creation* of a right to tax where one should exist, and (b) improved administrability for both the state and the taxpayer resulting from EU-led uniformity. Intra-EU distortive effects of the tax base would also be minimised through the EU levy.

Second, this contribution should be fair: this is a tax design question related to the tax base, rates, and scope. Both these 'fairness qualifications' would be satisfied regardless of the revenue side (accruing at Member State-level or EU-level).

The third element of fairness would build on the use of the revenue. According to the impact assessment it would be used 'for the purposes of the recovery and to support a more stable medium-term outlook'.[122] This revenue feature of fairness concerns the distribution of fiscal burdens *between taxpayers* and takes into account cognate matters such as fiscal transfers and the distributional consequences of public expenditure.[123] It resonates with a general, at times, constitutional, recognition that tax should support social welfare goals and generate distributive outcomes, as mandated by the ability-to-pay principle.[124]

In an EU setting, this would be reflected in the regulatory framework the EU could offer – potentially a framework for a green and digital transition – in exchange for the revenue it receives.[125] It would also materialise through the redistributive branch of the EU budget, rendering the EU tax into a vessel for enhancing democracy and social justice through redistribution.[126] While such distributive outcomes can be pursued and achieved at the national level, the advantage of satisfying this element at the supranational level also lies in superior effectiveness and efficiency. According to the traditional fiscal federalism and tax assignment literature, taxes levied on highly mobile tax bases and/or redistributive taxes should be levied at the central level to avoid their erosion.[127]

Furthermore, channeling the revenue *to the common budget* – whether through shared revenue or a genuine EU tax – would resolve other 'global' or 'intra-EU' fairness considerations arising from the fact that larger digital businesses concentrate in richer, more powerful economies.[128] Given that the economies of different Member States are very diverse, different revenue would inevitably arise across different states even in the case of a harmonised DST to be levied by

[121]See above, section 2a. G20 Press release ('Leaders' Communiqué'), Brisbane, 15–16 November 2014, available at <https://g20.utoronto.ca/2014/2014-1116-communique.html> accessed 15 September 2024, where the OECD stated that: 'We are taking actions to ensure the fairness of the international tax system and to secure countries' revenue bases. Profits should be taxed where economic activities deriving the profits are performed and where value is created.'

[122]European Commission, Incentive Impact Assessment.

[123]D de Cogan, 'Mapping Tax Justice Arguments' in D de Cogan and P Harris (eds), *Tax Justice and Tax Law: Understanding Unfairness in Tax Systems* (Hart Publishing 2020) 2.

[124]See Wagner, supra (n 111); K Tipke, Die Steuerrechtsordnung Band I: Wissenschaftsorganisatorische, systematische und grundrechtlich-rechtsstaatliche Grundlagen (2, völlig überarbeitete Auflage) (Köln, Verlag Dr. Otto Schmidt 2000) at 484.

[125]Although, as discussed before the nexus between the digital tax and a potentially expected 'digital output' is loose.

[126]J Jaakkola, 'A Democratic Dilemma of European Power to Tax: Reconstructing the Symbiosis Between Taxation and Democracy Beyond the State?' 20 (2019) German Law Journal 660 at 677.

[127]M Schratzenstaller et al, 'EU Taxes as genuine own resources to finance the EU budget. Pros cons and sustainability-oriented criteria to evaluate potential tax candidates' (2016) FairTax Working Paper no 3; J Martinez-Vazquez, C McLure and F Vaillancourt, 'Revenues and Expenditures in an Intergovernmental Framework' in R Bird and F Vaillancourt (eds), *Perspectives on Fiscal Federalism* (World Bank 2006) 15–34.

[128]See Y Brauner, 'Taxation of Information and the Data Revolution' (23 March 2023), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4400680> accessed 19 September 2024.

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individual states. Such a disparity would create a feeling of 'injustice' among citizens of smaller or less 'digital-friendly' states that would be 'penalised' due to their size or due to other policies, if the revenue were to go into national coffers.

This sense of injustice is also expressed through the '*juste retour*' argument, which is particularly visible in the context of the own resources system. As Member States and their citizens can easily calculate how much they pay into the EU budget and how much they receive back, wealthier states (and their citizens) feel that they contribute to the prosperity of the poorer ones.[129] This may easily result in certain redistributive outcomes being blocked by net contributing states, as has happened with cohesion policy in the past.[130]

This argument could be rebutted in the EU digital levy example. Even if the DST took the form of an own resource, as in revenue sharing, the nature of the levy itself, which primarily imposes the tax burden on 'foreign' taxpayers, would help mitigate the '*juste retour*' claim. When someone else bears the burden in lack of a physical presence at a territory, it is easier for the residents of that territory to allow the revenue to go to the 'supranational' budget.

If a genuine EU digital levy were to be preferred, it could ease the (justifiable) perception by taxpayers and Member States that the Union's own resources (especially the VAT-based and the GNI contributions) are *national transfers* from Member States and not 'own resources' of the Union.[131] A digital levy as a pure EU tax would also counter the perception of own resources as 'domestic' yet not individualised transfers, as it would enhance the connection between raising revenue and spending it, fulfilling the principle of 'no public expenditure without taxation'.[132] In other words, it would reverse the current sense of disconnect between spending (subject to more democratic oversight at the EU level) and taxation (subject to democratic oversight only at the national level). Accordingly, the current obvious incongruence between taxation, spending and representation at EU level would be soothed through an EU tax or an EU own resource that would finance the EU budget. This is because such an EU digital levy (*lato sensu*) would satisfy multiple aspects of digital constitutionalism, notably the EU's role as a global actor faithful to its international commitments, fairness considerations assuming appropriate tax design, the fair distribution of the value created, single market regulatory priorities (such as the EU's digital transformation), and social welfare, as a corollary of the redistribution policies embedded in the EU budget.

5. Conclusion

The taxation of the digital economy and of tech giants is a much debated topic in tax scholarship. States, other than the US, are dissatisfied with the fact that big corporations make profits in their territories and they are not able to have a share of the cake. This is why many of them have by now introduced individual measures, the so-called DSTs, to correct this 'injustice'. At the same time the OECD and the members of the Inclusive Framework push for a multilateral solution, the so-called Pillar 1, to avoid the fragmentation of measures and the potential of an unreasonably high tax burden on taxpayers. This multilateral solution is losing ground, especially in light of its rejection by the US. In the likely scenario that Pillar One fails, the EU will be brought before a crossroads – it will have to live up to its political commitment and in any case introduce a coordinated solution for the taxation of the digital economy in the EU. This can be done in many ways.

[129]J Bachtler, C Mendez and F Wishlade, *EU Cohesion Policy and European Integration – The Dynamics of EU Budget and Regional Policy Reform* (Ashgate 2013) 130.

[130]See for instance the opposition voices raised by the Netherlands and Denmark during the Agenda 2000 debate and by Sweden, the UK and Germany during the 2000–2005 period in Bachtler et al 2013 (supra, n 129) 130.

[131]For the VAT as a national transfer see Menéndez, supra (n 114) 300. For the general perception and nature of own resources see M Schratzenstaller, A Krenek, D Nerudova and M Dobranschi, 'EU Taxes as genuine own resource to finance the EU budget – pros, cons and sustainability-oriented criteria to evaluate potential tax candidates', FairTax Working Paper Series no 3 (*diva-portal.org*, June 2016) <https://ideas.repec.org/b/wfo/wstudy/58887.html> accessed 15 September 2025.

[132]Menéndez, supra (n 114) p 310 ff.

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In this Article I have argued that an EU digital levy would feed two birds with one seed. This is not only due to the necessity for an imminent response from the EU and the quantitative benefits it would bring to the EU budget. I have contended that the EU digital levy is the perfect candidate for the EU to introduce its first genuine EU tax. Such a tax can be (loosely) justified on the grounds of both the benefits principle – the EU has provided and will continue to provide a protective, coordinating regulatory framework for the digital economy and beyond – and the ability-to-pay principle in that the EU offers some degree of social welfare through its redistributive policies. Above all, such an EU tax would be perfectly aligned with the very mobile tax subjects that define the tax base for the taxation of the tech giants. As these mobile taxpayers within the EU cannot provide an accurate and concrete tax base in each individual Member State, it makes sense to conduct this assessment at the EU level. Finally, such an EU levy would counter one of the traditional arguments against national transfers to the EU budget – the '*juste retour*' argument – as it would primarily burden taxpayers outside the Union for the benefit of the common (EU) good, whether this is expressed through regulatory reform or redistributive policies.

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