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Mapping the History and Future of Carbon Taxation in the EU: Carbon Tax and Subsidiarity Principle

Rigorous Thesis

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1. Introduction

1.1. The Climate Change Issue and its Regulation

Climate change has often been cited as a defining issue of our time having major impacts on biodiversity, living conditions of all species, and the world economy. Over the last three decades, and especially in the past few years, concerns about climate change have been increasing. The debate about the impacts of global climate changes has gradually spread from international fora to governments and universities, and ultimately to the everyday lives of people. It is they who are experiencing these changes more frequently than ever before.

As public debate intensifies and scientific evidence becomes more apparent, governments are forced to adopt many kinds of measures. The general purpose of these measures is to either prevent climate change by decarbonizing the economy (so-called mitigation) or to adapt the society to deviations that cannot be averted anymore (adaptation). For mitigation purposes, traditional command-and-control regulation seems to be inappropriate nowadays. Measures whose purpose is mainly to forbid and command a behavior can be characterized as relatively rigid and are often perceived as inadequate to tackle the complexness of the problem of climate change. Therefore, an increasing number of national and regional administrations now prefer the economic regulation type of tools. The economic or market-based policy instruments enable states to deal with the climate change issue in a comparably more effective and determinant way. Most typically, they have a form of a carbon tax, or so-called emissions trading system. Both of these tools should, in theory, have a negative effect on emissions causing climate change and a positive effect regarding the increase of state revenues. Moreover, by these means, states can exercise their redistribution powers. To give an example, the redistribution is realized when a state puts a price on carbon emissions, the incentive to reduce the emissions thus increases, and gained revenues are then appropriately invested into projects and measures which further boost the process of decarbonization.[1]

[1] This thesis will describe only basic facts and premises of the economic theory behind carbon pricing. For more on that see e.g. HAITES, Erik. Carbon taxes and greenhouse gas emissions trading systems: what have we learned?. *Climate Policy.* 2018, vol. 18 (8), pp. 955-966. DOI: https://doi.org/10.1080/14693062.2018.1492897.

In 2003, the European Union decided to adopt a Union-wide emissions trading system (the European Union Emissions Trading System – EU ETS), not a universal framework for a common EU carbon tax. The EU ETS was introduced by Directive 2003/87/EC[2] and subsequently launched in 2005. Mainly the representatives of the European industry lobbied for the tradable permits system, rather than a common carbon taxation policy due to its supposed higher degree of flexibility.[3] As argued further in this thesis, it was also, from a strictly legislation-making point of view, comparably easier to introduce emissions trading.

However, the idea of a common European carbon tax framework has been considered even before the emissions trading system was even an option and has not been completely abandoned.[4] Currently, the idea to introduce a universal carbon tax framework is again growing in importance. There are multiple reasons for that. The EU ETS only covers certain economic areas; thus, many sources of CO_2 emissions remain unregulated. Also, due to the very low price of the EU ETS allowance in the past, the system was not considered too effective. A carbon tax, whose rate is not set by a market but a legislator, could function as a minimum carbon price.[5] Lastly, under the Paris Climate Agreement, the EU has set itself very ambitious climate and energy targets. A Union-wide carbon tax framework setting minimum rates could be a suitable tool to reach these since it is not expected that all the EU Member States would introduce their national tax at a sufficiently high level.

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[2] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0087.

[3] NESLEN, Arthur. Carbon taxation: An old-new idea whose time may soon come. In: *EURACTIV* [online]. 2013-02-19 [accessed: 2019-10-10]. Available at: https://www.euractiv.com/section/climate-environment/news/carbon-taxation-an-old-new-idea-whose-time-may-soon-come/.

In general, industry representatives perceived emissions trading as a less strict policy which would give them more space to maneuver their actions. Moreover, they liked the idea of emission savings trading as it opens new business opportunities.

[4] NESLEN, Arthur. Carbon taxation: An old-new idea whose time may soon come. In: EURACTIV [online]. 2013-02-19 [accessed: 2019-07-10]. Available at: https://www.euractiv.com/section/climate-environment/news/carbon-taxation-an-old-new-idea-whose-time-may-soon-come/.

[5] Therefore, if EU ETS price drops, carbon tax price could function as a carbon price floor and security.

1.2. Market Regulatory Instruments: Carbon Tax

Taxes are compulsory, unrequited payments made by institutional units to governmental units which are, in most cases, sources of the state budget.[6] A carbon tax is an excise tax which is based on the relative carbon content of a given good.[7] The purpose of this tax is to internalize the environmental cost of fuels or other products (i.e. rates are set according to how much CO_2e[8] is emitted). In the EU, the tax could be applied on areas not covered by the EU ETS (since the system regulates merely the largest polluters in energy and industrial sectors) or in cases when the EU ETS allowance price drops, and thus the system becomes dysfunctional.[9] A carbon tax has been established at a national level in a number of countries, where it helps reaching their climate change mitigation targets.[10]

Some of the EU Member States have introduced a tax based on the carbon content of a given good. All of them have in place a general energy tax, which is prescribed by the European law. However, existing carbon rates and energy taxation measures differ significantly across the EU.[11] That could partially undermine the collective efforts of the Union when it comes to the reduction of CO_2. With a universal carbon tax, its legal framework and minimum rates would be set at an EU level and thus all Member States would be obliged to implement this tool

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[6] OECD. Glossary of Statistical Terms. In: *OECD* [online]. Accessed 2020-09-05. Available at: https://stats.oecd.org/glossary/detail.asp?ID=2657

[7] Ibid. Available at: https://stats.oecd.org/glossary/detail.asp?ID=287

[8] The acronym 'CO_2e' stands for carbon dioxide equivalent. Since there are more greenhouse gases than just carbon dioxide, the equivalent represents the contribution of other greenhouse gases to global warming as an equivalent to the amount or concentration of carbon dioxide as the reference. For simplicity, this thesis uses the acronym 'CO_2' (or 'GHG', or simply 'emissions') for all greenhouse gases.

[9] EU Member States can introduce so called carbon price floor which can be considered as a form of carbon tax in cases when the EU ETS allowance price drops under a certain level. Many European countries currently evaluate adopting this tool. For instance, the Netherlands will have carbon price floor fully functioning from 2021. More on this see e.g.: https://www.government.nl/latest/news/2019/06/04/bill-submitted-on-minimum-carbon-price-in-electricity-production.

[10] In Europe, carbon tax was introduced, for instance, in Finland, Sweden, Latvia, Slovenia, Croatia, the UK, Ireland or France.

[11] KETTNER-MARX, Claudia – KLETZAN-SLAMANIG, Daniela. Energy and Carbon Taxes in the EU: Empirical Evidence with Focus on the Transport Sector. WIFO Working Paper No. 555. 2018, p. 17.

in a prescribed form. That could benefit reaching more ambitious greenhouse gas reduction targets and prevent EU internal market distortions.[12]

Although the introduction of a carbon tax at the EU level was put forward already few times,[13] the proposal never found sufficient support among the Member States. It has been a current understanding that new European tax legislation has to be agreed upon unanimously within the European Council.[14] Yet, in the past, common carbon tax regulation was mostly de facto vetoed by EU-wide tax opposing countries.[15]

Since the urgency of the climate crisis is becoming more apparent, most governments in Europe, as well as the European Union's governing body, the Commission, respond to this by proposing new or more strict environmental regulations. The continent has been viewed as the world's leader regarding climate change policies. It was the first one to introduce relatively stringent environmental policies in reaction to climate change science findings and, for instance, the world's largest emissions trading system. With the EU ETS allowance price considered not sufficiently high though,[16] experts call for the introduction of other supplementary measures. These should be able to raise the prices of carbon and regulate other areas of human activity that produce greenhouse gas emissions since the EU ETS only covers larger industrial installations and power plants. A carbon tax is a tool that is being put forward

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[12] In general, if different Member States' markets have different rules, internal market distortion can be presumed since some markets offer more (or less) favorable treatment to regulated units. See Chapter 3.2.4. for the example of the Czech Republic and Poland.

[13] For instance, in 2010. See: EURACTIV. Hedegaard throws weight behind EU carbon tax. In: *EURACTIV* [online]. 2010-06-28 [accessed: 2019-10-15]. Available at: https://www.euractiv.com/section/trade-society/news/hedegaard-throws-weight-behind-eu-carbon-tax/.

[14] See e.g. Art. 113 of TFEU.

[15] These were, for instance, the United Kingdom or later Poland. EURACTIV. Britain set to veto EU carbon tax plans. In: *EURACTIV* [online]. 2011-04-13 [accessed: 2019-10-15]. Available at: https://www.euractiv.com/section/climate-environment/news/britain-set-to-veto-eu-carbon-tax-plans/.

[16] In the initial phases of the EU ETS prices of emission allowance did not climb above 5 euro. Low prices did not motivate emitters to reduce their emissions, therefore the system was considered dysfunctional. With the latest reform of the system, the prices grew to almost EUR 28 in September 2020 and consequently to almost EUR 50 in May 2021. For current EU ETS allowance (EUA) prices, see the website of the EUA auction platform EEX: https://www.eex.com.

most of the time.[17] It should be mentioned that current carbon prices in Europe do not reach the average levels of what an ideal price should be. The appropriate carbon price which reflects societal costs of emitting one extra ton of greenhouse gas emissions can be as high as USD 417 per ton of CO_2 or as low as USD 54.[18]

The introduction of an EU policy in the tax area could encounter substantial obstacles – both political and legal ones. One of the first issues an EU legislative proposal can face is the Union's ability to legislate in the matter – the evaluation regarding the EU's scope of power to adopt a new piece of legislation always comes first when a new piece of law is considered. This assessment is governed by two principles which are based on the EU primary law, the EU treaties.

The principle of subsidiarity[19] is one of the main principles which govern the Union's authority to act. In areas in which the EU does not have exclusive competence (such as environment or energy – these are so called 'shared competencies' in which both the EU and the Member States can legislate), the subsidiarity principle safeguards a Member State's capacity to make decisions. On the other hand, it also authorizes possible intervention by the EU law-making institutions in cases when the objectives of an action cannot be sufficiently achieved by the state, but can, in fact, be better achieved at the Union level (these should be decided more effectively on the EU level '*because of the scale and effects of the proposed action'*).[20] The understanding of the principle evolved in time, and so did its influence on the EU's decision making.

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[17] HAITES, Erik. Carbon taxes and greenhouse gas emissions trading systems: what have we learned?. *Climate Policy.* 2018, vol. 18 (8), p. 955

[18] Social cost of carbon is a metric used to express economic damages to the society caused by carbon emissions. The world median show prices around USD 417, thus circa EUR 342.

[19] The principle is embedded in the Article 5 of the Treaty on European Union (TEU). It aims to ensure that decisions are taken as closely as possible to the citizen. With the exception of areas where the EU has exclusive competence, action at the EU level cannot be taken. However, if it is more effective to act at the European level, the power to legislate is deemed to exist. Subsidiarity is closely tied with the principle of proportionality. That means that any action by the EU should not go beyond what is necessary to achieve the objectives of the main treaties of the Union.

[20] Article 5(3) of TEU.

Another problem with the legislation-making process at the EU level might arise when the policy proposal is introduced as a bill that needs to be adopted via a special legislative procedure. This process requires unanimity among all the EU Member States. Until now, it has mostly been believed that all EU policies in the area of taxation have to be passed this way. It is so because Article 113 of the Treaty on the Functioning of the European Union (TFEU), the main tax provision in the EU primary law, specifically provides that in order to introduce provisions for the harmonization of tax legislation, the Council must act unanimously in accordance with this special legislative procedure. Thus, Member States have full control over taxation measures adopted on the EU level[21] and the European Parliament's powers are substantially reduced here. Article 194(3) TFEU which applies to energy and Article 192 (2) which is concerned about the environment require unanimity as well when making decisions about measures 'of a fiscal nature'.

In order to adopt a Union-wide carbon tax, and in case not all Member States are in favor of such proposal, modifying the rules for legislative procedures could ease the process. Another option could be to frame the prospective carbon tax proposal as purely an energy or an environmental measure. Both these options would ease its adoption process as well and their application should therefore be explored.

It shall be noted that the current European Commission will most likely propose changes in the decision-making process in the environmental and energy area. Its president Ursula von der Leyen committed to moving away from the rule requiring unanimity among the Member States when making decisions affecting energy and environmental taxation.[22] Such change of the legislation, as well as the introduction of a separate carbon tax framework, would be a part of a wholesome tax revision framework that has been promised by the president.[23]

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[21] TALUS, Kim. *EU Energy Law and Policy. A Critical Account.* Oxford: Oxford University Press, 2012, p. 64.

[22] GUERRA, Raquel. Von der Leyen floats 55% emissions cut by 2030. In: *ENDS Europe* [online]. 2019-07-15 [accessed 2019-09-16]. Available at: https://www.endseurope.com/article/56041/von-der-leyen-floats-55-emissions-cut-by-2030?utm_source=15/07/2019&utm_medium=email&utm_campaign=ENDS%20Europe%20editorial%20bulletin?utm_source=15/07/2019&utm_medium=email&utm_campaign=ENDS%20Europe%20editorial%20bulletin.

[23] The new tax policy will, according to the Commission's preliminary statements, have two pillars: climate change and digitalization. The European Commission will work towards revision of all existing tax legislation in order to adjust it to current needs of digital age and to combat climate change. It is expected that also other policies

This thesis will describe the functioning of this specific type of tax, explore the past attempts to regulate carbon taxation at an EU level and the reasoning behind its non-acceptance. It will also examine the development of the subsidiarity principle, its impact on the possible adoption of a Union-wide carbon tax, analyze subsequent legal obstacles the introduction of such taxation could encounter, and ways how these difficulties could be overcome. For this, other pieces of EU legislation will be analyzed, too.

By these means, the ultimate research question will be answered: By what means would the introduction of the EU carbon tax framework be possible when taking into account the EU's power to legislate in the areas of taxation, environment, and energy?[24]

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will be modified to promote climate change focus of the EU legislation. See: SERFATI, Jordan - VANROBBROECK, Nikolaas. European Commission's Tax Policy 2019 to 2024: What Can We Expect?. In: *Taxjournal* [online]. 2019-12-02 [accessed 2019-12-26]. Available at: https://www.taxjournal.com/articles/european-commission-s-tax-policy-2019-to-2024-what-can-we-expect.

[24] This thesis does not evaluate current political feasibility of carbon tax, nor the effectiveness of economic regulation in comparison with more traditional command-and-control regulation. Even though some authors mention that latter might be more effective, the more generally shared opinion is that economic regulation (i.e. carbon pricing) is in today's reality generally more feasible and well-suited for reaching climate change mitigation policies targets. See e.g.: MEHLING, Michael - TVINNEREIM, Endre. Carbon pricing and the 1.5° C target: near-term decarbonization and the importance of an instrument mix. *Carbon and Climate Law Review.* 2018, vol. 12 (1), pp. 50–61.

2. Climate Change and Legal Regulation

2.1. The UNFCCC Framework

The international-level legal basis for climate change legislation was formed at the United Nations Conference on Environment and Development in 1992. The outcome of the conference held in Rio de Janeiro was the first climate change international treaty – the United Nations Framework Convention on Climate Change (UNFCCC). The parties of the treaty committed that they will pursue efforts to stabilize '*greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.*'[25]

As a framework convention, the UNFCCC is dependent on the accompanying executive tools which are results of conferences of the treaty's parties (COP).[26] The purpose of the COPs is to establish mechanisms that would lead to the fulfillment of the ultimate objective of the UNFCCC stated in its Article 2. An important feature of the convention is that it recognizes the historic responsibility of the developed countries and the special circumstances and needs of the developing ones and makes it a guiding principle of the new legal framework (principle of common but differentiated responsibilities and respective capabilities)[27].

In 1997, the state representatives at the third Conference of Parties (COP 3) negotiated the Kyoto Protocol. The agreement took over the UNFCCC's concept of differentiated

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[25] The Article 2 of the UNFCCC states the ultimate objective of the convention: *"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."*

[26] Conference of the Parties 'COP' is the main decision-making body of the UNFCCC. Parties of the Framework Treaty are supposed to be meeting every year and negotiate protocols or other legal documents which execute the UNFCCC and its ultimate goals. COP meetings are orderly numbered – the first one took place in Berlin in 1995 (COP 1), the currently last one in Madrid in 2019 (COP 25).

[27] Included in Article 3 (1) of the UNFCCC.

responsibilities and distributed countries into groups (i.e. Annex 1 – developed countries with obligations and developing ones with less strict, or no responsibilities). Countries listed in the UNFCCC's Annex 1 were given greenhouse gas emissions reduction targets which they were supposed to reach by 2012.[28]

The parties to the UNFCCC recognized that economic regulation in a form of a market mechanism could be a useful tool for economically efficient emission reduction. Therefore, the Kyoto Protocol introduced an international emissions trading system, the historically first economic climate change regulation.[29] It allowed countries to trade credits generated by emission reduction projects which could help individual states to reach their Kyoto targets. Still, it was merely up to their domestic policies to fulfill the reduction obligations. The Kyoto Protocol was relatively successful in its first period (2008-2012). The market mechanism got quite well established and generated a large enough amount of emission reduction credits. However, due to reasons of diverse nature, its second period (ending in 2020) did not bring the desired results.[30] Therefore, it was decided at later COPs that a new tool or international treaty which would include also an international emissions trading mechanism replacing the Kyoto system should be adopted.[31]

2.2. New Climate Change Law Approaches under the Paris Agreement

The Paris Agreement is perceived as another climate change legislation milestone (following the UNFCCC and Kyoto Protocol). Negotiated at the 2015 COP 21 in Paris, it came into force only a year later, making it one of the fastest accepted international treaties in

[28] This represents so called top-down approach. The later Paris Agreement from 2015 is based on a bottom-up approach.

[29] Article 17 of the Kyoto Protocol.

[30] KURIYAMA, Akihisa – ABE, Naoya. Ex-post assessment of the Kyoto Protocol – quantification of CO_2 mitigation impact in both Annex B and non-Annex B countries. *Applied Energy*. 2018, vol. 220 (C), p. 286-295.

[31] An official mandate for the adoption of a new agreement was negotiated at the COP 17 which took place in Durban, South Africa in 2011.

history.[32] The Paris Agreement's long-term goal is to keep the increase in global average temperature to *'well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C'*.[33]

The agreement is still based on the UNFCCC framework and premises but it builds on some new or adjusted principles and overall creates an updated climate change legal system. Its Article 4 requires countries to submit so-called nationally determined contributions (NDCs). These represent state pledges regarding emission reductions. This way, the agreement incorporates the bottom-up approach: states themselves decide what their contributions regarding emission reduction policies should be. Even though the Paris Agreement still recognizes different capabilities of its parties and historic responsibility of developed states,[34] the principle did not result in strict differentiation when it comes to state responsibilities, as it did after the UNFCCC's adoption. All countries now have obligations under the Paris Agreement - they have to submit their NDCs and then update them periodically.[35]

The NDCs do not include solely the individual countries' CO_2 reduction target. They should also outline the means the country anticipates reaching them, the scope of reductions, as well as methodologies for emission estimations.[36] For instance, the European Union predominantly relies on the European Union Emissions Trading System (EU ETS), as well as its members' domestic policies. Some of the EU countries have incorporated CO_2 taxation tools targeting especially the non-EU ETS area.[37] Current EU NDCs are in line with its 2020 climate change and energy strategy.[38] However, the EU foresees the 2030 climate policies update which

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[32] YEO, Sophie. Explainer: Paris Agreement on climate change to ‚enter into force'. In: *CarbonBrief* [online]. 2016-10-06 [accessed 2020-05-19]. Available at: https://www.carbonbrief.org/explainer-paris-agreement-to-enter-into-force.

[33] Article 2 of the Paris Agreement.

[34] See e.g. Article 2 (2) of the Paris Agreement.

[35] Article 4 (9) prescribes that the NDC should be updated every five years.

[36] See e.g. the European Union's NDCs put forward to the UNFCCC official register: https://www4.unfccc.int/sites/NDCStaging/Pages/All.aspx.

[37] For example Sweden differentiates between carbon tax rates for entities which are subject to the EU ETS regulation and rates for other entities. See Annex 1 for detailed rates.

[38] The description of the 2020 Climate & Energy Package can be found at the European Commission website: https://ec.europa.eu/clima/policies/strategies/2020_en.

will be mirrored in the EU's new NDCs. Thus, it can be argued that carbon tax established in more of the Member States is desirable.

2.3. EU and its Climate Change Policies

European climate change policies are designed in a way that leads the EU towards fulfilling its international climate pledges. For the 2020 strategy, the EU set itself goals in three areas: greenhouse gas reduction, renewable energy sources share increase, and improvement in energy efficiency.[39] The Union followed a similar pattern in 2017 and 2018 when its state representatives negotiated the 2030 Climate and Energy Package which was later adopted by the European Parliament. This set of legislation includes, among other measures, targets for 2030 and specific tools to be used so that the defined goals will be met. Moreover, the EU's climate goals for 2020 were further developed and updated.[40]

With a vision to be carbon-neutral by 2050, the European Commission introduced the European Green Deal (EGD) in December 2019.[41] Taxation measures, as an emissions trading

[39] The 2020 Climate and Energy Framework includes a 20% GHG emissions reduction target, a 20% increase of renewable energy share in final energy consumption goal and a target of 20% improvement of energy efficiency. More on this: https://ec.europa.eu/clima/policies/strategies/2020_en.

[40] OBERTHÜR, Sebastian. Hard or Soft Governance? The EU's Climate and Energy Policy Framework for 2030. *Politics and Governance.* 2019, vol. 7 (1), p. 18. The main targets are following: at least 40% cuts in greenhouse gas emissions, at least 32% share for renewable energy, and at least 32.5% improvement in energy efficiency. See https://ec.europa.eu/clima/policies/strategies/2030_en. In April 2021, the targets have been updated by the proposal enshrined by the European Climate Law. The deal agreed between the Member States and the EU Parliament envisages the emission reduction to be at 55% by 2030, that is 15% more than it had been agreed just three years before that. More ambitious targets are expected to be set also for renewable energy sources and energy efficiency, targets in other subsector are also expected to be proposed. See: BBC. Climate change: EU to cut CO2 emissions by 55% by 2030. In: *BBC News* [online]. 2021-04-21 [accessed 2021-04-28]. Available at: https://www.bbc.com/news/world-europe-56828383 and EURACTIV. Leak: EU's draft renewables law confirms 38-40% target for 2030. In: *EURACTIV* [online]. 2021-05-04 [accessed: 2021-04-28]. Available at: https://www.euractiv.com/section/energy/news/leak-eus-draft-renewables-law-confirms-38-40-target-for-2030/.

[41] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal COM(2019) 640 final.

system supplement, play one of the central roles in the Commission's climate plan.[42] According to the EGD, the Energy Taxation Directive[43] will be revised so that it was more focused on environmental protection.[44] The cabinet is also currently planning to propose certain changes to the EU treaties in a way that secures that the tax area could be amended via the ordinary legislative procedure using qualified majority voting[45] (currently, it is commonly understood that measures regarding taxation must be approved unanimously). The EGD also presumes the expansion of the EU ETS, so that the trading scheme would cover more areas that are the source of CO_2 emissions.[46]

Diverse market mechanisms, including the emissions trading schemes and other types of economic regulation such as carbon tax, represent types of measures that have the potential to fulfill demanding European climate change and energy goals as well as pledges included in the NDC. Areas not covered by the EU ETS could be appropriately regulated by a carbon tax. These tools, when designed in a way that they are complementary to each other, would secure the achievement of the EU's 2050 climate neutrality goal and compliance with the Paris Agreement's ultimate objectives.

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[42] SERFATI, Jordan - VANROBBROECK, Nikolaas. European Commission's Tax Policy 2019 to 2024: What Can We Expect?. In: *Taxjournal* [online]. 2019-12-02 [accessed 2019-12-26]. Available at: https://www.taxjournal.com/articles/european-commission-s-tax-policy-2019-to-2024-what-can-we-expect.

[43] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

[44] Article 2.1.1. of the European Green Deal.

[45] Article 2.1.1. of the European Green Deal. In connection with the COVID-19 crisis, the Commission issued another communication on July, 15 2020 in which it repeats its intention to *'explore how to make full use of the provisions of the Treaty on the functioning of the EU (TFEU) that allow proposals on taxation to be adopted by ordinary legislative procedure, including article 116 TFEU'* (Communication from the Commission to the European Parliament, the European Council and the Council – An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy COM(2020) 312 final of July, 15 2020.

[46] Article 2.1.1., 2.1.4. and 2.1.5. of the European Green Deal. The European Union will promote inclusion of local heating and transport into the EU ETS, as announced by the EU officials in April 2021. See EURACTIV. ETS revision will include buildings and road transport, EU Commissioner says. In: *Euractiv* [online]. 2021-05-17 [accessed 2021-04-28]. Available at: https://www.euractiv.com/section/energy/news/ets-revision-will-include-buildings-and-road-transport-eu-commissioner-says/.

3. Climate Change Market-Based Instruments

3.1. Market-Based versus Command-and-Control Regulation

Climate change is an example of a common issue that is very complex and includes many uncertainties, therefore is hard to tackle.[47] Due to the increasing severity of problems it has been causing, the need to regulate human activities with negative impacts on our climate has risen in prominence.

The traditional model of command-and-control regulation[48] can be regarded as the most common form of environmental policy. It proved its usefulness mainly in the past. For instance, when the ozone layer depletion was discovered and fast action was needed, specific regulation was developed which banned the use of unwanted chemicals. Therefore, regulators have considerable experience with this type of policy and often opt for it as the first option.[49] However, the command-and-control approach has shown limitations when used to regulate such complex issues as, for example, climate change.[50]

One of the reasons for that is that obligations to act in the area of transboundary environmental issues (among which climate change belongs) are based on international law. Command-and-control regulation relies on prohibiting certain actions and sanctions when the subject is non-compliant. However, such an approach cannot be applied on an international

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[47] DOWNIE, David. Global environmental policy: governance through regimes. In: AXELROD, Regina - VIG, Norman (eds.). *The Global Environment: Institutions, Law and Policy. 2nd ed.* Washington DC: CQ Press, 2012, pp. 64-82.

[48] Command-and-control regulation is a tool used by the state by which it specifies undesired behavior, i.e. what is illegal, or sets standards as well as negative sanctions. By these means the state power enforces the wanted behavior. This type of regulation can respond quickly to activities which are not in compliance with set standards, however is often perceived negatively by the recipients, allows flexibilities only on a limited scale and can be stifling for businesses.

[49] TOL, Richard. *Climate Economics: Economic Analysis of Climate, Climate Change and Climate Policy*. Cheltenham: Edward Elgar Publishing, 2019, p. 51.

[50] EVANS, James. *Environmental Governance*. London: Routledge, 2012, p. 180.

level due to the fact that no strong international enforcement body exists.[51] This is just one of the reasons why policymakers searched for a more suitable kind of regulation.

Moreover, tackling climate change is a comparably more complex issue (when compared to the ozone layer issue, for instance). Greenhouse gas emissions are produced by almost every human activity. Therefore, emitting CO_2 cannot simply be prohibited. Additionally, when the findings about the ozone layer depletion were made, only one of many human activities needed to be regulated, and chemical substances causing the problem were quite easily replaced. Climate change, on the other hand, requires significantly larger changes throughout the whole world economy, not just in one sector.

When comparing to command-and-control, the market-based regulation differs from this more traditional way of regulating human behavior in a way that it incentivizes desired conduct by affecting the economic situation of a given person or an entity.[52] The oldest market-based instruments are taxes and subsidies. The tax imposes a charge, levy, or a penalty on a unit of product.[53] With a subsidy, a monetary reward is granted with every unit avoided or not used.[54]

A newer and more complex example of market-based regulation measure is the emissions trading (often called cap-and-trade system)[55]. Trading schemes offer an even higher degree of flexibility when it comes to CO_2 reductions (in comparison to carbon taxation). Its purpose is also to provide finances for other low-carbon measures. Why emission trading tends

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[51] HUNTER, David - SALZMAN, James - ZAELKE, Durwood. *International Environmental Law and Policy*. New York: Foundation Press, 2011, p. 33.

[52] Market-based regulation is also referred to as economic, or market regulation in this thesis. According to the OECD, a definition of market-based instruments is that they '*seek to address the market failure of 'environmental externalities' either by incorporating the external cost of production or consumption activities through taxes or charges on processes or products, or by creating property rights and facilitating the establishment of a proxy market for the use of environmental services'*. See: OECD. *Business and the Environment: Policy Incentives and Corporate Responses*, 2007. ISBN 978-92-64-02620-9. Definition available at: https://stats.oecd.org/glossary/detail.asp?ID=7214.

[53] TOL, Richard. *Climate Economics: Economic Analysis of Climate, Climate Change and Climate Policy*. Cheltenham: Edward Elgar Publishing, 2019, p. 52.

[54] Ibid.

[55] See following reference.

to be a more flexible tool of emission reduction is because market players are allowed to make their reductions a tradable item which can bring them profit. Therefore, with the market-based mechanisms such as emissions trading, the reduction is taking place where it is the most economically feasible.[56]

Another kind of regulation based on financial behavior is a feebate which imposes a sliding scale of fees on products with a high carbon footprint. If a given production emits fewer emissions than the average, the system awards a rebate or a subsidy. When more emissions are produced, the installation which produces a given good is obliged to pay a fee whose size depends on the volume of emissions emitted.[57]

Market-based regulatory measures can offer advantages the traditional forms of regulation cannot. To name the main benefit of them, it gives the regulated entity relative freedom to choose how to behave. That means that it does not forbid certain behavior completely; it makes it more or less economic. A regulated entity can, in theory, decide not to

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[56] This thesis is primarily focused on carbon taxation. Emissions trading, as another example of market-based regulation, should be mentioned here, though. The best example of an emissions trading scheme is the oldest and currently the largest one - the European Union Emissions Trading System. The Union has in 2003 decided to introduce this form of economic measure to regulate CO_2 and other GHG emissions in order to comply with its international climate pledges. The EU ETS was established by the Directive 2003/87/EC which was, since then, amended multiple times to react to the changes at the carbon allowances market.

The EU ETS is a cap and trade scheme: a fixed annual number (the cap) of emission allowances, which can be traded among market attendees, is established. The cap decreases each year by a given 'linear reduction factor' (from 2021 on, this factor is 2,2% a year). Number of industrial sectors as well as the energy sector and aviation in the 28 EU Member States (plus Iceland, Liechtenstein, and Norway) are covered by the scheme. One tradable carbon allowance gives its owner the right to emit one ton of CO_2 or equivalent. Some allowances are given for free so that the EU was protected from possible carbon leakage (i.e. moving the industry, and thus the emissions, to another country where climate regulations are less stringent). However, the system is gradually shifting towards giving less allowances out for free. More allowances are currently being auctioned.

The EU ETS regulates around 45% of GHG emissions within the EU+3. From 2021, it will be linked to the Swiss ETS. More on this: https://ec.europa.eu/clima/policies/ets_en.

[57] For instance, whether a power generator would receive a reward or pay a fee would depend on the their output times the difference between the emissions per kilowatt-hour and the average emission rate of the whole industry (International Monetary Fund. *Fiscal Monitor: How to Mitigate Climate Change.* Washington: IMF Publication Services, 2019, p. 4.)

reduce emissions and thus pay more for emission allowances. Funds gained from these companies can then be invested to reduce emissions somewhere else.

When taking emissions trading as an example, another one of its advantages is that it can be established at an international level (such as the international carbon credit trading mechanism under the Kyoto Protocol was established). At the same time, acceptance of the market-based forms of public policies by regulated subjects tends to be more positive.[58] Their efficiency is also recognized by a number of academic authors.[59]

Another proof of the advantageousness of market-based regulation and specifically emissions trading systems can be the fact that carbon pricing initiatives around the world have risen in recent years.[60] Governments not only understand their overall better feasibility but revenues obtained through these are a welcomed income to the state budget. Therefore, many states opt for carbon pricing tools to meet national climate targets submitted via Nationally Determined Contribution (NDC) to the Paris Agreement.[61]

3.2. Carbon Taxation

According to the IPCC, climate change mitigation efforts need to be intensified, including the progressive ones.[62] The pledges submitted via the Paris Agreement NDCs are currently not sufficient to prevent dangerous consequences and they are lagging behind what is

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[58] HUNTER, David - SALZMAN, James - ZAELKE, Durwood. *International Environmental Law and Policy*. New York: Foundation Press, 2011.

[59] See e.g.: BOESHERTZ, Daniel - ROSENSTOCK, Manfred. In: MILNE, Janet, et. al. (eds.) *Critical Issues in Environmental Taxation: Volume I: International and Comparative Perspectives*. Richmond: Richmond Law & Tax, 2005.; or: HAITES, Erik. Carbon taxes and greenhouse gas emissions trading systems: what have we learned?. *Climate Policy.* 2018, vol. 18 (8), pp. 955-966. DOI: https://doi.org/10.1080/14693062.2018.1492897.

[60] WORLD BANK GROUP. *State and Trends of Carbon Pricing 2020.* Report by the World Bank, ICAP and Navigant. May 2020, p. 3.

[61] For example, the EU specifically mentions its emissions trading system as one of the main tools it foresees fulfillment of its commitments under the Paris Agreement, see e.g. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Green Deal COM(2019) 640 final.

[62] Intergovernmental Panel on Climate Change. *Special Report Global Warming of 1.5 degrees Celsius*, 2018, p. 66. Available at: https://www.ipcc.ch/sr15/.

necessary.[63] Even if the first contributions were realized (i.e., translated into tangible measures that bring emissions reduction), the global temperature is still likely to rise by 2.3 – 3.5 degrees Celsius by 2100.[64] Therefore, it is necessary to re-evaluate the current policy settings and consider their amendment or the introduction of new tools so that deeper emissions cuts can be secured and Paris Agreement goals achieved.

Common carbon taxation framework can be one of these tools. Since the urgency of the climate crisis is increasingly apparent, one of the main advantages of carbon taxation is that it can be implemented in a relatively short time horizon and in the same time is able to target specific subjects (when compared to more complex market-based measures, such as emissions trading, which takes longer to establish).[65] With the tax, the price of carbon is also more predictable since it is set at a state level.[66] Cap-and-trade schemes set a definite limit on emissions but not on their price which is dependent on the situation in the market and is, therefore, relatively unstable.[67] Naturally, this variability creates uncertainties – a predictable price signal is important for business planning, as well as governmental budget preparations.[68]

As of 2020, 30 national and sub-national jurisdictions had an operational carbon tax, of which 11 are in the EU.[69] When assessing the already introduced carbon taxes, their

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[63] REILLY, John et al. Energy & Climate Outlook: Perspectives from 2015. MIT Joint Program on the Science and Policy of Global Change, 2015, 24 p. Available at: http://web.mit.edu/emonier/www/publications/Outlook2015.pdf.

[64] See e.g.: CAT. The Cat Thermometer. In: *Climate Action Tracker* [online]. 2019-12-10 [accessed: 2019-12-29]. Available at: https://climateactiontracker.org/global/cat-thermometer/.

[65] WEITZMAN, Martin. Internationally-Tradable Permits Can Be Riskier for a Country than an Internally-Imposed Carbon Price. Discussion Paper - Harvard Project on Climate Agreements. 2015-74, p. 2. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652796.

[66] Ibid.

[67] That is why some countries introduce a hybrid system – ETS combined with tax elements. For example, if an emissions trading system has a specified minimum or maximum allowance price (so called carbon price floor), the system *de facto* works similarly to a carbon tax. Germany in 2021 implements its own national emissions trading system. The price of allowance will be fixed in the period until 2025.

[68] CARBON TAX CENTER. What's carbon tax?. In: *Carbon tax Center* [online]. [accessed: 2019-12-29]. Available at: https://www.carbontax.org/whats-a-carbon-tax/.

[69] WORLD BANK GROUP. *State and Trends of Carbon Pricing 2020.* Report by the World Bank, ICAP and Navigant. May 2020, p. 7.

effectiveness in most cases depends on the tax rate. Lower tax rates and higher uncertainty regarding the rate changes cause the carbon tax to be less effective.[70]

One of the disadvantages carbon tax establishment can results in is that the general public often disapproves of new taxes. It is so because tax, in most cases, raises the final price of a product to a customer. If not established appropriately, it can also harm businesses and increase bureaucracy in the country.[71] Therefore, governments might often hesitate to adopt such measures for ideological reasons or also, simply, popularity. This concern is not groundless – it should be noted that, according to theory and empirical literature, energy taxes frequently tend to be mildly regressive.[72]

3.2.1. Main Principles of Carbon Taxation

A carbon tax is most typically used to regulate negative economic externalities. These exist when a given economic activity has a negative impact on a third party or an environment that does not receive compensation. According to the United Nations and its environmental statistics guidelines, environmental externalities *'refer to the economic concept of uncompensated environmental effects of production and consumption that affect consumer utility and enterprise cost outside the market mechanism.'*[73] In the case of greenhouse gas emissions, the pollution creates a *'societal cost'* of a given good or an activity – that is climate change – which has or will most likely have negative effects on many other human activities. Carbon tax internalizes these negative externalities (i.e., it forces the polluter to pay for the pollution they caused).[74] Most generally, carbon tax makes more traditional fossil fuels and

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[70] HAITES, Erik. Carbon taxes and greenhouse gas emissions trading systems: what have we learned?. *Climate Policy.* 2018, vol. 18 (8), p. 961.

[71] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 1.

[72] I.e. they impose a bigger burden on the less wealthy groups of inhabitants. See: PADILLA, Emilio – ROCA, Jordi. The proposals for a European tax on CO2 and their implication for intercountry distribution. Environmental and Resource Economics. 2004, vol. 27 (3), p. 294.

[73] UNITED NATIONS. Glossary of Environment Statistics. Studies in Methods, Series F, No. 67, 1997. Available at: http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf

[74] Internalization of negative externalities is closely bound to the 'polluter pays principle'. According the UN Glossary, '*the polluter-pays principle is the principle according to which the polluter should bear the cost of*

production based on them more expensive.[75] Therefore, it is one of the examples of a Pigouvian type of tax.[76]

3.2.2. How the Carbon Tax Rate is Set

In most cases, tax based on carbon content puts a price on every ton of greenhouse gas emitted by human activity. The government first specifies the emissions sources subject to the tax: it can be designed to burden most typically production, distribution and/or use of fossil fuels.[77] Then, the state sets the tax rate per unit of emissions.

How much is paid on tax usually depends on how many carbon (or carbon equivalent) emissions the combustion of certain fossil fuel emits (every fuel has its 'CO_2 emission factor' – tax reflects the carbon content of a given fuel based on its emission factor).[78] This way, fuels that emit fewer tons of greenhouse gases when being burnt than others are favored. Every ton of CO_2 emission avoided thus brings a reward. In this way the tax works similarly as a subsidy – in the short run, these two tools have the same effect on emissions reduction.[79]

There are a few ways the tax rate can be set (methods can be combined, too). One option is to set the rate at a level that should secure reaching the country's emission reduction targets.

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measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution' (See: UNITED NATIONS. Glossary of Environment Statistics. Studies in Methods, Series F, No. 67, 1997. Available at: http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf).

[75] WEITZMAN, Martin. Internationally-Tradable Permits Can Be Riskier for a Country than an Internally-Imposed Carbon Price. Discussion Paper - Harvard Project on Climate Agreements. 2015-74, p.10. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652796.

[76] *'Pigouvian tax is a tax levied on an agent causing an environmental externality (environmental damage) as an incentive to avert or mitigate such damage.'* (See: UNITED NATIONS. Glossary of Environment Statistics. Studies in Methods, Series F, No. 67, 1997. Available at: http://unstats.un.org/unsd/publication/SeriesF/SeriesF_67E.pdf).

[77] This way, the price of carbon is reflected in finals products – their producers transfer the burden to final customers.

[78] Swedish carbon tax can be used as an example: since combustion of one liter of gasoline releases 2.323 kg of CO_2 and the carbon tax rate of 0.25 SEK per kg of CO_2 the addition to the consumer price of gasoline will be 0,58 SEK per liter (data per 2020).

[79] TOL, Richard. *Climate Economics: Economic Analysis of Climate, Climate Change and Climate Policy*. Cheltenham: Edward Elgar Publishing, 2019, p. 52.

A detailed economic model needs to be developed for this.[80] Another option is to copy other countries' approaches (for instance, in the same geographical area) and set the tax rate at a similar level. This could ensure that the emitting activities will not simply shift to the jurisdiction of neighboring countries when customers start purchasing cheaper goods abroad. Some countries also choose the tax rate in such a way that it generates a desired and at least broadly predetermined tax revenue. At the most basic level, the tax rate should be equal to the estimated benefit of reducing one ton of CO_2, or equivalent to the social marginal damages from producing one ton of emissions[81] (in this case, the above criterion of the societal cost of emissions and climate change plays a role).

When it comes to the process of introduction of a carbon tax, in most cases it is phased in gradually.[82] It can be initiated with a low rate or narrow initial base and be increased over time. The tax legislation can also include a 'grandfathering' component. This way, the measure will exempt a baseline level of emissions from taxation (for instance, a quantity equal to the total emitted during a reference year).[83] Grandfathering was a distinct feature of the EU Emissions Trading Scheme (EU ETS) in its initial phases, too.[84]

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[80] METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review.* 2009, vol. 33 (2), p. 511.

[81] METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review.* 2009, vol. 33 (2), p. 511.

Damages, or social costs of carbon emissions can be difficult to calculate. In 2015, the American Interagency Working Group on the Social Cost of Greenhouse Gases estimated that the cost could range from USD 11 to 105 per ton of CO_2. See: LUCAS, Gary M. Voter Psychology and the Carbon Tax. *Temple Law Review*. 2017, vol. 90 (1), p. 38.

[82] HAITES, Erik. Carbon taxes and greenhouse gas emissions trading systems: what have we learned?. *Climate Policy.* 2018, vol. 18 (8), p. 956.

[83] METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review.* 2009, vol. 33 (2), p. 516.

[84] In the EU ETS, the grandfathering principle was a guiding rule of free allowances allocation. Free allowances, which the operators did not have to purchase on the single market, were assigned according to the historical production of a given installation.

Different kinds of fossil fuels have different carbon content. Therefore, a standardized unit needs to be settled for tax calculation (such as the already mentioned emission factor or a British thermal unit).[85]

Tax can be levied at different levels of the supply chain; diverse parties can be obliged to pay the tax. Government might target the top points of production (for instance, the producers, such as companies operating coal mines), intermediaries – distributors and suppliers, or they can charge consumers directly, for example by electricity bills (which should motivate customers to consider switching energy supplier as well as raising their energy-consciousness).[86] It is very likely that the final costs are paid by the customers even though the obligation is given to the upstream subjects in the value chain. Producers or suppliers increase the price of the final product when tax is imposed on them.

3.2.3. Carbon Tax Effects and Revenues

The governments in countries with a carbon tax in place decide the price of one ton of CO_2 and, most generally, translate it into a tax on energy products. These are typically oil, coal, gas, or electricity. According to the economic theory,[87] when a tax is applied within a certain sector, it increases the cost of production and of the final product. Businesses should be forced to reduce their consumption of fossil fuels and increase energy efficiency (in order to decrease the cost of production and not to lose their customers). Households should be motivated[88] to make smarter decisions about their consumption. Within a longer period, the tax causes a shift in investments to more energy-efficient products and processes and the more carbon-intensive

[85] British thermal unit implies heat content of a given fuel, emission factor describes how much CO_2 is emitted per a unit of energy produced by a given fuel. For example, in the Czech Republic, the factors are, for some areas determined by the Czech Ministry of Environment. See: https://www.mzp.cz/cz/vypoctove_faktory_emise.

[86] METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review.* 2009, vol. 33 (2), p. 516.

[87] Ibid.

[88] In case of households, products they purchase should be more expensive if also their production was costlier. With higher electricity prices, people are motivated to buy products which consume less energy and thus be motivated to purchase, for instance, energy-saving home appliances.

sectors shrink[89] (if businesses that produce or utilize processes that emit greenhouse gases remain unchanged). A carbon tax should also have the effect of making more environmentally friendly alternatives more competitive.[90]

The desired impact of a carbon tax has to be maintained by adjusting the rate so that it accounts for the effects of inflation or fossil fuel price changes.[91] This way, the tax can secure further emission reductions. However, it is also of equal importance to specify the tax rate for several years ahead. Emission reductions require high upfront investments and have long-range payoffs. Early announced tax measures facilitate these investment decisions.[92] Their relative predictability is an advantage of carbon taxes, compared to emissions trading, where the price of carbon is uncertain.[93]

Like all other kinds of regulation, a carbon tax can have negative effects, too. Among others, it can cause so-called carbon leakage[94] and migration of carbon-intensive industries and thus greenhouse gas emissions to other countries. This leakage mostly happens in situations when there is a territory with stringent CO_2 regulations and countries where carbon reduction measures are not in place (or are sufficiently weaker) and the transferring production to these countries is relatively easy. It can be averted by, for instance, putting border tax adjustments in

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[89] METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review*. 2009, vol. 33 (2), p. 516.

[90] Ibid.

[91] For instance, Metcalf & Weisbach see the rate changes as the most significant challenge of a carbon tax design. The rate has to change throughout the time – e.g. when new information regarding the effects of human activities on climate change becomes available. Optimal rate should be constantly examined and, if needed, adjusted. Authors suggest a partial delegation of this rate-setting to an expert agency. (See: METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review.* 2009, vol. 33 (2), p. 501.)

[92] Ibid.

[93] Tax rates can be more easily manipulated by the state that the price of carbon in the emissions trading scheme. Price of the allowance in the emissions trading system is susceptible to even small market deviations. For instance, between March 11 and March 20, 2020, the COVID-19 expansion caused the EU ETS allowance price to shed about 33 %. (See: FERDINAND, Marcus. European power and carbon markets affected by COVID 19 – an early impact assessment. In: *ICIS* [online]. 2020-03-27 [accessed: 2020-03-30].)

[94] See reference no. 56.

place.[95] These might be necessary in order to protect domestic industries, especially those sensitive to stronger environmental regulation (such as the steel, chemical, and cement industries, where carbon reduction has proved to be very difficult to achieve).[96]

With a carbon tax, the money obtained through fees flows from polluting companies and household bills to the government. In an ideal case, the revenues should then be invested in other environmental measures so that the effect on emissions reduction is multiplied.[97] At the same time, according to academia, environmental and carbon taxation respectively should and mostly follow the *'revenue neutrality principle'*. That means that revenues additionally generated from taxation are recycled back into the economy through reducing other taxes - especially labor taxes or health insurance.[98]

The revenues can also be invested into temporary transition assistance for workers in shrinking industries (such as the coal industry), who might face mass long-term unemployment

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[95] Border adjustments are import fees levied by a country on imported goods which are manufactured in another state. In case of a carbon border adjustment, the levy is imposed on items coming from non-carbon-taxing countries (or generally from countries where environmental regulation does not meet the domestic country's standards). Carbon border adjustment has been introduced within the Fit for 55 package released on July, 14 2021. More on this: CARBON TAX CENTER. Border Adjustments. In: *Carbon Tax Center* [online], [accessed: 2020-03-30].

[96] Carbon border tax has become an important topic for the new European Commission under president von der Leyen. The carbon border tax would be levied on imports from countries with less strict climate policies and its aim would be to protect European industries from cheaper competition from third countries. The plan to introduction of such tax is included in the European Green Deal. According to the document, the importers of steel, aluminum and other products with high carbon footprints would be obliged to purchase allowances, similarly to operators under the EU Emissions Trading System. The measure would thus be similar to an import tax and raise prices of imported products. That should help the competitiveness of the EU industry threatened by the carbon leakage. However, the proposal is likely to face constraints from other countries and possibly also the World Trade Organization and its rules. More on this: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12228-Carbon-Border-Adjustment-Mechanism.

[97] For instance, the EU ETS Directive prescribes certain percentage of state revenues from allowances auction which has to be invested in climate-related measures.

[98] Revenues can be locked-up and therefore intended to be used for a specific purpose (so called 'earmarking'). (See: SPECK, Stefan - GEE, David. Implications of environmental tax reforms: revisited. In: KREISER, Larry et al. *Environmental Taxation and Climate Change*. Cheltenham: Edward Elgar Publishing, 2011, p. 19.).

because of the environmental policies.[99] Together with appropriate information campaigns from the side of the government, this revenue recycling also secures a higher degree of acceptance of the tax measure by the public.[100]

However, despite experts' preference for a carbon tax, the general public's attitude towards it tends to be rather negative. Citizens are in most cases biased against any kind of tax, since their cost is noticeable in price rises, but benefits are not necessarily perceived.[101] The same phenomenon occurs with a carbon tax, even though the public may generally support environmental policies.[102] Therefore, the question of how the tax should be set so that it is supported by the public is of crucial importance. Some suggest setting the tax rate at a 'moderate compromise' level (not too low, so that the importance of the issue is recognized, but not so high that it is rejected by the public).[103] Naturally, the baseline for what is too low and too high will depend on many factors. Exemptions from paying the tax, which would reward certain behavior by regulated entities (or individuals) can also have positive psychological effects.[104]

Finally, funds gained from the tax could (and, arguably, should) be spent to help the transformation to a low-carbon economy That includes investments into renewable energy sources and grids (in the form of subsidies or grants), support for energy efficiency measures, assistance to new forms of businesses, or relevant research and development. The public might be more approving of a carbon tax when a proper information campaign is in place to report on how the revenues are spent.[105]

3.2.4. Case Study: Carbon Tax in Sweden and Czechia

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[99] METCALF, Gillbert – WEISBACH, David. The Design of a Carbon Tax. *The Harvard Environmental Law Review.* 2009, vol. 33 (2), p. 514.

[100] Ibid.

[101] LUCAS, Gary M. Voter Psychology and the Carbon Tax. *Temple Law Review*. 2017, vol. 90 (1), p. 15. However, when people are shown evidence proving the environmental benefits of the tax, the support generally increases. See: ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 1.

[102] LUCAS, Gary M. Voter Psychology and the Carbon Tax. *Temple Law Review*. 2017, vol. 90 (1), p. 39.

[103] Ibid.

[104] LUCAS, Gary M. Voter Psychology and the Carbon Tax. *Temple Law Review*. 2017, vol. 90 (1), p. 40.

[105] Ibid.

A short example of a functioning carbon tax will now be introduced. One of the first countries in Europe (and in the world) to introduce a tax based on the carbon content of a given fuel was Sweden in 1991. The carbon tax was established alongside the existing energy tax. Currently, its rate is one of the highest among carbon taxes in the world (around SEK 1,190 corresponding to ca. EUR 110 per ton of fossil carbon dioxide emitted)[106] and can serve as a good example of how a well-established carbon tax framework can function.

The Swedish carbon tax was introduced by the Energy Taxation Act.[107] To ease its public and political acceptance of the tax, the tax rate was gradually raised [108] That applies not only to the tax rate (it started at the rate of EUR 23) but also to the sectors which are subject to it. In 1991, the tax was introduced as part of a tax legislation reform[109] that also included a decrease in some other taxes (such as energy tax).[110] In the beginning, sectors such as industry enjoyed, for example, full exemption from paying the tax.[111] Some households were also granted a reduction in income tax.[112] Some of these reliefs were progressively phased out in later years.

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[106] Government Offices of Sweden. Sweden's carbon tax. In: *Government.se* [online]. 2020-02-25 [accessed: 2020-05-01].

[107] Current version of the act: Swedish Energy Tax Act (SFS 1994:1776). See: https://www.ecolex.org/details/legislation/energy-taxation-act-19941776-lex-faoc131806/.

[108] Government Offices of Sweden. Sweden's carbon tax. In: *Government.se* [online]. 2020-02-25 [accessed: 2020-05-01].

[109] The reform was a product of the oil crises in the 1970s and subsequent governments' desire to be more oil independent, as well rising environmental concerns. The major tax reform of affected all economic sectors. Beside carbon tax, a tax on Sulphur and nitrogen oxide were introduced, as well as a value added tax on energy. The traditional energy tax was halved. (See: ACKVA, J. – HOPEE, J. The Carbon Tax in Sweden. Policy paper by EUKI (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety of Germany). 2018, p. 4.)

[110] International Monetary Fund. *Fiscal Monitor: How to Mitigate Climate Change*. Washington: IMF Publication Services, 2019, p. 13.

[111] And still are. Electricity production in Sweden is to a very high degree decarbonized though. ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 6.

[112] International Monetary Fund. *Fiscal Monitor: How to Mitigate Climate Change*. Washington: IMF Publication Services, 2019, p. 13.

Currently, the tax mainly regulates consumption in the transport sector. Consumption of diesel and gasoline generates around 90% of revenues (transport is also the biggest source of emissions in Sweden – ca. 40% of total annual CO_2 emissions in 2009).[113] Other sectors pay a reduced tax rate and EU ETS installations are exempted from this tax obligation (and pay only the energy tax).[114] For more details on the Swedish carbon tax rates, see Annex 1.

In Sweden, the carbon tax applies to the same fuels that are taxed by the general energy tax. The tax rate depends on their carbon content. Sustainable biofuels are, according to Sweden's state aid notification (which was extended beyond 2020 for some bioenergy source),[115] not subject to the carbon tax. The Swedish National Tax Authority is responsible for the administration of the tax.[116]

The revenues of the Swedish carbon tax are not earmarked, so they are a general source of funds for the state budget. However, when deciding on the use of the resources in the state budget, the government takes into account the possible undesirable distributional consequences of the tax.[117]

On the opposite side of the spectrum, there are EU countries with very low carbon prices. The Czech Republic is one of them. As of now, Czechia applies only the EU ETS to put a price on carbon emitted by sources in its jurisdiction. There were multiple attempts to introduce a carbon tax. In 2012, the Ministry of Finance proposed a carbon tax framework that would be complementary to the EU ETS. The Government aimed to balance the conditions for larger (covered by the EU ETS) and smaller polluters, whose emissions were not regulated – such as minor municipal heating plants. The proposal would have introduced a tax on natural gas for households and increased the existing tax rate for coal and heating oils. It envisaged its

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[113] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 2.

[114] Government Offices of Sweden. Sweden's carbon tax. In: *Government.se* [online]. 2020-02-25 [accessed: 2020-05-01].

[115] Originally approved under decision SA.43301 (2015/N), SA.49893 (2018/N) prolonged in June 2020 by decision SA.56125 (2020/N) and SA.56908 (2020/N). More on this: https://ec.europa.eu/competition/elojade/isef/index.cfm.

[116] Government Offices of Sweden. Sweden's carbon tax. In: *Government.se* [online]. 2020-02-25 [accessed: 2020-05-01].

[117] Ibid.

introduction in 2014 with an estimated rate of EUR 15 per ton of CO_2. However, the new tax did not find enough support in the Parliament.[118] In 2019, a study conducted by the Charles University's Environment Centre was presented to the Ministry of Environment.[119] The ministry then claimed that the current government would not consider the introduction of the tax.[120]

3.2.5. Does It Work?

Most economists agree that Pigouvian taxes are the most suitable form of regulation of negative externalities.[121] The tax should be based on the degree of harm a given activity imposes on third parties (so-called societal cost). Therefore, if a polluter causes harm that can be valued at EUR 100 then they should be taxed by the same amount. As a result, the regulated polluting entity is forced to accommodate whether the polluting activity brings more value than the harm it causes, (therefore, whether it is, in fact, worth continuing it) into their decision-making.[122]

A carbon tax, as one of the Pigouvian taxes, should decrease CO_2 emissions effectively – at least according to economic theory. To confirm the validity of the theory, empirical evidence needs to be provided. Unfortunately, there are not many long-term ex-post empirical studies of the causal effects of a carbon tax on emissions.[123] When implementing, many

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[118] HROZEK, Dian. Uhlíková daň – riziko, nebo řešení? In: *oEnergetice* [online]. 2015-09-11 [accessed 2020-12-12]. Available at: https://oenergetice.cz/trh-s-elektrinou/uhlikova-dan-riziko-nebo-reseni.

[119] The study is currently not publicly avaliable.

[120] Ministry of the Environment. Reakce MŽP a MF na článek redaktorky Vlkové z MF Dnes: Za Česko zelenější. Vláda připravuje zdanění uhlí a plynu. In: *MŽP* [online]. 2019-08-17 [accessed 2020-12-12]. Available at: dhttps://www.mzp.cz/cz/news_20190817_reakceuhlikovadan,

[121] MASUR, Jonathan S. – POSNER, Eric A. Toward a Pigouvian State. *University of Pennsylvania Law Review*. 2015, vol. 164 (1), p. 94. For Pigouvian tax definition, see reference 76 for negative externalities definition, see reference 73.

[122] MASUR, Jonathan S. – POSNER, Eric A. Toward a Pigouvian State. *University of Pennsylvania Law Review*. 2015, vol. 164 (1), p. 95.

[123] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 2.

countries mainly rely on the economic theory, according to which the tax should have a negative effect on regulated (and undesired) externality.[124]

However, most of the empirical studies available support its at least partial effect on curbing emissions.[125] Several studies were reviewed for the purpose of this paper. The findings of the most comprehensive and relatively recent one – the study of the Swedish carbon tax by J. Andersson – will be briefly introduced.[126]

The Swedish carbon tax is a suitable candidate when researching whether the tax works. First, long-term effects can be traced back, since it was first implemented thirty years ago. It therefore has the potential to change the behavior patterns of regulated firms and the public. Second, the tax is sufficiently high. According to the research, in order to reflect the societal cost of pollution, the carbon price must be set at a sufficiently high level.[127] Third, the tax regulates mainly one sector – transport. That makes researching the impacts less complicated. Moreover, the local nature of the regulated sector and geographical conditions of Sweden almost eliminate possible carbon leakage effects.[128]

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[124] The theory has been supported for many years - see for instance: MASUR, Jonathan S. – POSNER, Eric A. Toward a Pigouvian State. *University of Pennsylvania Law Review*. 2015, vol. 164 (1), pp. 93-148. DOI: https://dx.doi.org/10.2139/ssrn.2559393.

[125] See for instance: ACKVA, J. – HOPEE, J. The Carbon Tax in Sweden. Policy paper by EUKI (Federal Ministry for the Environment, Nature Conservation and Nuclear Safety of Germany. 2018, 31 p. Available from: https://www.euki.de/wp-content/uploads/2018/11/fact-sheet-carbontax-se.pdf.; International Monetary Fund. *Fiscal Monitor: How to Mitigate Climate Change*. Washington: IMF Publication Services, 2019, 97 p. ISBN: 978-1-51351-533-5.; HÁJEK, Miroslav – ZIMMERMANNOVÁ, Jarmila – HELMAN, Karel – ROZENSKÝ, Ladislav. Analysis of carbon tax efficiency in energy industries of selected EU countries. *Energy Policy.* 2019, vol. 132, p. 1-11. ISSN: 0301-4215. DOI*:* 10.1016/j.enpol.2019.110955.

[126] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), pp. 1-30.

[127] See for instance: OECD. *Effective Carbon Rates 2018: Pricing Carbon Emissions Through Taxes and Emissions Trading*. Paris: OECD Publishing. ISBN 978-92-64-30529-8.

[128] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 27.

Andersson uses an identification strategy that constructs a control unit that did not implement a given policy (the synthetic control method): he creates a scenario with and without a tax treatment (Sweden vs. 'synthetic' Sweden).[129]

The results are as follows: CO_2 from transport dropped quite significantly in years following the introduction of the tax, when comparing Sweden and synthetic Sweden. In the last year of the sample period, the transport CO_2 emissions were 12.5% lower (that is 0,35 metric tons per capita lower) than they would have been without treatment. The total cumulative CO_2 reduction from 1990-2005 is 40,5 million tons.[130] Furthermore, the positive effects of the carbon tax can be extracted from the fact that emissions continued to fall even during the 2000-2005 period when the energy tax rate was reduced.[131] The research concludes the overall effects of the Swedish carbon tax were positive and prove its functionality, at least in the specific conditions of Sweden.

3.3. Carbon Tax in the EU

There are 61 carbon pricing initiatives worldwide (in place or scheduled for implementation), as of September 2020. Out of them, 30 are carbon taxes and 31 are emissions trading systems.[132] These initiatives are, in most cases, implemented at a national level, with certain partial exceptions, such as Canada which established a federal carbon pricing initiative in 2019.[133]

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[129] Ibid.

[130] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 14.

[131] ANDERSSON, Julius. Carbon Taxes and CO_2 Emissions: Sweden as a Case Study. *American Economic Journal: Economic Policy*. 2019, vol. 11 (4), p. 15. Andersson notes that some previous studies found small or no effect of carbon taxes (such as Lin and Li 2011). However, he argues that many have insufficiently developed or described methodologies or they capture only a short period of time when evaluating the overall effects of carbon tax in Sweden.

[132] WORLD BANK GROUP. *State and Trends of Carbon Pricing 2020*. Report by the World Bank and ICAP. May 2020, p. 7.

[133] In Canada, the power is divided between the federal Government of Canada and provincial governments. Provinces possess a great deal of power. They have jurisdiction over administration of many public affairs, including some taxes (especially the direct ones specified in *The Attorney General for Quebec v Reed*). Therefore,

In Europe, some countries have implemented a national carbon tax.[134] At an EU level, a common framework for a tax burdening CO_2 as a polluter is missing and is only suggested as an option by the Directive 2003/96/EC (the Energy Taxation Directive – 'ETD')[135]. The Directive lays down harmonized rules for energy products taxation; it sets minimum levels of taxation for specified energy products (motor and heating fuels) and electricity. Furthermore, it specifies conditions for tax reductions and exemptions.[136] Energy taxation rules in the EU Member States are also subject to common principles regarding all products subject to excise duties[137] which are included in the Council Directive 2008/118/EC.[138]

The ETD is a framework directive. EU Member States' energy tax schemes are thus quite fragmented while still respecting the boundaries laid down by it. The tax rate in many EU countries does not necessarily reflect the carbon content of a given product.[139] The ETD only recommends that Member States to set the rate according to the products' energy content[140] – which could prioritize fuels with high energy content and low externalities (such as pollution)

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established common carbon tax framework at a federal level can be classified as a form of 'supranational' taxation system.

[134] Such as Finland, Sweden, Latvia, Slovenia, Croatia, the UK, Ireland or France.

[135] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. The ETD entered into force 31st October 2003, it is applicable as of 1st January 2004.

[136] Commission Staff Working Document od 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final, p. 6.

[137] Excise duties are indirect taxes on the sale of a regulated products (such as alcohol, tobacco, or energy). In the EU, the revenue goes entirely to the Member State. However, the rules for their minimum rates are harmonized across the EU.

[138] Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

[139] Commission Staff Working Document od 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final, p. 17.

[140] Preamble to the Energy Tax Directive 2003/96/EC, para 14.

effectively. Therefore, in most Member States, tax is based simply on the volume of the good consumed.[141]

Since a carbon tax is recommended as an efficient climate change mitigation tool, it can be argued that common rules at the EU level prescribing the Member States to reflect both the energy and carbon content of a given product could help with reaching the Paris Agreement targets and enhance EU energy and climate policies. A European carbon tax could work in the same way as its energy tax. If adopted as a new tax, the common rules would set minimum standards for its rate (based on the carbon content of a product) and lay down possible exemptions. This way, strictly speaking, two kinds of taxes would exist in parallel (as in Sweden, for instance).

However, a carbon tax could also be introduced as a component of the existing energy tax. The introduction of such a carbon tax would most likely be more feasible. This way, the obligation to reflect carbon content in the national energy tax rate would be incorporated into the ETD. As such, there would be no new tax, only a modified framework for existing energy taxes. However, quite a complex tax reform would be needed.[142]

A common framework for a carbon tax could help the EU to reach the Paris Agreement's carbon reduction targets. Moreover, according to economic theory, a unified tax regulating a negative externality tends to be more efficient, in that the marginal costs of reducing emissions are lower and therefore reduction is cheaper.[143] Unified carbon tax rules should also help to

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[141] Commission Staff Working Document od 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final, p. 17.

[142] As part of the *„Fit for 55"* legislation package, a draft of new ETS was put forward. Thus, the EU is currently pursuing via existing energy taxation framework and ommited the possibility to introduce a new self-contained tax. See https://www.consilium.europa.eu/en/policies/fit-for-55/.

[143] See e.g. CONRAD, Klaus. – SCHMIDT, Tobias. Economic impacts of an uncoordinated versus a coordinated carbon dioxide policy in the European Union: An applied general equilibrium analysis. *Economic Systems Research*. 1998, vol. 10 (2), pp. 161-182; or BARKER, Terry. Achieving a 10% cut in Europe's CO2 emissions using additional excise duties: coordinated, uncoordinated and unilateral action using the econometric model E3ME. *Economic Systems Research*. 1999, vol. 11 (4), pp. 401-421. Both Conrad & Schmidt and Barker find that in case of a coordinated tax, lower tax rate is needed in order to secure the same level of emissions reduction which higher national rates would bring.

prevent so-called '*free-rider problem'*[144], and, as proposed by some authors, if the revenues were transferred to the EU budget, Member State's obligatory contributions to the common EU account to it could be lowered correspondingly. [145]

Support among the Member States regarding a new tax (or a higher-rate energy tax) may also come from an unforeseen stimulus: Brexit. The UK's exit from the EU will bring, among others, a clear gap in the EU budget and new sources of revenue must, therefore, be found. Even though it seems unlikely that the Member States would agree to the carbon tax revenues being a source for the Union and not national budgets, it remains an option. For example, the Commissioner for the EU Budget suggested the introduction of a tax on plastics and changes to the EU ETS[146] (the measure was then approved in July 2020)[147]. Both these measures aim to bring more funds to the Union's budget.

It should be emphasized that the main argument for common rules for a carbon tax at the EU level is the creation of a level playing field for all the Member States. To provide an example, in 2020 there was a reduction of excise tax for diesel fuel in the Czech Republic.[148] The move was in direct conflict with the air protection interest, yet the Czech government deemed it necessary because of lower taxation in Poland (which applies the minimum still

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[144] According to the OECD *'free riding occurs when one firm (or individual) benefits from the actions and efforts of another without paying or sharing the costs'.* Definition available at: OECD. Glossary of Statistical Terms. In: OECD [online]. Accessed 2020-05-16. https://stats.oecd.org/glossary/detail.asp?ID=3222

[145] PADILLA, Emilio – ROCA, Jordi. The proposals for a European tax on CO2 and their implication for intercountry distribution. Environmental and Resource Economics. 2004, vol. 27 (3), p. 278.
It should be noted that transferring the revenues directly to the EU could be a problem for at least some of the Member States. Despite that, some authors suggest the proposal of such measure as a convenient move.

[146] MORGAN, Sam. Plastic tax and ETS tinkering could plug Brexit hole, suggests EU budget chief. In: *EURACTIV* [online]. 2018-01-11 [accessed: 2020-05-11]. Available at: https://www.euractiv.com/section/future-eu/news/plastic-tax-and-ets-tinkering-could-plug-brexit-hole-suggests-eu-budget-chief/.

[147] GOLDSBERRY, Clare. EU Plastic Tax Approved by European Council. In: *Plastics Today* [online]. 2020-07-27 [accessed: 2020-09-20]. Available at: https://www.plasticstoday.com/legislation-regulations/eu-plastic-tax-approved-european-council.

[148] FREI, Martin. Nafta zlevní. Snížení spotřební daně pomůže alespoň někomu, je to ale dobře?. In: *Zprávy Aktuálně* [online]. 2020-11-23 [accessed 2020-12-20]. Available at: https://zpravy.aktualne.cz/ekonomika/auto/snizeni-spotrebni-dane-z-nafty-novu-na-scene-pomuze-alespon/r~06aa56762a4311eb80e60cc47ab5f122/.

allowed by the EU legislation). It can be argued that a common tax framework with a taxation level set at an efficient level is needed so that the same degree of environmental protection is secured across all the EU Member States.

As a crucial part of fulfilling the Paris Agreement pledges, a carbon tax should be introduced in all Member States. Currently, no country in the Central and Eastern part of the EU puts a tax on a fuel product specifically according to its carbon content (with the exception of Poland whose carbon tax is, however, very low).[149] Drawing from the experience in Czechia, it is hardly imaginable that, with current political representation, all EU Member States will introduce some sort of complementary measure to the EU ETS. A common framework for a carbon tax is thus needed.

The idea of a common CO_2 tax framework is not a novelty. In the recent past, there were a few unsuccessful proposals for a carbon tax at the EU level. These could provide some insights regarding the technicalities of a potential EU-wide carbon tax.

3.3.1. Unsuccessful Proposals for an EU Carbon Tax

The first time the idea of a common carbon tax at the EU level appeared was in 1992. According to the Commission's proposal for a directive from the same year,[150] it was envisaged there would be a national tax on fuels (used as heating, as well as motor fuels) and electricity according to both their energy content and CO_2 emissions, and the proposal prescribed minimum rates for specific energy products.[151] The individual tax rates were to increase over time. Moreover, the proposed directive included exemptions for energy coming from renewable sources, as well as for energy-intensive industrial sectors for which decarbonization was likely to be more problematic. The proposal specified that the application of the tax was conditional on the introduction of a similar form of tax by other OECD countries.[152] In the end, however,

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[149] WORLD BANK GROUP. *State and Trends of Carbon Pricing 2020.* Report by the World Bank, ICAP and Navigant. May 2020, p. 10.

[150] Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy of 30 June 1992, COM (92) 226 final. https://eur-lex.europa.eu/procedure/EN/1992_1019.

[151] Article 8 of the Proposal prescribed fixed tax rates: EUC (European Currency Unit) 2,81 per ton of CO_2 and ECU 0,21 per gigajoule of energy content. For mineral oils, special rates were set.

[152] Article 1, paragraph 2 of the Proposal.

despite the relatively careful wording of the proposal, the Commission's initiative met strong opposition and was not adopted.[153]

In 1995 and 1997 there were two other proposals with similar content.[154] According to the 1995 proposal, which only modified certain provisions included in the 1992 proposal, Member States had more freedom to set the rates (compared to the original document); the proposal solely prescribed an obligatory target rate to be reached over time[155] and so countries could enjoy a longer transitional period.

In 1997, the Commission produced a new draft of a directive for restructuring energy product taxes. Again, minimum levels of taxation were proposed, which were expected to be introduced at the national level by Member States in several phases.[156]

Even though all these proposals offered exemptions, tax refunds, and a justification of a possible new source for the state budget,[157] they were not adopted. Tax measures must be accepted by all the Member States: according to the EU primary law, proposals regarding taxation need to seek approval within a special legislative procedure. None of the aforementioned proposals found sufficient support at the time.

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[153] PADILLA, Emilio – ROCA, Jordi. The proposals for a European tax on CO2 and their implication for intercountry distribution. Environmental and Resource Economics. 2004, vol. 27 (3), p. 274.

[154] Amended Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy, COM (95) 172 final.

See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995PC0172&from=EN;

Proposal for a Council Directive Restructuring the Community Framework for the Taxation of Energy Products, COM (97) 30 final.

See: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0030:FIN:EN:PDF.

[155] Article 8 of the 1995 Proposal.

[156] Articles 4-10 of the 1997 Proposal.

[157] None of the proposal did not foresee that collected revenues would be a source of the EU budget. The idea of 'ensuing the revenues to the supranational level of government' (obtained via the CO_2 tax) however, appeared in the 1993 Commission's report on EU budget sources (European Commission. Stable Money-Sound Finances. *European Economy* 53, 1993.

Available at: https://ec.europa.eu/economy_finance/publications/pages/publication7524_en.pdf).

Just like in the past, contemporary primary law, more specifically the Treaty on the Functioning of the European Union (TFEU) in its Article 113[158] (general harmonization tax provision), requires the approval of the Council of the European Union and its unanimity when adopting common rules on taxation. This rule represents a great difficulty for any tax reform adoption (more on this below).

Nevertheless, the idea of the carbon tax was not abandoned in later years. Before the Nice summit on the Enlargement of the EU in 2000, the Commission issued a communication proposing new rules on environmental taxes.[159] In the paper, the Commission suggested that environmental taxes should be adopted via qualified majority voting, which would have favored the 'green' majority of Member States that supported strong environmental policies, especially those in the new accessing states.[160] However, even though the idea was anticipated to be included in the Nice Treaty, it did not appear there eventually. That suggests the Member States rejecting the idea.

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[158] '*The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.'*

The Article 113 corresponds to Article 93 of the Treaty Establishing the European Community.

[159] Communication from the Commission - Supplementary contribution of the Commission to the Intergovernmental Conference on institutional reforms - Qualified majority voting for Single Market aspects in the taxation and social security fields of March, 14 2000, COM(2000) 114 final. Available at: https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52000DC0114

[160] As can be understood from paragraph 4, part on excise duties: '*Accession of new Member States with economies undergoing important structural changes will require an increased recourse to efficient measures, including fiscal measures, to ensure the pursuit of the environmental objectives of the Treaty, which provide for the sustainable development (Article 6 EC) and the preservation and improvement of the quality of the environment (Article 174 EC). Therefore, the Commission considers that taxation measures that have as their principal objective the protection of the environment and have a direct and significant effect on the environment also requires qualified majority voting.'*

To prevent distortions to the EU internal market by divergent national tax rates, the Union adopted the ETD in 2003.[161] The main argument for producing the draft of a new directive was that energy products such as mineral oils and electricity which are crucial strategic commodities should not be a subject to excessively diverse tax rates in individual Member States engaged in a common market (in some states, the products were not taxed at all). That could have objectionable effects on the internal market – also because taxes account for a significant share of the final energy price paid by consumers.[162]

The ETD does not prescribe Member States to reflect CO_2 emissions produced by burning a given fuel in a national energy tax. The sum to be paid depends on the amount of fuel produced or consumed, but not necessarily on its CO_2 content. Tax rates for diverse fuels have therefore become more of a political topic. According to the ETD, Member States have the freedom to adjust the rates (when adhering to minimums set out in the Directive) and are able to reflect the environmental objectives when setting the tax rate. They are also free to introduce additional taxes related to energy, since tax measures are among the shared competencies of the Member States and the EU.

In 2011, there was a Commission proposal on changing certain aspects of the ETD so that the Directive would be more in line with the EU's increasingly important climate and energy policy.[163] One of the suggested measures was the obligation to take the carbon content of a given product into account when setting the tax rate. Unlike the current ETD, the proposal, in its new Article 1, distinguished between CO_2-related and general energy consumption

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[161] Prior to the entry into force of the ETD, the EU energy taxation rules covered solely mineral oils (Directives 92/81/EEC and 92/82/EEC). ETD widened the scope of these directives and introduced minimum excise duty rates which included all energy products. The ETD also revised rates for mineral oils (these had not been updated since 1992 when the Directives were introduced).

[162] Preamble to the Energy Tax Directive 2003/96/EC, para 1-4.

According to the Preamble, other reasons for the adoption of the Directive was to create incentives for reduction of CO_2 emissions, increase energy efficiency, allow Member States to implement and promote CO_2 component of the tax and help to raise employment by encouraging income tax reduction (which would, in the state budget, be covered by higher energy tax revenues).

[163] Proposal for a Council Directive amending Directive 2003/96/EC of 13.4.2011 restructuring the Community framework for the taxation of energy products and electricity, COM(2011) 0169 final.

taxation. The 2011 proposal also supported avoiding double taxation which could, in theory, have been a consequence of the EU ETS' coverage of some sectors.

According to this proposal, the CO_2 tax should have been set in EUR/t of emissions released during combustion. The value would follow the reference CO_2 emission factors set out in another piece of legislation.[164] The general energy consumption tax should then be calculated in EUR/GJ – based on consumption and energy content.[165] The proposal also specifies that the tax should be applied to uses of energy in installations outside of the scope of the EU ETS[166] (to avoid double taxation, as noted above) and provides for the possibility to adapt the minimum rates every three years.[167]

The European Parliament and the European Economic and Social Committee gave consent to the proposal. However, the amendment did not pass through the Council of the European Union since, again, it had to follow a special legislative procedure laid down in Article 113 of the TFEU (as mentioned above) and it did not win sufficient support.[168] Eventually, the Commission withdrew the proposal in 2015.[169]

As stated in the Commission's 2019 communication regarding the EU tax policy decision making,[170] tax legislation has, for years, been closely linked to national sovereignty. It is so because taxes are vital for the functioning of the state itself – they mainly fund the national

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[164] Point 11 of Annex I to Commission Decision 2007/589/EC of 18 July 2007 establishing guidelines for the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC of the European Parliament and of the Council.

[165] Article 1 of the Proposal for a Council Directive amending Directive 2003/96/EC of 13.4.2011 restructuring the Community framework for the taxation of energy products and electricity, COM(2011) 0169 final.

[166] Article 4 of the Proposal for a Council Directive amending Directive 2003/96/EC of 13.4.2011 restructuring the Community framework for the taxation of energy products and electricity, COM(2011) 0169 final.

[167] Ibid.

[168] Commission Staff Working Document od 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final.

[169] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 10.

[170] Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision making in EU tax policy of January, 15 2019, COM(2019) 8 final, p. 1.

budgets. Therefore, the EU treaties retained a de facto veto rule in the field of taxation. This requirement is well-suited to a smaller Union with limited integration, which is how the EU used to look like when the rule regarding tax rules adoption was incorporated into primary law. This purely national approach towards taxation might seem outdated, especially when the EU is, for instance, now even entitled to enter into international treaties on behalf of its members (such as the Paris Agreement). Increased interconnectivity of the national economies and the mobility of businesses and citizens can also cause one Member State's tax decision to affect the economy of another.

Changing legislative procedures in the area of taxation, which would ease the adoption of modernized rules as well as the overall approach towards taxation decision-making, has to be in line with EU principles, which might be more vested in the idea of the European integration. These include, among others, the principle of subsidiarity and proportionality.

4. Subsidiarity Principle and the EU's Power to Legislate

4.1. Subsidiarity Principle and its Development

Energy and environmental policies belong among areas of so-called shared competence. These can be legislated upon by both the EU and its Member States. Decision-making thus takes place at the national and supranational level and is governed by the rules laid out in EU primary law, as well as by the main principles of the Union's acquis. The EU has taken a leadership role in the area of climate protection. However, many analysts and academic authors argue that it has failed to develop a robust climate change policy[171] and it might seem that the EU had failed at delivering that. One of the reasons for this claimed failure can be its, in many cases, rather rigid rules for legislation making.

The principles of subsidiarity[172] and proportionality[173] are core elements of the EU's policymaking. Both principles are interconnected and are embedded in the EU's primary law. Based on these principles, EU Member States have conferred some competencies to the Union's decision-making bodies. Subsidiarity and proportionality principles then govern how these competencies are utilized. Control over compliance with the subsidiarity principle is essentially entrusted to EU institutions and is partially transmitted to the national parliaments via Article 12 of the 2007 Treaty on European Union (TEU). [174] The purpose of the principles is explained by Protocols to the founding treaties.[175] To further strengthen the proper use of these leading

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[171] DAHL, Agnethe. Competence and subsidiarity. In: GUPTA, Joyeeta – GRUBB, Michael (eds.). *Climate Change and European Leadership: A Sustainable Role for Europe*?. Dordrecht: Springer Science+Business Media, 2000, p. 204.

[172] Article 5 (3) of the TFEU: '*Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.'.*

[173] Article 5 (4) of the TFEU: '*Under the principle of proportionality, the content and form of Union shall not exceed what is necessary to achieve the objectives of the Treaties.'.*

[174] Consolidated version of the Treaty on the Functioning of the European Union Protocol (No 1) on the role of national parliaments in the European Union of June, 7 2016, C 202/203.

[175] Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality of May, 9 2008, 12008E/PRO/02.

legislation-making principles, the Union's top judicial body, the European Court of Justice can take action when there is a case considering principles' application brought to the Court by the Member States. The Commission also regularly proclaims to be working on 'strengthening a better application of the principles of subsidiarity and proportionality'.[176]

Competence is considered to be a precondition for EU bodies to act. However, thanks to the post-Maastricht interpretation of the subsidiarity principle governing the decision making regarding a shared competence area, the development in some policy areas has proven quite difficult.[177] These include, for instance, more robust EU energy and climate change policy instruments.

EU institutions are obliged to apply the principle of subsidiarity when making any kind of decision and evaluate whether a more effective solution would be to legislate at a national level. The overall purpose of the subsidiarity rule is thus to guide the most effective level at which to adopt various policies that do not fall within the exclusive competence of the Union. The EU's legal power to decide in the areas of environment, energy, and taxation (i.e. internal market), which belong among the shared competence areas, could be hampered by its lack of competence which can be resulting from the understanding, and then the application, of the principle.

To evaluate whether the EU is, in fact, able to legislate on a carbon tax (an area of shared competence), either in the form of a new component to the energy tax according to the ETD or

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Protocol No 2 describes the approach taken when new legislative acts are adopted. The new pieces of law should be forwarded to the national parliaments, which can then effectively conduct a subsidiarity principle check. The national bodies then have eight weeks (from the date of transmission of a draft) to send a reasoned opinion to the presidents of the EU institutions stating why they believe the proposal does not comply with the subsidiarity principle. If combined votes of national Parliaments over a certain issue exceed a certain threshold, the Commission is obliged to review the bill and explain its relevance and purpose.

[176] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking of October, 23 2018, COM(2018) 703 final.

[177] DAHL, Agnethe. Competence and subsidiarity. In: GUPTA, Joyeeta – GRUBB, Michael (eds.). *Climate Change and European Leadership: A Sustainable Role for Europe*?. Dordrecht: Springer Science+Business Media, 2000, p. 204-205.

any other, it is important to comprehend the development and current understandings of the principle of subsidiarity.

4.1.1. Different Interpretations of the Principle

The original purpose of the subsidiarity principle is to secure that there are procedures in place that lead to policymaking at the best level of governance.[178] The principle was integrated into the primary law by the Single European Act of 1987[179] and its main object was to regulate environmental policies adoption. Regarding the environment, Article 130r of the Single European Act states that 'The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at a Community level than at the level of the individual Member States'.

In 1991, the TEU established the subsidiarity principle to apply to all policy areas in which the EU does not have exclusive competence. However, the wording of the principle in the Treaty has been considered quite vague. As some academics argue,[180] since the introduction of the principle in the Single European Act, the word 'better' has been used. So if the interests of the EU are 'better' achieved via legislation at a domestic level, then the regulation should be adopted at this lower jurisdiction level.[181] This open-ended term leaves space for a quite broad range of interpretations. Thus, it can be used to both legitimate as well as undermine the adoption of all kinds of legislation (within the shared competence area) at the EU level.

Despite the principle's establishment in the Single European Act which could have, in theory, led to bigger decision-making power of individual Member States when it comes to environmental regulation, the number of the Commission's legal proposals in this area

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[178] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking of October, 23 2018, COM(2018) 703 final, p. 3.

[179] The Single European Act effective on July, 1 1987 was the first major revisioning act of the Treaty of Rome from 1957. The Act established the European Community.

[180] DAHL, Agnethe. Competence and subsidiarity. In: GUPTA, Joyeeta – GRUBB, Michael (eds.). *Climate Change and European Leadership: A Sustainable Role for Europe*?. Dordrecht: Springer Science+Business Media, 2000, p. 210.

[181] Article 5 of the TEU.

remained quite significant. Environmental issued remained to be decided at the EU level. Therefore, some argue that the principle was either fully ignored, or quite contradictory effectively used as a mandate for the EU's additional power.[182]

After the adoption of the TEU,[183] the principle has started to be applied to all kinds of legislation and it gained more importance in policy making. The European Council Summit which met in 1992 even declared that all existing legislation will be reviewed in light of the principle application, and that opened the possibility for the Member States to gain more control over shared competence policies that the EU had legislated on before.[184] Furthermore, the European Commission issued a communication in the same year stating that it generally intends to use directives more often, instead of regulations (which have a direct effect)[185] and thus leaving more space to national legislative bodies. As a result, the number of legal proposals, and especially regulations, in the area of the environment put forward by the Commission decreased significantly after 1992.[186]

It can thus be argued that the understanding of the subsidiarity principle has gradually been shifting towards leaving more space for the Member States' policymaking in the area of shared competence. However, the proper understanding of the principle has not been substantially clarified for years. Therefore, it still remains a possibility to understand it both ways – as a presumption in favor of legislating at a national level, or, at the same time, as a justification for policymaking at the EU level. As argued above, the first approach started to be

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[182] DAHL, Agnethe. Competence and subsidiarity. In: GUPTA, Joyeeta – GRUBB, Michael (eds.). *Climate Change and European Leadership: A Sustainable Role for Europe*?. Dordrecht: Springer Science+Business Media, 2000, p. 213.

[183] Adopted as the Maastricht Treaty in 1992.

[184] Ibid.

[185] Bulletin of the European Communities, 1992, vol. 25 (10), p. 116.

The long-term effect of the subsidiarity principle should be a more frequent use of directives at the expense of regulations. Directives are, in theory, intended to solely set the objectives and should not be too specific. The Member States should then have relative freedom to choose political instruments they believe are the most appropriate.

[186] GOLUB, Jonathan. Sovereignty and Subsidiarity in EU Environmental Policy. Political Studies. 1996, vol. XLIV, p. 692.

the predominant one, at least according to official documents of the EU institutions, in the post-Single European Act period and later even more significantly in the post-Maastricht era.

4.1.2. Current Tendencies in the Principle's Interpretation

At present, some authors argue that the definition of the subsidiarity principle in the Maastricht treaty was decided to be quite vague because at that time there was little political agreement on the real meaning of the concept.[187] Even later, a universally accepted explanation for the principle and its implications had not been offered by any EU institution. That is why the interest in clarifying it in the new primary law amendments was becoming increasingly apparent. An important milestone in the development of the current understanding of the principle was the Treaty of Lisbon[188] which became effective in 2009.

The Treaty of Lisbon strengthened the position of the subsidiarity principle and its interpretation which leans towards entrusting more powers to the national parliaments. This was also underlined by the new order and content of the Treaty's protocols attached. These protocols were developed to properly address the problem of diverse interpretations of the principles. Protocol No 1 (which was previously Protocol No 9) is devoted to the role of national parliaments and Protocol No 2 (former Protocol No 30) is focused solely on the application of the principles of subsidiarity and proportionality.[189]

The new wording of the TEU and the Protocols led to the creation of a new control mechanism. The new Article 5 (3) of the TEU stated that 'National Parliaments shall ensure that the principle of subsidiarity is respected'. Thus, theoretically, before any proposal for a new piece of legislation, the European Commission shall consult national legislative bodies. These should then exercise the control of principle's application. Consequently, sub-national

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[187] IOAKIMIDES, Panagiotis (ed.). The revision of the Maastricht treaty. Athens: Themelio, 1995, p. 87-91.

[188] Treaty of Lisbon effective on 1 December 2009, which reformed the TEU and the TFEU. The main changes to primary law included the move from unanimity to qualified voting in some policy areas in the Council of Ministers, and strengthened the position of the European Parliament which became bicameral legislature alongside the Council of Ministers under the ordinary legislative procedure. More on this: https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon

[189] See Chapter 4.1. The new order of the protocols highlights the important role of the principles of subsidiarity and proportionality.

decision-making institutions have received, for the first time, a chance to consult vis-à-vis the Commission.[190]

Protocol No 2 also established another control mechanism thanks to which national parliaments have the possibility of bringing a case to the European Court of Justice for infringement of the principle of subsidiarity by a legislative act. The procedural rules for such action are laid down in Article 263 TFEU. The appeal may also, in some cases, be exercised by the Committee of the Regions.[191]

Therefore, the current wording of the treaties and related protocols should, via the possibility of national parliaments' interference before the adoption of a legislative act, secure a higher degree of involvement of the Member States, and thus a reduction in so-called 'democratic deficit'[192] of the Union which is often being criticized. Moreover, in most recent communications and guidelines, the Commission promotes the principle as a legal rule allowing a higher degree of Member States' involvement in the EU's legislation making. The Commission's opinion presented in these documents should result in granting the states more power and allow them to effectively control the functioning of the European decision-making bodies.[193]

However, it should still be remembered that the involvement of national parliaments allowed under the above-mentioned protocols remains of purely advisory nature. The European Union legislator has the option to further pursue the proposed legislation even if a national

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[190] DOUSSIS, Athinodoros – DELITHEOU, Vassiliki – ATHANASSOPOULOS, Constantinos. The Principle of Subsidiarity. International Relations and Diplomacy. 2019, vol. 7 (07), p. 321.

[191] Article 8 of the Protocol No 2.

[192] See, for instance, Doussis et al.: '*The term "democratic deficit" in European institutions implies the exclusion of European citizens from the EU decision-making process. This is a concept that seeks to demonstrate that the EU and its institutions are deprived of democracy because of their complex functioning'* (DOUSSIS, Athinodoros – DELITHEOU, Vassiliki – ATHANASSOPOULOS, Constantinos. The Principle of Subsidiarity. International Relations and Diplomacy. 2019, vol. 7 (07), pp. 320-321).

[193] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The principles of subsidiarity and proportionality: Strengthening their role in the EU's policymaking of October, 23 2018, COM(2018) 703 final.

parliament decides to block the legislative process. The involvement of the Member States' bodies cannot constitute a veto right, it can solely achieve a re-examination of a proposal.[194]

To give an example, in 2010, only 211 opinions on upcoming legislation were received by the Commission from the national parliaments, 34 of which were concerned with subsidiarity. The first case appeared three years after the Lisbon Treaty entered into force.[195] The ex-ante control mechanism established in EU primary law by the Lisbon Treaty, therefore, does not seem to be utilized too often. To present the case to the European Court of Justice, as an ex-post form of control, remains a possible yet not very likely option to pursue. Still, it can be understood as considerably strong control mechanism.

It should also be kept in mind that bigger involvement of national parliaments in the EU decision making does not automatically constitute a positive feature of the EU law. Quite the opposite, it could bear negative effects as well. The efficiency of lawmaking processes at the EU level could, in fact, be hindered by an excessive interference of the Member States.

It can be concluded that the subsidiarity principle remains a legal rule which can result in a scenario where arguably more power is given to the national parliaments, as well as where the EU's institutions fully exploit their decision-making authority. However, when analyzing recent legal documents, it can be assumed that the Commission intends to give more legislative powers to the regional and local authorities. This deduction is based on the latest communications and other legally non-binding documents of the Commission, as well as on the wording in the Union's treaties and their protocols (and their new order). Yet, it can be remarked that in the reality the Member States do not often intervene regarding the issue of too much power is given to the EU institutions, even though they are provided with accurate legal tools.

4.2. EU Carbon Tax: the Competence Issue

When the EU wants to legislate in any area of its interest, it needs to be competent to do so. Whether the EU has the competence to legislate in the area of a carbon tax is an issue closely connected to the subsidiarity principle. All previous attempts to introduce an EU-wide carbon

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[194] DOUSSIS, Athinodoros – DELITHEOU, Vassiliki – ATHANASSOPOULOS, Constantinos. The Principle of Subsidiarity. International Relations and Diplomacy. 2019, vol. 7 (07), p. 322.

[195] ARRIBAS, Gracia Vara – BOURDIN, Delphine. What Does the Lisbon Treaty Change Regarding Subsidiarity within the EU Institutional Framework?. *EIPAScope.* 2012 (2), p. 15.

tax in any form were blocked by some Member States. The subsidiarity principle has been the main argument for the United Kingdom, a long-term opponent of tax harmonization.[196] The current understanding of the subsidiarity principle tends to be that the principle should minimize the democratic deficit of EU governance and thus one might argue that there is only limited space for the wider harmonization of tax policies which generally remain a national topic.

The subsidiarity principle is an especially important guiding legal rule for decision making in the area of shared competence. The policies related to energy, environment, and taxation all fall within the shared competence of the EU and its Member States.[197]

However, subsidiarity is not the only issue when it comes to adopting a unified carbon tax. When the EU decides to legislate, it requires a legal basis. When it comes to a potential carbon tax measure, four possible policies that could constitute a legal basis for the Commission's action can be identified: environmental policy, energy policy, taxation, and approximation of laws. A closer look at these possibilities given to the Commission by primary European law should be provided here to decide which area, or areas, could best encompass the EU's competence to legislate.

4.2.1. Possible Categories of Policies

The general tax framework is at the EU level provided by the TFEU. The Articles 110-113[198] relate to the harmonization of tax legislation concerning especially turnover taxes and excise duties in particular, while Articles 114-118 cover the issue of approximation of laws.[199]

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[196] DAHL, Agnethe. Competence and subsidiarity. In: GUPTA, Joyeeta – GRUBB, Michael (eds.). *Climate Change and European Leadership: A Sustainable Role for Europe*?. Dordrecht: Springer Science+Business Media, 2000, p. 218.

[197] Article 4 of the TFEU.

[198] The TFEU prescribes that product originating from other Member State cannot be subject to a different tax than domestic products, double taxation is undesirable and, generally, tax provisions aiming at harmonization should be adopted via special legislative procedure unanimously after consulting the European Parliament and the Economic and Social Committee.

[199] In order to achieve the objections of the Article 26, the Parliament and the Council shall, under an ordinary legislative procedure, adopt measures which should secure that similar tax policies and rates are applied in the EU Member States. Article 26 prescribes the principles of the proper functioning of the internal market where free movement of goods, persons, services and capital is ensured.

Other provisions relevant to taxation are included also in Articles 45-66 (these refer to the free movement of people, services, and capital), 191-192 (environment), and 107-109 (competition).

The principal provision of taxation law harmonization is included in TFEU Article 113.[200] It stipulates that the Council shall adopt a provision for the harmonization of indirect taxes so that the distortion of the internal market is prevented. The Article specifically mentions indirect taxes,[201] which is the most likely form of a carbon tax (i.e., taxation of the carbon content of, typically, an energy product). The 1992 carbon tax and the ETD were adopted based on Article 113 or its predecessors.[202]

Another provision of EU primary law on which the carbon tax legislation could, in theory, be based is the general approximation of laws provision of Article 115 of the TFEU.[203] It is more likely though that the new measure would follow the more specialized Article 191 and following, which set out the environmental objectives of the EU. The TFEU prescribes that the European Parliament and the Council should, in order to achieve these objectives, act in accordance with the ordinary legislative procedure.[204] However, Article 192 (2) derogates the previous one and stipulates that the Council should act unanimously when deciding on a provision primarily of a fiscal nature or a measure which can be seen as 'significantly affecting

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[200] '*The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.'*

[201] These are taxes that are collected via an intermediary, but then it is the customer who, ultimately, bears the economic burden. Indirect taxes are value added tax, and excise duties (taxes) on alcohol, tobacco and energy. See e.g. https://www.europarl.europa.eu/factsheets/en/sheet/81/indirect-taxation.

[202] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 2.

[203] '*Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.'*

[204] Article 192 of the TFEU.

a Member State's choice between different energy sources and the general structure of its energy supply'.[205]

The application of the principle of subsidiarity has had a direct effect on the aforementioned provisions. With the development of the EU and the growing appetite of some Member States for greater autonomy over their policies, the TFEU established that some legislation has to be passed through a complicated legislative process in order to be adopted at the EU level. Again, it can be argued that greater autonomy goes against the cohesion agenda of the EU and distorts the internal market and the revision of rules on legislative procedures should therefore be reevaluated.

The Lisbon Treaty of 2009 also introduced rules specifically applicable to the field of energy. Previously, the adoption of legislation in this area was based on either environmental or internal market provisions.[206] The TFEU's Article 194 introduced an ordinary legislative procedure for energy policy to secure a properly functioning internal market.[207] However, Article 194 (3) again derogates from this rule by establishing a special legislative procedure if the energy measure is primarily fiscal.

It can be assumed that these derogations indicate that the impacts of the subsidiarity principle apply when it comes to fiscal measures (such as taxation). In these cases, comparably broader powers are given to the Member States in that a special legislative procedure must be applied when deciding on these.

4.2.2. How the Subsidiarity Principle affects EU Legislative Powers

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[205] In July 2021, a proposal for a directive restructuring the energy taxation framework was presented (as a part of the „Fit for 55 package"). The proposal is based on Article 113 and 192(2). Thus, the Commission has decided not to adopt a singular new carbon tax but merely to reconstruct existing energy taxation framework. Both Articles then require unanimity in the Council.

[206] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 3.

[207] According to the Article 194, policy on energy shall aim to *'(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.'* Therefore, it can be presumed that it is an area related to the areas of environment and European Union internal market.

As explained, powers over taxation measures have traditionally been entrusted to the Member States. That is one of the reasons why the EU taxation system has not been significantly reformed. Thanks to strong opposition from some of the EU countries, it remains quite rigid or even outdated. The understanding of the subsidiarity principle has lately been to give more space to the states. Its influence can also be tracked in the EU's legislative processes, since different types of policies must, according to primary law, undergo different procedures.

Whether a measure must be adopted via ordinary or special legislative procedures depends on how a proposal is framed – put forward to the legislative procedure by the Commission. The bill can be presented as a taxation, environmental, energy, or any other measure. EU case law can provide guidelines to identify the main purpose of a proposed measure which will then have the effect on legislative procedure applied.

If there are, in fact, two purposes, one must look into whether there is a predominant one. The identified principal purpose then dictates the measure's legal basis.[208] Taking the carbon tax as an example, two most likely purposes can, theoretically, be identified: environmental protection (which undergoes procedures under the provisions of Articles 191 and 192) and energy regulation or promotion of alternative energy sources (Article 194). The following legislative procedure will then be reliant on the identified predominant purpose. This needs to be specified by the submitting entity together with arguments proving the predominant purpose.

In cases where there is no single clear purpose or the measure even has several purposes or components without any clear center of gravity, it must be based on various legal bases.[209] However, the legislator cannot base its proposal on multiple bases when procedures differ from each other or are in any way liable to undermine the rights of the European Parliament.[210]

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[208] See e.g.: 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.

[209] 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.

[210] 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.

Taking carbon tax as an example, one can find even three purposes – the need to protect the environment, the state's interest in a new source for the national budget, or its demand for diversification of its energy mix (in a way that it supports renewable sources of energy against traditional sources).

A carbon tax could most likely fall under both Articles 192 and 194[211] and which policy would be the dominant one would depend on the bill's proposer. Both Articles prescribe the same procedures, i.e., an ordinary legislative procedure, or, in the case of a measure primarily of a fiscal nature, a special legislative procedure.

Therefore, in order to figure out which legislative procedure would apply, the term *'primarily of a fiscal nature'* needs to be further clarified. It shall be noted that there is only a small number of cases brought to the EU Court of Justice that would require the clarification of the term.[212] However, using a verbal interpretation method, 'primarily' would, most likely, in the case of the aforementioned articles indicate that the measure's main purpose is a fiscal or budgetary one. The interpretation is in line with the current way of interpreting the principle of subsidiarity – it safeguards what is arguably one of the most important concerns of the EU Member States; in this case, the tax revenue implications.[213]

The interpretation of the term 'fiscal measure' might then be complicated, given the differences in national fiscal and tax laws, as well as the legal traditions of the EU's Member

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[211] Carbon tax would be a specialized tax. Its main purpose would be to of environmental or energy nature. Thus, it can be argued that it would not be submitted under the general tax provisions of primary law.

[212] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 4.

It shall be noted that since the interpretation of the wording determines what legislative procedure is applied, one would expect that clarification of the term 'primarily of a fiscal nature' would frequently be subject to review of the EU Court of Justice. Currently, there are almost no cases clarifying the term in the environmental and energy policy context.

According to Weishaar, absence of interpretation guidelines can imply three things: i) the interpretation is not important or the measure is not controversial, ii) no or only a few environmental or energy fiscal measures were proposed, or iii) Member States prefer negotiation when proposing controversial measures. He finds that there were, in fact, no fiscal measures adopted under Art. 192(2) or 194(3), and therefore that the explanations under ii) and iii) are quite likely.

[213] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 4.

States. However, two main interpretation streams can be identified – one narrow and another, wide interpretation. Most proponents of the first interpretation believe that the term refers only to taxes or that there is no certainty what exactly the term 'fiscal' means at all. The advocates of the latter believe the term includes both taxes and fees.[214] Hence, it can be concluded that since uncertainty regarding the meaning of the term *'primarily of a fiscal nature'* remains, one can argue that there might still be some room for speculation whether a new measure should follow the ordinary or special legislative procedure.

In general, though, measures such as energy or environmental taxes (falling under Articles 192(2)(a) or 194 (3)) were, in the past, understood as requiring the Council's unanimity.[215] Moreover, when examining the TFEU, it can be observed that all tax and fiscal measures require a special legislative procedure.[216]

However, given the development of the Union and the process of its integration, the rule of unanimity and special procedures regarding tax measures might seem obsolete nowadays and the subsidiarity principle should not be interpreted here as preventing policies at the EU level from being adopted. A Union-wide unified carbon tax is one of the preferred options for reaching its international climate commitments. As such, the ordinary legislative procedure should be understood as the ideal option for pushing more progressive policies through.

It can be assumed that the understanding of the subsidiarity principle in a way that the Member States are more involved in the decision making at the EU level (which is likely the current prevalent tendency), is largely reflected in the environmental and energy measures of a fiscal nature. However, the exact meaning of the term *'primarily of a fiscal nature'* has not yet been satisfactorily clarified. It can be assumed that the carbon tax could be submitted to the EU

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[214] Ibid.

[215] Advocate General Léger on C-36/98 Spain v. Council [2001] ECR I-779. Also included in Art. 223 (2): *The European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure after seeking an opinion from the Commission and with the consent of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.*

[216] See e.g. Article 113.

legislative procedure as an ordinary environmental or energy measure (if presumed as not having any impact on the Member States' choice of energy sources) or (and this is the less likely option) as a measure focused on the approximation of laws under Article 114 of the TFEU. This would be possible if it was justified that its (primary) purpose is not fiscal. In the case of environmental and energy measures, it could be argued that the proposed measure is needed for reaching the general objectives included in Article 191 (environment) and/or Article 194 (energy).[217] This could ease its adoption since, to achieve these objectives, the TFEU requires the European Parliament and the Council to establish necessary measures and these should be adopted under the ordinary legislative procedure.[218]

In order to understand if and how carbon tax at the EU level could be adopted (ideally via the ordinary legislative procedure), the legislative processes regarding other pieces of legislation of a similar character should be explored, as well as provisions allowing the use of the ordinary legislative procedure.

[217] According to Article 191, these include *'preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources;'* and (for our case probably most relevant) '*promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change'*. According to Article 194, the TFEU's energy policy should: *'ensure the functioning of the energy market; ensure security of energy supply in the Union; promote energy efficiency and energy saving and the development of new and renewable forms of energy'* (probably the most suitable objective); and '*promote the interconnection of energy networks'.*

[218] Article 192 (1) and Article 194 (2) – consultation of the Economic and Social Committee and the Committee of the Region is needed.

5. Exploring the Possibilities for the Adoption of an EU Carbon Tax

5.1. Future Common Framework

Some EU Member States have already introduced a tax based on the ratio of carbon content and produced energy, either in the form of a unique taxation instrument or as a component of a general energy tax. However, a common framework setting rules on the taxation of carbon content at the EU level, which could help with reaching its energy and climate goals, is still missing.

There are multiple adoption barriers identified by the literature that could hinder the common carbon tax framework. These are addressed in the following chapters. The main obstacles which can be identified are categorized as follows: unanimity requirement (already introduced in previous chapters about possible legal bases for the new legislation), national legal frameworks, national interests, and institutional memory.[219]

As in the case of energy tax, though, a carbon tax has the potential to affect energy prices and contributes to reaching climate and energy targets set out in the Paris Agreement. It can therefore be argued that there is a case for a common framework – for both preventing

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[219] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 5-7.

Unanimity requirement means that measures primarily of a fiscal nature must be approved by all EU Member States (more on this in previous chapters).

As the national legal framework barrier Weishaar identifies the issue of different interpretations of the EU rules caused by the several equally authentic language versions.

National interest will most likely constitute a very significant problem to a common carbon tax framework, especially if the measure will undergo the special legislative procedure. It is so because a Member State's position in the Council, and thus its voting, is governed by its national interests such as its energy mix, natural resources policies and other economic interests.

When it comes to the institutional memory issue, Weishaar argues that the Commission may be hesitant to refrain from proposing a new carbon tax as it appears difficult to accept (the tax was proposed multiple times in the past, both as a separate measure and as a part of existing energy tax).

distortions to the internal market (in prices of energy throughout Europe), and reaching climate mitigation objectives.[220]

Taking into account the history of carbon tax proposals, it can be assumed that it is a more likely possibility that the common carbon tax framework will be adopted as a component of existing energy tax legislation.[221] This indication is included in the European Green Deal,[222] as well as in the 2020 ETD revision-related public consultation.[223] A carbon tax *sui generis* thus remains an option for the future.

5.1.1. ETD Revision

First option that will be explored is the revision of existing framework for the taxation of energy products (ETD).

In 2019, the European Commission published a report[224] concerning the functioning of the ETD (further addressed as 'report'). The document's publication followed the Regulatory Fitness and Performance (REFIT)[225] exercise and public consultations. One of the purposes of the report is to assess whether *'new concerns and challenges have arisen since its [ETD]*

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[220] Which is one of the objectives of the EU environmental policy according to the Art. 191(1) of the TFEU.

[221] Majority or more recent proposals of carbon tax was submitted as a new measure under the ETD, see previous chapters.

[222] See e.g. Article 2.1.1. of the European Green Deal.

[223] European Commission. EU Green Deal – Revision of the Energy Taxation Directive. In: *European Commission* [online] [accessed: 2020-08-14]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12227-Revision-of-the-Energy-Tax-Directive/public-consultation.

[224] Commission Staff Working Document of 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final.

The purpose of the report on functioning of the ETD is, among others, to *'assess whether new concerns and challenges have arisen since its adoption, which cannot be addressed by the Directive in its present form'.* (p. 6 of the report).

[225] See Evaluation and Fitness Check (FC) Roadmap, Ref. Ares(2017)4224148 - 29/08/2017, published on Evaluation Energy Taxation Directive. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1478-Evaluation-Energy-Taxation-Directive.

adoption, which cannot be addressed by the Directive in its present form'[226] and thus whether policy change is needed to address the shortcomings of the ETD.

The Report emphasizes the Commission's call for a shift from the prevalence of labor to environmental taxes. Nevertheless, the composition of the Member States' tax revenues has barely changed over the last decade. The same can be observed with regards to the excise tax rates included in the ETD.[227] The report also stresses that energy and climate policies have developed significantly since 2003 when the ETD was adopted. Taxation is expected to play an important part when achieving the climate objectives, yet the ETD does not contribute to reaching them.

The report mentions several reasons indicating that the current wording of the ETD is not ideal for reaching the EU's key objectives in the area of energy and climate. Another highlighted fact is that the ETD does not guarantee a favorable tax treatment of low carbon fuels and renewable energy. Nor does it, for instance, recognize some of the new types of fuels, such as hydrogen and biomethane. [228] That can potentially result in a situation in which renewable energy, biofuels, or other more sustainable forms of energy are taxed at a less favorable or, in some of the EU countries, even higher rate than fossil energy.[229]

There is also a lack of alignment between the ETD and the EU ETS[230], according to the report. Overall, its contributions to meeting the objectives of the Paris Agreement are rather

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[226] Commission Staff Working Document of 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final, p. 6.

[227] For an overview of tax rates on products included in the ETD see Annex 1. Diverse rates the Member States apply indicate a possible distortion of internal market.

[228] The report mentions also some formal shortcomings of the ETD such as lack of clarity in the wording of some provisions, unorganized structure, as well as material flaws: excessive flexibility of certain measures, or significant differences among national tax rates of some energy products possibly resulting in fragmentation of the internal market.

[229] Commission Staff Working Document of 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final, p. 23.

It should be noted that this situation contradicts the general environmental *polluter pays principle*.

[230] According to the EU ETS Directive (2003/87/EC) energy taxation should function in a way it limits emissions from the installations excluded from the EU ETS (Recital 24 of the Directive 2003/87/EC of the European

limited. The report concludes with the statement that *'despite the legislators'* explicit intention to support environmental objectives with some of the ETD provisions, there is a degree of dissonance between the desired and the actual effects of the tax framework. This is especially noticeable with regards to recent developments of environmental policy at Union level. The main source of this dissonance is the high level of flexibility allowed to the Member States regarding the implementation of the Directive and the lack of coherence when it comes to the definition of rates (energy content and CO_2 emissions).[231]

The ETD revision process is currently underway.[232] The main purpose of the Directive's review is to ensure that its current wording can ensure the proper functioning of the internal market and that it is in line with other EU policies, legislation and technological advances.[233] It is therefore very likely that a CO_2 component of the generic energy tax would be suggested as a part of the revision.[234]

The main goal of the public consultation that precedes the ETD's revision is to collect ideas and to understand the needs of the affected stakeholders. The explanatory note to the

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Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC). The ETD does not secure this. Moreover, some sectors are excluded from the scopes of both the ETD and the EU ETS directive or have certain advantages (p. 52 of the report)

[231] Commission Staff Working Document of 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final, p. 65.

[232] First round of feedback gathering was in 2017. See: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1478-Evaluation-Energy-Taxation-Directive

Currently, the second review round is taking place, in line with the plan set out by the European Green Deal: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12227-Revision-of-the-Energy-Tax-Directive/public-consultation.

[233] Ibid.

[234] The revision of the ETD should be part of the so-called Fit for 55 Package. This group of legislative proposals should be introduced in summer 2021. Its main purpose is to prepare the EU for reaching the target of 55% emission reduction in 2030. The Commission has not indicated what the ETD revision will be comprised of. More at: https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/package-fit-for-55.

procedure[235] mentions the importance of the review for the delivery of the European Green Deal.[236]

To predict the results of the ETD's review would not, as of now, be an easy task. It can be presumed that the Commission will propose the inclusion of the carbon component of the tax, as this would be in line with the wording of the European Green Deal.[237] However, the Commission could also decide to merely to increase the ETD's tax rates and modify measures focused on exemptions.[238]

Even so, the explanatory note specifically refers to the EU's international commitments as well as the above-mentioned report from September 2019[239] and it emphasizes that *'the Directive does not adequately promote greenhouse gas emission reductions, energy efficiency, or alternative fuels'* and that '*the ETD does not achieve anymore its primary objective in*

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[235] European Commission. EU Green Deal – Revision of the Energy Taxation Directive. In: *European Commission* [online] [accessed: 2020-08-14]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12227-Revision-of-the-Energy-Tax-Directive/public-consultation.

[236] The Commission states that *'To deliver the European Green Deal, there is a need to rethink policies for clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits. Well-designed taxes play a direct role by sending the right price signals and providing the right incentives for sustainable practices of producers, users and consumers. The revision of the Energy Taxation Directive is an integral part of the European Green Deal and should be focused on environmental issues.'* See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12227-Revision-of-the-Energy-Tax-Directive/public-consultation.

[237] The EGD states that the Commission is planning to propose a revision of the ETD which will be *'focusing on environmental issues'.* Furthermore it, in the connection with the revision, anticipates the end of fossil-fuel subsidies and revision of current tax exemptions (see paragraphs 2.1.1 and 2.1.5 of the EGD).

[238] The Commission has stably supported the abolition of tax exemptions. Specific rates should be set to all products, their height then can be modified.

[239] Commission Staff Working Document od 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for taxation of energy products and electricity SWD(2019) 332 final.

relation to the proper functioning of the internal market'.[240] That could also be understood as an indication of the Commission's determination to introduce a carbon tax.[241]

In the European Green Deal's Annex, the submission of the ETD's review proposal was anticipated by June 2021 while the public consultation ended in October 2020. The revision was eventually made public in July 2021 and it indeed suggests the introduction of the carbon content of the energy excise tax. Since it is based on Articles 113 and 192(2) demanding unanimity, this will, most likely, hinder the EU institutions from adopting the measure.

One of the possibilities of how to avoid the special legislative procedure is to submit the proposal as a regular environmental or energy regulation (i.e., a provision not of a fiscal nature), as argued above. However, EU primary law also offers other provisions that can ensure that a qualified majority procedure is applied.

5.1.2. Overcoming the Obstacles

Since it is currently of a common understanding that taxation measures should be adopted via the special legislative procedure, it is quite likely that the new taxation measure will require special legislative procedure[242] (assuming the Commission will not eventually justify that the measure is not primarily of fiscal nature)[243]. The special legislative procedure requires unanimity in the Council.

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[240] European Commission. EU Green Deal – Revision of the Energy Taxation Directive. In: *European Commission* [online] [accessed: 2020-08-14]. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12227-Revision-of-the-Energy-Tax-Directive/public-consultation.

[241] This is also mentioned in Chapter 5.2 of the Commission Staff Working Document od 11 September 2019: Evaluation of the Council Directive 2003/96/EC of the 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity SWD(2019) 332 final.

[242] See Annex 3 for the overview of pieces of law already in force and their primary law base.

[243] Then, the ordinary legislative procedure would be used. This way of legislation making requires qualified majority in the Council's decision making is reached under two conditions: 55% of Member States vote in favor, these Member States represent at least 65% of the EU population. The decision can still be blocked by so called 'blocking minority': at least four Member States representing more than 35% of the EU population. See: https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en.

In the past, there have been a few proposals from the Commission to move from unanimity to qualified majority voting in a limited number of tax areas.[244] Even though the Commission presented multiple examples[245] of why qualified majority voting is not an ideal approach, the change of the EU rules in the area of taxation has not been approved.

As argued above, the unanimity requirement can have certain negative effects. The rule can be seen as undermining the progress of the European integration, legislation approximation, and internal market integrity. Moreover, in the special legislative procedure, the directly elected European Parliament is partially excluded from the decision-making process.[246] On the other hand, unanimity on in the issue of taxation might seem desirable, since national budgetary interests are concerned.

Even though there has not yet been any measure passed under Article 192(2) or 194(3) of the TFEU,[247] it is commonly believed that taxation measures require unanimity.[248] However, in the past, the adoption of unified carbon tax rules at the EU level was effectively prevented

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[244] These included proposals to combat tax fraud and environmental protection proposals. The Commission organized an intergovernmental conference in 2003, yet the legislative shift was not approved. See: European Commission. Taxation and Qualified Majority Voting. In: *European Commission* [online] [accessed: 2020-08-15]. Available at: https://ec.europa.eu/taxation_customs/general-information-taxation/taxation-qualified-majority-voting_en.

[245] European Commission. Qualified Majority Voting on Tax Issues: Detailed Arguments and Specific Examples by Sector. In: *European Commission* [online] [accessed: 2020-08-15]. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/egs_en.pdf.

[246] When applying an ordinary legislative procedure, European Parliament and the Council decide on an equal footing on a proposal put forward by the European Commission. In certain cases defined in the Treaties special legislative procedure applies. In these cases, the Council acts as a sole legislator and the Parliament's role is reduced to giving a consent or being consulted. See: https://eur-lex.europa.eu/summary/glossary/special_legislative_procedure.html. See also: https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en.

[247] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 11.

[248] Advocate General Léger on C-36/98 Spain v. Council [2001] ECR I-779 or European Parliament. General tax policy. In: *Fact Sheets on the European Union* [online]. 2019-05 [accessed: 2020-08-15]. Available at: https://www.europarl.europa.eu/factsheets/en/sheet/92/general-tax-policy.

by the unanimity requirement.[249] Even though the EU has, over time, moved to the qualified majority voting in most areas,[250] the unanimity rule remained as regards the taxation rules.[251] Qualified majority rule is a manifestation of the principle of compromise, which is one of the main cornerstones of the Union and it may speed up a legislation-making process.

In its policy documents,[252] the Commission sums up three main objectives the future energy taxation framework should deliver. It should support the clean energy transition; contribute to sustainable and fair growth; and reflect social equity considerations.[253] To achieve these objectives, qualified majority voting is arguably the preferable option when adopting new legislation.

If environmental and energy measures of a fiscal nature were to be approved via the ordinary legislative procedure and qualified majority voting, a change of primary law would be needed. That would require an amendment to the founding treaties, which, in most cases, means a considerably long process. However, there are faster and relatively easier options for the switch to a qualified majority when deciding on tax measures. EU primary law includes provisions enabling the use of ordinary legislative procedure and qualified majority voting,

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[249] The unanimity rule is a requirement for all EU countries represented via the Council to be in agreement when adopting a proposal. The number of policy areas which requires unanimity was significantly reduced by the Single European Act (1987) and, later on, by the Lisbon Treaty (2009). Areas such as taxation, social security, foreign and defense policy, new members accession and police cooperation rules still remain to be decided under the unanimity rule. See: https://eur-lex.europa.eu/summary/glossary/unanimity.html.

[250] Currently, ordinary legislative procedure with qualified majority voting requirement is applied for more than 80% of legislative procedures. See: https://ec.europa.eu/taxation_customs/taxation/decision-making-eu-tax-policy_en.

[251] Communication from the Commission to the European Parliament, the European Council and the Council: A more efficient and democratic decision making in EU energy and climate policy of April, 9 2019, COM(2019) 177 final, p. 2.

[252] See e.g.: Communication from the Commission to the European Parliament, the European Council and the Council: A more efficient and democratic decision making in EU energy and climate policy of April, 9 2019, COM(2019) 177 final.

[253] Communication from the Commission to the European Parliament, the European Council and the Council: A more efficient and democratic decision making in EU energy and climate policy of April, 9 2019, COM(2019) 177 final, p. 5-7.

even in cases when the treaties require special procedures. These are so-called *'passerelle clauses'* and *'procedures of enhanced cooperation'*.[254]

The TEU, as well as the TFEU, contains passerelle clause provisions. These unlock the opportunity to decide, under certain circumstances, that some measures normally requiring unanimity or special legislative procedure can be adopted via qualified majority voting under the ordinary legislative procedure. However, in order to exercise this competence, certain conditions exist which can curtail the application of the clauses.

The passerelle clause included in Article 192(2) TFEU's second subparagraph[255] can be applied in the cases of primarily environmentally focused legislation and of a fiscal nature. However, in order to use the opportunities offered by the passerelle clause, the Council must unanimously agree upon the use of it. Moreover, consultations with the European Parliament, the Economic and Social Committee, and the Committee of the Regions are required, too. The measure which should be decided upon via the passerelle clause must be primarily of an environmental nature. Since reaching the Paris Agreement targets requires appropriate tax adjustments and energy production and use are responsible for a significant portion of the EU CO_2 emissions, the carbon tax could benefit from the application of the TFEU's passerelle clause.[256]

There is also a general passerelle clause included in Article 48(7) of the TEU, which would provide for qualified majority voting for tax measures primarily designed for reaching

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[254] There is also another theoretical possibility which has, however, never been used by the EU institutions: Article 116 TFEU allows for qualified majority voting under the ordinary legislative procedure in cases when there are different tax rules in the Member States causing distortions of competition. This distortion cannot be removed via the cooperation with Member States. However, using this provision is conditional upon approval of the Parliament and the Council and its usage would most likely be very difficult to justify.
See: Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision making in EU tax policy of January, 15 2019, COM(2019) 8 final, p. 8-10.

[255] The first subparagraph prescribes special legislative procedure for environmental measures primarily of a fiscal nature – the second derogates from it by enabling the use of the ordinary legislative procedure.

[256] Communication from the Commission to the European Parliament, the European Council and the Council: A more efficient and democratic decision making in EU energy and climate policy of April, 9 2019, COM(2019) 177 final, p. 8.

the energy goals.[257] This provision again allows the European Council to adopt a decision authorizing the use of a qualified majority where special legislative procedure or unanimity is needed. However, not only the European Council must agree on the use of the clause unanimously, but this initiative also has to be notified to the national Parliaments, which can express their opposition within six months of such notification. This means that the passerelle clause included in Article 48(7) of the TEU introduces the possibility to switch to qualified majority voting, which, however, again needs to be adopted unanimously. If a co-decision by the European Parliament is obtained, decision-making can move to the ordinary legislative procedure.[258]

The clauses do not directly affect Member States' competencies in the field of taxation represented through the Council. Triggering this tool would essentially just alter the way their competencies are exercised. The idea to move from unilateral decision-making to using the passerelle clauses is also contained in a few recent policy documents from the Commission,[259] which emphasize that their use would ensure that the powers of the directly-elected European Parliament and the Council in this decision-making would be balanced. However, since the application of the passerelle clause still requires unanimity within the Council, hence the Member States, it does not help to overcome difficulties that the carbon tax encountered in the past (i.e., the opposition of some EU countries).

Based on the above-mentioned Commission's policy papers which propose the use of passerelle clauses, they seem likely to be adopted in future [260] (in comparison with, for instance,

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[257] Ibid.

[258] Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision making in EU tax policy of January, 15 2019, COM(2019) 8 final, p. 10.

[259] For instance, the aforementioned documents 'Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision making in EU tax policy' and the 'Communication from the Commission to the European Parliament, the European Council and the Council: A more efficient and democratic decision making in EU energy and climate policy'.

[260] The Commission proclaims that '*For the Commission, the question is no longer whether there is a need to move away from unanimity in taxation, but rather how and when to do it.'*

proposing changes to primary law). Such a move would also very likely form a general approach towards using passerelle clauses and therefore ensure a faster legislative process in the future.[261]

Another option for the move to an ordinary legislative procedure is the exploitation of the so-called enhanced cooperation procedure. The possibility is embedded in Article 20 TEU while detailed arrangements are laid down in Articles 326 to 334 TFEU. If specific conditions are met, a group of Member States can undertake steps that would, in normal circumstances, fall within the ambit of the Council as a whole. A minimum of nine Member States are needed to establish enhanced cooperation within the Union's non-exclusive policy area[262] and this move should aim to further the overall EU's objectives (such as its environmental and energy goals of the EU). The decision to use enhanced cooperation must be adopted unanimously by the Council as a 'last resort' in cases when the decision about a specific issue cannot be reached within a reasonable period.[263] The use of the measure must be proposed by the Commission and agreed on the European Parliament's ground. If agreed, only the Council members who are representing the Member States engaged in enhanced cooperation take part in the vote when deciding on the proposed measure (all other Member States can however participate in the deliberations).[264] According to Article 333 of the TFEU, the Council members engaged in the enhanced cooperation can even agree that a provision which, under normal circumstances, requires the special legislative procedure, can be adopted via an ordinary procedure. However, it must be noted that acts adopted in this procedure then bind the participating states only, and not the EU as a whole.[265] The cooperation also cannot undermine the internal market or other

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See: Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision making in EU tax policy of January, 15 2019, COM(2019) 8 final, p. 11.

[261] Which is outlined in the roadmap included in the Communication from the Commission to the European Parliament, the European Council and the Council: Towards a more efficient and democratic decision making in EU tax policy.

[262] According to Article 20 TEU and 329 TFEU, the enhanced cooperation can be used only for decision making in areas which are not in the exclusive competence and the foreign and security policy.

[263] Article 20(2) of the TEU.

[264] Article 20(3) of the TEU.

[265] Articles 20(1), 20(2), 20(3), 20(4) of the TEU.

EU policies, such as economic, social, and territorial cohesion policies. The primary law provisions also stipulate that the use of this provision cannot constitute any kind of barrier to trade or trade discrimination.[266]

Applying this procedure is, in theory, able to overcome a deadlock if a given proposal is blocked by an individual country or a group of Member States in the Council. However, it is not an optimal solution to the systemic issue of the unanimity requirement, nor does it secure more efficient and just decision making in the area of EU tax policy over a longer time.

In 2013, the procedure has been approved, for instance, for the Financial Transaction Tax, which had long been discussed by all Member States.[267] However, even though the procedure followed all the prescriptions, the group of participating states failed to agree on a common framework for the tax and, currently, the measure is on hold.[268]

Using the procedure could ease the adoption of unified rules for the CO_2-based tax which would, however, then only be applicable in specific Member States. Since one of the objectives of the European tax policy is the protection of the internal market's integrity, it can be argued that a tax agreed only among a few Member States would not ultimately help to reach this objective. The same accounts for the EU's objective to reach international commitments in the area of energy and climate.

5.2. Examples of other Taxation Measures

Carbon tax proposals introduced in the past can serve as an example of how a new carbon tax, either in the form of a new taxation measure or as a component of existing energy tax, could be adopted. Currently, it is understood that taxation measures should be decided upon unanimously which makes any kind of progress difficult since, in fact, each Member State has the right to veto a proposal. Therefore, in order to support the case for simplified adoption procedures at the EU level, the adoption process of other pieces of legislation should be explored. The goal of this investigation is to find out whether there was any legislation (with

[266] Article 326 of the TFEU.

[267] See: https://eur-lex.europa.eu/summary/glossary/enhanced_cooperation.html.

[268] See: https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-financial-transaction-tax

similar objectives in the area energy, environment, or taxation) that was, in fact, adopted via the ordinary legislative procedure.

The 1992 carbon tax proposal (see Chapter 3.3.1) was based on Article 99 of the Treaty Establishing the European Community[269] (now Article 113 TFEU), as well as its Article 130s (currently Article 192 TFEU). However, at that time, neither Article 99, concerning excise duties, nor Article 130 on the internal market included provisions providing different treatments to measures of a fiscal and non-fiscal nature. Both, however, required unanimity universally.[270] Therefore, the original proposal is not very suitable for the supporting of our case.

The proposals of 1995 and 1997[271] (see Chapter 3.3.1) were based on Article 189a and Article 99 respectively, of the Treaty Establishing the European Community. Article 189a required unanimity since the proposal was merely an amendment to a previous proposal. The same applies to Article 99. Again, these provisions did not distinguish between measures of fiscal and non-fiscal nature. It can be argued that this was a common trend in the early years of the European Union (formerly European Community) – a quite common unanimity rule standard implies a low degree of integration within the Union.

The ETD introduced in 2003 was based on Article 113 of the TFEU (which used to be Article 93 of the Treaty Establishing the European Community)[272], was passed through the special legislative process and voted upon unanimously. Again, the directive does not represent the best case for the support of a waiver of the unanimity requirement and the special legislative

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[269] The Treaty Establishing the European Community (first version adopted as the Rome Treaty on March, 25 1957) in its 1992 version. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11992E%2FTXT

[270] Articles 99 and 130 of the Treaty Establishing the European Community and WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 8.

[271] Amended Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy, COM (95) 172 final. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51995PC0172&from=EN; and Proposal for a Council Directive Restructuring the Community Framework for the Taxation of Energy Products, COM (97) 30 final. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0030:FIN:EN:PDF.

[272] Consolidated version of 2002:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

procedure rule. Same as in the previous case, its amendment proposed in 2011[273] was again based on the same provision as its original piece of legislation (in this case Article 113 of the TFEU).

All the above-mentioned legislation and proposals for legislation were specifically about carbon (or general energy) taxation. None of them provide support for the argument to introduce the ordinary legislative procedure for the new carbon tax proposal. Therefore, to find out whether there was any other piece of legislation that could be characterized as *'of a fiscal nature'* adopted via the ordinary legislative procedure, an analysis of few groups of legislation was conducted. The results of this research – an overview of these pieces of legislation, their legal bases, and further details – can be found in Annex 3.

The methodology and results of the research are as follows: First, the existing EU tax legislation, mainly concrete directives and regulations, both of an older date and more recent ones, were reviewed and their legal bases were explored.[274] To conclude, it was found that all these taxation directives were based on the articles of treaties that demand unanimity and special legislative procedure. Only one regulation was based on an article requiring ordinary legislative procedure (Regulation of the European Parliament and of the Council establishing the 'Fiscalis' programme for cooperation in the field of taxation, which was based on Articles 114 and 197 of the TFEU)[275]. However, the character of this regulation is more of a technical nature, establishing a program for administrative cooperation among the Member States, not a tax framework. Hence, it is unlikely to be suitable for supporting our case.

The second group of legal instruments that was studied was directives and regulations based on TFEU articles focused on environment and energy that do not require a special

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[273] Proposal for Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity of April, 13 2011 COM(2011) 169 final.
Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0169:FIN:EN:PDF

[274] EUR-Lex website, specifically its sites concerned about taxes, was used to explore the EU's taxation legislation. See: https://eur-lex.europa.eu/summary/chapter/taxation.html?root_default=SUM_1_CODED%3D21.

[275] Regulation of the European Parliament and of the Council establishing the 'Fiscalis' programme for cooperation in the field of taxation of June, 8 2018 SWD(2018) 323 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0443.

legislative procedure while they still could be considered as of a fiscal, or economic, nature.[276] It can be concluded, that even though quite a large number of energy and environmental laws exist, almost none of them is of a fiscal nature understood in the same way as described above (i.e., establishing a tax, fee, or any other kind of levy). The only exception is the EU ETS Directive. This established an EU-wide emission allowances system that requires polluting industries to pay for each ton of CO_2 they emit. The revenues, coming from state-executed auctions, are the source of the individual Member States' budgets. It can therefore, theoretically, be classified as a measure of a fiscal nature. The Directive was, in 2003 when the system was established, based on Article 175(1) of the Treaty Establishing the European Community, which does not require unanimity and prescribes the use of Article 251 (ordinary legislative procedure).

The third group of examined instruments was the amendments of the ETD, both successful and unsuccessful. It can be concluded that all of these documents were based on articles requiring special legislative procedure and unanimity, as already mentioned.[277]

5.3. Other Possible Obstacles

It should also be noted that even if the European Commission were to decide to proceed with a new carbon tax proposal, obstacles could follow in the subsequent stages of the legislative process. Negotiations among the Member States have to take place in order to adopt a new piece of legislation at an EU level.

In most cases, the European Commission initiates informal exchanges with Member States' authorities or their representatives within the Committee of Permanent Representatives (COREPER) before the work on a legislative proposal's draft even begins. After the working-level discussions, the proposal is formally presented to the COREPER, and negotiations between the Commission and the Member States take place. In the past, the Commission

[276] EUR-Lex search tool 'Documents based on this document' was used. This way, pieces of legislation based on energy and environmental articles of the EU primary law were refined. See e.g. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012E192

[277] EUR-Lex search tool 'Subsequent related instruments' which shows all legal instruments amending the main piece of legislation was used. See: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32003L0096.

regularly withdrew initiatives that did not seem generally supported.[278] Even though the competence of the Commission to withdraw proposals already planned or in an early stage of adoption is not specifically included in the TFEU, it does include a provision allowing the Commission to alter its proposals at any time (prior to the Council's action).[279] The Commission used this possibility in the context of its proposals for the inclusion of a carbon-content related tax component and later ETD amendments.[280] As such, it can be expected that if the proposal for a new carbon tax would meet opposition during its adoption process, the Commission would eventually use the possibility given to it by Article 293(2) of the TFEU.

This opposition could come not only from the representatives within the EU institutions but also from the national decision-making bodies. Thanks to the measures included in primary law, Member States have the possibility to express their opinion regarding proposed legislation during the whole law-making process. According to Article 12 TEU, national parliaments '*contribute to the good functioning of the EU'*, that means also through involvement in legislative process. All pieces of legislation, as well as annual legislative Work Programs of the Commission, are primarily sent to the national decision-making bodies. In this way, Member States' parliaments have the chance to express their opinion regarding all new European rules.[281]

Moreover, not only national decision-making bodies and representatives may influence the new legislation. Before a new proposal is presented to the Council, the Commission also

[278] In March 2015, for example, the Commission stopped 73 pending proposals which were included in its Work Programme because they were not universally supported. On the other hand, it put forward 23 initiatives which were not planned beforehand. See https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4567 and WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 6.

[279] Article 293(2) of the TFEU.

[280] WEISHAAR, Stefan. Carbon taxes at EU level – Introduction issues and barriers. WIFO Working Papers, No. 556. 2018, p. 6.

[281] See Art. 1 of the Protocol No 1 on the Role of National Parliaments in the European Union. More on this in chapter 4.1.2

conducts a public consultation process so that regional, local, and interest groups' dimensions of the envisaged action can be taken into account.[282]

If a legislative proposal is not rejected at any of these levels, it can still encounter problems at the level of COREPER, or later in the European Council. It can be assumed that if the carbon tax proposal was submitted as a regular environmental or energy measure not of a fiscal nature (under the ordinary legislative procedure rules included in Article 191 or Article 194) the disagreement with such a procedure would arise, at least at one of these levels. The Commission would have to defend the reasons for not submitting the proposal under the special legislative procedure. Probably the most suitable argument for that would be that the legislation is, in fact, not *'primarily of a fiscal nature'* since its main objective is not to serve as another source of the state budget but to reach the objectives of the EU's environmental and energy policies.[283] Negotiations would have to be commenced. However, if the opposition was great enough it is quite likely that the Commission would either change or eventually completely withdraw the proposal.

[282] For instance, the ETD is currently undergoing the public consultation process, as already mentioned. The initiative was published in July 2020. Everyone can express their ideas and comments to the Directive's revision which should take place most likely in 2021 or 2022. The ETD's amendment is foreseen by the European Green Deal. More on this: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12227-Revision-of-the-Energy-Tax-Directive/public-consultation

[283] As mentioned in Chapter 4.2.2 if multiple purposes of a measure can be identified and these have different rules for adoption, the primary purpose has to be identified.

6. Conclusions

According to the Paris Agreement, an increase in global temperature must stay well below 2 °C above pre-industrial levels and the international community must collectively attempt to keep the increase to 1.5 °C. The Agreement, as well as its predecessors, supports economic legal instruments to regulate greenhouse gas emissions and even aspires to establish an international emission trading mechanism.

Economic legal instruments such as carbon tax or more modern emissions trading systems are thus becoming an increasingly popular tool to regulate excessive greenhouse gas emissions. When regulating climate change, they can, thanks to their flexibility, bring more benefits than traditional command-and-control regulation. The instruments should, according to the economic theory, have a negative effect on emissions and a positive effect regarding the increase of state revenues. Funds obtained through them can then be used in a way that further boosts the process of decarbonization. Thus, economic instruments are also favored by, for instance, the European Commission.

In 2003, the European Union introduced the EU Emissions Trading System (EU ETS) which currently regulates about half of the greenhouse gas emissions in the Union. However, the system does not cover all emission sources. That is why some of the EU states also apply carbon tax which is, in most cases, set in a way it regulates sectors not covered by the EU ETS. Not all the EU Member States have the tax which is based on the carbon content of a given product in place, though. Hence, there have been a few attempts to introduce a European-wide carbon tax framework so that distortions in an internal EU market were prevented. None of them was successful, though.

The current European Commission has on multiple occasions addressed the issue of a common carbon tax and stated that it is willing to pursue efforts to introduce a Union framework. That could have a form of a singular new carbon tax directive. However, it is more likely that the framework will be put in place through a revision of the existing Energy Taxation Directive (ETD). This Directive currently prescribes minimum tax rates of energy products based, simply, on the amount of fuel produced or consumed, and not necessarily on its environmental qualities such as CO_2 content (number of tons of emissions emitted during combustion). There have, in fact, been several proposals for changes to ETD which promoted

taking the carbon content of fuels into account when setting a tax rate. The proposals did not pass through the Council of the EU. The main reason was the common assumption that unanimity in the Council is needed when legislating about tax issues.

The unanimity requirement stems mainly from the historical development of the distribution of powers between the EU and the Member States over taxation measures and, more specifically, the subsidiarity principle. The principle guides the way in which policy-making competencies should be exercised at the state or at the Union level. According to its ruling, the EU institutions can act only if the objectives of a proposed action cannot be achieved by the Member States individually. Different interpretations of this ruling exist, though. Currently, the understanding of the principle leans toward providing more powers to state legislators and securing a higher degree of involvement of the Member States via a consultation obligation of the Commission (this accounts for any new piece of legislation). This application of the principle can be observed particularly with regards to taxation measures which have, so far, been only partially harmonized across the EU. It can be observed that, being a source of state budgets, the Member States prefer to legislate on the taxation issues on the national level and the subsidiarity principle justifies that.

However, if a carbon pricing framework at the EU level would be proposed, it does not necessarily have to be framed as a taxation measure. As this thesis argues, the proposal can also be submitted as an environmental, energy, or approximation of laws provision. This would ease the adoption of such a measure since unanimity in the Council for these types of measures would then not be required. It is a duty of the entity that puts forward a new legislative proposal (such as the European Commission) to present it under one of the provisions of the primary law. Thus, it can decide to frame the proposal as an environmental or energy measure. In case of a dispute, it must then justify why the submitted proposal is submitted under a given provision of primary law.

An EU carbon content-related tax can be introduced as a part of the general energy tax via the ETD revision. This is emphasized by recent policy documents of the European Commission and provided as one of the options in the European Green Deal. If the new framework would be submitted as a taxation measure, it will most likely require the special legislative procedure, thus unanimity in the Council. As a taxation measure (thus source of the state budget), it is currently more likely to be understood as requiring an agreement among all

the Member States. This requirement which stems from one of the possible ways how to understand the subsidiarity principle is sometimes perceived as undermining the progress of European integration. It partially excludes the European Parliament, a directly elected EU body, from the decision-making process. There are a few ways how the unanimity requirement can be overcome, though, which can ease the adoption process. Primary law includes provisions enabling the use of ordinary legislative procedure and qualified majority voting in cases where unanimity would normally be required. One of them is a so-called 'passerelle clause'. However, in order to use this provision, the Council must unanimously agree upon its applicability in a specific case. After that, the specified proposals can undergo the regular legislative procedure also in the future. The unanimity requirement is thus abandoned only partially. Another option is the 'procedure of enhanced cooperation' which enables a group of states to address a specific issue and adopt a provision regulating it. However, acts adopted in this procedure then bind the participating states only.

When analyzing existing EU tax legislation, it can be found that all existing taxation EU directives were based on the articles of treaties that demand unanimity and special legislative procedure, except for one. The thesis also analyzed directives and regulations based on TFEU articles focused on environment and energy (that do not require a special legislative procedure and thus unanimity) while they still could be considered as of a fiscal, or economic, nature. It was found that the EU ETS directive, establishing a system that can be classified as of fiscal nature since it works in a similar way as a tax and is a source of state budget, was adopted via the ordinary legislative procedure. Therefore, future carbon tax framework measures could follow its example and be submitted as an environmental or energy measure.

While this thesis might suggest that the prospects of the common EU carbon tax framework are likely only a scant possibility in practice, it was shown that EU primary law provides for a possible course of action. There are, in fact, ways to adopt an EU-wide carbon tax both in the cases it is framed as taxation, or as another type of measure. It would, however, require firm support of the European Commission and a at least a greater majority of the Member States.

Since it is now clear that the climate change crisis requires an immediate response, the case for a robust policy was never stronger. Because carbon tax can contribute to reaching climate and energy targets set out in the Paris Agreement it can be expected that the current

Commission, as well as the European Parliament, will support strong climate measures. Furthermore, the new European Commission has set six priorities for its program. The main one is the European Green Deal which mentions that the revision of the current energy taxation framework in a way that it reflects current environmental crises is needed. It is thus more than likely that carbon tax will be put back on the table as part of the Green Deal strategy and the primary law can support its smoother adoption.

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List of Annexes

Annex 1

Minimum excise duty rates according to ETD, as applied in Czech Republic, Poland and Sweden

Below you see minimum excise duty rates that a Member State has to apply to most relevant energy products (for fuel and transport, as well as electricity) compared to the rate in Czech Republic (CZ), Poland (PL), and Sweden (SE) in January 2020 (numbers are rounded up). Sweden's rates are in most cases distinctively higher, thanks to its carbon tax. That is also a reason for lower rates for the EU ETS industry, which is exempted from paying the carbon tax (it is covered by the EU ETS).

fuel/energy		minimum rate in € (ETD)	CZ (€)	PL (€)	SE (€)
Motor fuels*	unleaded petrol	359 per 1000 l	499	383, 444	431, 622 or 619 (classed)
	leaded petrol	421 per 1000 l	533	416 (not on market)	704
	LPG	125 per 1000 kg	153	191	333
	LPG – commercial and industrial use	41 per 1000 kg	50	191	32 (EU ETS industry), 365, 440, 333
	natural gas	2.6 per GJ	2.9	0	5.9
	natural gas – commercial and industrial use	0.3 per GJ	0.3	0	0.7 (EU ETS industry), 6.6, 8.2, 5.9
Heating and electricity**	heavy fuel oil	15 per 1000 kg	18	15	421
	LPG (butane, propane)	0 per 1000 kg	0	13	440, 32 (business use)
	heavy fuel oil – rate for business	15 per 1000 kg	18	15, full exemption for agriculture	26 (EU ETS industry), 360
	natural gas	0.3 per GJ	0.3	0.3	8.2
	natural gas – rate for businesses	0.15 per GJ	0.3	0.3	0.7 (EU ETS industry), 6.6
	coal and coke	0.3 per GJ	0.33	0.29	10.7
	coal and coke – rate for businesses	0.15 per GJ	0.33	0.29, full exemption for agriculture and railways	0.6 (EU ETS industry), 9.3, full exemption for railways
	electricity	1.0 per MWh	1.1	1.14	32.7
	electricity – rate for businesses	0.5 per MWh	1.1, exemption for railways, metro, tram	1.14	0.46, exemption for railways, metro, tram

*Fuel used in aircraft for international transport is exempt from the excise duty (Art. 14(1)(b)) of the ETD. Gas oil and kerosene are not mentioned for their relatively low relevance.

** Gas Oil and kerosene are not mentioned for their relatively low relevance.

Sources (Annex 1):

Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

European Commission DG Taxation and Customs Union. Excise Duty Tables. In: European Commission [online] [accessed: 2020-08-14]. Available at https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/excise_duties/energy_products/rates/excise_duties-part_ii_energy_products_en.pdf.

Annex 2

Overview of possible legal bases for common carbon tax in the Treaty of Functioning of the EU (TFEU) and adoption procedures required

Legislative procedure	ordinary	special
Article 113 TFEU: Harmonization of Taxes (incl. excise tax)	-	Council, unanimously (consultation of EP, Economic and Social Committee) – if necessary to ensure functioning of internal market and avoid distortion to competition
Article 114 TFEU: Approximation of Laws*	EP and Council (consultation of Economic and Social Committee) – does not apply to fiscal measures	-
Article 115 TFEU: Approximation of Laws, measures affecting functioning of internal market	-	Council unanimously (consultation of EP, Economic and Social Committee)
Article 192 (1) TFEU: Environment	EP and Council (consultation of Economic and Social Committee, Committee of Regions)	-
Article 192 (2) TFEU: Environment, measures primarily of a fiscal nature or affecting choice between energy sources	-	Council unanimously (consultation of EP Economic and Social Committee, Committee of Regions)
Article 194 (2) TFEU: Energy	EP and Council (consultation of Economic and Social Committee, Committee of Regions) – measure shall not affect the choice between energy sources	-
Article 194 (3) TFEU: Energy, measures primarily fiscal nature	-	Council unanimously (consultation of EP)

*provision the original ETD was adopted under

Annex 3

Overview of other legislative tools that could be classified as '*of a fiscal nature*' and their legal bases

Area of legislation	Directive / Regulation	based on	detail
Tax	Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market	Art. 115 of the Treaty on the Functioning of the European Union	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.193.01.0001.01.ENG
	Regulation of the European Parliament and of the Council establishing the 'Fiscalis' programme for cooperation in the field of taxation	Art. 114 and 197 of the Treaty on the Functioning of the European Union	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018PC0443 The regulation used argumentation suitable for the support of approximation of tax measures universally: 'The EU tax objectives of fighting against tax fraud, tax evasion and tax avoidance, **improving tax fairness and transparency as well as supporting the functioning of the single market and competitiveness cannot be achieved by the Member States alone. Common rules, coordination and cooperation between Member States' tax authorities are needed to deliver on these objectives and face all related challenges**.'
	Council Directive 2008/118/EC concerning the general arrangements for excise duty	Art. 93 of the Treaty establishing the European Community	https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1456138665149&uri=CELEX:02008L0118-20140101
	Council Directive 2011/64/EU on the structure and rates of excise duty applied to manufactured tobacco	Art. 113 of the Treaty on the Functioning of the European Union	https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:176:0024:0036:EN:PDF
	Proposal of Council Directive laying down rules relating to the corporate taxation of a significant digital presence	Art. 115 of the Treaty on the Functioning of the European Union	https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf
	Proposal of Council directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation	Art. 113 and 115 of the Treaty on the Functioning of the European Union	https://ec.europa.eu/taxation_customs/sites/taxation/files/2020_tax_package_dac7_en.pdf
Energy & Environment (fiscal nature)	EU ETS Directive (Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC	Art. 175(1) of the Treaty establishing the European Community	https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32003L0087 (procedure)

			https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0087 (Directive)
Amendments to ETD (successful and unsuccessful)	Proposal for a Council Directive amending Directive 2003/96/EC as regards the possibility for certain Member States to apply, in respect of energy products and electricity, temporary exemptions or reductions in the levels of taxation (2004)	Art. 93 of the Treaty establishing the European Community	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004PC0042
	Proposal for a Council Directive amending Directive 2003/96/EC as regards the possibility for Cyprus to apply, in respect of energy products and electricity, temporary exemptions or reductions in the levels of taxation (2004)		https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52004PC0185
	Proposal for a Council Directive amending Directive 2003/96/EC as regards the adjustment of special tax arrangements for gas oil used as motor fuel for commercial purposes and the coordination of taxation of unleaded petrol and gas oil used as motor fuel (2007)		https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007PC0052
	Proposal for a Council Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (2011)	Art. 113 of the Treaty on the Functioning of the European Union	https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0169

Mapping the History and Future of Carbon Taxation in the EU: Carbon Tax and Subsidiarity Principle

Abstract

With the growing awareness of climate change impacts, policymakers around the world are trying to develop legislation that would tackle the issue in the most effective manner. They often choose economic regulatory tools such as carbon tax. This thesis is primarily focused on the possibility to establish a common carbon tax legal framework at the EU level. It argues that there are multiple obstacles to it which often stem from the past and current understanding of the subsidiarity principle. Therefore, the objective of the thesis is to show how these obstacles can be overcome while still preserving the fundamental principles the Union is based on.

In the first part, theories regarding carbon tax and subsidiarity principle are explained. After that, relevant pieces of the EU legislation and policy documents are analyzed. Finally, the application of tools found in these documents which, theoretically, enable the adoption of the common tax framework is evaluated.

The analysis has shown that the adoption of a common EU carbon tax framework is achievable. Yet, it would be problematic to obtain unanimity in the Council which is likely needed for this legislation to be passed. The EU primary law includes tools that can ease its adoption, though none of these were ever used in a similar enough case. The findings of the research illustrate how the subsidiarity principle can be understood in a way that undermines the robust climate change legal framework. However, the case for strong legislation in this area was never as strong as it is now. Therefore, it can be argued that applying the examined tools seems likely.

Key words: carbon markets, carbon tax, subsidiarity principle

Historie a budoucnost zdanění uhlíku v Evropské unii: Uhlíková daň a princip subsidiarity

Abstrakt

S rostoucím povědomím o dopadech změn klimatu lze vypozorovat i zvýšenou snahu zákonodárců vyvinout právní předpisy, které by tuto otázku dokázaly řešit co nejúčinnějším způsobem. Využití ekonomických právních nástrojů, jako je například uhlíková daň, je pak stále populárnější volbou. Tato práce je primárně zaměřena na možnost vytvořit společný právní rámec pro uhlíkovou daň na úrovni EU. K přijetí této legislativy ale brání překážky, které často vyplývají z historického chápání principu subsidiarity. Cílem práce je proto ukázat, jak lze tyto překážky překonat při zachování základních principů, na nichž je Unie založena.

V první části jsou vysvětleny teorie týkající se uhlíkové daně a principu subsidiarity. Následně jsou zanalyzovány příslušné části právních předpisů a dalších unijních dokumentů. Nakonec je zhodnocena možnost využití nástrojů nalezených v těchto dokumentech, které teoreticky umožňují přijetí společného daňového rámce.

Lze usoudit, že přijetí společného rámce EU pro uhlíkovou daň je teoreticky dosažitelné. Problém by však mohlo představovat pravidlo, že daňová opatření musí být schválena všemi státy Unie. Primární právo EU ale obsahuje nástroje, které mohou pomoci překonat tuto překážku, ačkoli žádný z nich nebyl doposud použit v dostatečně podobném případě. Tato práce ukazuje, že princip subsidiarity lze chápat způsobem, který příliš nepodporuje vybudování silného právního rámce pro regulaci změn klimatu na evropské úrovni. Na druhou stranu ale podpora klimatických opatření nebyla nikdy tak intenzivní, jako je tomu nyní. Lze proto předpokládat, že použití zkoumaných nástrojů při normotvorbě na úrovni EU se jeví jako pravděpodobné.

Klíčová slova: trhy s uhlíkem, uhlíková daň, princip subsidiarity

Shrnutí v českém jazyce

Změnu klimatu lze označit za jednu z největších výzev dnešní společnosti. Vzhledem ke stále se stupňujícím projevům tohoto globálního fenoménu vyvstala i potřeba jej regulovat na právní úrovni. Na mezinárodním poli byla jako první dohoda o změně klimatu přijata Rámcová úmluva o změně klimatu, a sice v roce 1992. Tato úmluva zakotvila systém, v rámci kterého je rozhodováno o budoucím mezinárodněprávním rámci na takzvaném Setkání stran úmluvy (COP). Právě na COP konaném v roce 1997 byl přijat Kjótský protokol, který zavedl první tržně založený právní nástroj pro regulaci změny klimatu.

I na přijetí Kjótského protokolu lze demonstrovat, že tvůrci práva po celém světě se při řešení otázky změny klimatu v současnosti čím dál častěji přiklánějí k užívání ekonomicko-právních nástrojů. Ty, na rozdíl od klasičtějšího přístupu nazvaného *command-and-control*, využívají trhu a jeho ekonomických nástrojů k regulaci subjektů, které vypouští skleníkové plyny. I Pařížská dohoda, přijatá na setkání COP konaném ve Francii v roce 2015, v sobě zakotvuje rámec pro přijetí globálního tržního mechanismu pro regulaci emisí (doposud se na přesnějších pravidlech pro něj ale nepodařilo dohodnout). Aplikaci tradičního regulatorního přístupu v právu životního prostředí lze vysledovat například u Montrealského protokolu, který byl přijat v osmdesátých letech minulého století k regulaci narušování ozónové vrstvy. Přístup byl poměrně úspěšný, z velké části ale pro to, že regulovat bylo potřeba pouze některé oblasti ekonomiky a poměrně limitovanou škálu škodlivých plynů. Naopak klimatická změna se dotýká veskrze všech oblastí světového hospodářství, kdy u téměř každé lidské činnosti lze identifikovat určitou uhlíkovou stopu. I proto bylo potřeba hledat mechanismy, které budou schopny regulovat ekonomiku vhodnějším způsobem. Úplný zákaz a následná kontrola vypouštění skleníkových plynů by v tomto případě nebyla namístě.

Pokud bychom srovnávali regulaci přístupem *command-and-control* a ekonomicko-právními nástroji, lze konstatovat, že tyto nástroje se od sebe liší především druhem incentiv, které využívají k regulaci lidského chování. Zatímco u prvního přístupu je určitá činnost zakázána či velmi omezena a následně kontrolována, u druhého jmenovaného je chování pouze více či méně ekonomicky zvýhodněné. Mezi nejtradičnější ekonomické druhy regulace patří daně a státní pobídky například ve formě finančních příspěvků či subvencí.

Modernějším ekonomicko-právním nástrojem je pak obchodování s různými typy vygenerovaných kreditů. Typickým příkladem v oblasti ochrany klimatu je v tomto případě systém obchodování s povolenkami na emise skleníkových plynů. Pokud jde o vynucování požadovaného chování, systém obchodování nabízí poměrně velkou míru flexibility pro regulované subjekty. Pokud účastníci systému činnost realizují, mohou tímto vygenerované kredity prodat na volném trhu a získat tím profit. Mají ale i možnost emise nesnižovat a místo toho platit za kredity či povolenky (výnosy jsou poté ideálně investovány do jiných opatření na snižování emisí). V evropském prostředí tímto způsobem funguje Evropský systém obchodování s povolenkami (*EU ETS*).

Ekonomické nástroje regulace skýtají mnoho výhod. Krom zvýšené flexibility pro regulované subjekty, která se následně odráží ve větší míře akceptace při zavádění tohoto nástroje, mnozí autoři také odkazují na jejich vysokou efektivitu, co se týče dosahování kýženého výsledku. Pokud jde o obchodování s povolenkami, výhodou je jistě i možnost zavádět podobné nástroje na mezinárodní úrovni (viz například Kjótský protokol). O výhodnosti ekonomických nástrojů regulace v oblasti klimatu svědčí i fakt, že v poslední době významně narůstá počet států, které je zavádějí.

Vzhledem k nutnosti posílit politiky v oblasti regulace změny klimatu, zavádění ekonomických nástrojů se, pokud přihlížíme k výše uvedeným výhodám, jeví jako velmi vhodné. Pokud poté srovnáváme uhlíkovou daň se systémem obchodování s povolenkami, její výhodou je bezesporu relativní jednoduchost jejího zavádění, možnost s ní regulovat konkrétně určené subjekty a také relativní cenová stabilita, jelikož výše daně je dopředu určovaná státem a nikoli trhem. Stabilní cenový signál je důležitý pro plánování v rámci podniků i pro rozpočtové plánování státu. Na základě dostupných studií lze konstatovat, že čím větší je nejistota ohledně výše daně (a rovněž čím nižší je míra zdanění), tím méně efektivní uhlíková daň obecně bývá.

Uhlíková daň je typicky využívaná k regulaci negativních externalit. Tyto se objevují v případě, kdy má určitá lidská činnost negativní účinky na své okolí, které nejsou původcem nijak kompenzovány. Výše uhlíkové daně se odvíjí od množství emisí, které je vyprodukováno danou činností – typicky stát daní zatíží distribuci či produkci fosilních paliv. Za každou energetickou jednotku paliva uvedenou na trh poté povinný subjekt platí daň. Palivo, které při svém spalování neemituje velké množství emisí skleníkových plynů, je tak na trhu zvýhodněno

a trh s nevhodnými palivy se postupem času zmenšuje až je nahrazen trhem s podporovanými palivy.

Výše daně může být ze strany státu stanovena tak, aby dosáhla určitých makroekonomických cílů, nebo tak, aby byla přibližně na stejné výši jako v dané geografické oblasti. Druhý jmenovaný přístup je aplikován při stanovování minimální výše daně na úrovni evropských směrnic. Dle ekonomické literatury je vhodné zavádět nové daně postupně, tedy navyšovat daň v průběhu let a rozšiřovat množství typů subjektů, na které je aplikována. Výše daně by taktéž měla reagovat na inflaci, přitom by ale neměla být měněna skokově, což by mohlo mít negativní vliv na hospodářskou situaci státu.

Výnosy z uhlíkové daně by, v ideálním případě, měly být dále využity na reinvestici do dalších klimatických opatření, na jiná opatření pro dosažení nízkouhlíkové ekonomiky, případně do sociálních politik státu (jelikož daně ve své podstatě nakonec nejvíce dopadají na konečné spotřebitele). Tím je pak zajištěno dodržení daňového principu neutrality (*revenue neutrality principle*) a také větší míra akceptace ze strany občanů. Informační kampaň týkající se zavádění nové daně je nezbytná, jelikož veřejnost má veskrze tendenci reagovat na nové daně negativně.

Jako příklad daně založené na obsahu uhlíku lze uvést jednu z nejdéle fungujících uhlíkových daní na světě, která je zavedena od roku 1991 ve Švédsku. Právní úprava pro švédskou uhlíkovou daň byla přijata v rámci reformy systému energetického zdanění, přičemž její výše byla postupně navyšována, stejně tak jako bylo rozšiřováno i pokrytí produktů. Výše daně je v současnosti 110 euro na tunu CO_2. V současnosti je daň využívána především pro regulaci emisí z dopravy, která je největším zdrojem emisí v této severské zemi. Výjimku z placení daně mají udržitelná biopaliva, stejně jako bioplyn. Naopak například v České republice nejsou uhlíkové emise zpoplatněny jiným způsobem než evropským systémem obchodování s povolenkami (a *de facto* energetickou daní). Ačkoli byla myšlenka uhlíkové daně několikrát přednesena a byly představeny i její návrhy (například v roce 2012 a 2014), v českém Parlamentu nakonec dostatečnou podporu nezískala.

Podle ekonomických teorií by přitom uhlíková daň měla být velmi účinným nástrojem ke snižování emisí. Piguviánské daně, které zpoplatňují negativní externality, mají tendenci ovlivňovat chování subjektů, které musí volit mezi řešeními přinášejícími různou míru zisku. Při ideální výši uhlíkové daně jsou tak nuceny od nežádoucího chování upustit. Při zkoumání

švédské uhlíkové daně, která je pro pozorování dlouhodobých efektů ideálním kandidátem, lze dojít k závěru, že emise z dopravy významně poklesly právě díky dani. Model J. Anderssona zkoumající reálné a *„syntetické“* Švédsko (tedy Švédsko bez daně) ukazuje, že v posledním zkoumaném roce byly emise díky dani celkově o 12,5 % nižší. Výsledky výzkumu však mohou být ovlivněny specifickými podmínkami Švédska.

V Evropě má v současnosti daň založenou na množství emisí uhlíku zavedeno méně než deset států. Na evropské úrovni neexistuje sjednocený právní rámec – do současnosti oblast energetického zdanění reguluje pouze směrnice Rady 2003/96/ES, kterou se mění struktura rámcových předpisů Společenství o zdanění energetických produktů a elektřiny (směrnice o energetickém zdanění). Dle této směrnice stanovující minimální daňové zatížení se ale výše daně odvíjí pouze od množství dodaného paliva, nikoli od jeho energetického obsahu vzhledem k vypuštěným emisím. Díky tomu, že některé státy uhlíkovou daň zavedenou mají, zatímco jiné nemají anebo pouze na velmi nízké úrovni, tak může docházet ke značným nerovnostem na vnitřním trhu EU. Sjednocená pravidla pro uhlíkovou daň a její dostatečná výše přitom mohou bezesporu přispět k dosahování cílů Pařížské dohody a efektivně pokrýt oblasti ekonomiky, které v současnosti nereguluje EU ETS. Uhlíková daň by mohla být zavedena jako samostatný daňový nástroj nebo jako prvek energetické daně, jejíž pravidla a minimální hodnoty stanovuje právě směrnice o energetickém zdanění.

Myšlenka zavedení uhlíkové daně na evropské úrovni není v evropském prostředí novinkou. Návrhy na zavedení nové daně byly představeny již v roce 1991, následně v letech 1995 a 1997. Tyto návrhy stanovily cílovou minimální výši zdanění, ke které se státy měly v přechodném období postupně dostat. I přesto, že obsahovaly řadu výjimek, které členské státy mohly aplikovat, ve své době nenašly v rámci unijních schvalovacích procesů dostatečnou podporu. Doporučení na zavedení uhlíkové daně bylo rovněž obsaženo ve sdělení Komise, které předcházelo rozšíření EU v roce 2000. To také doporučovalo, aby byly daňové předpisy na úrovni EU schvalovány obecným schvalovacím procesem, tedy prostou většinou v Radě Evropské unie, a aby tedy nebylo vyžadováno jednomyslné schvalování (typické pro zvláštní legislativní proces). Ten je ve většině případů vyžadován při schvalování pravidel týkajících se daňové politiky.

Za účelem sjednocení vnitřního trhu, co se týče zdanění energií, přijala poté Unie v roce 2003 již zmíněnou směrnici o energetickém zdanění. V roce 2011 byly následně navrženy

změny směrnice, které měly zohledňovat obsah CO_2 v daném palivu. Ačkoli Evropský parlament i Hospodářská a sociální rada daly návrhu zelenou, odmítnut byl nakonec v Radě. Návrh byl totiž předložen jako daňové opatření, tudíž se na něj automaticky dle primárního práva EU aplikovalo pravidlo vyžadující jednomyslnost v Radě, kterou ale návrh nenašel. Jak Evropská komise uvedla například v jednom ze svých sdělení z roku 2019, daňová legislativa je tématem velmi propojeným s národní suverenitou (daně jsou hlavním zdrojem rozpočtů). I proto zakládající evropské smlouvy státům ponechaly *de facto* právo veta v daňové oblasti. Lze argumentovat, že tento přístup byl vhodným a demokratickým řešením v situaci, kdy Unie měla pouze několik členů. V současnosti ale může způsobovat zdržování legislativního procesu, a tak i postupující unijní integraci a přijímání progresivnějších politik. Tento problém je spjatý s aplikací evropských právotvorných principů proporcionality a subsidiarity.

Oblast energetiky a životního prostředí patří v rámci EU mezi takzvané sdílené politiky. Ty jsou zakotveny v primárním právu Unie a jejich aplikace dále rozvedena v relevantních protokolech k zakládajícím smlouvám. Princip subsidiarity jsou pak evropské instituce povinny aplikovat při rozhodování o jakémkoli právním předpisu. Princip stanovuje, že v případě, kdy může cíle regulace být lépe dosaženo na národní úrovni, v dané oblasti by měly věc regulovat právě orgány na úrovni státu, tedy nikoli unijní. Tato formulace ale ponechává mnoho prostoru pro interpretaci tohoto principu, která se postupem času proměňovala.

Princip subsidiarity byl do evropského práva zaveden Jednotným evropským aktem v roce 1987. V této době byl princip veskrze chápán jako podporující právotvorbu spíše na evropské, tedy nikoli národní úrovni. Postupem času se ale začal ve stále větší míře v legislativě projevovat tím, že bylo ponecháváno více prostoru tvorbě legislativy na úrovni jednotlivých členských států. Především Lisabonská smlouva, která přesunula protokoly týkající se právotvorných principů na první a druhý v pořadí dle právních vědců podpořily interpretaci principu ve smyslu posilování role národních parlamentů (předtím byly protokoly týkající se subsidiarity a proporcionality řazeny jako č. 9 a 30, nyní mají čísla 1 a 2). Parlamenty mají být dle primárního práva a protokolů konzultovány před předložením jakékoli nové evropské legislativy Evropskou komisí. Lisabonská smlouva posílením role státních legislativních těles reagovala na častou výtku, která je nazývána *„demokratickým deficitem“* EU. Z právně nezávazných interpretačních dokumentů Komise také v současnosti vyplývá, že princip subsidiarity by měl být vnímán v tom smyslu, že posiluje roli národních parlamentů. Nutno

podotknout, že možnosti zasáhnout do znění nové legislativy ale státy v současnosti příliš často nevyužívají.

Princip subsidiarity, a tedy pravomoc tvořit novou legislativu na národní nebo evropské úrovni, má rozdílný efekt na různé kategorie legislativ. Při předkládání nové legislativy k projednávání na evropské úrovni je vždy třeba zprvu specifikovat, na jakém právním základu (uvedeném v zakládajících smlouvách) je nový akt založen. Například návrh na zavedení uhlíkové daně by mohl být předložen jako opatření k harmonizaci vnitřního trhu (dle článků 110-113 Smlouvy o fungování EU – SFEU) či jako akt určený ke sbližování právních předpisů (články 114-118). Na základě článku 113 byly v minulosti předloženy návrhy na zavedení uhlíkové daně, stejně tak jako v roce 2003 směrnice o energetickém zdanění. Další možností je také předložit návrh na základě článku 192 či 194 které se týkají oblastí životního prostředí a energetiky a které vyžadují pouze obecný legislativní proces. Článek 192 odst. 2 (resp. 194 odst. 2) ale toto pravidlo posléze deroguje, když stanovuje, že pokud je opatření *„fiskální“* povahy, je vyžadováno jednomyslné schválení v rámci Rady (přehled možných právních základů pro novou legislativu je obsažen v příloze č. 2). V těchto opatřeních lze vysledovat vliv principu subsidiarity, který, především pokud jde o oblast daní, svěřuje mnoho rozhodovací pravomoci jednotlivým státům, které mohou zablokovat návrh při schvalování v Radě. Debaty se vedou o smyslu slova *fiskální*, kdy někteří míní, že například i systém EU ETS, tedy nejen daňové předpisy, je opatření fiskální povahy, přesto byla ale jeho legislativa schvalována obecným legislativním procesem.[284]

První, avšak zdaleka nejkomplikovanější možností je změna primárního práva EU, konkrétně relevantních opatření, která stanovují požadavek jednomyslnosti v Radě. Zakládající smlouvy ale nabízí i další řešení pro případy, kdy pravidla pro přijímání legislativy nejsou vyhovující. Jedním z nich jsou takzvané *„paserelle clauses“*, které umožňují v rámci Rady

[284] V červenci 2021 byl Evropskou komisí v rámci legislativního balíčku nazvaného Fit for 55 představen návrh na restrukturalizaci směrnice o energetickém zdanění (viz níže). Komise se rozhodla nejít cestou zcela nové směrnice o uhlíkové dani, ale úpravou existujícího rámce pro energetickou daň. Návrh směrnice je předložen na základě článků 113 a 192 odst. 2, které vyžadují jednomyslnost v Radě – schválení ambiciózního plánu tak může být složité. Evropské právo ale nabízí několik řešení, díky kterým by mohly být překážky legislativního procesu překonány.

rozhodnout, že nebude aplikováno pravidlo jednomyslnosti. Doložka je obsažena ve článku 192 odst. 2, druhém pododstavci SFEU a fakticky umožňuje užití obecného legislativního procesu. Využití doložky je avšak podmiňováno jednohlasným odsouhlasením v Radě a konzultací s Hospodářským a sociálním výborem EU. Podobná doložka je dále obsažena i v článku 48 odst. 7 SFEU, který umožňuje vyhnout se pravidlu jednomyslnosti v oblasti energetických daní, avšak za splnění obdobných podmínek. V případě odsouhlasení využití doložek je poté teoreticky možné rozhodovat podobným postupem o návrzích legislativy i v budoucnu. Možnost jejich aplikace byla uvedena jako jedna z cest pro novou daňovou legislativu v několika nelegislativních dokumentech Evropské komise.

Další možností pro překonání pravidla jednomyslnosti je takzvaný postup posílené spolupráce (*„enhanced cooperation procedure“*), který je obsažen ve článku 20 Smlouvy o Evropské unii. Tento postup umožňuje skupině členských států vykonávat některé pravomoci, které by jinak byly svěřeny Radě a má sloužit jako poslední možnost v případě, kdy dané opatření nenajde podporu mezi státy. Aplikace postupu ale znovu vyžaduje jednomyslnost v Radě a schválené opatření je pak navíc aplikováno pouze ve státech, které na přijetí participovaly.

Je nutné zdůraznit, že využití výše uvedených opatření sice teoreticky umožňuje překonání některých legislativních bariér při přijímání nové legislativy, zároveň ale jejich využití není dlouhodobým a systémovým řešením. Doporučeny by tedy měly být spíše změny primárního práva, aby tak byla zabezpečena větší integrita vnitřního trhu EU, snadnější přijímání progresivnějších právních předpisů a sbližování legislativ naskrz členskými státy.

Evropské právní předpisy přijaté v minulosti mohou sloužit jako příklad toho, jakým způsobem by nový daňový rámec mohl být na úrovni evropských orgánů přijat (viz příloha č. 3). V rámci výzkumu byl vytvořen přehled všech legislativních nástrojů na úrovni sekundárního práva, které by se daly zařadit do kategorie daňových nebo environmentálních či energetických opatření *fiskální* povahy. Po jejich selekci bylo zkoumáno, na jakém právním základě (obsaženém v primárním právu) byly přijaty a zda tyto vyžadují zvláštní legislativní proces. Účelem vytvoření tohoto přehledu bylo zjistit, zda byla jiná opatření, která by se dala charakterizovat jako daňová či fiskální, přijata na základě obecného legislativního procesu a zda by se tak dalo argumentovat, že i uhlíková daň anebo nové prvky energetické daně by mohly v dnešní době být přijaty obecným legislativním procesem. První návrhy uhlíkové daně (předložené v letech 1992, 1995 a 1997) byly předloženy na základě historických článků

zakládajících smluv vyžadujících jednomyslnost Rady. Původní znění těchto článků ale neobsahovala speciální ustanovení o pravidlech přijímání opatření, pokud jsou fiskálního charakteru, pouze obecné pravidlo o jednomyslnosti (odstavce zavádějící pravidlo jednomyslnosti, pokud je environmentální či energetické opatření fiskálního charakteru byly do smluv přidány až v rámci později přijatých smluv). Větší množství typů opatření, pro jejichž přijetí byla nutná jednomyslnost, a tedy i nižší míra evropské integrace, byla typickým prvkem Evropské unie v jejích dřívějších fázích. Směrnice o energetickém zdanění byla v roce 2003 přijata na základě článku 113 SFEU, který rovněž vyžaduje jednomyslnost v Radě.

V rámci výzkumu byly dále analyzovány i další fiskální opatření na evropské úrovni, a to jak striktně daňová, tak i další energetická a environmentální, která lze chápat jako fiskální (tak jak tento pojem chápe literatura a evropské case law, tedy jako přispívající do rozpočtů členských států). V této kategorii lze jmenovat dva nástroje sekundárního práva, které i přes svou daňovou či jinak fiskální povahu byly přijaty obecným legislativním procesem bez nutnosti jednomyslnosti. Prvním z nich je nařízení zakládající program Fiscalis pro kooperaci v oblasti zdanění, druhým je poté směrnice zavádějící systém EU ETS. Právě ta byla přijata na základě článku 175 odst. 1 SFEU, který odkazuje na ustanovení o obecném legislativním procesu, přičemž lze ale systém s jistotou označit za legislativní nástroj fiskálního typu. Lze tak argumentovat, že i jiná opatření fiskální povahy mohou být přijata v rámci obecného legislativního procesu nevyžadujícího jednomyslnost v Radě.

V rámci revize nazvané *„Fit for 55“* byla v červenci 2021 navržena novelizace směrnice o energetickém zdanění. Evropská komise se tedy rozhodla uhlíkovou daň zavést nikoli jako samostatný nový daňový nástroj, ale pouze jako prvek energetické daně. Navrhuje úpravu některých ustanovení a aspektů existující směrnice o energetickém zdanění, především tedy změnu minimálních sazeb daně tak, aby reflektovaly uhlíkovou náročnost daného paliva. Rovněž také modifikuje pravidla ohledně možných výjimek ze zdanění, a sice tak, že by nová směrnice prakticky již nedovolovala udílení výjimek z daně. Revize směrnice byla navržena na základě článků 113 a 192 odst. 2, které vyžadují jednomyslnost v rámci Rady. Komise tedy nevyvinula snahu navrhnout revizi směrnice jako obecné environmentální nebo energetické opatření, což by teoreticky mělo být jednou z možností. Jelikož lze tak očekávat nesnadný legislativní proces, Komise by se v následujícím roce mohla pokusit o prosazení výše popsaných nástrojů, které by mohly přijetí revize usnadnit.