1. Environmental taxation from a European Union perspective, after the Covid-19 crisis

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1. INTRODUCTORY CONSIDERATIONS: FROM THE EUROPEAN GREEN DEAL TO THE EUROPEAN COMMISSION’S PROPOSALS OF 14 JULY 2021

Following the European Green Deal – i.e. the European Commission’s Communication COM(2019) 640 final of 11 December 2019 – and the European Commission’s Communication COM(2020) 312 final of 15 July 2020 (which contains the Tax Action Plan, with 25 ambitious actions to support economic recovery after the health crisis), the European Commission (EC) has continued its action in 2021. This action is undoubtedly designed to identifying a common evolutionary pathway for Member States in terms of environmental taxation.

This chapter aims to selectively analyse the important proposals submitted by the EC in 2021 (in addition to the Council Decision 2020/2053 of 14 December 2020 on the system of the EU’s own resources), with a view to precisely understand in what direction the European Union (EU) is going from an environmental taxation viewpoint, after the COVID-19 crisis.

In this respect, two recent and important Communications, which will be analysed in the next paragraph, are worth mentioning: COM(2021) 251 final, on “Business Taxation for the 21st Century”, and COM(2021) 550 final, on climate targets to be achieved by 2030 and 2050, as will be further detailed below.

In the following paragraphs, we will briefly analyse the most important innovations resulting from the numerous and articulate proposals put forward by the EC on 14 July 2021, aimed at encouraging economic growth and green transition.
We will not analyse the important OECD report published on 25 January 2021, entitled “Taxing Energy Use for Sustainable Development”, because this chapter is focused on EU law and, in particular, on the recent proposals of the EC, formalised on 14 July 2021.


Demonstrating an undeniable sensitivity to the issues of environmental protection and the circular economy, the EC has drafted two important Communications in less than two months, which deserve to be properly analysed. Both Communications refer to the European Green Deal, in terms of fair and sustainable growth, and reaffirm its objectives and underlying strategy.

The EC’s Communication COM(2021) 251 final of 18 May 2021, entitled “Business Taxation for the 21st Century”, is particularly important in this regard. It underlines that the international corporate tax system is outdated and should be reformed in depth, considering the possible reallocation of taxing rights and the minimum effective taxation at a global level. In addition, corporate taxation needs to be set on new bases.

In terms of “green transition” and environmental taxation, a critical step will be the proposal to reform the Energy Taxation Directive (Council Directive 2003/96/EC on the taxation of energy products and electricity) “by rationalising the system of minimum rates and removing outdated exemptions and reduced rates”.

Moreover, the EC reiterates that, at the same time as the proposal to reform this Council Directive, a carbon border adjustment mechanism (CBAM) will be presented, together with a “proposal for a revised EU Emissions Trading System (ETS)”. The first of these two proposals will have a twofold objective, firstly “to reduce the risk of carbon leakage by ensuring that the price of imports more accurately reflects their carbon content”. Secondly, the same mechanism “will also contribute to achieving climate objectives by incentivising third country producers and EU importers to adopt low carbon technologies”.

As a result, during the health and economic crisis triggered by COVID-19, the EC has not refrained from clearly reaffirming its goals of combating climate change, pollution and environmental degradation, and in favour of green transition, environmental sustainability and the circular economy, thus implementing the polluter pays principle more effectively and ending the era of free pollution.
In this perspective, taxation becomes a fundamental and essential factor and should be placed within a framework of wide-ranging reforms of Member States’ tax systems, of which the pandemic crisis is an incentive and almost a point of no return. In fact, the crisis itself has clearly exposed the weakness of Member States’ tax systems (and public finances), which are largely unable to cope with the exceptional nature of the emergency, except with often temporary and short-lived measures. The push towards exiting the crisis and achieving sustainable economic growth will depend on the ability of Member States to rethink their tax systems, starting from the fundamental principles that govern them.

Moreover, on 14 July 2021, the EC formalised its Communication COM(2021) 550 final, in which it reaffirms the EU’s commitment to reduce net emissions by at least 55 per cent by 2030 compared to 1990 and being the first climate-neutral continent by 2050, thereby partly strengthening its global leadership. If achieved in an efficient and timely manner, these ambitious targets could correctly implement the general “polluter pays” principle in its various (and sometimes complex) facets and also lead to a significant increase in opportunities for innovation, sustainable investment and employment.

The Communication also sets out the numerous proposals (which are closely linked and interconnected) that the EC put forward on the same date in order to achieve the above stated goals and strategy, with a view to “ensuring a fair, competitive and green transition by 2030 and beyond”. More precisely, the Communication introduces the set of proposals in a unitary manner and, in particular, “strengthens eight existing pieces of legislation and presents five new initiatives, across a range of policy areas and economic sectors: climate, energy and fuels, transport, buildings, land use and forestry”.

The total of 13 initiatives submitted at the same time on 14 July 2021, all aiming to achieve the same goals, each in its own field of application, clearly shows how seriously the EC is working in this area, with an all-encompassing and comprehensive approach, towards climate neutrality and zero pollution. Among these 13 initiatives, those on taxation represent a small, but certainly very significant, part which will be discussed in the following paragraphs.


In the systematic and complex set of tax proposals submitted by the EC on 14 July 2021, the (eagerly awaited) recast of the Council Directive on the taxation of energy products and electricity, i.e. proposal COM(2021) 563 final, stands
Environmental taxation from an EU perspective, after Covid-19 crisis

It largely rewords the text of Council Directive 2003/96/EC,¹ which is to be considered outdated, as it is not (and, as currently drafted, could not be) in line with the ambitious goals promoted by the EU in terms of climate, energy policy and the fight against climate change and pollution.

In particular, Council Directive 2003/96/EC is not in line with the targets of reducing net emissions by at least 55 per cent by 2030 compared to 1990 and being the first climate-neutral continent by 2050. Furthermore, the Council Directive itself is not in line with the objectives of the Paris Agreement and, in particular, with limiting global temperature increases, nor does it support the energy transition and sustainable growth advocated by the EU.

Tax discipline is a key element with a view to achieving these objectives, and it is a priority to promote the production and use of clean fuels and technologies that can run on them.² Conversely, taxation on polluting fuels and on fossil fuels, in particular, must be increased, by also eliminating some exemptions and reductions which must be considered outdated, such as in the case of aviation and maritime fuels,³ which vary widely from one Member State to another.

Moreover, the minimum rates laid down in Council Directive 2003/96/EC/CE⁴ have not been updated since 2003 and those applied by the Member States are, in many cases, well above these rates, thus contributing to an unjustified fragmentation that must necessarily be corrected in a sector as crucial and strategic as the energy sector. In the EC’s view, the minimum rates need to be recalibrated and rationalised in order to meet the EU’s climate and energy targets, in line with the European Green Deal. The current tax exemptions and reductions also need to be systematised, not least because of the actual incentive to use fossil fuels and the uncertainty of interpretation of some provisions. These include the rules on energy products supplied for use as fuel for the purposes of air or sea navigation, the wording of which is certainly not clear.

The proposal for a Council Directive, which should be implemented by the Member States by 31 December 2022,⁵ is particularly innovative with regard to the calculation of the tax. Indeed, the minimum levels of taxation⁶ will be calculated by grouping energy products (used as motor or heating fuels) and electricity into categories and classifying these products according to their respective environmental performance.⁷ The following considerations examine the classification, starting with the highest minimum levels of taxation and moving down to the lowest minimum levels, with the tax being calculated in euros per gigajoule, on the net calorific value of energy products and electricity, converted into gigajoules.⁸

Under this approach, conventional fossil fuels, such as diesel oil and gasoline (as well as kerosene), will be subject to the highest minimum levels of taxation from 1 January 2023 and, for example, oil will be subject to a tax of 10.75 euros per gigajoule.
Other fossil-based fuels that are less harmful, and have some potential to contribute to decarbonisation in the short to medium term, will be subject to minimum taxation levels of two-thirds of the maximum levels. Examples include natural gas and liquefied petroleum gas, for a transitional period of ten years, i.e. from 1 January 2023 to 1 January 2033. The increase in the minimum levels of taxation shall be fixed at one-tenth per year of the transitional period.

At the end of this decade the minimum levels of taxation shall be equal to the higher levels above, thus aligning them permanently with those of traditional fossil fuels.

The next category in the proposed classification is sustainable but not “advanced” biofuels (and biogas) and, with a view to reflecting their contribution to decarbonisation, half of the minimum tax levels apply.

Electricity, irrespective of its concrete use, advanced biofuels, bioliquids, biogas and hydrogen of renewable origin shall be subject to the lowest minimum tax levels, which are well below the maximum levels. Indeed, electricity and these fuels can characterise and facilitate the EU’s energy transition towards achieving the (ambitious) objectives of the European Green Deal and ultimately towards climate neutrality by the year 2050.

Transitional periods shall apply in some sectors, especially in those that currently qualify for full exemptions, such as air navigation, excluding private pleasure flying, with a view to gradually balancing the economic and social costs of introducing this taxation. Furthermore, the proposal for a Council Directive takes the social dimension largely into account by introducing the possibility to exempt vulnerable households from taxation on heating fuels for a period of ten years and by providing for a transitional period of ten years to reach the minimum levels of taxation.

Consequently, the tax applied is calibrated on the contribution that each motor or heating fuel can provide to decarbonisation. In this way, Member States are allowed to tax highly polluting fuels, thus making them increasingly unattractive due to the higher tax burden, with a view to achieving the objectives set out by the EC in the European Green Deal. This is certainly a significant improvement in the taxation of energy products and electricity, and it is to be hoped that the Council will adopt this proposal for a Directive in the near future.
4. THE EC’S PROPOSAL TO ESTABLISH A CBAM AT THE EU’S BORDERS, WITH A VIEW TO PROGRESSING TOWARDS DECARBONISATION AND THE STRENGTHENING OF THE EU’S EMISSION TRADING SCHEME

On 14 July 2021, the EC (also) submitted a proposal to establish a CBAM at the EU’s borders.\(^10\) It aims at intensifying cooperation at the international level so as to make significant progress towards decarbonisation, in a multilateral context, with a hopefully progressive reduction of polluting emissions outside the territory of the EU too.\(^11\)

The adjustment mechanism under consideration shall be gradually introduced from 1 January 2023, albeit with some exceptions.\(^12\) It shall be gradually introduced for a few selected products\(^13\) and, in the first years, a simplified system shall apply. As a result of this mechanism, the same domestic and imported products shall be subject to the same carbon price, without any discrimination, hopefully in line with the principles set out by the World Trade Organization and with the other international obligations undertaken by the EU.

This mechanism should also prevent the increased tax burdens imposed by the EU and the individual Member States in relation to greenhouse gas emissions from being more than offset by increases in these emissions outside the territory of the EU. The phenomenon to be avoided is a real relocation of production with harmful emissions outside the EU, without any real decarbonisation at global level. In other words, polluting emissions would move, to a large extent, from the EU’s territory to other continents, without any real benefits on a global scale.

The mechanism under consideration, therefore, acts as a corrective, selectively with reference to certain sectors, to be applied to the importation of goods with CO\(_2\) embedded emissions,\(^14\) aligning the prices of these imported goods with those of similar goods produced within the EU, on the basis of their carbon content. This approach should encourage third countries that are less (or not very) sensitive to environmental protection issues and the fight against climate change and pollution to adopt carbon taxation that is not very different from that applied by the EU.\(^15\) Otherwise, the alignment of the prices of these goods will take place at importation and, other factors being equal, the choice of goods (imported or produced in the EU) with a carbon content will not be influenced by their price.

Besides providing incentives for third countries to share environmental objectives with the EU, also from a tax viewpoint, the mechanism under consideration directly implements the polluter pays principle, even if the
Green deals in the making

producer is located in a country geographically outside the EU. It can be said that, by adjusting the price of imported goods, the above principle takes on even greater significance in the relations with the producers of these goods in non-EU countries. In this respect, this principle takes on a very important international scope, not only from the operational but also from the theoretical viewpoints.

Moreover, these goods will be imported into the EU’s customs territory by a subject that must be authorised in advance by the competent authorities. This subject shall lodge a specific customs declaration by 31 May of each year, which shall indicate, inter alia, the imports made in the preceding calendar year, the embedded emissions in the goods, denominated in tonnes of CO₂, in addition to the other data set out in Article 6 of the proposal for a European Parliament (EP) and Council Regulation.

The competent authorities may rectify the declaration submitted within the period ending in the fourth year following the year in which the declaration was submitted, taking into account, inter alia, the analysis of the accounting records and any evidence deemed relevant. Conversely, if the declaration has not been submitted, the competent authorities may ascertain – on the basis of the information at their disposal – the obligations of the defaulting party by 31 December of the fourth year following the year in which the declaration should have been submitted. In this case, the customs authorities notify the authorised subject of a rectification or a request, respectively, against which an appeal may be lodged, while the appeal and the regulation of the process remain governed by the individual Member States.

The resulting system is particularly complex and it can be expected that it will take several years (and it is difficult, if not impossible, to predict exactly how many) for it to produce positive and significant effects on global decarbonisation. Moreover, this system is inextricably intertwined with politics and international trade and could generate new tensions.

Some third countries could have the perception that CBAM is a protectionist measure. Indeed, this appears, prima facie, to be true. But this effective tool is, in fact, a crucial step to reduce the risk of carbon leakage and promote carbon pricing under the EU’s climate goals, thus encouraging third-country producers and EU importers to adopt low-carbon technologies.

More radically, the mechanism under consideration may not achieve its main objective, i.e. it may not succeed in drastically reducing greenhouse gas emissions into the atmosphere, especially in those countries that are the main competitors, in terms of trade, with respect to the Member States, first and foremost, China.

As a complement to this mechanism, the EC proposes to strengthen the EU ETS. This is an instrument which, over the last 16 years, has yielded very positive results in terms of reducing emissions from electricity production and
energy-intensive industries. The EC’s proposal is, on the one hand, to reduce the overall cap on pollutant emissions and to increase the reduction on an annual basis and, on the other hand, to phase out the free emission allowances for the aviation sector (from which the latter currently benefits) and to include emissions from maritime shipping in the scheme.

5. THE INNOVATIVE INCLUSION OF THE “QUANTITY OF PLASTIC PACKAGING WASTE THAT IS NOT RECYCLED IN EACH MEMBER STATE” IN THE EU’S OWN RESOURCES CATEGORIES, PURSUANT TO COUNCIL DECISION 2020/2053

Before concluding, it is worth stressing the importance of Council Decision 2020/2053 of 14 December 2020 on the system of the EU’s own resources, based on national contributions, the allocation of which among the Member States should be as fair, simple and transparent as possible. The own resources system should, on the one hand, reflect the “orderly development of the policies of the Union” and, on the other hand, respect a “strict budgetary discipline”. In other words, the EU’s financing instruments, based on national contributions, need to be better aligned with its strategic priorities with a view to better contributing to the achievement of its many ambitious objectives. In this framework, the VAT-based own resource is still of particular relevance, but its calculation system is quite complex and the European Council of 17–21 July 2020 called for the introduction of other own resources, which could include a tax on financial transactions.

In the light of the European Green Deal, policies to combat climate change and pollution, in favour of a circular and fully sustainable economy, are particularly important. In particular, among the various priorities in these areas, all of which are abstractly appreciable, the Council has enhanced the European strategy for plastics, the amount of waste of which can be estimated (for each Member State) without insurmountable difficulties.

Council Decision 2020/2053 introduces a new category of own resources for the EU, setting parameters for national contributions to the “quantity of plastic packaging waste that is not recycled in each Member State”. The uniform rate of 0.80 euros per kilogram applies, with annual flat-rate reductions at current prices for some Member States, including Italy. These reductions consist of an “adjustment mechanism”, “in order to avoid an excessively regressive impact on national contributions”.

The smaller the amount of waste produced in a Member State, the lesser the sum of own resources the Member State shall pay the EU based on the amount of waste produced. This mechanism will provide a clear incentive to reduce
the production of this waste and, if anything, to recycle as much plastic as possible, with largely positive effects on the environment in terms of protection and sustainability. In this perspective, the annual EU budget contributes, in an innovative way, to reducing pollution from “plastic packaging waste that is not recycled in each Member State”.

Council Decision 2020/2053 was ratified by the Member States, entered into force on 1 June 2021 and applies retroactively from 1 January 2021. The revenue from this own resource is estimated at around 4 per cent of the EU’s budget25 and other categories of own resources could possibly be identified that are geared towards environmental sustainability and tackling climate change and pollution.

Consequently, the Member States’ national contributions, based on the “quantity of plastic packaging waste that is not recycled in each Member State”, could hopefully be a first and innovative (but not isolated) link between the categories of own resources and environmental protection and encouragement towards a fully circular economy model. In this perspective, the Union’s annual budget would increasingly become a fundamental tool (also) for implementing the Union’s increasingly relevant environmental policy, in the perspective of the European Green Deal.

The EC has also proposed that CBAM revenue should be part of the EU’s “own resources”, together with the revised EU ETS and a digital levy. The EC has suggested that their introduction as “own resources” should take place at the latest by 1 January 2023.26


Considering the above, some brief conclusions can be drawn. The devastating effects of climate change are obvious to everybody. To give just a few examples, on 11 August 2021, at 1.14 p.m., a temperature record of 48.8 degrees Celsius was set in Europe at Syracuse, in the district of Monasteri. The rise in the sea water level will create many problems for many coastal cities and for the city of Venice in particular, for which a rise ranging between 0.17 and 1.2 metres is forecast by 2100, with the possible need to close the lagoon for almost the whole year from 2075.27

In this respect, the EU’s ambitious goals, formalised in the European Green Deal and other important EC Communications mentioned in this chapter, are
Environmental taxation from an EU perspective, after Covid-19 crisis

to be welcomed. Good intentions, however, are not enough. With a view to achieving these goals, each Member State (and each European citizen) shall proactively play its (his/her) part, and the EC shall closely monitor the fulfilment of these commitments, solemnly undertaken by the Member States.

In this complex scenario, the implementation of a new EU own resource parameterised to the “quantity of plastic packaging waste that is not recycled in each Member State” is a very important step, with a view to encouraging the recycling of plastics as much as possible. It will be an innovative (and hopefully not isolated) link between the EU’s own resources and environmental protection with regard to combating climate change and pollution.

There is no doubt that environmental taxation will be a formidable tool, to be used selectively, with a view to achieving the EU’s objectives. The fulfilment of these commitments will necessarily require the adoption of the proposal put forward on 14 July 2021 to revise the Council Directive on the taxation of energy products and electricity, i.e. proposal COM(2021) 563 final.

The latter largely rewords the text of the (now outdated) Council Directive 2003/96/EC, aligning taxation in parte qua with EU objectives. Member States, however, should also swiftly adopt the proposal for an EP and Council Regulation COM(2021) 564 final, establishing an innovative CBAM at the Union’s borders, with a view to making significant progress on the path to decarbonisation, in a multilateral context, also involving third countries.

It is not a drop in the ocean, nor a message in a bottle thrown overboard for posterity. It is much more than that. It is a serious attempt to acknowledge the devastating effects of climate change and pollution and to make a real U-turn, before it is too late. Environmental taxation is certainly a key element of this U-turn.

Despite all the EC’s efforts, however, the implementation process of these proposals may be fraught with difficulties and problems. The unanimity vote of the 27 Member States may be a real limit, thus pushing them to rethink and change some proposals submitted by the EC. CBAM may be the most-discussed EC proposal, due to the predictable disagreement of some third countries which, at first sight, may regard it as a protectionist measure.28

If the initiatives proposed by the EC in the field of environmental taxation, as implemented by the Member States, are not enough, we shall have to think about other initiatives to be taken at European level. It is too early, however, to make such predictions now. On this point, we just have to conclude, quoting the poet and novelist Alessandro Manzoni, that “posterity will judge”.29

NOTES

2. Just think of renewable hydrogen, synthetic fuels, biofuels, etc.
4. The tax rates applied by the Member States must respect the minimum levels of taxation laid down in Articles 4 and 5 of Council Directive 2003/96/EC. These minimum levels are set out in Annex I to this Council Directive.
5. See Article 30 of the proposal for Council Directive COM(2021) 563 final, the provisions of which are expected to come into force on 1 January 2023.
6. Pursuant to Article 4, paragraph 2, of the proposal for Council Directive COM(2021) 563 final, the “level of taxation is the total charge levied in respect of all indirect taxes (except VAT) calculated directly or indirectly on the quantity of energy products and electricity at the time of release for consumption”.
7. The concept of environmental performance has been defined in relation to other EU policies, in the context of the European Green Deal and the package of measures called “Fit for 55”.
9. For taxation purposes, intra-EU air navigation, i.e. between two airports located in the EU, will be considered, including domestic flights and excluding “business and pleasure flights”, in the light of Article 14 of the proposal for a Council Directive COM(2021) 563 final.
10. This is the “Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism” COM(2021) 564 final.
11. For a first comment on this mechanism, see Stefano Latini, “In arrivo una nuova carbon tax alle frontiere dell’UE” (2021) 1 IPSOA Quotidiano.
12. The transitional period shall end on 31 December 2025, with the exception of Article 35 of the proposal COM(2021) 564 final, which shall apply until 28 February 2026.
13. In particular, it shall apply to cement, electricity, fertilisers, iron, steel and aluminium.
15. Examples include Russia, China and Turkey.
16. As provided for in Article 19, paragraphs 1 and 2 of the proposal COM(2021) 564 final.
17. Sanctions for failure to comply with the CBAM legislation shall be effective, proportionate and dissuasive, in accordance with Article 26, paragraph 5 of the proposal COM(2021) 564 final.
18. See the “Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union green-
20. The EC also suggests implementing a parallel emissions trading scheme for the road transport and building sectors from 2026, thus further stimulating the supply of cleaner fuels for existing vehicles (in the case of road transport) and for heating and cooling of existing buildings. Emissions in these two sectors shall be subject to a cap, which shall be progressively reduced in order to lower total emissions: see COM(2021) 550 final, page 8.
21. Own resources finance approximately 98 per cent of the EU’s budget. The own resources system is established unanimously by the Council, after consulting the EP, and must be ratified by the Member States.
23. See the eight “whereas” clauses of Council Decision 2020/2053.
24. This quote is taken from the seventh “whereas” clause of Council Decision 2020/2053, which clarifies that this adjustment mechanism with an annual lump sum reduction should be applied to contributions of Member States with a gross national income per capita in 2017 below the EU average.
26. See the “Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources” [2020] OJ LI 433/28, Annex II, Part B.
27. In this respect, see Eugenio Pendolini, “Venezia, il livello del mare può alzarsi fino a 1,2 metri a causa dell’inquinamento”, Il Mattino di Padova (Padova, 2 September 2021) 18, which mentions a scientific analysis on the risk of high water in Venice, published in the journal Natural Hazards and Earth System Sciences, coordinated by researchers from the University of Salento, the Institute of Marine Sciences of the National Research Council and the Ca’ Foscari University of Venice. The study analyses historical and modern data on the phenomenon of flooding in the city of Venice and examines its increased risk.
28. See above, section 4.