Navigating taxation towards sustainability

Contradictions between social, gender, environmental, and economic ambitions, obligations and governance capacities in European tax law

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1 Abstract

This paper analyses existing tax competences in EU law, in the light of European and international obligations, and their evolution since the initial founding of the European Economic Community. It approaches this task not just from the perspective of competences, but examines values, objectives, obligations and actual governance capacities underpinning the implementation and realisation of these aims and duties in the field of taxation. The analysis is linked to discourses addressing sustainability gaps within EU taxation law and policy, in particular: a prevailing focus on economic growth; a lack of EU-level environmental taxation; an absence of tax measures that tackle, much less consider inequalities in income and wealth; and, persisting socio-economic inequalities between men and women.

The concept of sustainable development features prominently in the objectives of the European Union and is closely linked to the function of the internal market. The implications of sustainability for legal obligations, however, remain unclear, and particularly so in the context of taxation. This paper provides an outline of the current legal framework for positive and negative integration of taxation, and considers the evolution of values, objectives and obligations in European and International law with a particular focus on the legal concept of sustainable development. From this basis, it examines legislative capacities to address the economic, ecological and social dimensions of sustainable development in the area of taxation and offers preliminary options for the amendment of hard and soft law mechanisms, so as fully to support European values and objectives in the field of taxation.

Keywords Sustainability, European Union, Taxation, Gender equality, Environment, Social justice
1. Introduction*

1.1 Fiscal competences in multilevel governance structures

In the evolution of the variant versions of “federalism” found in countries such as Germany, Switzerland or even the United States, the legal competence to forge economic, fiscal and social policies - perceived as vital components in the sovereignty of nation states - was transferred, fully or partially, to a centralised government (see, inter alia, Fossati and Panella 2005; Oates 2005, 1999; Rodden 2006; Schütze 2016; von Hagen and Eichengreen 1996). The transfer of competence was spurred by a variety of motivations, including: ambitions to improve living conditions across federal states, whilst distributing tax burdens efficiently; in some instances, the hope to achieve a more effective distribution of governmental tasks (Jahn and Storsved 1995, Berg and Spehar 2013); or (as in the case of the United States) the need to provide funds for a war (Mumford 2002, 20, 44, 45). It is not surprising that these histories have caught the attention of scholars hoping to inform the future of the European Union (Cnossen 2002, 1; Schütze 2016, and 2015, loc. 425).

Such investigations, in what might be described as the fiscal federalism literature, are fairly broad in scope, and concern “unitary (and regional) states”, and not just federal governments (Bizioli and Sacchetto 2011, foreword). On the whole, the literature on fiscal federalism has evolved beyond the traditional confines of somewhat standard law and economic analyses, which as Oates explains, “essentially... ignore[d] the electoral dimension of the public sector structure and... treat[ed] the vertical structure of the public sector much like that of the firm” (Oates 2005, 357). Indeed, it is important to recognise that federalism, as a concept, should not be analysed without reference to specific constitutional, legal and cultural contexts (Hill 1989).

Despite the attractions of comparison, it is important to acknowledge the limitations of studying the histories of other jurisdictions, (inter alia, Curran 1998, Alford 1986) either as predictors or models for the next iteration of ‘fiscal federalism’ in the EU. The EU is unlike any other supra-national government in the world, and, in this sense, is perhaps pressingly unique. The EU does not equate to a ‘fiscal federalism,’ in the same sense as, for example, Germany, despite the fact that, in common with other federal states and federations, it adopts a multilevel governance structure.† Seeking to emphasise the difference, the German

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† The term multi-level governance, used in political science, was initially used to describe a system of continuous negotiation among governments at several territorial levels - supranational, national, regional and local. Today, the
Constitutional Court defined the EU as a treaty-based, closed, long-term association of states, which remains sovereign, insofar as it exercises public authority, although its fundamental order is subject to the decision-making power of the Member States (Judgment of the Second Senate of 30 June 2009 - 2 BV E 2/08). The unique features of the EU include the existence of an autonomous legal order with direct applicability of Union law, with primacy over domestic provisions. The Union’s competences nonetheless remain quite limited, especially given the heavy constraint on the conferral of sovereign powers, and the continuing sovereignty of the Member States in many policy fields (Blanke in: Blanke and Mangialmeli 2013, Art. 1 TEU, para 18). It is particularly striking that, even after the amendments of the Treaty of Lisbon, the Union does not have the competence to decide on its own competences.

The European Treaties in particular lack comprehensive fiscal and budgetary competences, comparable to national – often constitutional – rules, which regulate the allocation of tasks, expenditure and revenue, budgetary law, the fundamental principles of taxation and public debts. What could be described as a “comprehensive” fiscal union would include a budget at the federal level that is sustained by its own tax revenue and has the capacity to act as a kind of overdraft facility on present and future taxpayer. Borrowing is often an important part of the evolution of sovereign competences to raise taxes. The EU budget, by contrast, resembles a finite fund for an international organization, based on defined contributions that must be balanced every year (Zwaan et al. 2016, 144).

On a national level, taxes are collected primarily to generate revenue and to finance public expenditures. In EU law, however, taxation is not about revenue. The tax competence of the Union, originating from the conferral of competences from Member States, is supported by tax provisions in the treaties that have been designed as instruments to prevent distortion of competition, and to facilitate the implementation and functioning of the internal market. Thus, EU taxation law has focused on economic principles, such as neutrality, and primarily has been used to create incentives for economic growth. The ability to pay principle, thus – which is fundamental to the national tax policies of many Member States - has little foundation in primary European Law (Englisch 2014; Grassi 2015).

In nation states, the experience has been somewhat different. The history of taxation is linked closely to aspirations of ‘nation building,’ the increasing costs of warfare, territorial conflicts, and expanding expectations from the state. The design of taxation, early on, was attended by economic, judicial and philosophical discourse as to what constitutes a “good” multi-level governance approach is an addition to the theoretical attempts to understand the structure of the EU (see e.g. Stephenson 2013).
tax system. Although evolving principles of good taxation also include economic considerations of neutrality, efficiency and tax compliance, political and social notions of equality, fairness and ability to pay have played an increasingly dominant role. Legislative measures and fiscal reform processes in many nation states therefore regularly refer to traditional tax policy principles, including the equal distribution of tax burdens, whilst taking into account impacts both on equalities (the “social”) and economic growth. Another common feature of nation states are “equalization policies” which level financial capacities within the federal entity.

The discourse surrounding tax objectives and principles in the EU, constrained by the restriction in competences, has not contained a parallel shift, or evolution. Many nation states, however, and to differing extents, also have experienced an evolution both in goals and in competences. In this, the EU is no different, for it also has experienced change. The initial European Economic Community, founded in 1957, with a view to a shared common market, has evolved into a Union that is based upon human rights, democratic, economic and social values and pursues various political, economic, social and ecological objectives. The progression of values and objectives thus gives rise to the question of whether these changes also should influence the role and impact of taxation in EU law. This paper thus aims to integrate legal analyses of taxation competences within other obligations.

1.2 Ambitions and overview of content

The overarching goal of this paper is to analyse existing legislative capacities within EU tax law, in the light of European and international obligations, and their evolution since the initial founding of the European Economic Community. It approaches this task not just from the perspective of legislative competences, but examines values, objectives, and obligations underpinning the implementation and realisation of these aims and duties in the field of taxation. The analysis is linked to discourses addressing sustainability gaps within EU taxation law and policy, such as: a prevailing focus on economic growth; a lack of EU-level environmental taxation; an absence of tax measures that tackle, much less consider inequalities in income and wealth; and persisting socio-economic inequalities between men and women (e.g. Schratzenstaller et al. 2016, 2015). The concept of sustainable development features prominently in the objectives of the European Union, and is closely linked to the function of the internal market. The implications of sustainability for legal obligations, however, remain unclear, and particularly so in the context of taxation.
*Chapter 2* thus, provides an outline of the current legal framework for positive (and negative) integration of taxation. It also draws attention to the inherent perspective of tax measures introduced at the EU level.

*Chapter 3* considers the evolution of values and objectives since ratification of the Treaty of Rome in 1957. The analysis focuses, in particular, on the concept of sustainable development that, since the Treaty of Lisbon, has been implemented as an essential objective of European policies addressing the internal market. As this chapter will explain, sustainable development is a legally binding objective, although the meaning and implications for EU taxation beyond economic considerations remain vague.

*Chapters 4 and 5* reflect on the environmental and “social” dimension of EU law, by analysing the obligations and objectives specified in European treaties, and in international, hard and “soft” law, with a view to substantiating the concept of sustainable development. From this basis, *chapter 6* examines legislative capacities to address the economic, ecological and social dimension of sustainable development in the area of taxation. It highlights gaps in the realization of objectives and obligations, and explores options for change.

Finally, *chapter 7* offers some possibilities for the amendment of hard and soft law mechanisms, so as fully to support European values and objectives in the field taxation.
2. Harmonization of national tax systems

2.1 Legislative capacities

The Treaty establishing the European Economic Community (EEC – Treaty of Rome) signed in 1957 and in force from 1958, contained few regulations about taxation. The tax provisions in the chapter addressing common rules on competition, taxation and approximation of laws proscribed primarily increased tax burdens on the import of goods and excessive export subsidies (ex-Art. 95-98 EEC). Art. 99 EEC called for the Commission to consider and propose options for the harmonization of national turnover taxes, excise duties and other forms of indirect taxes in the interest of the common market. Although direct taxes were not explicitly addressed in the Treaty, the general clause in Art. 100 EEC implicitly covered the harmonization of direct taxes. This provided the authority to the Council for the approximation of national regulations that affected the establishment or the functioning of the common market. These legislative measures required the approval of all of the founding Members (Art. 99 and 100 EEC).

These regulations have little changed since then and largely correspond to today’s tax provisions in Art. 110 – 115 TFEU.

In principle, the Union may only act within the limits of the legislative competences conferred upon it by the Member States in the Treaties to attain the objectives provided therein (Art. 5(2) TEU). Competences not conferred upon the Union remain with the EU countries (Art. 4(1) TEU). There are three types of competence: exclusive (Art. 2(1) TFEU), shared (Art. 2(2) TFEU) and ‘supporting’ (Art. 2(5) TFEU). It is the first two that are relevant in respect of taxation. The Union has exclusive competence, meaning that only the Union can act, in respect of the customs union (Art. 3(1)(a) TFEU). This relates to the abolition of internal customs tariffs and setting of one common customs tariff for non-members (Art. 28, 30, 31 and 34 TFEU). The initial requirement for a unanimous approval in the Council was replaced by the co-decision or ordinary legislative procedure (Art. 294 TFEU) that strengthened the position of the European Parliament and facilitated qualified majority voting.

Meanwhile, where a competence is shared between the EU and Member States, both are able to legislate and adopt legally binding acts, as long as the measures accord with the principles of subsidiarity and proportionality (Art. 5 TEU). Subsidiarity interrogates whether there is a reason for intervention by the Union. It does not interrogate the manner of that intervention – this is addressed by proportionality. The difference thus is between when to intervene and the quality of the intervention (Chalmers et al., 2014, 393). Member States
can legislate in respect of those areas where the EU has not exercised a shared competence or has explicitly ceased to do so (Art. 2(2) TFEU). Art. 4 TFEU provides that competence is shared in several areas such as the environment, consumer protection, transport, and, importantly for present purposes, the internal market. Thus, if it can be demonstrated that tax harmonization is necessary for the purposes of the internal market, then legislative action may take place at the EU level. The key treaty provisions thereafter which are important for the purposes of harmonising national tax legislation are Art. 113 TFEU and 115 TFEU, which will be examined in turn.2

2.1.1 **Harmonization of indirect taxation**

Variances in indirect taxes between Member States are considered to be more distortive of competition than direct taxes. Therefore, the EU was expressly provided with shared competence in the Treaty of Rome (HM Treasury 2012, para 3.12) in respect of ‘turnover taxes, excise duties and other forms of indirect taxation’. The relevant treaty provision today is Art. 113 TFEU. There is a need generally for a unanimous agreement between Member States about the adoption of indirect tax measures. Proposals are submitted by the European Commission (Commission) to the European Council (Council), represented by the economic and finance affairs ministers of the Member States at ECOFIN (Economic and Financial Affairs Council). The Council acts unanimously after consulting the European Parliament and the Economic and Social Committee (Art. 113 TFEU). The proposed harmonising measures must be *necessary* to ensure the establishment and the functioning of the internal market and to avoid distortion of competition, although in matters of indirect taxation necessity is regularly implied.

To date, the EU has sought to harmonise VAT and excise duties (tobacco, alcohol and energy set minimum rates). Member states have competence over other indirect taxes (taxes on insurance contracts, betting and gambling, stamp duties and anything that can be characterised as turnover taxes) (HM Government 2013, 16-17) so long as they do not result in barriers to cross border trade.

The reason generally deployed in support of harmonizing indirect taxes revolves around the need to ensure neutrality in competition. For instance, the purpose of harmonizing VAT is set out in the preamble to the VAT Directive (Council Directive 92/77/EEC), which makes clear that the overarching objective of harmonization in this area was to assist in the
elimination of distortions of competition in the internal market so as to achieve ‘neutrality in competition’:

The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonization of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.

Nonetheless, more recent regulations illustrate that the need to ensure neutrality does not exclude the pursuit of additional purposes. In the case of harmonizing excise duties in respect of tobacco, for instance, the purpose was two-fold: first, to ensure the proper functioning of the internal market by eliminating distortions of competition by taxes on consumption of products in the tobacco sector, which might in turn hinder free movement; secondly, to promote a high level of public health protection, given that the EU is a member of the WHO and that Art. 168 TFEU provides that Union action shall be directed towards improving public health (Council Directive 2011/64/EU). The earlier directives harmonizing the rates and structures of excise duties on alcoholic beverages were less detailed in their justifications and in their preambles referred simply to the need for harmonization for the purposes of the internal market (Council Directive 92/84/EEC; Council Directive 92/83/EEC). The preamble to the Directive harmonizing taxation of energy products similarly spoke of the need to assist in the proper functioning of the internal market and to eliminate distortions caused potentially by the appreciable differences in the national levels of energy taxation applied by Member States (Council Directive 2003/96/EC). Council Regulation (EU) No 904/2010 establishes common rules and procedures for administrative cooperation and information exchanges between national competent authorities to properly apply value added tax (VAT) and to combat fraud. The need for the regulation is justified with reference to the completion and operation of the internal market, which requires a common system for cooperation concerning for instance the exchange of information to ensure the proper application of VAT. Still, the measures, intended to hinder tax evasion and tax avoidance also refer to budget losses and the requirement of fair taxation, distortions of capital movement and conditions of competition (COM(2013) 71 final of 14.2.2013, 1).

The Financial Transactions Tax (FTT), which is still under discussion, was originally proposed to be adopted in accordance with Art. 113 TFEU (COM (2013) 71 final of 14.2.2013, 2). The Financial Transactions Tax, which would do precisely that, namely, tax financial transactions, was deemed to be necessary for the proper functioning of the internal market. It would, however, further ensure that financial institutions make a fair and substantial
contribution to cover the costs associated with the financial recent crisis and create a level playing field with other sectors, and it would create appropriate disincentives for transactions that do not enhance the efficiency of financial markets. Action is said to be necessary at a supranational level as unilateral action would produce distortions (COM(2013) 71 final of 14.2.2013, 2).

2.1.2 Approximation of direct taxes

The legal competence on direct taxes meanwhile remains primarily with Member States. However, the EU is not barred from legislating in respect of direct taxes, given that it has shared competence in respect of the internal market (Art. 4(2)(a) TFEU). Accordingly, Art. 115 TFEU allows the Council, represented by the Economics and Finance Ministers of the Member States at ECOFIN, to 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. The adoption must be taken unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee. Thus, as with legislation introduced under Art. 113 TFEU, there is the need for unanimity, but unlike Art. 113 TFEU relevance for the internal market has to be proved.

Whilst Art. 113 TFEU refers to ‘provisions’, thus also encompassing regulations for instance,³ Art. 115 refers only to ‘directives’. Thus, in principle only the directive is available as a binding legal instrument for harmonization of direct taxes (Terra and Wattel, 2012, 24). To this end, there have only been a few tax Directives passed in respect of direct taxation under Art. 115 TFEU or the previous Art. 94 TEC, and these generally operate in the field of Corporate Tax Law.

An example is the Mergers Directive (Council Directive 90/434/EEC), first adopted in 1990 that put in place a common system of taxation applicable to cross-border reorganisations of companies situated in two or more Member States. The Parent-Subsidiary Directive (Council Directive 2011/96/EU), initially adopted in 1990 - amended and updated several times - abolished withholding taxes on dividend payments between group companies residing in different Member States and prevented double taxation of the parent companies on the profit of the subsidiaries. The Interest and Royalties Directive, adopted in 2003, put in place a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Council Directive 2003/49/EC). One of

³ Unlike a Directive, a Regulation does not need to be transposed through national legislation. Whilst Directives provide Member States with some autonomy in how they seek to introduce the provisions into national law, Regulations leave no autonomy in the hands of the Member States.
the most recent directive, the Anti Tax Avoidance Directive, lays rules against tax avoidance practices that directly affect the functioning of the internal market and should be operative from January 2019 (Council Directive 2016/1164/EU). A further Directive notable in this area and adopted under Art. 113 (and Art. 115) is the Administrative Cooperation Directive (Council Directive 2011/16/EU). The Directive established a range of procedures for better cooperation between tax administrations in the European Union.

As with the measures adopted under Art. 113, the underlying rationale for these Directives, as expressed in the preambles, was generally neutrality in competition, otherwise expressed as eliminating particular distortions as necessary for the internal market. When it comes to the understanding of what is necessary for the proper functioning of the internal market, however, the Directives provide a fuller picture of the scope of what this could require. The Savings Directive (Council Directive 2003/48/EC), which was largely repealed in 2015, previously provided for tax administrations to have access to information about ‘private savers’, was justified on the basis of needing to eliminate distortions in capital movements between Member States. However, the preamble to the 2015 Directive also spoke of the need to combat cross-border tax fraud and tax evasion which lead to the depletion of national revenues (Council Directive 2015/2060). The Mutual Assistance in Recovery of Taxes Directive (Council Directive 2010/24/EU) proceeded on the basis that there was a need to ensure fiscal neutrality and to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses. The need to safeguard neutrality in the internal market was linked to the safeguarding of the financial interests of Member States. The Anti Tax Avoidance Directive noted that the measures proposed therein were necessary in order to allow Member States to be able to exercise their tax sovereignty. It was held as essential for the good functioning of the internal market that, as a minimum, Member States should take action to discourage tax avoidance practices and ensure fair and effective taxation in the Union. As to what fair taxation means in the context of the Directive, the preamble directs the reader to the Commission communication from 17 June 2015 on key areas to promote a fair and efficient corporate tax system (COM (2015) 302 final of 17.6.2015). Therein, it is specified that, when it comes to taxes on businesses, fair taxation requires a balance between tax raising from companies and cuts to spending (where these cuts are perceived as necessary) (ibid., 2), it requires the fair distribution of taxes between member states (ibid., 3), in particular aligning economic activity with taxation (ibid., 9), it encompasses the need to tackle tax avoidance (ibid., 6), and it necessitates tax transparency (ibid., 12). The interpretation of fairness accordingly revolves around fair burden sharing amongst corporate tax-payers, fair competition between businesses and fair play between Member States in collecting the tax on profits (ibid., 2). However, while it is acknowledged
that the different tax systems within the integrated market lead to strong tax competition resulting in lower corporate tax rates and national revenue losses, measures to ensure fairness focus merely on efficient taxation and tax compliance (ibid., 4 and 6).

The proposed Directive for a Common Consolidated Corporate Tax Base (CCCTB) would also be introduced under Art. 115 (COM (2016) 685 final of 25.10.2016, 4). The idea that it would eliminate obstacles that create distortions that impede the proper functioning of the internal market was based upon a number of more specific objectives. First, the CCCTB, by providing rules to determine the basis for corporate taxation in Member States, would provide an anti-avoidance function. In this sense, it would allow Member States to protect their national tax bases from erosion and counter profit shifting by setting out rules so as to ensure an alignment between economic activity and taxation, rather than failure to coordinate resulting at times in double non-taxation. The second objective would be to facilitate cross-border trade and investment in the internal market by setting a single set of rules for calculating a company’s tax base across the European Union. This it was posited would reduce one of the administrative burdens to doing cross border trade (ibid., 2, 12).

2.2 Indirect harmonization

Member States’ autonomy to set their own tax policy is also circumscribed by the Treaty provisions on the fundamental freedoms. These “non-discrimination rules” prevent the Member States from introducing measures that directly or indirectly discriminate nationals or resident companies in other Member States, without proportionate justification. Furthermore, national tax regimes must comply for instance with the EU Treaties in respect of the provisions on State Aid. As noted by Panayi, the Court of Justice has frequently held that the powers retained by the Member States must be exercised consistently with Union Law (Panayi 2010, 267). To this end, the Courts and the Commission – based on Art. 258 TFEU - can play an important harmonising role by taking actions against Member States whose tax laws fail to comply with other provisions of the Treaties.

2.2.1 Freedoms in the EU Treaties

Negative harmonization of national tax systems arises most notably from the application of the non-discrimination principle which applies in respect of the freedoms enshrined in the Treaties. Thus, in respect of the free movement of workers (Art. 45 TFEU), services (Art. 56 TFEU) and capital (Art. 63 TFEU), and the freedom of establishment (Art. 49 TFEU), national tax measures should not discriminate between nationals (or resident companies) of that Member State and those EU nationals (or resident companies) from outside that Member State. To this end, the Court has regularly struck down national tax measures which
directly or indirectly discriminate between EU non-nationals (or non-resident EU companies) in the host Member State and nationals (or companies) of that state (Metzler 2008, 44). For instance, the Court of Justice in Marks & Spencers, held that the UK was required to amend its existing legislation in order to grant relief for terminal losses (C-446/03 Marks & Spencers [2005]). The United Kingdom rules were found to discourage undertakings from establishing subsidiaries in other Member States by applying different tax treatment to losses incurred by a subsidiary resident in the United Kingdom and those losses incurred by a subsidiary in another Member State. Accordingly, this was found to constitute a restriction on freedom of establishment. To this end, the non-discrimination principle has had an impact not only upon corporate tax (see also: C-270/83 Commission v French Republic [1986]), but also personal income tax (C-242/03 Weidert [2004]; C-35/98 Verkooijen [2000]; C-315/02 Lenz [2004]).

It is worth noting however that Member States may introduce discriminatory measures where they pursue a legitimate purpose (compatible with the treaty) such as 'Reciprocity' (C-376/03 D [2005]), ‘Territoriality’ (C-250/95 Futura Productions [1997]) and 'Fiscal Competence' (C-336/96 Gilly [1998]), and the discriminatory measures go no further than is required to achieve that objective: in other words that they are proportionate (C-436/00 X and Y [2002]). Where a measure is directly discriminatory however, the list of possible justifications is narrow and to be found in the words of the Treaty itself. For instance, if the measure is directly discriminatory in terms of freedom of establishment (Art. 49 TFEU), the measure may only be justified on grounds of public policy, public security or public health (Art. 52 TFEU).

The impact of the treaty freedoms of Member States tax autonomy can provide an obvious tension, with Member States restricted in how they use their tax system to achieve certain ends. Anti-avoidance legislation for instance can fall foul of the non-discrimination principle. The need to fight tax avoidance will not suffice alone as a justification for a discriminatory measure. Regard will be had for its proportionality. The case of Cadbury Schweppes (C-196/04, Cadbury Schweppes [2006]) exemplifies this. In that case, the UK had in force legislation on ‘controlled foreign companies’ (CFCs). This provided for the inclusion, under certain conditions, of the profits of non-UK subsidiaries in which a UK resident company had a controlling holding. The Court was asked to assess whether the legislation breached freedom of establishment. It was argued that the legislation was

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4 The line between measures which are directly discriminatory and those which are indirectly discriminatory may not be easy to draw. Loutzenhiser suggests the difference lies in whether the measures are discriminatory ‘on their face’, in other words distinguishing between rules applying only to nationals of a certain state, and those which simply have that effect (Loutzenhiser 2016, 1468).
necessary to thwart practices ‘which have no purpose other than to escape the tax normally due on the profits generated by activities carried on in national territory’ (ibid., para. 59). The Court held that the measure could be justified in principle, but only where it specifically related to wholly artificial arrangements aimed at circumventing the relevant Member State legislation and did not go beyond what is necessary to achieve that purpose.

Thus, Member States are not constrained from seeking to advance national interests, but such must be balanced against the economic freedoms. This may also arise where Member States design social security systems which operate through the tax system. In most Member States, social security benefits are financed through a mix of social security contributions and taxes (Peeters and Verschueren 2016, 263). One result of this, as noted by Peeters and Verschueren, is that a State, in which a non-resident is employed, has to grant a non-resident who receives the major part of her taxable income and almost all family income in this state the same benefits as it does vis-à-vis residents, which result from taking into account his or her personal and family circumstances (ibid., 269).

In cases that concern taxation, justifications deployed by Member States for the presence of discriminatory measures tend to have an economic focus, even if tangentially tied to a social objective as in the case of reciprocity. This is unsurprising in the context, but it is noteworthy that in other contexts such as in the fields of competition law and employment law social objectives have been successfully invoked for having measures which would otherwise infringe Treaty provisions.

The clash between economic considerations and social policy considerations arose the context of trade unions and EU Competition Law for instance. In brief, Art. 101(1) TFEU prohibits as incompatible with the internal market all agreements between undertakings, which have as their object or effect the prevention, restriction or distortion of competition within the internal market. However, collective bargaining agreements on their face would clash with this general prohibition as they eliminate competition in respect of wages by setting labour prices. Whether collective agreements would be in conflict with Art. 101 came before the European Court of Justice (Joined Cases C-67/96, C-115/97, C-116/97 and C-117/97 Albany). The Court found that in principle collective bargaining agreements would not fall foul of Art. 101 on the basis that the requirements of the competition rules must be balanced with the social policy objectives which can now be found at Art. 151-161 TFEU (ibid., paras 54-58) Whilst it was ‘beyond question’ that collective bargaining restricted competition thus in principle contrary to the competition rules, the social policy objectives would be ‘seriously undermined’ if management and labour were subject to the competition rules (ibid. para 59). Thus, collective bargaining of the type in the case fell outside the scope
of the competition rules (Albany, para [60]). The Advocate General’s view was that ‘one set of rules should not take absolute precedence over the other and neither set of rules should be emptied of its entire content’ (Opinion of Advocate General Jacobs in Albany, para [179]).

Viking Line (CJEU C-438/05 Viking Line [2007]) and Laval (CJEU C-341/05 Laval [2007]) are examples for a conflict between social and economic objectives in the context of collective action and employers’ economic freedoms of establishment, with the Court of Justice indicating that a balance there too must be performed. These cases recognised explicitly the right to strike as a fundamental right of EU law (Laval, para 90), whilst concurrently holding that actions by trade unions were caught by the Treaty provisions on freedom of establishment and free movement of services (Laval, para 98; Viking Line, para 33).

### 2.2.2 State Aid

Similar to restrictions caused by the fundamental freedoms, Member States may not introduce tax measures which conflict with the Treaty provisions on State Aid (Art. 107-108 TFEU). In brief, State Aid arises where first, there has been an intervention by the State or through State resources and second, the intervention gives the recipient an advantage on a selective basis. The advantage is determined by a two-stage test (sometimes broken down into three or even four stages). Whether the measure favours certain entities in comparison with others in a comparable legal and factual scenario and whether the measure is justified by the nature or general scheme of the tax system of which it is part” (Adria-Wien Pipeline, paras 41-42). Third, the advantage did or may distort competition and is likely to affect trade between Member States.

National tax provisions can be struck down, accordingly if these criteria are satisfied. For instance, in (CJEU C-75/97 Belgium v Commission [1999]) the Belgian State had reduced the social security contributions in order to promote the creation of jobs, but had done so only in relation to parts of the processing industry. The Court observed that the measure was selective because it applied only to certain sectors of the processing industry. The Court then examined whether such differentiation could be ‘justified by the nature or general scheme of the social welfare system’, concluding that this was not the case.

State Aid, however, is compatible with the internal market where it is of a non-discriminatory, social character granted to individuals or used to make good the damage

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5 The case, however, provides no ‘right’ to collective bargaining but rather ‘limited antitrust immunity’ (Opinion of Advocate General Jacobs in Albany, para [135], since the scope of the decision is limited to employees and not the self-employed (Freedland and Kountouris 2017, 63).
caused by natural disasters or exceptional occurrences. Thus, State Aid may be justified in cases of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment or aid intended to facilitate the development of certain economic activities or areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Art. 107(2)(a) and (b) TFEU).

As with the freedoms, national measures pursuing non-economic ends may come into conflict with the State Aid rules. The British Aggregates case (CT-210/02 British Aggregates [2014]) demonstrates such a tension. The case concerned a UK levy on virgin, but not secondary or recycled aggregates. The General Court initially agreed with the Commission that there was no selectivity provided to the competitor of the applicant ‘British Aggregates Association’ (who benefited from using recycled aggregates). It held that Member States are empowered by reason of Art. 11 TFEU to consider environmental protection in the interpretation of Treaty provisions. The Court of Justice overturned the General Court’s decision and remitted it for reconsideration. The General Court on reconsideration found that there were factual and legal similarities between virgin, secondary and recycled aggregates, despite the fact that they were subject to different rates of tax. The Court then moved to the second question of whether the differentiation was justified by reference to the overall environmental objective. This was also rejected. The environmental objective was undermined by the fact that the scheme created a market for secondary aggregates, the extraction of which was just as harmful as the extraction of virgin aggregates. The case serves to underscore the tension between the economy and the environment within the European legal framework. As with the example above in respect of anti-avoidance legislation and the non-discrimination principle, a provision which leads to State aid will not be accepted unless it can be demonstrated that the measure is rationally connected to the desired goal. Blanket justifications are not sufficient (European Commission 2016a, para 140).

2.3 Harmonisation necessary to the functioning of the internal market

EU law regulates Member States tax systems, both by reason of legislative measures positively introduced, primarily under Art. 113 and 115 TFEU, and by reason of Treaty provisions, such as the fundamental freedoms and State aid, which impose constraints negatively upon Member States. Thus, just as Member States are constrained from acting for instance in contradiction to VAT rules, so too are Member States constrained from introducing measures which undermine the fundamental freedoms.
Art. 113 and 115 enable the Union to introduce legislative measures which have the effect of harmonising in relation to taxes. The competence itself is a shared one in respect of the internal market. Thus, measures adopted under Art. 113 and 115 TFEU must relate to the internal market and always reference the need to eliminate distortions in the internal market. The provisions on Treaty freedoms and State aid similarly ensure the functioning of the internal market and prevent distortion of competition between Member States.

However, there are other objectives that the legislative tax measures have pursued additionally. For instance, Directives have also sought to promote public health, the safeguarding of national revenues, ensuring fair distribution of tax collection, the participation of companies in Member States tax revenues and economic development. More recent Directives also focus on problems as ‘tax avoidance’ or ‘fair taxation’ and their impact on the internal market, although measures generally concentrate on tax compliance. Given the myriad, varied reasons provided in respect of how the internal market can be further developed through harmonising legislation in the field of taxes however, it seems clear that the ‘internal market’ is not only an ‘ambiguous concept but also a moving target’ (Weatherill 2017, 2), the understanding of which has not remained ‘static over time’ (ibid., v). Still, even when discussing measures such as fair taxation, the focus is still distinctly upon economic impact rather than for instance the social impact. Similarly, restrictions on Treaty freedoms and State aid provisions may be justified based on social or environmental rights or obligations, although respective court decisions are rare.

Ultimately, it seems clear that EU tax law, whether in respect of positive or negative integration, has had primarily an economic impact and focus.
3. Fundamental values and objectives in the Treaty of Lisbon

The existing legislative capacities of the Union concerning taxation are closely linked to the initial economic objective of the European integration. Art. 2 of the Treaty of Rome, establishing the European Economic Community (EEC) in 1957, stated: “The Community shall have as its task [...] a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it”. The means to meet those economic objectives was the establishment of a common market and the progressive approximation of economic policies between Member States (ex-Art. 2 EEC). The concept of the common market as an intermediate step in the integration process, entailed “the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market” (CJEU C-15/81 Gaston Schul [1982]). The Roman Treaty, based on liberal market principles, consequently comprised primarily regulations with the objective of abolishing barriers to trade, such as customs duties, and ensuring the fundamental freedoms concerning the free movement of goods, persons, services and capital. As a result, governance capacities concerning taxation also aimed at equality in competition and ensuring economic freedoms (Mick in: Birk 1995, 640).

It is, however, crucial to note that the initial economic aim of the European Economic Union has been expanded considerably over time. Several amendments to the Treaty of Rome introduced new values, objectives and competences that gradually expanded the nature of the Economic Community, based on liberal market principles to a Union, based on economic, ecological and social values and objectives.

3.1 Art. 2 and 3 TEU

To date, Art. 2 and 3 TEU set out the core values and objectives of the Union as a framework for all European activities, including taxation. Art. 2 lists fundamental democratic values, common to the Member States, such as human dignity, democracy, equality, the rule of law and respect for human rights. The list is complemented by principles that should govern the civil societies in the Member States, among them no-discrimination, solidarity and equality between men and women. Art. 2 TEU provides an obligation to the Union to respect and promote these values. The reference in Art. 3 (1) TEU adds the values, listed in Art. 2 to the objectives of the Union. The values are also relevant for the interpretation of objectives and
competences and serve as a measure for accession to the EU and sanctioning procedures under Art. 7 TEU (Geiger: in Geiger, Khan and Kotzur 2015, Art. 2, para 1-1).

Art. 2 TEU The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Art. 3 TEU contains the basic objectives of the Union. The establishment and functioning of the internal market, mentioned in paragraph three remains one of the core objectives of the Union. The Single European Act from 1986 added the aim to establish an Economic and Monetary Union, set out in Art. 3 (4) TEU. The Treaties of Maastricht, Amsterdam and Lisbon extended these economic and monetary objectives by additional decidedly non-economic objectives, expressly environmental and social aims. Art. 3 (3) TEU refers to the goal of sustainable development and specifies social and environmental goals that are explicitly linked to the implementation of the internal market. The second subparagraph constitutes autonomous social objectives, among them the combat of social exclusion and discrimination, the promotion of social justice and protection, equality between men and women and solidarity between generations. The third subparagraph refers to solidarity among Member States (Sommermann in: Blanke and Maniameli, 2014, Art. 3, para 30).

Art. 3 (3) TEU

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protections of the right of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States. [...]  

3.2 Sustainable development as a legal concept

The paradigm shift in the objectives of the Union raises the question of the legal implications and the consequences concerning the design and competences of tax policies on a European level. The wording in Art. 3 (3) TEU is of particular interest because the competence to harmonize national tax regulations bears upon the establishment of the internal market. In contrast to the objectives in the founding treaties in 1957, the current Art. 3 (3) TEU links

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6 Further objectives related to specific policy areas can be found in the TFEU, for example in Art. 151, 168 and 191 TFEU for social, health and environmental policy.

7 The Treaty of Lisbon (2007) replaced the term of the common market with the final integration stage of the “internal market”.

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the realization of the internal market to the concept of sustainable development, based on 1) economic growth and price stability, 2) a highly competitive social market economy and a 3) high level of environmental protection and improvement. Furthermore, subparagraph two and three enumerate various social principles.

The term “sustainable development” is used extensively in European policy documents and has been adapted to different contexts and developments (Kenig-Witkowska 2017; Morgera and Durán 2014, 994). The concept is also mentioned and has even been defined in secondary legislation (Council Regulation –EC – No. 3062/95) e.g. regulations and directives, although only concerning environmental measures. It is, however, interpreted rather flexibly and not defined in the European primary law, such as the Treaties or the Charter of Fundamental Rights. So far, the Court of Justice (CJEU) has not engaged with its interpretation. Thus, the legal meaning remains vague (e.g. Kenig-Witkowska 2017, 64; de Sadeleer 2015; Morgera and Durán 2014, 994; van Hees 2014).

The perception of sustainable development as a legal concept poses various questions. This concerns firstly the question of the legal value, in particular, of whether the concept implies or is linked to legal norms or rules that create substantive or procedural obligations or duties that are subject to legal review (see e.g. Aviles 2012, 30). It requires, secondly clarity about the precise meaning of sustainable development, the weight and balance between the different dimensions, mentioned in Art. 3 (3) TEU and their implications for the design of tax policies.

The legal status of the concept of sustainable development has been discussed in international law, starting almost immediately after the Brundlandt-report in 1987. The status remains a subject of debate till today (Kenig-Witkowska 2017, 64). Perceptions of the concept vary between the status of a political category and a binding principle of international law that comprises both procedural and substantive consequences (Sands 1999). There is a similar debate for the European context (e.g. Kenig-Witkowska 2017, 63; de Sadeleer 2015; Aviles 2012). The literature, however, focuses mostly on environmental requirements that were introduced into the European law in the 1980s. The inclusion of social requirements is less discussed, although certain objectives and regulations, such as obligations to aim for gender equality, have been enshrined in EU law for quite some time now.

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8 E.g. Directive 2000/147 on the conservation of wild birds; 92/43 on the conservation of natural habitats and of wild fauna and flora; 2009/28 on the promotion of renewable energy
9 Art. 2: ‘Sustainable development’ means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations
3.3 Legal weight and meaning

The concept of sustainable development in Art. 3 (3) TEU is a normative principle and not just a policy guideline or a general programmatic assumption (de Sadeleer 2015, 39; Kenig-Witkowska 2017, 68). Art. 2 and 3 TEU are interpreted as legally binding values and objectives, close to state obligations in national constitutions. The provisions serve in particular as a rule for the interpretation of European law (Ruffert in: Callies and Ruffert 2016, Art. 4, para 11; Lewalter 2015, 153-55). The Union’s institutions, including the European Court of Justice (CJEU) are obliged to pursue the achievement of the objectives and ensure the conformity of European soft and hard law measures. Nevertheless, objectives and values do not convey rights to individuals and may only constitute a judiciable violation of Union law, if legislative measures fail to consider the objectives at all or obviously contravene the core of it (CJEU e.g. C.85/76 Hoffmann-La Roche [1979] para 125; C-314/89 Rauh [1991] para 117). The meaning of “sustainability” in Art. 3 (3) TEU remains vague. The reference in Art. 3 (3) TEU, which is similar to the term in the Brundtland-Report, was only introduced with the Treaty of Lisbon in 2009. The 1993 Maastricht Treaty used the term “sustainable and non-inflationary growth“ and the 1998 Treaty of Amsterdam referred to a “harmonious, balanced and sustainable development of economic activities”. Both terms associated sustainability primarily with economic growth and economic activities. Only since the Treaty of Lisbon, sustainability is recognized as an objective in its own (de Sadeleer 2015, 44). It is not only mentioned in Art. 3 (3) TEU, but also cited as a principle in the preamble of the TEU. It is also enshrined in several other treaty provisions that, however, apply to specific policy areas, such as external actions (Art. 3 (5) and Art. 21 (2d) TEU) or environmental policies (Art. 11 TFEU and Art. 37 CHFR).

Art. 3 (3) TEU frames the concept of sustainable development non-hierarchically. de Sadeleer argues that economic growth and price stability, full employment, social progress and protection of the environment all have the same status. Therefore, they must be viewed from a balanced perspective. Economic growth cannot be achieved without the promotion of the other two components (2015, 49). The argument is supported by Art. 7 TFEU, which contains a general obligation to ensure consistency between policies and activities, taking all of the objectives into account. This approach does not only apply to the environmental and social aims linked to internal market, but to the Union’s objectives in general (Kenig-Witkowska 2017, 67).

So far, the internal market has been conceptualized in terms of economic integration. The legal definition in Art. 26 TFEU still describes the internal market merely as “an area without internal frontiers in which the free movement of goods, persons, services, and capitals is
ensured.” The implementation and functioning of the internal market is primarily realized by rules designed to ensure the fundamental freedoms and the non-distortion of competition, complemented by regulations to ensure budgetary stability within the EMU. However, a balanced approach to sustainable development within the internal market, as suggested by Art. 3 (3) TEU, is confronted with the problem that the objectives in Art. 3 TEU do not impose clear-cut obligations (de Sadeeler 2015, 49).

For instance, the term “social market economy” connects economic and social objectives within the context of the internal market, in particular, concerning full employment and social progress (Schorkopf in: Grabitz, Hilf and Nettesheim 2014, Art. 9, para 47). Still, the term “social market economy” that is used for the first time in EU treaty law, is generally considered as a mere semantic meaning without legal significance (e.g. Ruffert in: Callies and Ruffert 2016, Art. 3, para 3). Other Treaty regulations, specifically those dealing with economic and monetary policies (e.g. Art. 119, 120 TFEU) still refer to the concept of an open market economy, favouring an efficient allocation of resources and free competition (Craig 2013, 313).10

The vague meaning of the environmental and social dimension in Art. 3 (3) gives rise to the question, whether other provisions – in EU or international law, binding to the Union and Member States – add substance to the legal concept of sustainable development regarding taxation. The question will be explored in the following chapters.

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10 The Treaties were also annexed by a legally binding Protocol on the internal market and competition that emphasises the understanding of the internal market as an open market economy, see Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 27) on the internal market and competition.
4. Legal substantiations of the environmental and social dimension in European law

European primary law provisions substantiate the values and objectives outlined in Art. 2 and 3 TEU. Provisions of relevance to the environmental and social dimension in the context of taxation include the so-called ‘horizontal policy’ or ‘integration clauses,’ and the objectives set for certain policy areas. Rights and principles, established in primary law and specified in secondary legislation, inform and consolidate substantive and procedural elements of the environmental and social dimensions. Additionally, the Treaty of Lisbon incorporated the Charter of Fundamental Rights (CHFR) into European primary law, such that it carries the same legal weight as the treaties (Art. 6 (1) TFEU).

The horizontal policy, integration or cross-cutting clauses are based upon an interpretation of functional integration. Within this framework, the policies and activities of the Union are not governed solely by (what could be described as) single policy areas and the competences specifically conferred to the EU by these areas. Rather, policies and activities are meant to be designed in an integrated manner, which takes into account the consequences that may accrue in other policy fields (Schorkopf in: Grabitz, Hilf and Nettesheim n.d., Art. 9, para 8). Horizontal policy clauses are not competences per se. Rather, the clauses formulate obligations and objectives, across different policy fields, for the interpretation of competences. The provisions are binding to all European institutions, and to their policies and activities, including both hard and soft law tax measures (see Kotzur in: Geiger, Khan and Kotzur 2015, Art. 8 TFEU, para 1).

The Treaty of Lisbon comprises various horizontal policy clauses, which have been introduced over time. The provisions with general application in Art. 8 to 11 TFEU and similar clauses in the Charter of Fundamental Rights\(^\text{11}\) include, among other aspects, obligations about environmental and social aims. The Charter codifies a catalogue of fundamental principles and subjective rights, drawing on several sources of law, including the jurisdiction of the CJEU, constitutional traditions common to the Member States and international human rights obligations (Rosas 2014, 1685). Craig and de Búrca describe the Charter as a creative distillation of the rights contained in various European and international agreements, and national constitutions (2015, 396).

The Charter applies to institutions, bodies, offices, and agencies of the Union, but also to the Member States when they are implementing Union law (Art. 51 (1) CHFR). Art. 6 (2) TEU

\(^{11}\) Additional integration clauses have been integrated in specific policy field provision, e.g. Art. 167 (4) TFEU or Art. 173 (3) TFEU.
and Art. 51 (2) CHFR clarify that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Whenever the EU undertakes hard- or soft-law measures, however, the Union must ensure the compliance with the principles and rights in the CHFR (Schiek 2014, Art. 23, para 34). The CHFR even may influence national tax policies, insofar as Member States are “implementing Union law.” Indeed, this expression has prompted some debate as to which measures may arise under EU law, yet nonetheless not fall under the legislative competences of the Union. According to the CJEU, however, the CHFR applies to all situations governed by EU law\textsuperscript{12} - including, by way of example, national VAT-provisions, due to the high level of European regulation of VAT and the link to the collection of VAT as a source for the EU budget (CJEU C-206/13 Åkerberg Fransson [2013] para 23-25; Kokott and Dobratz 2015, 25; Elgaard 2016, 80).

4.1 Environmental obligations and objectives

The horizontal policy approach to European activities and policies was first adopted with respect to the protection of the environment. Art. 130\textit{r} of the EEC Treaty, introduced with the Single European Act in 1987, reflected the integrated approach to economic and environmental development taken in the Brundlandt-Report. Art. 130\textit{r} addressed the reservation, protection and improvement of the quality of the environment. Section two stated explicitly that environmental protection requirements shall be a component of the Community’s other policies.

The Treaty of Amsterdam upgraded environmental integration to a general principle of EU law (Sand 1994; Weidemann 2009 Morgera and Durán 2014, 988). Art. 6 stated that environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Art. 3, in particular, with a view to promoting sustainable development. To date, the horizontal policy principle is articulated in Art. 11 TFEU, which requires European institutions to integrate environmental protection requirements into the definition and implementation of the Union’s policies and activities, with a view to promoting sustainable development. This obligation applies to soft-law instruments, but also legislative measures, including measures concerning taxation.

\textbf{Art. 11 TFEU (ex Art. 6 TEC)}

Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.

\textsuperscript{12} This interpretation includes the implementation of secondary legislation in the Member States and situations, in which national legislation restricts the economic freedoms guaranteed by the Treaty
Art. 11 TFEU is complemented by Art. 37 CHFR, containing a similar integration principle (de Sadeleer 2012), although the wording differs slightly, hence raising questions as to the meaning and scope of the principle.

**Art. 37 CHFR**

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Neither “environmental protection” nor “high level” (Art.3(3) TEU) is defined in the Treaties. The substance of environmental protection requirements is thus to be inferred from Art 191 TFEU, which specifies the objectives and principles of European environmental policy (Morgera and Durán 2014, 992). The provision refers in broad terms to the preservation, protection and improvement of the quality of environment, the protection of human health, prudent and rational utilisation of natural resources and the promotion of measures at international level to deal with regional or worldwide environmental problems. The Treaty of Lisbon specifically added the goal as part of an effort to combat climate change.

Art. 191(2) provides a number of important, environmental “principles”. First, it states a requirement that “policy on the environment shall aim at a “high level of protection”, which, as unspecific, carries the potential of tension with other, largely economic objectives of the European Union (Lee 2014, 34). Second, it specifies that policy “shall be based on the precautionary principle and on the principles that preventive action should be taken that environmental damage should as a priority be rectified at source and the polluter should pay”. The “precautionary principle”, which Lee suggests “acknowledges the place of scientific uncertainties at the heart of environmental decision-making” (ibid., 35). Finally, the “polluter pays” principle, according to Jacobs AG, is “conceived to deal with a market failure”, or a “negative externality”, in that a polluter might “ignore the costs to society” of harmful actions if they nonetheless produce a profit (id., 39-40, citing CJEU C-126/01 GEMO SA [2003]).

Nevertheless, Art. 191 para 1 and 2 leave the EU legislator a wide margin of appreciation in deciding what action and measures, if any, are necessary to achieve those objectives. Consequently, the same applies to Art. 11 TFEU. The European Union has produced a wide array of environmental legislation; indeed, perhaps the most extensive of any supranational organization (Barnes and Barnes 2000,1-3). A quick review of EU environmental protection legislation reveals several hundred regulations and directives addressing a vast range of topics, including pollution, sustainable energy, and the ozone layer, amongst other areas. Examples of particular importance include the “ETS Directive,” referring to the
EU Emissions Trading System (Erbach 2016) and a variety of measures – largely introduced in July 2016 – which sought to “accelerate the transition to low-carbon emissions in all sectors of the economy in Europe”. Most significantly, and with particular potential for the Paris Agreement, the Commission has introduced a “circular economy” model, which is predicated on the idea of recycling and, in particular, sustainability (European Commission 2016a).

Tax measures, on the other hand, are rare, although environmental taxes could, as way of example, replace less environmental forms of taxation without risking sufficient revenues. The only exception in EU law is the Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, specifically entailing the regulations of tax rates, based on today’s Art. 11 TFEU. It is a matter of political choice which specific environmental issues and instruments are to be integrated in the Union’s policies and activities (Morgera and Durán 2014, 993; Kotzur in: Geiger, Khan and Kotzur 2015, Art. 11, para 6). The expression “improvement of the environment”, however, implies, at the least that implementing any measures leading to a deterioration of the current status of the environment, contradict Art. 37 CHFR, Art. 3 (3) TEU and Art 191 (1) TFEU. Neither Art. 11 TFEU nor Art. 37 CHFR entail a subjective right that could be invoked by individuals before a European or national court. Still, the term “must be integrated” – and its suggestion of a legally binding obligation to the European institutions – would appear to require a systematic integration of environmental considerations into other Union policies (see Kenig-Witkowska 2017, 63; Sadeleer 2015, 51; Callies in: Callies and Ruffert, 2016, Art. 6 AEUV, para 21).

The provisions translate, at the very least, into an obligation to perform an integrated and balanced assessment concerning environmental objectives when defining and implementing Union policies (Morgera and Durán 2014, 997). Art. 37 CHFR emphasises the obligation to ensure environmental protection. Thus, the obligation is not limited to a process-oriented integration of environmental aspects into the conception and implementation of policies, but must entail considerations of the actual outcomes of these policies. It is therefore not sufficient merely to integrate an environmental dimension; rather, it is necessary to establish effective measures and mechanisms that ensure environmental standards (see in relation to Art. 23 CHFR: Schiek, 2014, Art. 23, para 32-3).

4.2 Social obligations and objectives

The social dimension is far less advanced in the Treaties as compared to the economic and environmental dimensions. The “social constitution” largely was omitted from the scope of
the initial framework of the Economic Union, which prioritised the ideal of a liberal market economy, fortified by a system of undistorted competition. Social issues were essentially the domain of the Member States. The gradual incorporation of principles addressing the social dimension is, first, a direct result of the exercise of jurisdiction by the CJEU. Secondly, an increasing constraint on Member State sovereignty in matters of social policy and labour market concerns has developed, largely due to the impact of EU law (Jääskinen 2014, 1706). The Treaties of Maastricht, Amsterdam and Lisbon collectively introduced new social values, objectives and specific obligations. These provisions predominantly, however, tend to address social issues within the context of the labour market, including working conditions, social protection and gender equality (Rhodes 1995; Borrás and Jacobsson 2004; Lewis 2006). Macroeconomic policies, including taxation, rarely are addressed (Hoskyns 2004), although certain social provisions must be taken into account for the design and effect of tax related measures.

4.2.1 Employment, social protection and exclusion, education, human health

Until the Treaty of Lisbon, EU primary law did not contain a horizontal policy clause concerning social aims. The newly introduced Art. 9 TFEU states that the Union “shall take into account” requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and human health. These aspects correspond largely with the list of social policy fields in Art. 156 TFEU.

Art. 9 TFEU

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Art. 9 TFEU emphasises dissociation from an overwhelmingly economic focus on the market economy, and the increased relevance of social values and objectives. The integration clause does not transfer competences to the Union, but contains an obligation to consider specific social policies across all policy fields and activities of the Union, including taxation. However, in comparison to Art. 11 TFEU, the horizontal policy clause in Art. 9 TFEU has considerably less impact, because it only requires the Union to take social requirements into account. The wording of the horizontal policy clause affords a broad political margin as to the means of consideration in the definition and implementation of the Union’s policies, its activities, and the degree of adherence. Judicial review thus is limited to the question of
whether the institution in charge took social aspects into consideration at all, or whether it exceeded its discretion (Kotzur in: Geiger, Khan and Kotzur 2015, Art. 9, para 8).

The social aspects addressed in Art. 9 TFEU correspond largely to the core objectives in Art. 3 (3) TEU. The specific meaning is further specified in the objectives, set out for different social policy fields: employment (Art. 147 TFEU), social protection (Art 151 TFEU), social exclusion (Art. 153 (1j) TFEU), education and training (Art. 165 TFEU), and human health (168 TFEU). However, the terminology within the treaty provisions is not always coherent and the objectives are formulated in broad terms. Whereas Art. 3 (3) TEU by way of example refers to the promotion of full employment, Art. 9 and 147 TFEU refer to a high level of employment. The term 'social progress', which is linked to the concept of the internal market in Art. 3 (3) TEU, is mentioned in the preamble of both the TEU and the Charter of Fundamental Rights. It is, however, not further specified, and remains vague (Sommermann in: Blanke and Mangiameli 2013, Art. 3, para 33; Eeckhout 2002; Schütze 2015, at loc.156).

Art. 9 TFEU emphasizes specific goals concerning employment, education or health that must be acknowledged in policy decisions concerning taxation. Still, these policy goals do not establish any directly enforceable social rights of individuals or any binding commitments to Member States (Schütze 2015, 559-561). The Charter of Fundamental Rights adds social rights and principles to the primary law e.g. relating to employment, social security and assistance, social exclusion and poverty. Most of those provisions, however, have been interpreted simply as principles, not as judiciable subjective rights. In this context the provisions minimally go beyond the requirements as stated in the treaties. The European Social Charter does contain explicit social rights – yet, and despite the fact that the Charter is mentioned in Art. 151 TFEU, the Charter is not part of the European primary law. The CJEU has invoked the Social Charter to create general principles of EU law, but only sparingly (Jääskinen 2014, 1706; de Schutter 2016, 11, 51).

The treaty provisions also do not specify substantive requirements for the design and impact of taxation in the context of inequalities in income and wealth. Notions of solidarity and social justice are principles of a number of national constitutions, and serve as the foundation of the ability to pay principle as a tax-fairness standard, also engaging redistributional aims of taxation (Lahey, Spangenberg, Mumford, Eriksson 2017; Englisch 2014). In European primary law, solidarity is mentioned as an element of the canon of societal values in Art. 2 TEU, but it refers to social cohesion between Member States only. The term social justice, introduced for the first time with the Treaty of Lisbon, is brought up in Art. 3 (3) TEU, but not further specified in the treaty provisions. Solidarity is also addressed in the preamble of the Charter of Fundamental Rights as one of the core values.
besides human dignity, freedom and equality, in a way that extends beyond solidarity between Member States. And yet, the Chapter on Solidarity includes neither principles nor rights referring to social inequalities. Art. 34 (3) CHFR is not only interpreted as a principle, but merely specifies the aim to combat social exclusion and poverty by recognizing and respecting the right to social and housing assistance (Kücük 2016). An exception is the right to human dignity in Art. 1 CHFR, which could be used to deduce certain requirements concerning a minimum standard of living that should be excluded from taxation (English 2014). The same goes for provisions regarding the protection of the family (Grassi 2015).

### 4.2.2 Gender equality

The regulations addressing gender equality present an important exception within the social dimension. Concepts of gender equality did play a minor role in the founding treaties – for example, the Treaty of Rome already included a provision on equal pay (Art. 119 EEC, Art. 157 TFEU). The obligation to ensure equal pay was introduced in order to avoid competitive disadvantages for Member States that already imposed a right to equal remuneration between men and women. The first directive on equal pay (75/117/ESG) was therefore based on the legislative competence in Art. 100 EEC, which allowed for an adoption of directives concerning the structure of the common market (Vleuten 2016, 35-37, 88). The European Court of Justice interpreted the provision on equal pay, included in the chapter on social policy, later as a regulation pursuing both economic and social purposes with a primary objective of preventing competitive disadvantages, and secondary objectives of ensuring social progress and improving living and working conditions (C-43/75, Defrenne II [1976], para 10,11). Today, Art. 157 establishes a legally binding and individually enforceable obligation for the Union and Member States to ensure the principle of equal pay. In contrast to the freedom of movement in Art. 45 (1) TEU, the definition of “pay” in Art. 157 TFEU does not apply to taxes; or, at least, it does not apply to tax advantages (CJEU C-207/04, Vergani [2005] para 23). Art. 45 TEU covers tax advantages because the principle of equal treatment concerning remuneration would be rendered ineffective if it could be undermined by discriminatory national income tax provisions (CJEU C-512/13, C. G. Sopora [2015] para 22). A similar argument, however, could be applied to the principle of equal pay in Art. 157 TFEU.

The European Union adopted several directives establishing the principles of equal opportunities and equal treatment in matters of employment and occupation, based on Art. 157 (3) TFEU (former Art. 141 (3) EC-Treaty). Taxation is not explicitly included in the scope of application. Nevertheless, the CJEU has opted in several cases addressing age and gender discrimination to interpret the scope of secondary legislation concerning the prohibition of
discrimination in employment and occupation as extending to working conditions that include the taxation of the activity in question (CJEU Meyer, [1995], C-116/94, C-207/04, Vergani [2005] para 25-29; de Lange, 2016, C-548/15, para 20). Thus, personal income tax regulations, which impact access to employment for secondary earners or vocational training, including joint tax measures, income splitting or insufficient deductions for work-related childcare costs, may violate the principle of equal treatment, enshrined in secondary legislation (see Spangenberg 2017).

Gender equality gained further weight with the Treaty of Amsterdam. It established the principle of equality between men and women as an essential task of the EU (Art. 2 (1) TEU). The amendments also included an integration clause committing the Community “to aim to eliminate inequalities, and to promote equality, between men and women” in all its activities (Art. 3 (2) TEU), thus enshrining the concept of gender mainstreaming in the primary law. Today’s horizontal policy clause in Art. 8 TFEU corresponds largely to the initial obligation to implement gender mainstreaming. It obliges all European institutions to aim to eliminate inequalities, and to promote equality between men and women across all activities of the Union (Mückenberger, Spangenberg and Warncke 2007, 52; Rust in: Groeben at al. 2015, Art. 8 AEUV, para 10).

Art. 8 TFEU

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Despite the slightly different wording, Art. 8 TFEU contains a similar obligation as the one found in Art. 11 TFEU, which has been interpreted as a prohibition of deterioration (Rossi in: Callies and Ruffert 2016, Art. 8, para 56) or even an obligation to optimize the current situation (Lewalter 2015, 161). The latter obliges the Union to at least avoid measures that deteriorate or perpetuate already existing gender disadvantages. The implementation of this commitment requires an assessment of the possible impact of intended or promoted measures, based on gender disaggregated data, and a consideration of discovered effects and possible alternatives during the formulation of policies (Schorkopf in: Grabitz, Hilf and Nettlesheim n.d., Art. 3 EGV, para 24; Streinz in: Streinz 2012, Art. 3 EGV, para 46).

Art. 23 CHFR

Equality between women and men must be ensured in all areas, including employment, work and pay.

The integrational approach to gender equality has been strengthened with Art. 23 (1) CHFR. The provision complies with existing gender equality requirements. As with Art. 8 TFEU, Art. 23 (1) CHFR goes beyond the scope of Art. 157 TFEU that applies primarily to wages,
employer provided pensions and working conditions. The obligation to eliminate inequalities, and to promote and to ensure substantive equality applies to all policy fields, including discrimination produced by allocative and distributional effects of corporate, and indirect, taxation. Since most tax regulations formally presume a ‘gender neutral’ taxpayer, particular attention must be paid to the allocative and distributional impact of tax systems and fiscal policy decisions. Research addressing gender equality in taxation reveals numerous disadvantages, due to gender differences in socioeconomic realities of women and men (e.g. Gunnarsson, Schratzenstaller and Spangenberg 2017; Lahey 2015; Brooks et al. 2011).

In contrast to Art. 8 TFEU, which states that the Union shall aim to eliminate inequalities and to promote equality between men and women, Art. 23 (1) CHFR demands that equality between women and men must be ensured. It is therefore not sufficient to integrate a gender perspective into policy formulation, even if it intends to promote equality. The obligation to ensure equality is fulfilled only when a change in society has been reached, and secured (Schiek 2014, Art. 23, para 32-3). Such an approach extends beyond the common practice of merely integrating gender perspectives in institutional procedures and policy (see Hafner-Burton and Pollack 2009, 117), but stresses the relevance of changing socio-economic outcomes and an actual diminution, or redressing, of gender inequalities in the Member States. “Ensuring equality” requires the identification and definition of gender equality goals, and sufficient monitoring based on targeted indicators, so that improvements or deteriorations can be measured. If inequalities persist, ensuring equality may require taking specific measures to overcome structural disadvantages (Schiek 2014, Art. 23, para 32-3).

4.2.3 Non-discrimination

The Treaty of Amsterdam strengthened the concept of non-discrimination within the scope of the Treaties by expanding it to grounds beyond sex. In 2000 the Council adopted several directives, based on Art. 19 TFEU (Art. 13 EC-Treaty) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC) and establishing a general framework for equal treatment in employment and occupation (2000/78/EC).

Art. 10 TFEU, introduced with the Treaty of Lisbon, contains a horizontal policy clause addressing the prevention of discrimination on gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The provision corresponds with the social objectives in Art. 3 (3) subparagraph 2 TEU, referring to the obligation to combat social

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13 Hafner-Burton and Pollack (2009) distinguish developments at three levels: process, outputs and outcomes.
exclusion and discrimination. The wording in Art. 10 TFEU implies the obligation to prohibit discrimination across all European policy fields. The regulation does not contain any legal competence to introduce non-discrimination measures, but entails the duty to avoid discrimination in the process of defining and implementing policies. The charter of fundamental right contains an additional non-discrimination clause (Art. 21 CHFR), prohibiting direct and indirect discrimination based on the categories addressed in Art. 10 TFEU, but also adding several grounds such as social origin, genetic features or membership of a national minority.

**Art. 10 TFEU**

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

**Art. 21 CHFR**

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Within the scope of application of the Treaty [...] and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

### 4.3 Substantive and procedural requirements

European primary and secondary contain several provisions that add substance to obligations concerning the environmental and social dimension addressed in the concept of sustainable development. The primary law itself involves in particular various horizontal policy clauses that require the Union to consider environmental, social, gender and non-discrimination objectives in the definition and implementation of all of the Union’s activities and policies, including hard and soft law measures concerning taxation. The objectives, stipulated for the field of environmental policies, employment policies, indicate the goals that have to be considered, even in the context of measures that pursue different objectives. The Principles and rights, enshrined in the Charter of Fundamental rights further strengthen the obligation to consider non-economic dimensions of tax policies, applying to all tax measures governed by EU law.

Whereas environmental protection and gender equality gained considerable weight in the Lisbon Treaty, the social dimension is less pronounced. Although, the integration clauses are equally binding to all European institutions, the formulations in the respective provisions reflect distinctive legal obligations. The clauses concerning environmental and gender aspects contain compulsory outcome-oriented obligations. The horizontal policy clause referring to social aspects requires a mere consideration of those aspects.
Furthermore, the social dimension refers mainly to employment and social security, but spares for instance social inequalities in income and wealth. Exceptions are provisions that prohibit discrimination, for instance on grounds of sex, ethnicity or disability that often involve social disadvantages. Principles of solidarity and social justice could, however, surface based on constitutional traditions, common to the Member States.

But, even provisions that refer to environmental protection and gender equality, rarely define substantive requirements, such as specific policy measures or outcomes, for instance regarding tax policy (Mückenberger, Spangenberg and Warncke 2007, 55 referring to Art. 2 (3) TEC). Even the provisions in the Charter of Fundamental Rights such as Art. 23 CHFR that have been interpreted as individually enforceable rights rarely provide the legal basis to claim specific measures to ensure substantive gender equality beyond the prohibition of direct and indirect discrimination. The inclusion of the principle of a “high level of environmental protection” in Art. 37 CHFR also does not give citizens 'a right' to claim in courts for positive action by the EU Institutions or Member States. Union and the Member States have wide discretion in decisions about goals and measures to implement the objectives, defined in primary law or secondary legislation. The exceptions are mainly regulations that prohibit direct or indirect discrimination based on various grounds, enshrined in primary and secondary EU law.

It is, therefore, difficult to reduce the environmental and social obligations to specific measures or outcomes that are individually enforceable. The same applies to all the horizontal policy clauses, although Art. 8 and 11 TFEU in connection with Art. 23 and 37 CHFR contain a prohibition of deterioration that forbids impairment in relation to substantive gender equalities and environmental issues.

The scope of the Union’s discretion, however, is exceeded if the obligation to take social and environmental objectives into account is neglected. The failure to at least consider and analyse the impact of tax measures in relation to social and environmental objectives, as set out in the treaties, and then to make a balanced decision between diverging objectives and effects, would fail to achieve an ‘integrated’ approach. This can provide the basis of judicial review, because the EU, in such instances, would have breached the margin of discretion (Kotzur in: Geiger, Khan and Kotzur, Art. 11 TFEU, para 222). Gender- and environmental impact assessments present good examples for mechanisms to consider the impact of taxation with a view to social and environmental objectives.
5. Implications of international treaties and commitments

The Union and Member States are subject to a range of obligations derived from international treaties and commitments that may also add substance to requirements concerning the design, implementation and impact of tax policies. The Actions from the OECD Base erosion and profit shifting project that are intended to address tax avoidance strategies, are a clear example of this in the field of tax. The legal status of international treaties and commitments varies between hard law instruments with binding legal effect for the Union itself or the Member States and soft law declarations, guidelines or recommendations that have no binding legal effect, but provide political pressure and practical guidance.

Whilst the OECD BEPs Actions equip governments with domestic and international instruments to address particular issues, international instruments may also be utilised in a different manner in the EU context. Namely, they can be consulted in order to add substance to the meaning of EU Treaty provisions, which then may in turn impact upon the tax policies of Member States. In this section, it is preliminarily sketched out how such could occur in the case of CEDAW and the ICESCR, the Paris Agreement and the 2030 Agenda for Sustainable Development. It ultimately stresses the utility of looking to international instruments for this purpose.

5.1 CEDAW and ICESCR

5.1.1 Relevance of human rights for taxation

The relevance of human rights obligations in the field of taxation is most often discussed in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (e.g. Kofler et al. 2011). Art. 6(2) TEU explicitly states that the Union shall accede to the ECHR. 14 Art. 6 (3) TEU refers to the fundamental rights, guaranteed by the ECHR and the constitutional traditions common to the Member States as foundations for general principles of the Union’s law. 15 The European Court of Human Rights (ECHR) has frequently used the ECHR to challenge rules and procedures in matters of taxation and the CJEU refers at times to the ECHR as a source for the interpretation of the Charter of Fundamental Rights (e.g. CJEU Berlioz C-682/15 [2017] para 28). However, the protection

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14 The draft Accession Agreement of the EU to the ECHR was finalised in 2013, but the CJEU identified a number of problems concerning the autonomy of EU law (Opinion of the Court of 18.12.2014, Case Opinion /13, ECLI: EU:C: 2014:2454). These aspects are still under consideration.

15 The EU is using different terms throughout the Treaties. The term 'fundamental rights' coincides conceptually and legally with 'human rights', see for a longer explanation UN High Commissioner, 2010, 9).
of human rights under the ECHR concerning taxation is largely confined in scope to civil and criminal matters (del Federico 2011). UN conventions in contrast, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or the International Covenant on Economic, Social and Cultural Rights (ICESCR) are wider in scope with respect to economic, social and cultural rights, as well as rights in relation to particular vulnerable groups, such as women and children (High Commissioner of Human Rights, 2010).

These UN conventions are also increasingly applied to taxation (e.g. Elson 2006; Lahey 2013; Saiz 2013; CERD 2016; Gunnarsson, Schratzenstaller and Spangenberg 2017). Although EU law already entails similar rights and principles, certain rights and duties exceed those enshrined in primary law, as in the instance of the duty not only to respect but to protect and promote certain rights. Most UN-conventions, however, are not ratified by the EU itself and therefore not an integral part of EU law (Rosa, 2014, 1688). On the other hand the UN Conventions have been ratified by all Member States, which raises the question whether the Union must ensure their implementation or at least enable Member States to fulfil their human rights obligations.

5.1.2 CEDAW: Scope and implications for taxation

CEDAW seeks to tackle ‘all forms of discrimination’ against women. It is the principal and most comprehensive international legal instrument to advance the equal recognition, enjoyment and exercise of all human rights of women in the political, economic, social, cultural, civil or any other field (see Art. 1). It requires the States Parties to condemn discrimination against women in all its forms, agree to pursue a policy of eliminating discrimination (Art. 2) and to take ‘all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men’ (Art. 3). Art. 24 ‘underscores’ these commitments by obliging States to ‘undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention’ (Cook 1990, 647). The Convention ‘moves from a norm of non-discrimination on grounds of sex to a norm of the elimination of all forms of discrimination against women’ (Cook and Howard 2007, 1043). It is the first and only human rights treaty that obliges State Parties to modify and abolish social attitudes, cultural patterns and practices which are based on hierarchical assumptions or stereotyped roles for men and women (see Art. 2f and 5 a). Similar to Art. 23 CHFR, the obligation on States to eliminate all forms of discrimination is an ‘obligation of results’. Thus, States are ‘obligated to achieve formal and substantive equality through elimination of de jure and de
facto discrimination’ (see Neubauer 2011, 7; Raday 2012, 515; Cook 1990, 647; General Recommendation 25, UN Doc A/59/38, annex I, para 4).

The protection for human rights, laid down in CEDAW, essentially stems from the same principles and values as EU gender equality law. An important distinction arises however in that EU law does not contain an obligation to proactively address gender-based stereotypes. Legislative measures focus mostly on equal treatment in the field of employment as noted earlier in this paper, while CEDAW strives to ensure substantive equality in all policy fields. Furthermore, while positive measures to ensure full equality of men and women are permitted, EU law does not impose a positive obligation to introduce such measures, nor does it oblige States to actively facilitate the realization of women´s rights (see Neubauer 2011, 16).

The convention does not explicitly mention taxation, but the obligation to prohibit discrimination against women and ensure substantive equalities applies to all government policies, thus including taxation (Elson 2006). There are several provisions relevant for tax policies. For instance, CEDAW assigns rights to women as individuals. Neither marriage nor family relations allow for any kind of discrimination. States are therefore required to analyse the impact of taxation for individuals, not only at a household level. Moreover, women´s right to employment and economic independence demands an elimination of tax-related disincentives to women´s access to employment. Practices based on hierarchies or stereotyped roles for men and women have to be abolished. The design of tax policies should therefore promote the equal sharing of paid and unpaid work between men and women (Elson 2006: 75ff). Disadvantages concerning the distributional or allocative effect of tax expenditures, linked to occupational segregation and income differences may violate the prohibition of discrimination in the field of employment and other areas of economic and social life ((ibid.). The Committee on the Elimination of Discrimination against Women, which is the UN monitoring body for CEDAW, has recommended that the tax system does not discriminate women in respect of taxation and allowances, for instance by treating women as single for the purposes of tax, thereby not obtaining the same tax allowance as married men. (United Nations, 2008, para 192-3). The committee has also repeatedly criticised legal provisions on the taxation of married couples (“splitting”) and its impact on

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16 Elson (2006, 76ff.) applies the CEDAW principles to evaluate direct and indirect taxation in the light of explicit and implicit biases in tax rules, the burden and incidence of taxes, behavioural incentives or responses and the distributional impact of tax on income inequalities.

17 In the case of Germany, the CEDAW committee has for instance repeatedly recommended to assess the current legal provisions on the taxation of married couples (“splitting”) and its impact on the perpetuation of stereotypical expectations for married women (e.g. CEDAW/C/DEU/5 (2003), para 28; CEDAW/C/DEU/CO/7-8 (2017), para 35).
the perpetuation of stereotypical expectations for married women (e.g. CEDAW/C/DEU/5 (2003), para 28; CEDAW/C/DEU/CO/7-8 (2017), para 35; United Nations 2000, para 314). The committee also called upon signatories to review the tax legislation relating to small businesses and the expansion of micro-credit programmes involving commercial and agricultural banks in order to ensure gainful and secure employment for women; take measures to address the hidden discrimination in social security and taxation between different groups of women and to balance the number of women and men working part-time (United Nations 1996, para 190). Only recently, the committee expressed concern about Switzerland’s financial secrecy policies and rules on corporate reporting and taxation, because the regulations have the potential to diminish the ability of other States to mobilise the maximum available resources, necessary for the fulfilment of women’s rights. The Committee recommended independent, participatory and periodic impact assessments of the extraterritorial effects on women’s rights and substantive equality, conducted in an impartial manner with public disclosure of the methodology and findings (CEDAW/C/CHE/CO/4-5 (2016), para 40 c).

The Beijing Platform for Action, which substantiates objectives and measures necessary to achieve substantive gender equality, also emphasises the need to analyse tax policies from a gender perspective (for instance with respect to their impact on poverty and inequality) and to adjust them, as appropriate, to promote more equitable distribution of productive assets, wealth, opportunities, income and services (Strategic objective A. 1., No. 58b). Furthermore, the relevance of gender analyses is highlighted with regard to national income tax, inheritance tax and social security systems as well as the development of economic and social policies (Strategic objective F. 1. No. 165 f and p).

5.1.3 ICESCR: Scope and implications for taxation

The ICESCR, adopted by the United Nations General Assembly in 1966, imposes obligations on signatory states to promote economic, social and cultural rights of individuals. Art. 2 specifies the obligations of State Parties, which have to take steps [...] to the maximum of their available resources, to progressively realize the rights recognized in the Covenant by all appropriate means, including the adoption of legislative measures (Art. 2). The rights, guaranteed in the Covenant take account of just and favourable conditions of work, which involves fair wages and equal remuneration and a decent living for themselves and their families (Art. 7), social security (Art. 9), the widest possible protection and assistance to the family (Art. 10), an adequate standard of living (Art. 11), health (Art. 12), education (Art. 13-14) and the participation in cultural life (Art. 15). Art. 2 contains a non-discrimination clause which underscores the obligation to guarantee those rights without discrimination of any
kind as to categories similarly to Art. 21 CHFR, although the catalogue of the categories is open ended.

The rights in the ICESR in general mirror the provisions of the chapter on solidarity and equality relating for instance to working life (Art. 31) social security and assistance (Art. 34), or combating social exclusion and poverty in Art. 34 (3) CHFR. The Covenant, however, contains not just principles, but mostly individual rights that provide a legal basis for individual complaints before the UN Committee on Economic, Social and Cultural Rights. [An individual claim is only open in states that are signatories to the optional protocol. The same applies to complaints about the violation of rights in CEDAW.] The ICESR also contains rights that go beyond the CHFR, as in the case of the explicit right to an adequate standard of living or the right to participate in cultural life (Romainville 2015, 145). Further, the Covenant obliges State parties not only to respect rights and prevent infringements but also to fulfil rights. The latter requires States Parties to take necessary steps, to the maximum available resources, to facilitate and promote the enjoyment of Covenant rights (CommESCR General Comment No. 34 para 23). Compliance with the ICESCR is monitored by the Committee on Economic, Social and Cultural Rights, based on national reports provided by governments and NGO’s. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of “concluding observations” (see ECOSOC Resolution 1985/17, (f).18

The ICESCR also affects tax policies concerning their impact on economic, social and cultural rights, provided for in the Covenant. For instance, in its concluding observations on a report submitted by Argentina, the Committee recommended in relation to the right to enjoy the highest attainable standards of physical health (Art 12) that the Country develop tax policies to reduce tobacco consumption (Committee on Economic, Social and Cultural Rights, 2011, para 23). Furthermore, taxation is increasingly discussed concerning the obligation of State parties to facilitate the realization of human rights by generating maximum available resources (e.g. Elson et al. 2013; CERD 2016; Saiz 2013). The duty refers to Art. 2 (1) that requires the deployment of the maximum resources States can generate domestically and, where necessary through international cooperation. A lack of adequate resources cannot be invoked by any state as an excuse for missing action in the face of deprivations of economic and social rights. In straightened circumstances, States must demonstrate that every effort has been made to use all resources at their disposal to satisfy, as a matter of priority, their minimum core human rights obligations (Saiz 2013, 79 referring to ComESCR General Comment No.3 [1991], para 10-12). In European Member States,

18 The same procedure applies to CEDAW.
taxation is the primary source of public resource generation and thus an indispensable policy instrument for mobilising additional resources without sacrificing spending priorities. Taxation may also serve as redistributive mechanisms for transferring and redistributing wealth to reduce inequalities and disparities in the enjoyment of human rights. Redistributive tax measures are thus part of the arsenal of measures that states should deploy to tackle and redress structural discrimination and to ensure universal access to economic, social and cultural rights (Saiz 2013, 81 – 82).19

The concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, issued in June 2016, address these aspects regarding UK tax policies (E/C.12/GBR/CO/6 – July 2016, para 16) [Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland (24 June 2016)]. The UN Committee criticises, in particular, the adverse impact of tax policy changes, such as the increase in the threshold for the payment of inheritance tax, the increase of value added tax and the gradual reduction of the tax on corporate incomes on the ability of the UK to address persistent social inequalities and to collect sufficient resources to achieve the full realization of economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups. Further, the Committee was concerned that financial secrecy laws and permissive rules on corporate tax were affecting the ability of the UK, as well other States, to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights. The Committee accordingly recommended that the UK (1) conduct a human rights impact assessment, with broad public participation, of the recent changes introduced to its fiscal policy, including analysis of the distributional consequences and the tax burden of different income sectors and marginalized and disadvantaged groups; (2) ensures that its fiscal policy is adequate, progressive and socially equitable and improves tax collection so as to increase resources available for implementing economic, social and cultural rights; (3) take strict measures to tackle tax abuse, in particular by corporations and high-net-worth individuals; and (4) intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse.

The most recent general comment of the committee issued in June 2017 on obligations concerning Art. 2 (1) (ComESCR General Comment No. 24 [2017]) urges States Parties to address taxation in the context of business activities in particular with regard to their extraterritorial obligations. The committee refers to abusive tax practices, excessive

19 Saiz also addresses the accountability function of taxation, which is increasingly discussed in developing countries, because in comparison to other revenues, e.g. state aid, taxation fosters incentives for States to be more answerable to taxpayers (Saiz 2013, 83).
protection of bank secrecy and permissive rules on corporate tax, as a practice that minimized available resources. It also criticises the reduction of corporate tax rates with the sole view to attracting investors, because it encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights (ibid, para 36).

5.1.4 Legal implications

As international human rights conventions are usually only open to States, most UN-conventions are not ratified by the EU itself. So far, the only exception is the Convention on the Rights of People with Disabilities (Council Decision 2010/48/EC [2010]). Absent such formal adherence, human rights treaties are not an integral part of Union law, thus excluding their direct applicability in EU law and direct effect in the Member States (Rosa, 2014, 1688).

In policy areas where the Member States have transferred competence to the EU, however, Member States no longer have exclusive or even any authority to act. Still, they remain bound by their obligations under UN human rights treaties, but may lack the means to ensure the compliance with these obligations. Member States also give effect to EU rules that do not necessarily reflect the broader and deeper standards contained in UN instruments (UN High Commissioner 2011, 8).

The transferal of competence does not automatically involve the transition of obligations that are binding to Member States. The CJEU has acknowledged a binding effect for the Community only in matters of exclusive competence (C-21/72 International Fruit Company [1972], para 18). Except for customs, however, matters of taxation are subject to shared competence between Member States and Union. Unless the EU itself is bound to ensure the implementation of international treaties, the situation creates two problems. Firstly, discrepancies in substantive and procedural obligations risk the creation of a two-tiered system of protection between policy fields that remain in the competence of Member States and policy fields governed by EU law. Secondly, it may create a gap in the implementation of human rights duties in policy areas where the Member States have delegated powers to the EU (see UN High Commissioner 2011, 8).

The neglect of international human rights treaties in matters of taxation may for instance violate duties to protect and promote the realisation of human rights. The legal framework of community law contains the respect for human rights, meaning that hard and soft law

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20 The only clear cases of EU succession to international treaties binding upon the Member States are the General Agreement on Tariffs and Trade and related Convention on Nomenclature for the Classification of Goods in Customs Tariffs and the Convention Establishing a Customs Cooperation Council (Rosa, 2014, 1688).
measures must not infringe human rights. It however lacks a clear duty not only to respect, but to protect and promote the realisation of guaranteed rights. This stands in contrast to human rights obligations as interpreted both by the UN monitoring bodies and the European Court of Human Rights (UN High commissioner 2010, 14). Taxation has been found to be of specific importance for mobilizing revenues, necessary to realize economic, social and cultural rights for the benefit of disadvantaged and marginalized individuals and groups. Legislative measures and recommendations that constrain the fiscal space of Member States or restrict expenditures to ensure certain rights may therefore hinder or at least hamper Member States in the fulfilment of their obligations under Art. 2 ICESCR. A potential clash between EU tax provisions issued to Member States and the requirements of the ICESCR may also arise due to the focus on economic considerations, such as tax neutrality, non-distortion of competition or economic development and the neglect of distributive considerations with a view to social justice or even redistribution, common to most Member States. VAT law for instance is to a large extent determined by EU secondary legislation. Although the Member State have retained some discretion, they are severely restricted in reducing tax rates, to comply with social objectives, because the standard rate of VAT in all Member States must be at least 15%. Even the reduced rate is set at a minimum rate of 5% (Council Directive 92/77/EEC) and the lists of goods which are zero-rated, exempt and subject to the reduced rate is fixed at the EU level. In sum, this limits the ability of Member States to adjust the levels of VAT on goods and services to less than 5% which has caused controversy in some Member States (see for instance de la Feria and Schofield 2017; Seeley 2013). Tax autonomy of Member States is further restricted by de-facto developments concerning, for instance, decreasing tax rates of corporate taxes, resulting from competition within the internal market and the shortage of EU regulations in this area. The focus on economic development, the lack of concern for the distributional impact of taxes in combination with the different extent of EU regulation in direct and indirect taxation promoted a shift from direct to indirect taxes and has among other effects resulted in an increasing tax burden on low income groups, including women (e.g. Gunnarsson, Schratzenstaller and Spangenberg 2017, 20-4).

The founding treaties did not include references to human rights nor did they bind the European institutions or EU Member States to any international or EU human rights duties. The only exception has been the provision about equality between men and women and the principle of non-discrimination based on nationality, although their inclusion was based on economic rational (Besson 2011). Today’s treaty provisions, on the other hand, draw upon international human rights in several ways. The values, stated in Art. 2 TEU, include the respect for human rights. The EU also actively promotes the ratification of UN human rights
treaties by third countries in its external relations, based upon Art. 3 (5) and 21 TEU (e.g.
Council Decision Human Rights and Democracy: EU Strategic Framework and EU Action
Plan; Rosa 2014: 1694). Both treaty provisions refer to human rights and fundamental
freedoms and the promotion of solutions, in particular in the framework of the United
Nations. It is therefore important that the EU ensures its own internal human rights regime,
the more so as the international actions shall be guided by the principles which have inspired
its own development (Art. 21 (1) TEU).

Furthermore, the preamble of the Charter of Fundamental Rights mentions explicitly that
the CHFR reaffirms “[…] the rights as they result, in particular from the constitutional
traditions and international obligations common to the Member States”. The preamble of
the CHFR is based upon the jurisdiction of the European Court of Justice concerning the
interpretation of fundamental rights in EU law. According to the Nold judgment from 1974,
the court is bound to draw inspiration from the constitutional traditions common to the
Member States and cannot uphold measures which are incompatible with the fundamental
rights established and guaranteed by the constitutions of these States. Similarly,
international treaties for the protection of human rights on which the Member States have
collaborated or of which they are signatories, can supply guidelines which should be followed
within the framework of Community law (C-4/73 Nold [1974]).

The Court has already cited UN conventions, such as the International Covenant on Civil
and Political Rights (ICCPR), the Convention on the Rights of the Child and the ICESCR, as
a possible restriction or additions to the interpretation of fundamental rights and economic
freedoms (C.244/06 Dynamic Medien [2008]; C 540/03 Parlament v Council [2006], para
37; C-73/08 Bressol and others [2010]). Nonetheless, the applicability and legal effect of UN
conventions in Community law remains uncertain. Firstly, the European Court of Justice stated in relation to the ICCPR that the Human Rights
Committee as the monitoring body of the covenant is not a judicial institution and the
findings have no binding force in law (C-249/96 Grant [1998] para 46). This understanding
would exclude e.g. the general comments on state obligations or the country specific
concluding observations, issued by the respective monitoring bodies. The UN Commissioner
on Human Rights (2010, 12) points out that this interpretation is not coherent with the
jurisdiction of other courts, examples being the International Court of Justice or certain
national courts. Even the European Court of Human Rights, a body that has been very
influential for the interpretation and application of general principles in the case law of the
CJEU, increasingly draws upon the decisions of the UN monitoring bodies. Secondly, even in cases with an explicit reference to the UN conventions, the CJEU doesn’t
elaborate on the specific content, but relies mostly on other sources of law, such as the case law of the European Court of Justice, the CHFR or the ECHR. Thirdly, since the Treaty of Lisbon came into force, the Court seems to rely mostly on the Charter of Fundamental Rights and the European Charter of Human Rights. References to other human rights instruments have become rare, although the ICESCR or the ICCPR have been addressed every now and then (e.g. Opinion Advocate General King C-214/16 [2017] concerning the right to paid annual leave), even in respect to taxation (e.g. C-543/14 *Ordre des barreaux francophones* [2016]). On the other hand, Art. 53 of the CHFR states that nothing in the Charter shall be interpreted as restricting or adversely affection human rights and fundamental freedoms as recognized [...] by international agreements to which the Union or all Member States are party. The CJEU may therefore refer to human rights and duties in UN treaties that do not feature in the Charter itself (UN Commissioner Human Rights 2010, 11; Rosa 2014, 1699; Douglas-Scott et al. 2017, 282). In brief accordingly, there is an argument to be made that it would be desirable for the EU to be bound to or at least comply with international treaties that are binding to Member States.

It is not uncommon for EU tax law to refer to International law for inspiration on the minutiae of Treaty provisions. It is interesting to note that the European Commission has recently sought to rely upon agreements within the OECD for the purposes of its State Aid investigations. Art. 107 TFEU contains a general prohibition against the provision of State Aid to undertakings. It provides that ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market’. The provision applies for instance to national subsidies, given to companies operating in that Member State, or to attract them through the grant of such subsidies to establish a base in that Member State (European Commission n.d. b). That Art. 107 TFEU will apply to cases of direct subsidy is clear and as such Member States know that direct subsidies above a certain threshold must be approved by the EU Commission. More problematic are those cases where benefits are indirectly given by Member States to companies. Particularly problematic in this regard is deciphering whether a Member State has granted aid to undertakings through relaxation of tax rules in the provision of advance rulings to large multinationals.

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22 By way of brief background, multinationals, as is apparent from the name, contain an array of companies operating in different jurisdictions and oftentimes with more than one company operating in each. These companies buy, transfer and sell to each other goods, assets and services. To ensure that these prices are not manipulated, which multinationals can then use to artificially lower their tax bills, a set of guidelines known as ‘Transfer Pricing’ rules apply so as to provide an objective matrix by which these prices can be determined. The
The Commission has accused various Member States, such as Ireland, the Netherlands and Luxembourg, of granting state aid to Apple, (European Commission 2016c), Fiat (European Commission 2014b), and Starbucks (European Commission 2014a) by way of advanced rulings from the respective national revenue authorities that were overly favourable to those companies, though each of these decisions is being challenged. Art. 107 TFEU is broadly written to prohibit State Aid. To determine whether this Treaty provision has been breached by the grant of advanced rulings, the Commission refers to the OECD Transfer Pricing Guidelines (OECD 2010), and Art. 9 of the OECD Model Tax Convention. Both regulations provide guidance on the arm’s length principle, stating that transactions between associated enterprises must be conducted as if they were between two non-related entities subject to external market forces (OECD 2014) These guidelines are non-binding and seek only to encourage the tax administration of OECD member countries to follow them. According to the Commission, these nevertheless serve as a ‘focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries’ (European Commission, COM (2016) 739). The justification adopted by the Commission for using OECD material to interpret State aid obligations, could be said equally to apply to UN Conventions such as CEDAW. Similarly to the OECD guidelines, the provisions in CEDAW as well as general comments and recommendations, issues by the monitoring committee, serve as a focal point and exert a clear influence on the practices of signatories and non-signatories. Moreover, those guidelines have been given the force of law by signatories (at least in an international law context).

5.2 Paris Agreement on Climate Change

The Paris agreement on climate change is the most recent international treaty on the protection of the environment, intended to enhance the objectives of the United National Framework Convention on Climate Change (UNFCC). It has been adopted by the EU and Member States. It came into force in November 2016, and has been ratified by 159 of 197 parties to the UNFCC (UNFCC 2017). The preceding Kyoto protocol included tax measures, but focused mostly on transfer pricing (UNFCC n.d.). The Paris Agreement has made the central tenet of these rules is that transactions between associated enterprises must be conducted on an ‘arm’s length’ basis, in other words, as if they were between two non-related entities subject to external market forces. To ensure that the prices that have been set are in line with the transfer pricing rules and hence the arm’s length principle, multinationals will seek assurances, by way of ‘advanced rulings’, from national revenue authorities.

23 Commission 2014a, 19-20: “OECD TP Guidelines serve as a focal point and exert a clear influence on the tax practices of OECD member (and even non-member) countries. Moreover, in numerous OECD member countries those guidelines have been given the force of law or serve as a reference for the purpose of interpreting domestic tax law. To the extent the Commission cites the OECD TP Guidelines in the present Decision, it does so because those guidelines are an existing manual in the area of transfer pricing that are the result of expert discussions in the context of the OECD and elaborate on techniques aimed to address common challenges of the application of the arm’s length principle to concrete situations.”
application of environmental taxes in general, and carbon taxes in particular, a timely subject.

5.2.1 Content and legal implications

The Paris Agreement promises to add to existing EU environmental policy in a significant way, especially when compared to the (also, historic) impact of the Kyoto Protocol and the Copenhagen 2009 negotiations. The Commission’s engagement with both Kyoto and Copenhagen was, comparatively, “limited”. In the run up to the Paris Agreement, however, the EU was the “first major economy to submit its intended contribution”, which included the commitment to reduce greenhouse gas emissions by at least forty percent domestically (European Commission 2015).

The Paris Agreement replaces the approach to combatting climate change taken under the 1997 Kyoto Protocol and sets out a long-term goal in line with the objective to keep the global temperature increase well below 2°C above pre-industrial levels and to pursue efforts to keep it to 1.5°C above pre-industrial levels. It is a legally binding agreement under international law that has been adopted and ratified by the Union itself (Council Decision EU 2016/1841). Art. 216 (2) TFEU establishes that the EU’s international agreements bind EU institutions and its Member States. However, the Paris Agreement concerns legislative competences concerning the environment, which is a matter of shared competence. Thus, the agreement also requires ratification in the Member States. As a legally binding agreement, it also requires the EU to comply with the regulations agreed upon. Thus, the Union must take the measures required to give effect to those provisions. The Union also has to ensure compliance in the Member States, because these agreements become an integral part of EU law, once they entered into force (Martines 2014), although international law cannot provide for the legislative competence of the Union. The scope of necessary actions depends on the agreed commitments.

The Paris agreement establishes binding procedural commitments for countries that have ratified. C2ES (n.d.) Parties must “prepare, communicate and maintain” their nationally determined contributions (NDCs) to combatting global climate change (ibid) Each new NDC also should attempt to “progress” from the previous NDC, and should “reflect its highest possible ambition” (id.). Actually meeting the NDC, however, is not a legally binding obligation under the Paris Agreement (id.) This means that the EU is “legally bound to pursue domestic mitigation measures, with the aim of achieving the objectives of their contributions.” The objective of the arrangement is that “[t]his, combined with robust
transparency and accountability provisions, provides a solid basis for an inclusive regime” (ibid).

5.2.2 Relevance for environmental taxation

Carbon taxation, and “hybrid” cap and trade systems which incorporate carbon taxes, have become an important part of the discussion for all parties attempting to meet NDCs (Jones 2017). This is because, as NDCs were determined during the negotiations leading to the Paris Agreement, many countries expressed a strong amount of support for using “market-based approaches” as a way of meeting their targets (C2ES n.d.)

The CO2 emission reduction targets will be an important part of any changes to carbon taxation, or cap and trade developments, within the EU. In particular, it may be important to focus on higher prices for carbon permits, given that the relatively low prices within the EU Emissions Trading System (ETS) have been criticised as “provid[ing] an insufficient incentive for abatement, and in some instances has been a boon to polluters who have capitalized on over-allocation.” (Gro 2016) Gro suggests that the success of the ETS in future will depend upon the accuracy with which it is able to predict levels of emissions, which is very difficult due to fluctuating costs of energy, and volatility within the coal sector (ibid).

One of the difficulties that might arise from enhancing the ETS is that businesses that operate outside of the EU might gain a competitive advantage (Andersen 2017, 4). Carbon taxation – in particular, in the form of a border tax - presents one way of redressing this. Carbon based imports which come from countries that, for example, do not abide by the Paris Agreement, can be assessed at the EU border for an appropriately ‘punitive’ tax. For this to operate effectively, existing treaties on taxation and trade will have to be taken into account. WTO rules will govern this. Existing border tax arrangements for cigarettes and alcohol are likely to provide a model for the development of this kind of tax (ibid).

Analyses of the likelihood of signatories to the Paris Agreement to meet their NDCs has been linked to the “coverage and type of instruments applied” (Averchenkova and Bassi 2016, 15). Put differently, some tools are likely to be more effective than others, and a signatory’s commitment to the ‘serious’ tools is viewed as a hopeful augury. Carbon taxes and ETS are placed in the ‘serious’ category, whereas carbon funding and credits are not. Additionally, the presence of an over-arching policy on climate change is likely to be more effective than one which relies on “bottom up” approaches from “individual sectors” (ibid).

Within the EU, it is difficult for “individual sectors” to have “bottom up” policies because the sectors operate within the internal market, which is governed by the EU. Environmental
taxation policies, however, largely have been left to member states. EU member states with experience with carbon taxes include in particular Sweden and Ireland (Carbon Tax Center, n.d.) (Center n.d.) The challenge faced by countries such as, for example, Sweden, even with its established and successful carbon taxes, is providing financing for further developments in environmental or “green” technology (Lööf et al. 2017). Targeted and effective support from the financial sector has been described as crucial to Sweden’s success in meeting CO2 reduction targets. The support of Sweden’s government is already “extensive and well developed”, but it is from the financial markets that the crucial capital will emerge for funding green technological innovation (ibid, 23).

The support that different member states will need in meeting the CO2 reduction targets is varied. Nonetheless, and despite the important of a holistic approach to the process of meeting the targets in the Paris Agreement, the weight of the literature leans towards unanimity on the principle that “[f]irst-best climate policy is a uniform carbon tax which gradually rises over time” (Tol 2017, 431). Carbon taxation provides the benefit of certainty about the price for emissions – as, through a carefully designed tax, this is something that effectively can be controlled (Aldy 2017). It does not provide the certainty, however, that it will work, or that it is enough to halt climate change (ibid). It also produces uncertainties in terms of interaction with existing international tax and trade frameworks, although these uncertainties are perhaps less of a problem in the EU (than for other countries, by comparison), given the existence of a multi-lateral framework for addressing both tax and trade.

5.3 The 2030 Agenda for Sustainable Development

The EU committed itself, at an early stage, to integrate the Sustainable Development Goals (SDGs) in the European Policy framework and the commissions priorities (European Commission, COM (2016) 739).

5.3.1 Content and legal implications

The Sustainable Development Goals (SDGs), provide a framework of 17 goals and 169 targets, all adding substance to the design and impact of legislative measures and soft law approaches in matters of taxation. There are seventeen goals in total that refer to (1) poverty, (2) hunger, (3) health, (4) education, (5) gender, (6) water, (7) energy, (8) economic growth, (9) industry / infrastructure, (10) inequalities in and between countries, (11) sustainable cities / communities, (12) consumption / production, (13) climate action, (14) marine life, (15) land ecology, (16) peace / justice and (17) partnership (World Economic Forum n.d.).
They are designed to be universal in reach, and to ensure that the pursuit of a new, 2030 agenda will ‘leave no one behind’ (ibid).

The SDGs, adopted by the UN in the end of 2015 (UN 2015a) were preceded by the Millennium Development Goals (MDGs), which expired at the end of 2015 (World Economic Forum n.d.) The MDGs were mostly relevant for developing counties and focused primarily on ending extreme poverty. In contrast, the SDGs are a global agenda for sustainable development, which incorporates ending poverty as a core objective, but expands the agenda to environmental, social and economic sustainability. The SDGs thus include universal goals that set targets for developing and developed countries, and thus apply to all countries, including the European Member States (Fukuda-Parr 2016, 3). A particular focus was addressing different sustainability challenges in an integrated way, in what was described as an “eco-social turn,” or a normative and policy shift toward greater consideration of ecological and social objectives in development strategies – that delivers genuinely transformative results in terms of human well-being and rights-based, inclusive development (UNRISD 2016). The great advantage of the MDGs was that they were “concrete, specific and measurable” (ibid). Thus, they helped to prioritise some areas of activity, and served to hold countries to account (id). The great advantage of the MDGs, however, was also its greatest weakness, in that, “by being so targeted, they had left out other, equally important, areas” (id). The SDGs aimed to improve this, by adopting a new, integrational approach. LeBlanc argues that SDG targets are best understood as a network, “in which links among goals exist through targets that refer to multiple goals” (Le Blanc 2015, at abstract).

In the context of international law, the SDGs, adopted by the UN in the end of 2015 (UN 2015a), can be seen as a set of norms at the softest end of the ‘hard-to-soft’ continuum. There are no legal obligations to achieve the SDGs, in the sense of rules and commitments binding under international or domestic law. The SDGs do not define or prescribe a certain conduct, but, rather, specify outcomes and targets that are not always precise, but, in some cases, could be described as rather vague and aspirational. Furthermore, the SDGs are a politically negotiated consensus that has no enforcement or implementation mechanism inherent in its structure (Persson et al. 2016, 60).
5.3.2 Relevance concerning taxation

A number of proposals linking taxation\textsuperscript{24} to the achievement of the SDGs have emerged since 2015. The World Bank, for example, recommends that tripling tobacco taxes worldwide would play a “key” role in meeting the SDGs (Jha 2017). Similarly, the UN has announced that tackling “tax crimes,” including all forms of illicit financial flows, is “crucial” to meeting the SDGs (United Nations 2017). Dickinson has argued that reform of tax administration worldwide, so as to enhance transparency and trust, is fundamental to achieving the SDGs (UNA-UK 2016).

The proposals address taxation in different ways. First, tax provides an important level of resources necessary to finance the implementation of the SDGs on the expenditure side of the budget. The key goal in this context is number seventeen, which focuses on the means of implementation. The Addis Ababa Action Agenda underlines the relevance of domestic public resources, including the tax system as means to achieve the SDGs (UN 2015b, 7-9). Due to the low level of obligation and lack of enforcement and compliance mechanisms, arrangements for follow-up and review become particularly important for maintaining the commitments (Persson et al. 2016, 60). A revised EU 2020 strategy and the European Semester could provide a credible framework for monitoring and guiding the implementation of the SDGs (Niestroy 2016, 49), which would automatically involve tax policies.

Secondly, taxation is addressed in relation to its design and impact. Some SDG goals and targets are focused on complex concepts and quality development processes, such as ‘sustainability’ and ‘inclusion’, but they also include tangible and measurable outcomes (see Fukuda-Parr 2016, 49) and thus add substance to the objectives that tax policies shall aim to ensure. A specific example of this includes taxation of tobacco – not only does this protect health by discouraging its use, but this tax also provides a potentially significant source of revenue (Jha 2017).

In contrast to the MDGs the SDGs incorporate economic dimensions, for instance a goal for growth that is sustainable and inclusive (goal 8), but also several goals that address women and gender concerns, social inequalities and environmental concerns, relevant for taxation.

\textsuperscript{24} Long and Miller suggest that taxation can play a key role in supporting the SDGs, provided that tax is appreciated as a tool with capacity for impact beyond simply raising revenue. They caution that encouraging developing countries, simply, to tax more, could have a deleterious impact – what is needed, is to tax in a better way. The international community, they suggest, needs to “...priorities[e] support for better tax systems, rather than more tax collection.” (2017).
The specific goal focusing on women and gender concerns (goal 5) involves, for instance a stand-alone goal on gender equality, comprising nine specific targets, among them end all forms of (direct and indirect) discrimination against women, recognize and value unpaid care and domestic work and ensure women’s full and effective participation at all levels of decision-making. Furthermore, gender issues, are not confined to goal 5, but have been mainstreamed into other goals, such as end poverty (1), the promotion of sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all (8) the reduction of inequalities within and between countries (10). To date, the European Union has linked the SDGs only to the existing equal treatment legislation, gender mainstreaming, the targets in the European Semester and the Strategic engagement for equality (European Commission, 2016b, 390), which rarely address ensuring equality concerning taxation.

The treaty provision address solidarity and reducing inequalities primarily in relation to inequalities between countries or approach social inequality indirectly through gender equality, non-discrimination or employment objectives. The SDGs, however, adopted a particular goal on social inequalities within and between countries (goal 10). It is a goal of its own, but the inclusion of marginalized social groups is also addressed through other goals (Fukuda-Parr 2016, 48). The goal includes targets that specifically address inequalities in income and wealth, such as progressively achieve and sustain income growth of the bottom 40 per cent of the populations at a rate higher than the national average, adopt especially fiscal [...] policies, and progressively achieve greater equality. Reducing inequalities is particular challenging, because it requires a reversal rather than acceleration of the current trends in many countries. It is also relevant to all countries, regardless the level of income (ibid). It is of particular importance for tax policies that for instance decrease the progressiveness of taxation or shift the tax burden to growth friendly, but regressive forms of taxation without considerations of consequences for the distribution of income and wealth.

Environmental sustainability is addressed directly in goals 11-15; specifically: (11) sustainable cities / communities, (12) consumption / production, (13) climate action, (14) marine life, (15) land ecology. The potential role of environmental taxation, and cap and trade systems, in meeting these goals is a key topic of discussion both at the IMF and the UN (IMF 2017). Proposals involving targeted tax regimes for fossil fuels (Rentschler and Bazilian 2017) and low-carbon energy (Fankhauser, Jotzo, and others 2017) have been suggested. Within the EU, specifically, the SDGs have been construed as complimentary to the EU 2020
strategy (Eurostat 2017). The potential of environmental taxes to discourage pollution, and to encourage ‘green’ choices, is an important focus in this combined approach (ibid).

5.4 Specifications and expansion of rights, outcomes and instruments

The international provisions examined in this chapter all differ in respect of their legal nature, and range from legally binding, yet rarely recognized, international conventions, to political commitments that best could be described as a commitment towards forging consensus on collective action. Regardless of their legal weight, the international provisions add substance both to the substantive and the procedural obligations, as deduced from European law with respect to the environmental and social dimension of sustainable development in taxation. The legally binding provisions, in particular, reduce the room for discretion in the consideration of social and environmental aspects.

CEDAW and ICESCR specify and expand subjective rights, and substantiate state obligations in respect to the design and impact taxation concerning socio-economic rights, as stipulated in the Conventions. In contrast to European gender equality provisions, CEDAW entails, by way of example, an obligation to proactively address gender-based stereotypes. Tax policies should therefore promote the equal sharing of paid and unpaid work, which involves abolishing joint tax measures that perpetuate a stereotypical division of labour. The UN committees, in charge of monitoring compliance with the conventions, also criticised, for instance, the distributional impact on marginalized and disadvantaged groups, because it violates socio-economic rights. The SDGs, as an overall agenda on sustainable development, entail an explicit goal to reduce social inequalities, an objective that is rarely specified in European law, and is of particular relevance for gaps or changes in the tax base that increase the overall tax burden on low income groups. The Paris Agreement adds to already existing objectives to combat climate change, but emphasises the relevance of taxation.

Additionally, the provisions stress the relevance of taxation as a source of revenue, necessary to facilitate the realisation of these rights on the expenditure side. Member States, as signatories to the respective UN conventions, must comply with the obligation to ensure maximum available resources. UN Committees have stressed the need for adequate, progressive and socially equitable taxes, and improved tax collection and tackling tax abuse, so as to increase resources available for implementing socio-economic rights. The Addis Ababa Action Agenda underlines the relevance of domestic public resources, including the tax system, as means to achieve the SDGs.
The international provisions further strengthen the requirement of procedural mechanisms, deduced from the horizontal policy clauses in European law. The various conventions and agreements call attention to the need for analyses of direct and indirect taxes from the perspective of gender, socio-economic rights and environmental objectives. The UN Committees urge Members States to perform human rights impact assessments concerning tax policy changes, with broad public participation. Whereas the Paris agreement does not establish a legally binding obligation in respect of nationally determined contributions, it, however, does establish binding procedural commitments. Parties must “prepare, communicate and maintain” their nationally determined contributions (NDCs) to combatting global climate change. These obligations require an effective monitoring system across Member States, based on transparency and accountability.

The Paris Agreement and the SDGs are of particular relevance for the design of impact assessments and monitoring systems, because they not only refer to economic, social and environmental rights and principles, but also involve outcomes and targets. The goals and targets, although not always precise, prepare the ground for specific social and environmental outcomes and indicators that must be considered in all policy areas, including taxation. The commitments to CEDAW and ICESCR that only apply to the Member States as signatories to the conventions raise the question of how Member States may realize these commitments in policy fields with shared competence and requirements of European law. An example is the specification of minimum tax rates for VAT, which prohibits Member States from reducing the tax burden for basic goods and services. European policy recommendations also have promoted a shift of the tax base to less progressive forms of taxation, which may reduce tax revenues, and also add to a disparate distribution of the tax burden which violates socio-economic rights.

The problem of shared competences, combined with the impediment of unanimous agreement for legislative tax measures, also threatens compliance with the Paris Agreement. In contrast with CEDAW and ICESCR, the Paris Agreement has been adopted and ratified by the Union and the Member States. Thus, the Union must take the measures required to give effect to those provisions and, hence, ensure compliance in the Member States. The legislative framework of European law, however, seriously may hamper effective instruments, such as environmental taxation, given the prohibitions against market distortions on the one hand, and lack of agreement as to appropriate EU measures on the other (see 6.1.2).
6. Legislative capacities to comply with objectives and obligations

The implementation of the values and objectives, enshrined in Art. 2 and 3 TEU requires the corresponding governance capacities, in particular legislative competences. The objectives do not create regulative competences (Geiger in: Geiger, Khan and Kotzur 2012, Art. 3 TEU). Art. 3 (6) TEU clearly states that “the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties”. The principle of conferral is the cornerstone of the vertical distribution of competences between the Union and the Member States. Competences not conferred upon the EU in the treaties remain with the EU countries (Art. 4 (1) TFEU).

The enhanced integration and broadening of European values and objectives was attended by extensive changes in the level and scope of authority between European Institutions and Member States. Still, those changes did not translate into a transfer of legislative competences, equally extensive as the objectives. The chapter explores legislative governance capacities to comply with European and international obligations with a view to sustainable taxation.

6.1 Legislative competences to harmonize or introduce tax measures

6.1.1 Comprehensive approach to internal market policies

The legal basis for tax harmonization or approximation of laws essentially has not changed since the Treaty of Rome. As illustrated in chapter 2, Art. 113 and 115 TFEU confer legislative competences to the European Union to adopt provisions for the harmonisation of national tax provisions, to the extent to which such harmonisation is necessary to ensure the establishment and smooth functioning of the internal market. Art. 3 (3) TEU links the realization of the internal market to the concept of sustainable development, and thus requires a balanced approach to harmonizing tax measures. Such a comprehensive approach entails, at the least, consideration of the allocative and distributional impact of legislative proposals concerning environmental and social aspects, based on the objectives, duties, rights and targets specified in EU and international law.

Although EU tax legislation based on Art. 113 and 115 TFEU must be necessary to the functioning of the internal market as defined in Art. 26 TFEU, tax legislation also may be used to pursue objectives beyond the aim of preventing the distortion of competition. Directive 2003/96/EC, amending the Community framework for the taxation of energy
products and electricity, presents a useful example. Although Art. 192 (2) and 194 (3) TFEU provide specific legal bases for the introduction of fiscal measures in support of environmental objectives (see chapter 6.1.2.), the provisions in Art. 113 TFEU also may be used to harmonize national environmental taxes, as long as the main purpose concerns the operation of the internal market (Nettesheim in: Grabitz, Hilf and Nettesheim n.d. Art. 192 para 36). Directive 2003/96/EC was introduced because the differentiation amongst national levels of energy taxation, when considered against the background of an absence of Community provisions imposing a minimum rate of taxation on electricity and energy products other than mineral oils, presented an impediment to the proper functioning of the internal market. The Directive, however, also supports environmental protection requirements with a view to sustainable development, given the horizontal policy clause addressing environmental protection in the former Art. 6 EC-Treaty (today’s Art. 11 TFEU) and the objectives agreed upon in the Kyoto Protocol (i.e., the predecessor to the Paris Agreement).

A further example is presented by the (proposal for a) Financial Transaction Tax (FTT), which was introduced on the bases of ensuring the functioning of the internal market in transactions in financial instruments, and the prevention of distortion of competition between financial instruments, actors and market places across the European Union. The FTT also pursues the objective, however, that financial institutions should make a fair and substantial contribution to cover the costs associated with the financial crisis (COM (2013) 71 final). The response to the financial crisis has been interpreted as an objective that appeals to social justice (e.g. Buckley 2014), but also complies with the requirement of maximum available resources, as stated in the ICESCR. The FTT also has the capacity to impact upon gender equality, given the differences in men’s ownership and women’s ownership of assets and trading activity (Schäfer 2016, 21-25).

It is thus important to consider the way in which the EU implements the requirement of ensuring fair competition in the internal market. This is not simply a policy objective, but a legally binding requirement.

Progress may be made in this respect by adopting institutional mechanisms and indicators, including the target set out in the SDGs, for the specific purpose of assessing the implementation and impact of internal market measures. Although the EU conducts impact assessments for tax proposals and has committed itself to strategies and instruments of ‘better regulation,’ analyses of the distributional and allocative impact of taxes concerning social and environmental objectives or human rights obligations remain superficial and unsystematic (e.g. European Commission 2016d, 66). Gender equality is rarely considered.
With the exception of labour market policies, the lack of impact assessments in regard to gender equality is especially apparent in macroeconomic policies, including taxation (see Klatzer and Schlager 2016, 40; Maier 2010, 252-253; Hoskyns 2004). Gender aspects of taxation seem to be “too distant” to evaluate, and discriminatory treatment is relegated to the EU’s equal treatment legislation (Hoskyns 2004, 13), which is a consequence of the focus on economic aspects that are prioritised over social aspects. A recent exception is the disproportionate tax burden on secondary earners (see Gunnarsson, Schratzenstaller and Spangenberg 2017). In the most recent reports on tax-policies in the EU and the Member States is also a general shift of priorities or at least a widening of the focus observable (e.g. European Commission 2017b).

6.1.2 Environmental taxes

Art. 192 TFEU affords the Union the competence to introduce legislative measures to promote environmental objectives, as set out in Art. 191 TFEU. Both provisions are of renewed interest in the context of the Paris Agreement on Climate Change and in particular in terms of their potential to support environmental taxes. Whereas Art. 192 (1) regulates competence in relation to environmental objectives, Art. 192 (2) refers specifically to provisions primarily of a fiscal nature, which includes the adoption of environmental taxes.

Art. 192 TFEU

(1) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Art. 191. 

(2) By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Art. 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

[...]

Art 192(2) TFEU, in particular, allows the introduction of taxes without a link to the aims of the internal market. Art. 192 (2) TFEU entails the competence not only to harmonize existing environmental tax measures in Member States, but also to implement an EU-level environmental tax (Krämer in: von der Groeben, Schwarze and Hatje 2015, Art. 192, para 28). The specific competence was introduced with the Maastricht Treaty in 1992 (Art. 174 EGV), although the promotion of environmental objectives had been established with the Single European Act in 1987. The Treaty of Lisbon added a similar legal basis in Art. 194 (3)
TFEU, which permits the adoption of fiscal measures with a view to the objectives concerning energy policies in Art. 194 (1) TFEU.

**Art. 194 (3) TFEU**

By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are *primarily of a fiscal nature*.

Despite the focus on environmental objectives, legislative measures based either on Art. 192 or 194 TFEU must comply with the horizontal policy clauses concerning social, gender and non-discrimination objectives. Environmental taxes that, for instance, indirectly disadvantage women (for example, due to the regressive effect of consumption taxes; e.g. Chalifour 2010) must integrate either compensation measures, or social hardship regulations.

Art. 191 (1) TFEU provides a general legal basis for the adoption of environmental measures through qualified majority voting. In contrast, Art. 192 (2) TFEU requires unanimity for the adoption of measures that are “*primarily of a fiscal nature*,” and other issues that are viewed as particularly “sensitive”. This includes town and country planning issues, and a country’s choice concerning its energy supply (Reins 2017, 34). The term “primarily” suggests that regulations with a secondary, or incidental tax objective may be adopted under Art. 114 or 192 (1) TFEU, through the ordinary legislative procedure (see chapter 6.2.2.).

The expression, however, also raises the question of whether measures of a fiscal nature should be defined in a broad sense - thus encompassing taxes, charges and fees - or in a narrow sense, referring to taxes only. A narrow interpretation would allow the adoption of environmental charges or fees under the ordinary legislative procedure (Weishaar 2015, 39-40). It might even permit earmarked taxes, the revenue from which would be earmarked specifically to finance environmental purposes. An example would include the Dutch water tax, the proceeds of which are used to sanitise wastewater.

The narrow interpretation seems to be favoured in the German jurisprudence (e.g Krämer in: Groeben and Schwarze 2015, para 28-30; Callies in: Ruffert and Callies, 2016, Art. 102, para 28). The German language version of Art. 192 (2) refers explicitly to taxes, and German law defines taxes as compulsory levies without a service in return (§ 3 (1) German Fiscal

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25 As with Art. 192 (1), Art. 194 (2) TFEU does not refer to fiscal measures, and prescribes the ordinary legislative procedure for measures addressing the “security”, “efficiency” and “interconnectivity” of the energy market, Art. 194(1) with a specific requirement to consult the Committee of the Regions (Peeters and Schomerus 2014, 12). In contrast, Art. 194 (3) requires the agreement of all Member States, based on the special legislative procedure after consulting the European Parliament only.

26 The ordinary legislative procedure may be applied, if the Council unanimously decides that certain issues may be resolved in that way. So far, the exception has not been used.
Even following the jurisdiction of the German Federal Constitutional Court, however, earmarked taxes that are not included in the general budget are only exceptionally permissible, if the beneficiaries of the tax have as specific relationship with its designated purpose, and if the tax revenues in fact are used in favour of that group (German Constitutional Court, Judgement of the Second Senate 28. 01. 2014 - 2 BvR 1561/12, para 121). In contrast to the German language version, the English version of the Treaty refers to “fiscal measures,” and this term – as with taxes, charges and fees - is not defined in, for instance, UK law. Comparing how countries use these terms is difficult because different countries use the terms not only differently but interchangeably (ECOTEC 2001, iv).

The European Commission has adopted the broad term “environmental levies,” which is meant to embrace both environmental taxes and charges (Weishaar 2015, 39-40, citing COM (97) 9 final, 26 March 1997, 3-4). This term is meant to cover, in a very broad sense, all “unrequited payments” – whether earmarked for a specific purpose, or not (id). Regulation (EU) No 691/2011 does contain the term “environmental taxes,” and defines it as “[a] tax whose tax base is a physical unit (or a proxy or a physical unit) of something that has a proven, specific negative impact on the environment” (ECOTEC, 9). This regulation, however, is designed to assist the development of European environmental economic accounts and to support EUROSTAT in compiling statistics for the ‘green economy,’ and is not written to provide an authoritative answer to the question of ‘what is a tax?’ Indeed, careful reading of the regulation reveals that the question of a legal definition of tax has been carefully sidestepped.

Given the holding by the CJEU (CJEU C-108/81 Amylum [1982] para 29-33) that the legislative competence to pursue particular objectives necessarily involves the right to use every appropriate and effective measure to accomplish the targeted purpose, Art. 192 (1) must include the use of non-tax, or “non-fiscal measures,” such as charges and fees. The competence for taxation, or fiscal measures, is severely restricted in the Treaties as a safeguard for budgetary control and political priorities of Member States. As a consequence, using Art. 192 (1) TFEU for the implementation of earmarked taxes would almost certainly result in legal action as an inadmissible circumvention of the unanimity requirement in Art. 192 (2) TFEU.27

6.1.3 Social objectives

In contrast to provisions linking the functioning of the internal market and environmental objectives, the Treaty does not contain a specific competence permitting the introduction of

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27 For a more detailed account of the literature see Weishaar 2015, 37 – 40.
tax related legislation in pursuit of social objectives. The EU and Member States share competence in the area of social policies, just as they share competence in internal market and environmental policies (Art. 4 (2) TFEU). Nonetheless, and despite the introduction of social values and objectives in the Treaties, legislative competences in social policy fields remain largely with the Member States. Indeed, the treaties provide only limited means to further social integration.

For instance, legislative competences addressing social policies in the promotion of employment, improved working and living conditions (Art. 153 TFEU) are restricted to selected fields. The introduction of provisions to combat social exclusion is restricted to measures that encourage cooperation between Member States, and excludes any harmonization of the laws and regulations of the Member States (Art. 153 (1j) TFEU. Additionally, legislation that would redress discrimination based on sex, racial or ethnic origin, disability or age is subjected to the special legislative procedure (Art. 13 TEC/ Art. 19 TFEU), as are measures concerning termination, social security and the social protection of workers (Art. 153 (1) TEU). Art. 34 CHFR, which is intended to combat social exclusion and poverty, explicitly does not confer any power to enact legislative measures, beyond the treaty provisions.

The treaties do not provide a legislative basis for tax measures that seek to address inequalities in income and wealth, whether based on the ability to pay principle, or the need to enhance the redistributitional function of the tax system. An EU-wide implementation of a net-wealth tax (Krenek and Schratzenstaller, 2017), for instance, may be introduced via the harmonization competences in Art. 113 and 115 TFEU, only, based on arguments linked to the functioning of the internal market (see, e.g. Silva 2016).

Attempts to use existing competences to combat discrimination to address social inequalities in taxation have failed. For example, in 2002 the Commission attempted to address direct and indirect taxation with a directive implementing the principle of equal treatment between women and men in matters beyond employment and occupation. The proposal was intended to cover all types of direct and indirect taxation, save for taxation of income from the pursuit of employment (which falls within the scope of Art. 157 TFEU, per Art. 141 EC-Treaty). The proposal was based on the legislative competence in Art. 19(1) TFEU (Art. 13 EC-Treaty). The Commission argued that even though taxation is, in principle, a matter of national competence only, nonetheless, the case law addressing the impact of the fundamental freedoms in the field of taxation does apply to the fundamental principles of Community,
including equality between men and women.\textsuperscript{28} The final directive on equal treatment in the access and supply of goods and services (2004/113/EC) does not apply to taxation. During the legislative process, stakeholders and members of the European Parliament also expressed concern about joint taxation, which may result in discriminatory disincentives to the paid employment of women. The commission, however, argued that existing community law, notably 157 TFEU (Art. 141 EC-Treaty), already required that the taxation of income from employment should comply with the principle of equal treatment.\textsuperscript{29} Art. 157 TFEU, however, which ensures the principle of equal pay between men and women, has been interpreted as not to apply to taxes, although the term “remuneration” in Art. 45 TFEU includes certain tax deductions, in line with the prohibition of discrimination between workers of Member States (see chapter 4.2.2.). Art. 157 (3) TFEU also has not been used to address tax provisions that create disincentives to employment, e.g. joint taxation or non-deductible work-related child care costs. Art. 157 (3) TFEU, however, does provide a legal basis for legislative measures that ensure equal opportunities and equal treatment of men and women in matters of employment and occupation. In contrast to the provisions for the harmonization of indirect and direct taxes and measures based on Art. 19 TFEU, the adoption of legislative measures follows the ordinary legislative procedure, giving Council and European Parliament equal weight. Thus, the CJEU, in several cases addressing gender and age discrimination, has opted to include tax related disadvantages in the scope of secondary legislation addressing employment discrimination, per Art. 141 EC (today’s Art. 157 TFEU, Directive 76/207/EEC) and Art. 19 TFEU (Directive 2000/78/EC) (see chapter 4.2.2.).

\textbf{6.2 Challenging the special legislative procedure}

\textit{6.2.1 Unanimity in tax legislation: an exception to the rule}

A more comprehensive and sustainable approach to the harmonisation of taxation which supports the introduction environmental taxes would not impact the requirement that such actions would have to be supported by all Member States. Starting with the Single European Act in 1986, several amendments to the founding treaties facilitated the establishment of the internal market by increasing the number of cases in which the Council can take decisions by qualified majority voting. The Treaty of Amsterdam rendered the ordinary legislative procedure (Art. 294 TFEU), formerly known as the co-decision procedure or community method, admissible in the majority of policy areas. Nevertheless, even after further


\textsuperscript{29} European Commission, Proposal for a Council directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services {SEC (2003) 1213}, Explanatory Memorandum.
extensions with the Treaty of Lisbon decisions in the field of taxation still fall under the special legislative procedure (see chapter 2.1. and 6.1.2). Attempts to replace the unanimity requirement in Art 192(2) TFEU with the ordinary legislative procedure failed in the Maastricht negotiations; and were revived, again, during the Amsterdam negotiations, but then, and yet again, failed to be implemented (Kahl in: Streinz 2012, Art. 192, para 17).

During the government conference in Nice in 2000, the Commission attempted to insert the "normal procedure" in Art. 192(2), but, again, failed (ibid., 69).

The requirement of unanimity often prevents the introduction or amendment of European legislative tax measures (Kube 2016, 252-53). In the case of environmental taxation, the special decision-making procedure has been used to defeat carbon tax proposals at EU level (De Sadeleer 2014, 266). The 1992 proposal failed to achieve unanimity in the Council despite attempts by the Commission to revise (and, thus, revive) it in 1996. Significantly, this initiative was developed by the Commission in the first place only because Germany, Denmark and the Netherlands had “threatened” to introduce their own carbon taxes, if the EU did not take action (Collier 1996) The 2003 Energy Tax Directive emerged as the Commission’s response to the defeat in 1996 (Weisbach 2012, 183).

Given the interaction of the policies underpinning the smooth functioning of the internal market, fundamental freedoms and state aid, the unanimity requirement can result in a deadlock that hinders, for instance, effective environmental taxation, both on a European and Member State level. The difficulty with this, as the British Aggregates case demonstrates, is the creation of a circular cycle of repression for tax-based initiatives – for, ultimately, the prohibitions against state aid can render some taxes difficult to implement at member state level. This is because countries that may wish to introduce carbon taxes at national level risk falling foul of the policy against distortion of competition (Kingston, Heyvaert, and Čavoški 2017, 175). Thus, the legal framework of the EU hinders the Union and the Member States to introduce effective instruments to comply with European environmental objectives and international goals. Similar problems challenge the introduction of a Financial Transaction Tax in one or even more Member States, because it may lead to distortion of competition (e.g. Ness 2015, 298; Wernsmann and Zirkl 2014).

The adherence to the principle of unanimity reflects the Member States’ reluctance to confer legislative tax competences to the Union. A decision based on a qualified majority voting is considered as at least a partial loss of fiscal sovereignty of non-assenting Member States (Mick in: Birk 1995, 656). Sovereignty-based arguments appear regularly in tax-related debates as states consider the degree to which they should cooperate, coordinate, or defer to the views of other states (Ring 2008, 167). Certain topics, such as tax rates, seem particularly
vulnerable to critiques based on sovereignty. Other topics, such as definitions, appear more amenable to shared decision making, unless the issue has a strong unilateral impact. The dominant functional reasons in the EU debate seem to be revenue and fiscal policy control, but also democracy and local culture concerns (ibid., 210–214). On the other hand, Member States conferred exclusive competences for monetary policies to guarantee macroeconomic stability and realize the establishment of the Economic and Monetary Union. The same applies to customs and competition rules, necessary for the functioning of the internal market (Art. 3 (1) TFEU). Both policy areas strongly affect Member States fiscal policies. On the other hand, however, revenue and fiscal policies, competition rules and monetary policies have been framed as non-political policy fields, expected to pursue price-stability as an “objectively-given” aim, arising from framework requirements of a free market economy (Tuori 2012, 7).

6.2.2 Qualified majority voting

An exception to the unanimity requirement arises where legislative measures in the context of the internal market, illegal activities and social security may be passed under the ordinary legislative procedure, as laid out in Art. 294 TFEU. These exceptions, however, either exclude fiscal matters (Art. 114 TFEU), apply to tax relevant aspects of social security (Art. 48 TFEU) or have only been discussed in relation to harmful tax competition and the prevention of / fight against tax fraud (Art. 116 and 325 (4) TFEU). Nevertheless, these provisions may be of use for certain legislative actions, and ultimately afford insight as to alternative procedures that balance effective legislation and the interests of Member States

- Art. 114 TFEU allows for the approximation of national provisions that concern the establishment and functioning of the internal market. Art. 114 (2) TFEU explicitly excludes the applicability in fiscal matters, but the regulation may be applied under the condition that only a secondary, incidental tax objective is pursued. Examples of measures which had an incidental tax objective and thus were introduced under Art. 114 TFEU include the European Emissions Trading Scheme Directive (Council Directive 2003/87/EC) and the Eurovignette Directive (Council Directive 1999/62/EC). The former was amended under (the modern) Art. 192 (1) TFEU, and the latter was updated under what is now Art. 91 TFEU (addressing transport), notwithstanding the fact that both directives contained fiscal elements.

- Art. 116 TFEU admits qualified majority adoption of directives or of any other, appropriate measure that are necessary for the elimination of market distortions, due to disparities in national provisions. The regulation was established with the Treaty of Rome, but the requirement of unanimity was not abolished until the Treaty of Amsterdam (Leible
Schröder in: Streinz 2012, Art. 115, para 1). The procedure in Art. 116 TFEU, first, requires the Commission to consult the relevant Member State about the distortive impact on competition arising from provisions laid down by law, regulation or administrative action. If such consultation does not result in an agreement eliminating the distortion in question, a directive may be adopted pursuant to the ordinary legislative procedure. This includes disparities in national tax law and administrative practices.

Art. 116 TFEU would be the obvious legal basis for addressing harmful tax policy competition between Member States, including distortions cause by Staid aid as an alternative to the Code of conduct (Wattel 2016). The regulation has never been applied in tax cases, however, and has hardly ever been used (ibid, 64), although it was initially designed to circumvent the requirement of unanimity in extreme cases of market distortions caused by some Member States (Leible and Schröder in: Streinz 2012, Art. 116, para 4).

• **Art. 325 TFEU** contains an obligation for both Union and Member States to counter fraud and any other illegal activities affecting the financial interests of the Union. The “Union” paragraph (number four) empowers the Union to adopt respective measures pursuant to the ordinary legislative procedure. The regulation allows for the adoption of legislative measures that address e.g. tax fraud within national regimes that may impact Member State contributions to the European Union’s own resources (see CJEU C617/10, Åkerberg Fransson [2013], para 26).

• **Issues surrounding Social Security** are provided for by way of a distinct Treaty provision, now **Art. 48 TFEU**. It stipulates that ‘measures in the field of social security’ which ‘are necessary to provide freedom of movement for workers’ should be adopted by way of the ordinary legislative procedure. The regulation may also apply to taxation, due to intersections of tax and social security systems, e.g. family benefits (see 2.2.1.; Peeters and Verschueren 2016). The Treaty of Lisbon not only expanded the scope of Art. 48 to self-employed workers, but replaced the requirement of unanimity in the Council with a specific procedure, similar to the adoption of consistent minimum rules concerning criminal offences (Art. 83 (3) TFEU and the judicial cooperation in criminal matters (Art. 82 (3) TFEU) (Eichenhofer in: Streinz 2012, Art. 48, para 12-15). Although the adoption of law basically follows the ordinary legislative procedure, paragraph two affords a Member State the right to request that the matter is referred to the European Council, if the proposed legislation would impact important aspects of its national security system. The procedure, thus, attempts to facilitate harmonized national law, whilst safeguarding essential national characteristics.
6.2.3 Enhanced cooperation

Enhanced cooperation, regulated in Art. 326-334 TFEU, is a further means of circumventing the unanimity requirement and can also be applied in respect of tax matters. It does not change competences, rights or obligations as laid out in the treaties (Art. 327 TFEU). It provides a possibility to introduce legislative measures in areas where it has been established that objectives cannot be attained by the Union as a whole (Art. 20 (1) TEU).

Enhanced cooperation deviates from the ideal of joint steps towards deeper integration. The concept of a mechanism for asymmetric integration emerged after the Treaty of Maastricht, due to the diverging perspectives of Member States on the further development of the European Union. Thus, the Treaty of Amsterdam introduced provisions on the possible authorisation of a closer cooperation of some Member States (Art. 43-45 EC-Treaty). Amendments followed which changed the requirements and the procedure. The current regulations, introduced with the Treaty of Lisbon, set out uniform rules for the establishment of enhanced cooperation in all sectors – with the exception of the common foreign and security policy - that do not fall within the EU’s exclusive competence (Craig 2010, 437-448; Cantore 2011, 1-8). To avoid the risk of a completely fragmented Union, Art. 329 TFEU restricts the right of request to nine or more Member States, who collectively must submit a proposal for enhanced cooperation to the Commission. The Council may authorize further proceeding by qualified majority voting, after obtaining the consent of the European Parliament. Member States not only have the right to participate in an established enhanced cooperation and subsequently join the process, but also may participate in the deliberations (Art. 328, 331 TFEU).

The enhanced cooperation procedure has been adopted twice successfully, once concerning the choice of law applicable in divorce cases (Council Decision 2010/405/EU) and once concerning a common European patent (Council Decision 2011/167/EU). Both proposals were subsequently supported by additional Member States. The initiatives, however, also gave rise to judicial proceedings before the CJEU (e.g. C-274/11, C-295/11, Spain and Italy [2013]; C-147/13, Spain [2015]).

The most recent proposal under the procedure of enhanced cooperation concerns the introduction of a Financial Transaction Tax, based on Art. 113 TFEU (see 2.1.1). Since the initial draft of a directive implementing a FTT in 2011 did not attain unanimous agreement from all Member States, the European Commission submitted a proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (COM (2013) 71 final of 14.02.2013). The FTT has been considered in terms of its potential as an
own-source revenue that might replace other less effective Member States contributions (see Nerudová and Dvoráková 2014). To date, the proposal of the Commission is still under discussion (Council, Note ECOFIN Report to the European Council on tax issues, 12 June 2017). The directives that have emerged from the enhanced cooperation procedure demonstrate that it is a powerful tool, capable both of supporting integration and circumventing threats of veto (Cantore 2011, 12). In areas where unanimity is required, it also avoids the watering down of proposals to a lowest common denominator (Armstrong 2013).

It, however, is difficult to predict the consequences of enhanced cooperation in policy fields – such as taxation - that have significant economic or political impact, and, in particular, where the interests of the Member States fundamentally conflict (see Cantore 2011, 12). One question that might require a ruling by the CJEU is whether the introduction of an FTT in some Member States causes even more distortions between participating and non-participating Member States, than, say, the existence of such a tax in two states only (see Wernsmann and Zirkl 2014, 6; Ness 2015, 304). This is particularly relevant in the case of the FTT, given that the UK already took action before the CJEU arguing that the adoption of an FTT with extraterritorial effects for non-participating Member States would adversely affect the competences and rights of those Member States. The future FTT also potentially would give rise to costs for the non-participating Member States because of the obligations of mutual assistance and administrative cooperation (C-209/13, UK [2015]).

6.2.4 Legislative procedure

The challenges of the current legislative procedure in Art. 113, 115 or 192 (2) TFEU extend beyond the question of qualified majority voting or unanimity. Art. 113 and 115 provide that legislative measures should be adopted by the Council acting unanimously in accordance with the special legislative procedure and after consulting the European Parliament and the Economic and Social Committee. In contrast to the ordinary legislative procedure, which was introduced to strengthen both the role of the European Parliament and the democratic legitimacy of European law, the influence of the Parliament is limited. The ordinary legislative procedure only requires a consultation of the Parliament, and leaves the decision to the Council.

Whilst it is required to consult the Parliament (and the Economic and Social Committee), the Council is not bound to follow the wishes either of Parliament or the relevant committee. In contrast, the ordinary legislative procedure accords the European Parliament co-equal status in the legislative process to the Council (Art. 14 TEU). The ordinary legislative
procedure requires the Commission to submit the proposal to both Parliament and Council, and to hold several hearings, during which the Parliament and the Commission should strive to find common ground for legislative acts (see Art. 293 TFEU). There are also special legislative procedures, which at least require the consent of the Parliament (e.g. Art. 19 TFEU).

The difference between the ordinary and special legislative procedures often is discussed within the literature as a fundamental question underpinning the democratic legitimacy of legislation adopted by the European Union (e.g. Mick in: Birk 1995, 656). The involvement of the European Parliament as well as consulting committees however adds expertise, different perspectives and political weight to the legislative process, and influences the design and impact of legal acts. Proposals raised under Art. 113 and 115 TFEU primarily are progressed with ECOFIN, a Council consisting of economics and finance ministers. Legislative acts in social and environmental policy fields would not only engage other committees and thus actors, but would enhance the impact of social and environmental perspectives. This also would include the European Parliament as a meaningful participant in the process.

Parliament has been acknowledged as an “environmentally friendly” actor, keen to combat climate change and a motor for gender equality (Gravey and Schoenefeld 2014; Vleuten 2016). Their participation has been limited, however, by a number of factors. The introduction of horizontal policy clauses, for example, which require an integrated perspective to matters of taxation, nonetheless have not led to a change in legislative competences. As a matter of principle, legislative decisions that follow different legislative procedures must be based on a single legal competence, required by the main or predominant purpose or component.

Additionally, the question of ‘the correct legal basis’ in environmental policy, in particular, has a history of frequent and contentious disputes before the ECJ, when attempts were made to rely on Art. 114 TFEU (which requires “qualified majority” voting in the Council) instead of Art. 192(1) (which originally required unanimity within the Council) (Kingston, Heyvaert, and Čavoški 2017, 50). The European Court of Justice solves the question of horizontal policy measures that pursue a dual purpose by identifying the main or predominant purpose (C-300/89, Commission v Council [1993]; C-336/00, Huber, [2002]). In some cases, however, it will be impossible to identify the main purpose of an initiative, and both purposes will appear equally important. However, a “dual legal basis” is “exceptionally” and only possible, if the legal procedures for implementing the measure are the same (Reins 2017, 40, citing Commission v Council). Where different legal procedures are involved, a
single legal basis must be identified. The risk, thus, is that the ordinary legislative procedure always will be sacrificed in these circumstances. As the ordinary legislative procedure typically involves consulting the Parliament, the rights of Parliament generally are impinged (de Sadeleer 2014, 380). Furthermore, the preference for adopting a single legal basis risks disconnect between the objective of an integrated, balanced approach to taxation and the actual mechanisms to integrate and enforce social or environmental perspectives.

6.3 Own resources as starting point for sustainable taxation

A fundamental difference between the Union and national states is the funding of their tasks. National states levy taxes to gain revenue, necessary to fund governmental tasks, whereas the Union, lacking any fiscal sovereignty, raises revenue exclusively through what it describes as “own resources”, which are addressed in the financial provisions of the Treaties (Art. 310, 311 TFEU). The Union’s tax competences, on the other hand, addressed in Art. 113, 115, 192 (2) and 194 (3) TFEU, only refer to the harmonization of national taxation, necessary for the functioning of the internal market and taxes to pursue environmental and energy purposes. This section will introduce the own resources system, and consider its potential to support the Union’s obligations to sustainable development in the context of taxation. It starts by considering the architecture of Art. 311, and the historical evolution of the own resources system. Finally, it provides a legal analysis of the potential for introducing “EU taxes”.

6.3.1 Art. 311 TFEU

Art 311 TFEU opens by specifying that “[t]he Union shall provide itself with the means necessary to attain its objectives and carry through its policies.” It then sets down the procedure for implementing, and changing the form of own resources:

**Art. 311 TFEU**

The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Without prejudice to other revenue, the budget shall be financed wholly from own resources.

The Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. In this context it may establish new categories of own resources or abolish an existing category. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The first two sentences involve one of the most distinctive aspects of the system for financing the EU’s budget. In most states, and in particular other monetary unions - including the
Belgium–Luxembourg monetary union, the East Caribbean Currency Area, and the West and Central African monetary unions – no limits are placed on the unions’ abilities to borrow from external sources (that is to say, sources other than their central banks) (von Hagen and Eichengreen 1996, 134). In contrast, Art. 311 TFEU presupposes that “means necessary to attain” excludes borrowing to cover shortfalls in spending. Art. 311 also restricts the funding of the EU-Budget to “own resources”, although “without prejudice to other revenue”, an expression that will be discussed in detail further below.

The third subparagraph refers to what is described as the EU ‘own resources decision’ (ORD), which is a specific legislative procedure, with a number of distinctive features. The ORD requires the unanimous support of the Council, after consulting European Parliament, following the special legislative procedure. The ORD also requires that national parliaments approve the decision according to their constitutional requirements. Amendments to own resources may be effected through the ORD.

6.3.2 EU own resources

Schratzenstaller et al (2016) provide an account of the development of EU own resources, revealing a striking evolution from a system of wholly voluntary Member State contributions, to one which is based upon a legal regime, controlled by the EU. Beginning in 1958, the six, original member states commenced from a starting point of “voluntary, ad-hoc national contributions”. As the need to provide the EU with a more stable form of income grew, voluntary contributions were abandoned, and a broad concept of “own resources” was established in 1970 (Schratzenstaller et al. 2016, 8-10). The evolution from voluntary contributions, to own resources, represented a “small but significant step towards decisional supranationalism” (Schütze 2015, at loc 122). The evolution was prompted by Charles de Gaulle’s famous “Empty Chairs” crisis in 1965, during which France’s seat at key meetings was left empty until other member states acceded to a number of demands (Benedetto and Milio 2012, 24). Keen to resolve the crisis, Member States did agree to forego voluntary contributions, although this loss in national sovereignty was supposed to be compensated by an increase in the powers of the European Parliament (Schütze 2015, at loc.122-123). This was achieved by replacing the system of convening a selection of national parliamentarians with directly elected representatives (ibid). Over time, the European Parliament’s (EP’s) powers were further enhanced (id). Nonetheless, the European Parliament today plays only a minor role in decisions about own resources (see Art. 311 TFEU).

Today, the ORD process has evolved to produce three distinct sources of revenue: first, customs duties and agricultural import duties (“traditional own resources”); second, value
added tax; and, finally, contributions based on growth national income (GNI) (Jordan and Lenschow 2009, 85). None of these three categories, however, resemble truly “own resources” in a manner that would mirror national tax revenues, given the reliance on national budgets (Le Cacheux 2010, 135). Even customs duties, whose revenues are allocated to the Union, are levied by Member States, and the Union does not maintain primacy in claims against the customs’ debtors (Borchardt 2010). A similar principle applies to the contributions based on national VAT-revenues. The failure to introduce complete harmonisation of bases for VAT (although the EU did try), led to the observation that VAT, simply, is not truly an ‘own resource,’ but just another form of national contribution (Genschel and Jachtenfuchs 2009, 10). GNI based resources suffer a similar criticism, i.e. that, given the intimacy of their connection to national assessments, GNI could not be described as truly “EU own” resources (ibid., 11).

It has not always, however, been thus. The European Coal and Steel Community (ECSC) Treaty of 1951, for example, contained “the seeds of a genuine European power to tax” (Genschel and Jachtenfuchs 2009, 8). It empowered the “High Authority” to impose duties on coal and steel without consulting member states first, in a system that “bore a close resemblance to supranational taxes” (ibid).

Customs duties and agricultural duties, which became the first “own resources” in 1970, continue to be imposed directly by the EU, in a manner that arguably resembles taxes (id., 9). The allocation of revenues from custom duties and agricultural levies to the Community resulted from an effort to neutralise distortion of trade within the internal market. Customs duties and agricultural levies, however, are largely paid by corporate actors and thus “[have] not create[d] the visible fiscal link between the European institutions and the citizens which the Commission and other ardent supporters of a federal Europe had longed for.” (Genschel and Jachtenfuchs 2009, 9).

Finally, although distinctions may be drawn between “own resources” and other resources in Art. 311 TFEU (e.g. Waldhoff 2016), a “genuine, EU” tax is levied on employees of the European Union, under a policy introduced by Art. 12 of the Protocol on Privileges and Immunities of the European Union. The salaries of EU employees, or permanent officials, are subject only to this tax, and are not subject to taxation by Member States (European Commission n.d.a). The charge consists of a progressive “Community tax,” which funds the EU’s budget, and a supplementary “solidarity levy” (per Art 66, Reg. No 31 (EEC, 11 (EAEC), “Staff Regulations...,” ibid).
6.3.3 **Current challenges**

Discussions for reform have addressed a variety of issues, including whether the institution of genuine EU taxes (i.e. taxes that fund the EU budget) may improve the functioning of the EU as a political and economic entity. Since “own resources” rather resemble transfers from Member States it seems to be “[...] tempting to regard this contribution as a fee for membership in the EU ‘club,’ and to compare it to an evaluation of the (private) benefits derived from being a member” (Le Cacheux 2010, 36). This perspective contributes to the “juste retour,” or “fair return” expectation, which “...has transformed the EU budget, and by extension the EU, into a zero-sum game instead of the win-win arrangement it is expected to be” (“Monti Group Challenges the ‘juste retour’ Principle in EU Budgeting” 2017). The introduction of VAT as a form of own resources in 1979 was meant to redress the absence of a “visible fiscal link,” between the European institutions and the citizens, as well as other problems. Initially presented as a new own resource, VAT was heralded as a financial instrument with great capacity to support the EU budget in future (Le Cacheux 2010, 134). Viewed as a “neutral” and flexible tax, the hope was that it would provide ongoing revenue to a budget that was becoming increasingly strained both by expenses under the Common Agricultural Policy, and the (then, in 1979, new) structural funds. As the years progressed, however, it became clear both that the revenues from the tax were insufficient, and that (given the capacity of member states to control tax bases, leading to wide variation throughout the community) it was burdened by unpopularity (ibid., 135). Concern heightened after the last ORD in 2014, when a variety of costs and contributions were either fixed or reduced (Benedetto and Milio 2012, 11).

Discussion for reform further address how, in particular, EU taxes might serve to bolster the limited resources within the EU budget, and whether genuine EU taxes, simply, might help the EU to function more effectively as a government, beyond the benefits of simply funding its budget (see, e.g. Le Cacheux 2010, 132).

More recent analyses also have asked whether own resources might be reconfigured so as to support existing EU commitments to principles of sustainability based on social, environmental and cultural objectives. Schratzenstaller et al. identified “sustainability gaps” within the current system of financing own resources (2016, 5). First, they argue that the Europe 2020 strategy for a sustainable economy simply is not served by the system of own resources (ibid, 39). The EU has committed itself to the strategy, yet has not afforded itself the tools necessary to achieve the goals underpinning it. Secondly, the absence of consideration of gender (and other, including environmental) perspectives within the European Semester, which seems wholly focused on growth and stability, prevents the
adoption of principles of sustainability (id., 40). Finally, the current tax mix of member states (which in many instances hinders the labour force participation of women, or fails to take substantial steps towards “greening the economy”) does not provide support for sustainability. Put simply, the restrictions on the current system of own resources are producing greater pressures than simply a “downward” force on available budgetary funds.

Over many years, a variety of candidates for using EU-level taxes to fund own resources have been proposed over many years, and “passionately advocated,” including: “a modulated value added tax, a corporate income tax and a tax on environmental pollution” (Le Cacheux 2007; Wasserfallen 2014, 5). The most recent proposals refer, inter alia, to a wealth tax, flight ticket tax, a tax on nuclear energy, a tax on financial transactions and a border carbon adjustment (Schratzenstaller et al. 2016, Krenek and Schratzenstaller 2017; Dellinger and Schratzenstaller 2016, Nerudová et al. 2017; Krenek et al. 2018). The Commission introduced a proposal, based on Art. 113 and 311 TFEU, to use a Financial Transaction Tax (FTT) as an own resource with the intention that it would gradually reduce the GNI contributions (European Commission, COM (2011) 510 final). The proposal failed to receive sufficient support from Member States. The most recent proposal (European Commission, COM (2013) 71 final), implementing enhanced cooperation in the area of the FTT, relies solely upon Art. 113. The Commission also proposed to use parts of the proceeds as a future own resource (ibid., see 1.5.4.; also Nerudová et al. 2017).

The long advocated, wide variety of potential EU-level taxes (on financial transactions, aviation, wealth, and carbon, as well as others) all might serve as instruments to increase economic, social and environmental sustainability in the EU (ibid., 38). Further support for this approach is found in the Report for Future Financing of the EU, which is the most recent example of high level EU consideration for reform of the own resources system (Monti 2016).

6.3.4 Legitimacy of EU taxes to fund the EU budget

The proposal for changes in the system of own resources gives rise to two distinct legal questions. First, does the EU possess the legal competence to replace the current system of own resources with other, different forms of tax-based resources? Second, do the treaties also permit the introduction of genuine EU-taxes, intended to raise revenues to fund the EU budget?

The wording in Art. 311 TFEU does not restrict “own resources” to certain types of revenues, except borrowing. Art. 311 (3) TFEU explicitly provides that the Council “may establish new
categories of own resources or abolish any existing category”. As long as Member States approve a new resource decision within their respective national parliaments and unanimous support is achieved within the Council - then there should not be any legal barrier to replace the current system with different tax-based contributions, based on (harmonized) taxes, collected at the national level (Cattoir et al 2004, D’Alfonso 2014, Waldhoff 2016, BMF 2016, 12). Such “tax based own resources” that merely replace existing Member State contributions, would however, not afford more autonomy to the EU. Still, they would for instance afford a means for redressing the “downward pressure” of recent years and strengthen objectives of sustainable development.

The question, whether the EU budget could also be directly funded by genuine EU taxes is more complicated. The term EU-taxes seem to be used with different meanings, on the one hand as any tax arising from an EU obligation, on the other hand as tax revenue raised at a supranational level (see “House of Lords - EU Financial Framework from 2014 - European Union Committee” 2017, at para 223). The focus of the second question is on the latter, meaning EU taxes, enacted at the Union with a view to raise revenues for the EU Budget.

Art. 192 (2), 113 or 115 TFEU enable the Union to harmonize national taxes concerning the functioning of the internal market and even provide for the introduction of new environmental taxation. These competences, however, do not necessarily involve the competence to use the revenues collected to fund the EU budget. The wording in Art. 311 TFEU suggests that the general tax provisions in the treaties, such as Art. 192 (2) TFEU do not include this kind of competence. Art. 311 states explicitly that “Without prejudice to other revenue, the EU budget should be financed wholly from own resources”, which seems to imply a priority for revenues under the own-resource decision (e.g., Schmidt-Kötters 2009, 1390, Waldhoff 2016). The term ‘other revenues’ in Art 311 TFEU that covers for instance taxes from EU employees and agriculture, would only allow for insignificant amounts of additional revenue (ibid). Fabbrini, on the other hand argues that the combinations of Art. 311 and 113 provide the EU with the power to enact taxes, generally (2017). However, he does not distinguish between 1) taxes which fund the EU’s budget directly; and, 2) taxes which are collected by Member States, and are then transferred to the EU budget.

The European Court of Justice seems to imply that the legislative competences in the Treaties may include all measures required to attain the respective objectives, including fiscal measures. In the Amylum case the CJEU held the Council as competent to impose a levy on the production of isoglucose, based on a competence that assigned to the Council the task of creating the common organization of the agricultural markets and laying down
the rules relating thereto (CJEU C-108/81 *Amylum* [1982] para 29). The Court stated explicitly in relation to the newly adopted own-resource decision, [...] that its purpose is to define own resources allocated to the community budget and not to stipulate the community institutions which are competent to impose duties, taxes, charges, levies or other forms of revenue. As a measure adopted under budgetary law, [the own resource] decision does not prevent the council from creating a levy [...] where the power of the Council to create that levy has its basis [...] in the provisions of the treaty relating to the common agricultural policy (at para 30). However, the assumption of an implicit competence to raise tax revenues for the EU budget, based on Art. 113, 115, 192 (2) and 192 (4) contradicts the distinctive requirements in the own resource decision procedure that almost gives the ORD the status of primary law (Adolf and Rohrig 2016, 15). The competence to enact EU-own taxes, based on the special legislative procedure, would not only circumvent the approval of national parliaments. It lacks democratic legitimacy in general, because the legislative procedure lies primarily with the Council and limits the influence of the European Parliament to a mere consent to the decision. The problem of “earmarked taxes” for certain purposes, based for instance, on Art. 192 (1) TFEU that does involve the European Parliament, has already been addressed in Chapter 6.1.2.

Furthermore, any proposal to enact genuine EU-taxes, which relate to a shared competence, must accord with principles of subsidiarity and proportionality, stated in Art. 5 TEU. It requires first that the Union should only act if it is not possible for the objectives to be achieved at a national level (and would therefore be more successfully achieved by the Union because of the scale or effects of the proposed action HM Government 2013, 11) and second that the competence is used in a manner which does no more than necessary to achieve the required aims (Art. 5 TEU). Concerning the introduction of a genuine EU tax, the requirements would not only apply to a more effective implementation of, for instance, environmental objectives in general, but the justification must also relate to the fact that the revenue goes in to the EU budget.

The allocation of revenues from custom duties to the Community is necessary to neutralise distortion of trade, because customs duties are levied on imports of agricultural and non-agricultural products from non-EU countries, at rates based on the Common Customs Tariff. The taxation of EU employees as a source of revenue for the EU Budget serves to guarantee a uniform taxation of the EU employees, independent from their respective national tax systems. The introduction of further taxes of this type clearly, however, would require institutional changes.
7. Preliminary conclusion in relation to competences

This paper considered provisions within the European treaties that forge commitments, through international hard and soft law, to values, objectives and obligations that are unsupported by effective legal mechanisms, and conflict with common conceptions of pre-existing duties in tax policy. In particular, this paper forges connections with existing discourses that promote sustainable development, from economic, social and environmental perspectives.

Art. 3 TEU that stipulates the core objectives of the Union, explicitly refers in paragraph three to the concept of sustainable development. The concept is therefore relevant to tax measures, whether implemented or coordinated on the European level. Legal obligations concerning social, gender and environmental objectives and duties add substance to the legally binding, yet vague, concept. The (limited) substantive provisions and procedural obligations, deduced from European law and including the Charter of Fundamental Rights, are specified within international hard and soft law provisions. These provisions do not only stipulate socio-economic rights, but substantiate obligations of signatories in relation to tax policies and even define distinctive outcomes and targets that Union or Member States should achieve.

From the perspective of sustainable development various sustainability gaps have been identified within EU taxation law and policy. These gaps include, in particular: a prevailing focus on economic growth; a lack of EU-level environmental taxation; an absence of tax measures that tackle, much less consider inequalities in income and wealth; and persisting socio-economic inequalities between men and women (Schratzenstaller et al., 2016, 2015). The redress of these ‘sustainability gaps,’ however, presents various challenges.

First, the legal obligations that substantiate the concept of sustainable development in Art. 3 (3) TEU are neither recognised nor implemented in either legislative or coordinating procedures. Although the EU conducts impact assessments for tax proposals and has committed itself to strategies and instruments of ‘better regulation’, analyses of the distributional and allocative impact of taxes concerning social and environmental objectives or human rights obligations remain superficial and unsystematic. Additionally, the implementation of gender mainstreaming demonstrates that instruments alone are insufficient to ensure action – expertise, structures and actors also are required, so as to enforce a truly comprehensive perspective in tax policy.

Secondly, one of the main challenges in the introduction of truly effective European legislative tax measures is the requirement of unanimity. Environmental taxes provide a
salient example of the lack of effectual measures within both Member States and the Union, due to the European law prohibitions against market distortions on the one hand, and the difficulties of agreeing upon European measures on the other. This stalemate contradicts not only European and national objectives, but also risks adherence to international agreements that prescribe environmental targets. The growing influence of European tax law, due to positive and negative harmonization, increasingly constrains Member States' freedom in taxation. This creates a risk to compliance with constitutional, but also international law obligations concerning not only environmental standards, but social inequalities and human rights. The treaties contain several examples for alternative procedures that might offer possibilities to balance Member States' interests and need for sovereignty with effective EU-level tax measures.

The special legislative procedure poses an additional challenge, when it comes to the (legally required) comprehensive approach to legislative tax measures, based on economic, social, gender and environmental objectives and targets. The difference between the ordinary and special legislative procedures is usually discussed as a question of democratic legitimacy, given that the European Parliament, and relevant committees, are relegated to a consulting role. Essentially, only the Council and ECOFIN render decisions on tax policy. This, however, also excludes actors with expertise in environmental, social and gender issues from the process.

Third, options to reform the own resource system address a number of different perspectives. The legal obligations to promote sustainable development in a comprehensive manner underline the need to address the funding of the EU with a view to sustainability-oriented own resources. The current architecture of own resources allows for a range of options to promote a sustainable oriented system, but is limited to changes within the existing own resources procedure, requiring unanimous agreement in the Council and the approval of all Member States. The introduction of genuine own resources with the (underlying) purpose of financing the EU Budget - based on existing legislative competence - would not comply with existing primary law. The use of EU tax measures at the least would require the involvement of the European Parliament and additional justification in relation to subsidiarity and proportionality.

Finally, a particular problem is caused by the neglect of objectives, rights, obligations and competences which are necessary to tackle inequalities in wealth and income. Despite the increasing relevance of the social dimension in the Treaties, social aspects concentrate largely on policies related to employment. Additionally, legislative competences mostly are restricted to the coordination of national measures. An exception to this arises in respect of
provisions to address gender inequalities and prohibitions of discrimination on various grounds, although respective legislation concerning taxation remains a problem. Although values and objectives suggest a greater emphasis on social values beyond employment and social security, the legal framework scarcely provides the means to implement this. In contrast to the development of environmental objectives, obligations and competences, the Treaties still lack the legislative competence to introduce redistributive tax measures, unless these measures are included in harmonizing legislation related to the functioning of the internal market. To this end, there ought to be consideration of the introduction of new rights, principles and competences targeting inequality that resemble the constitutional traditions of Member States. This would serve to enhance the social dimension of the European Union, thus balancing the economic, environmental and social impact of European policies. It would need to be considered whether such change should occur at the EU level or the Member State level.

UN conventions that are only binding to Member States, but not the Union, pose a specific problem, because the division of competence between Union and Member States may even hinder the realization of socio-economic rights in international obligations that Member States have ratified. In these instances, it is crucial to consider soft-law mechanisms to ensure compliance with human rights-based competences and reflect on comprehensive competences with regard to human rights. The EU has already established a European Union Agency for Fundamental Rights that might add expertise in the area. It also is an example for EU measures concerning the realization of human rights that is based on the so called “flexibility clause”, set out in today´s Art. 352 TFEU. The provision allows the EU to act in areas where EU competences have not been explicitly granted but are necessary to the attainment of the objective set out in the Treaties.

Options for strengthening hard and soft law mechanisms that promote sustainable taxation could range from changing current practices, to utilising existing mechanisms to enforce obligations and strengthen tax compliance – and, perhaps, to changing procedures for the implementation of taxes. A stronger role for the European Parliament could well prove transformative. There are a number of potential steps:

1. Strengthening institutional mechanism to take account of the environmental, social, and gender impact of taxation in legislatives procedures as well as soft law procedures, in particular the European Semester. Institutional mechanisms would include impact assessments, adequate and transparent monitoring procedures based on rights, principles, outcomes and targets - defined both in European and international law.
2. Exploring mechanisms for the enforcement of legal obligations. This paper has highlighted various legal uncertainties, including, by way of example, the competence to use Art. 157 (3) TFEU as means of addressing joint taxation, or, perhaps, Member States’ non-compliance with secondary legislation concerning tax measures that impede women’s access to employment. Legal action could be based on Art. 258 TFEU, but improvements could entail the development of a more comprehensive procedural framework for infringement procedures and accountability mechanism (see Yevgenyeva, 2013).

3. Considering the possibilities provided by Art. 116 and Art. 328 for introducing tax measures concerning tax fraud and tax avoidance based on the ordinary legislative procedure, if soft-law mechanisms are less effective.

4. Reforming legislative procedures: the treaties offer a variety of mechanisms that might support effective and more democratic and measures on a European level, and secure the interest of Member States. These procedures include, at a minimum, the adoption of the procedure in Art. 19 that at least would require the consent of the European Parliament (instead of a consultation). The procedure in Art. 48 TFEU is a further example of an attempt to facilitate harmonized national law, whilst safeguarding essential national characteristics. New procedures also should take account of the need for expertise and actors that promote social and environmental perspectives.

5. Exploring options for alternative, tax-based Member State contributions within the own-resource system. Reform options, with a view to promoting sustainability, may include a flight-ticket tax, a wealth tax and a nuclear power tax.

6. Considering the introduction of new rights, principles and competences targeting inequality that resemble the constitutional traditions of Member States. This would serve to enhance the social dimension of the European Union, thus balancing the economic, environmental and social impact of European policies. It would need to be considered whether such change should occur at the EU level or the Member State level.
8. References


____________________ 2014. EU environmental law and the internal market: OUP Oxford.


Fankhauser, Sam, Frank Jotzo & others. 2017. Economic growth and development with low-carbon energy. Centre for Climate Economics & Policy, Crawford School of Public Policy, The Australian National University.


Grassi, Clara Maria. 2015. Status and impact of the ability to pay principle in the ECJ’s case law concerning tax benefits based on personal and family circumstances. CFE Working Paper Series, No. 52. Centre for European Studies, Lund University


Jha, Prabhat 2017. Tripling tobacco taxes: Key for achieving the UN Sustainable Development Goals by 2030. Investing in Health.


Kofler, Georg, Miguel Poiarees Maduro & Pasquale Pistone (eds.) 2011. Human rights and taxation in Europe and the world, Amsterdam: IBFD.


Monti, Mario 2016. Future Financing of the EU: Final report and recommendations of the High Level Group on Own Resources.


9. Project information

**FairTax**

FairTax is a cross-disciplinary four year H2020 EU project aiming to produce recommendations on how fair and sustainable taxation and social policy reforms can increase the economic stability of EU member states, promoting economic equality and security, enhancing coordination and harmonisation of tax, social inclusion, environmental, legitimacy, and compliance measures, support deepening of the European Monetary Union, and expanding the EU’s own resource revenue bases. Under the coordination of Umeå University (Sweden), comparative and international policy fiscal experts from eleven universities in six EU countries and three non-EU countries (Brazil, Canada and Norway) contribute to FairTax research.

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