NextGenerationEU: Will the Debt be Repaid by EU Own Resources or Member State Taxpayers?

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Summary (150 words)

NextGenerationEU has been heralded by the EU as a once in a lifetime chance to transform the economies of the Member States. It is a novel legally constructed facility enabling the EU to borrow a significant amount of money on the financial markets. Of course this significant amount of borrowing will have to be repaid. The legal construction places the Member States, and their taxpayers, as the underwriters who will be responsible for repayment unless the EU can raise new own resources. Having first set out the legal structure of NextGenerationEU borrowing and repayment, the article explores the potential revenue raising capacity of the suggested new own resources and the possible timing of their implementation. It will do so by considering both primary and secondary EU legal provisions as well as the Interinstitutional Agreement which contains a roadmap to repay the debt. What will become clear, through a detailed review of the proposals, which are heavily reliant on taxation including estimated figures, is that the EU is a long way off implementing and receiving sufficient revenue through new own resources to repay the debt. The proposal with the most revenue raising potential, the Emmissions Trading Scheme (ETS) is linked to competing EU environmental policies, which means that this could be an ever diminishing resource. The other proposals, being the Carbon Border Adjustment Mechanism (CBAM), a digital levyPillar One of the OECD Inclusive Framework on global corporate tax reform, and a Financial Transaction Tax (FTT), have significant hurdles to their adoption. The article will demonstrate that without considerable recourse to the legal mechanisms of differentiated integration - be that enhanced cooperation or minimum harmonisation – to obviate the issues including those of competence and unanimous voting associated with taxation, the EU stands little chance of repaying the debt through new own resources.

Introduction

The introduction of NextGenerationEU[2] has been lauded for being a monumentous occasion for the EU, not just because of its financial size, but also due to the implications for integration in the EU. It has been suggested as potentially prompting institutional change in the EU,[3] being

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[2] Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ LI 433/23

[3] B. de Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', (2021) 58 Common Market Law Review 635–682.

a constitutional moment,[4] and even moving the EU closer to developing into and becoming a Federation.[5] There is no doubt that the financial size of NextGenerationEU is large, at EUR 750 billion in 2018 prices, what is remarkable is that it is enabled by borrowing on the financial markets through the EU Budget. This very much creates the appearance that it is the EU which has undertaken both to borrow the monies as well as the liability to repay. This is not however the case in relation to repayment. The legal construction of NextGenerationEU actually contains a defult provision making the Member States, and therefore their taxpayers, liable to repay the debt.[6] There have, however, been statements made by the EU institutions that sources of revenue will be introduced to enable new EU own resources to repay the debt. Despte the significant extent of the debt and the energy put into creating the extraordinary and novel legal construction of the NextGenerationEU borrowing, there has surprisingly been comparatively little emphasis on repayment. Many of the legal instruments which authorise the borrowing make little or no reference to the new own resources which will supposedly be in place to repay the debt, let alone whether they will be implemented in time before the repayment deadline of 2058 or raise sufficient revenue. Should the new own resources not be in place, and in time, to raise sufficient revenue it will become necessary for the EU to ask the Member States for the cash. If the creation of the NextGenerationEU borrowing facility is said to be of constitutional importance for the integration of the EU, then recourse to Member State budgets for repayment must surely undermine it. It is a question of credibility, "otherwise, the recovery fund will create public debt of the Union: not really a great European moment".[7] It would also have a detrimental impact on integration, "the road to this step in integration … is paved by the need to repay the EU debt. As things stand, the NGEU has resulted in a mandate for the Union to incur large amounts of debt, while deferring for later the negotiations on how to repay the debt. It is difficult to see this as a very stable constitutional turn".[8] Whilst it has therefore been suggested that nextGenerationEU borrowing is an example of EU integration and uniformity, which could also be a demonstration of a decline in the need for differentiated integration,[9] this article argues that repayment should see a shift away from uniformity and towards differentiated integration, if the EU is to avoid questions of credibility and constitutional embarrassment.

After first setting out the legal construction of the NextGenerationEU borrowing, the article will evaluate the proposals for new own resources to repay the debt as well as the legal instruments which do, and do not, provide for their successful introduction. It will also do so by considering both the timing and revenue raising capacity of each proposal. What will become apparent in relation to the environmental proposals, is that the EU has selected two new own resources linked to the Green Deal and "Fit for 55"[10] policies which means that the Emmissions Trading Scheme (ETS) and Carbon Border Adjustment Mechanism (CBAM)

[4] P. Leino-Sandberg and M. Ruffert, 'Next Generation EU And Its Constitutional Ramifications: A Critical Assessment', (2022) 59 Common Market Law Review 433–472.
[5] See N. de Costa Cabral, 'Borrowing in the European Union: from a pure national model to the antechamber of a European fiscal federal solution', 43:8 (2021) Journal of European Integration 939-954 and C. Fasone and P. Lindseth, 'Europe's Fractured Metabolic Constitution: From the Eurozone Crisis to the Coronavirus Response', Luiss School of Government Working Paper Series SOG-WP61/2020, October 2020 and Hofmann, Pantazatou and Zaccaroni (Eds.), The Metamorphosis of the European Economic Constitution (Edward Elgar, 2019).
[6] Own Resources Decision, Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU, [2020] OJ L424/2, Art.9(4) and (5).
[7] Editorial Comments, 'Neither Representation nor Taxation? Or, "Europe's Moment – Part I" 5:2 (2022) European Papers 703-706, p706.
[8] P. Leino-Sandberg and M. Ruffert, (fn4) p458.
[9] B. de Witte (fn3).
[10] Council "Fit for 55 package proposals (CBAM, ETD and SCF) - Progress report" 13850/21 of 26 November 2021 para.12

should be ever diminishing resources unless the EU fails to meet its climate targets. In essence, the EU has made the success of one initiative contingent on the failure of another. This is not the only example of where the EU has established, in the construction of NextGenerationEU in relation to repayment, competing and often contradictory priorities and objectives the success of which are contingent on the failure of others. In actuality, the most significant of all is that in utilising a novel legal construction to enable borrowing and create an arguably constitutional moment in EU integration, it is likely to be differentiated integration that is required to enable new own resources to repay the debt.

In seeking to answer the question, will the NextGenerationEU debt be repaid by EU own resources or Member State taxpayers? it will become apparent that there will be a significant potential of a dependency on taxation proposals, especially corporate taxation proposals, to raise the revenue required to repay the debt, if the EU is not to compromise or abandon its environmental targets. The EU has tried for many years to implement EU wide corporate taxes and a financial transaction tax (FTT), but has so far been unsuccessful, even though the FTT has had the objective of being introduced as an own resource to reduce the reliance on Member State budgets as its selling point since its outset in 2011. This has been attributed to the requirement of unanimity voting in the Council for measures relating to taxation. The requirement of unanimity has been identified – or blamed – to such an extent that there have been proposals on its avoidance.[11] However, the unanimity requirement belies the EU's lack of competence in the area of tax. The EU has little competence in indirect taxation[12] and even less in direct taxation. Unanimous voting in relation to the former demonstrates the prominent role Member State sovereignty still performs. The principle of conferral[13] means that the EU has to act within its competence and, like it or loath it, competence is limited when it comes to taxation. Attempts to avoid unanimity are really therefore manifestations of attempts to avoid the lack of competence. A way to address this is for selective action amongst those Memner States which are willing to adopt proposals and / or setting minimum provisions on financial and corporate tax bases and rates. Consequently, this article will demonstrate that without considerable recourse to the legal mechanisms of differentiated integration - be that enhanced cooperation[14] or minimum harmonisation to obviate the issues of competence and unanimous voting associated with taxation – the EU stands little chance of repaying the debt through own resources and recourse to the budgets of Member States, and their taxpayers, will be unavoidable.

Borrowing Under NextGenerationEU

The EU's ability to borrow the money to finance NextGenerationEU has been facilitated by being undertaken as part of the EU's Budget. The budget usually only comprises the seven year framework, known as the Multiannual Financial Framework (MFF),[15] which regulates spending of the usual sources of revenue, or traditional sources of the EU's own resources.[16] NextGenerationEU is novel in many ways, not least its legal construction. In essence, the EU's

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[11] Communication COM (2019) 8, 'Towards a more democratic and efficient decision making in EU tax policy', 15 January 2019.
[12] See Articles 113 and 115 TFEU.
[13] Article 3 (6) TEU.
[14] M. Kendrick, "Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?" in P. Birkinshaw and A. Biondi *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (London: Kluwer Law International, 2016) pp165-182.
[15] Regulation 2020/2093 MFF Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 OJ LI 433/11
[16] These sources are detailed in the section below.

budget backs the borrowing as there are now two elements to the budget: the MFF and NextGenerationEU.

The legal basis of the MFF is art.312 TFEU, which provides the EU with the legal authority to adopt a Regulation which, in accordance with art.312 (1), "shall ensure that Union expenditure develops in an orderly manner and within the limits of its own resources"[17]. The legal basis of the EU's own resources is art.311 TFEU and it is the interesting constructive interpretation of the provisions of that Article which purportedly[18] provides the legal authority for NextGenerationEU. It is the reading of the first sentence of art.311, which states that "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies" in conjunction with the second sentence of the third paragraph, which provides, "In this context it may establish new categories of own resources or abolish an existing category", that is the essential legal authorisation for NextGenerationEU to be linked to the budget and the EU's own resources. The legal construction of the facility is based on a reading of art.311 TFEU, which authorises new categories of own resources which further the EU's objectives. NextGenerationEU is therefore affixed to the budget through its novel legal construction which means that both the disbursement of the funds[19] occurs through the budget as does repayment, the budget is the channel, or conduit, for both in relation to NextGenerationEU.

The EU's Own Resources: The Legal Framework

The usual long term budgetary provisions in the EU will see agreement reached in the MFF with an accompanying Decision on own resources and an accompanying Interinstitutional Agreement (IIA). Ordinarily, these legal instruments combine to provide for sources of traditional revenue which comprise the EU's own resources and generally the regulation of typical expenditure and budgetary management. Although novel, NextGenerationEU still sees the utilisation of these customary legal instruments. The novel element of the design of NextGenerationEU however includes novel, or exceptional, legal provisions contained in both the Own Resources Decision and the accompanying IIA, facilitating both the borrowing and the repayment of the debt.

The novel legal construction of NextGenerationEU has several interesting consequences for the EU's financial arrangements as well as for the Member States' financial liabilities. Borrowing under NextGenerationEU is enabled by the EU raising capital from the financial markets, rather than from the Member States directly. In addition, the borrowed funds are not to be immediately lent to the Member States, but are instead considered a source of finance for the EU's budget to then be disbursed to Member States in the form of either loans or grants.[20]

[17] Article 312 (1) TFEU.
[18] Council Legal Services Opinion, especially references to "borrowing for spending", 9062/20, 24 June 2020 https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf accessed 24 November 2022.
[19] Discussion of the disbursement and allocation of the borrowed funds and the legal basis of NextGenerationEU Council Regulation (EU) 2020/2094 (fn2), being art.122 TFEU, is outside of the scope of this article, which is focused on repaying the debt. For more information on art.122 see B. de Witte (fn3) and B. de Witte, 'Guest Editorial: EU Emergency Law and its Impact on the EU Legal Order', (2022) 59 Common Market Law Review 3-18 and the published Council Legal Services Opinion, especially references to "borrowing for spending", 9062/20, 24 June 2020 https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf accessed 24 November 2022.
[20] Own Resources Decision 2020/2053, (fn6) Preamble para 14 and art.5 (1) (b) See amongst other legislative instruments the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on

It should first be stated that some of the important legal instruments contain typographical errors, stating that the level of the borrowing is in millions rather than billions,[21] a remarkable mistake on the part of the legal drafters, which will be left in where quotations are used in this article to illustrate this, but otherwise corrected in the text discussion. Whilst some readers may think that the legal authority of the EU to borrow in billions of Euros is compromised by these errors, and that in actual fact the EU only has legal authority to borrow in millions of Euros, any assessment by the CJEU would likely identify these as unfortunate errors which would not negate and void the legal basis of the actual level of borrowing otherwise so publically pronounced.[22]

There will be EUR 360 000 billion in 2018 prices of the funds borrowed, which may be used for providing loans[23] and EUR 390 000 billion in 2018 prices of the funds borrowed, which may be used for grants, or expenditure.[24] Both the loans and the grants are being disbursed through the budget. The current legal construction for NextGenerationEU, as explained above, is anchored to the Treaties and the implementation of its provisions into EU law have been legally achieved by the Own Resources Decision 2020/2053 (ORD),[25] under the legal basis of art.311 TFEU. This is because Decision 2020/2053 provides the legal empowerment for the European Commission to borrow the total EURO 750 billion in 2018 prices from the financial markets to finance the NextGenerationEU element of the EU's budget[26]. It is the provisions on the borrowing, the exceptional nature of the reasons justifying the borrowing, and the, albeit brief, references to new own resources, which are exceptional in the ORD 2020/2053. In relation to the IIA of 16 December 2020, unlike the IIA of 2013[27] it essentially replaced, there is an additional second Annex providing for both principles and a roadmap intending to set out a time frame for the generation of new own resources listed within the Annex. There are elements of the provisions of these documents which are so exceptional they require closer consideration. The smooth running, or lack of, in relation to these provisions means that there are already amendments proposed to the Own Resources Decision 2020/2053. It is to the exceptional provisions of the ORD, the IIA and the proposed amended instruments to which the next three sections of this article respectively turn.

The Own Resources Decision

The Own Resources Decision 2020/2053 of 14 December 2020, contains details of the EU's usual own resources, including the relatively new addition on plastics wastage. The usual own resources of the EU, as stipulated in art.2 of the Own Resources Decision 2020/2053, are:

sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources [2020] OJ L433 I/28 22.12.2020 and Own Resources Decision, 2020/2053 (fn6).

[21] Extraordinarily this includes the Own Resources Decision, 2020/2053 (fn6), Preamble para 14 and art.5 (1) (b) and the second Annex to the Interinstitutional Agreement (fn20).

[22] The examples of EU statements as to the true value of the borrowing in billions are far too numeraous to list. Suffice it to direct the reader to an example: European Commission, 'Recovery Plan for Europe', https://ec.europa.eu/info/strategy/recovery-plan-europe_en

[23] Own Resources Decision, 2020/2053 (fn6) art.5 (1) (b)

[24] Own Resources Decision, 2020/2053 (fn6) art.5 (1) (b)

[25] Own Resources Decision, 2020/2053 (fn6).

[26] Own Resources Decision, 2020/2053 (fn6) art.5.

[27] Interinstitutional Agreement of 2 December 2013 between the European Parliament, the Council and the Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management [2013] OJ C 373/01.

customs duties (art.2(1)(a) ORD);[28] Value Added Tax (art.2(1)(b) ORD);[29] a charge on the basis of the weight of plastic packaging wastage (art.2(1)(c) ORD);[30] and contributions from Member States based on their Gross National Income, or GNI (art.2(1) (d) ORD)[31]. It is hoped by the EU, and the Commission especially,[32] that the impetus to repay the NextGenerationEU debt will provide a sufficient incentive to enact legislative instruments needed to add to this list through the creation of new own resources. To facilitate this, the legal authority to do so, as stipulated in art.311 TFEU,[33] is repeated in paragraph 2 of the ORD in all but name.

There is surprisingly little reference to the potential sources of these new own resources in the ORD. Plastics wastage is mentioned at paragraph seven and effectively adopted as a category of own resource in art.2(1)(c). Otherwise, paragraph 8 of the Own Resources Decision 2020/2053 is the only mention of the potential categories of new own resources explicitly in the Decision. Paragraph 8 provides:

> "The European Council of 17 to 21 July 2020 noted that, *as a basis* for additional own resources, the Commission will put forward in the first semester of 2021 proposals on a carbon border adjustment mechanism and on a digital levy *with a view to their introduction at the latest by 1 January 2023*. The European Council invited the Commission to put forward a revised proposal on the EU Emissions Trading System, possibly extending it to the aviation and maritime sectors. It concluded that the Union will, in the course of the multiannual financial framework for the period 2021-2027 ('MFF 2021-2027'), *work towards the introduction of other own resources, which may include a Financial Transaction Tax*" (emphasis added).[34]

Here we start to see mention of the categories which are included in the 'roadmap' contained in Annex II of the IIA, but tentatively and carefully worded so as not to promise too much. The description of proposals for a digital levy and a carbon border adjustment mechanism being tentatively and indicatively stated "as a basis" and "with a view to their introduction at the latest by 1 January 2023" has proved a wise approach, with the digital levy already suspended, possibly permanently,[35] as the next section of this article on the current state of play in implementing the roadmap will discuss.

The other surprising entry in this paragraph comes with the mention of "other own resources" in the form of a potential Financial Transaction Tax. This is again tentatively stated with use of the word "may" rather than an any more categorical or firm promise. This is likely because

[28] Detailed in art.2 (1) (a) of Own Resources Decision, 2020/2053 (fn6) as "traditional own resources consisting of levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries, customs duties on products under the expired Treaty establishing the European Coal and Steel Community, as well as contributions and other duties provided for within the framework of the common organisation of the markets in sugar".

[29] Own Resources Decision, 2020/2053 (fn6) art.2 (1) (b).

[30] Detailed in art.2(1)(c) of Own Resources Decision, 2020/2053 (fn6) as "the application of a uniform call rate to the weight of plastic packaging waste generated in each Member State that is not recycled. The uniform call rate shall be EUR 0,80 per kilogram".

[31] Own Resources Decision, 2020/2053 (fn6) art.2(1)(d).

[32] European Commission, 'The next generation of EU own resources' https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2021-2027/revenue/potential-new-sources-revenue_en See also para.6 of the Own Resources Decision, 2020/2053 (fn6).

[33] See Council Legal Services Opinion (fn19).

[34] Own Resources Decision, 2020/2053 (fn6), para.8.

[35] At the time of writing in the latter half of 2022.

there have been proposals around for a Financial Transaction Tax in the EU since 2011[36] but implementing legislation has still not been adopted at the EU level, despite a review and amendment of these proposals in 2013 and the authorisation for the use of enhanced cooperation.[37] Whilst the difficulties in adopting a Financial Transaction Tax as an own resource will be discussed later in this article, it suffices for present purposes to highlight the fact that with the importance of the ORD in the legal construction of NextGenerationEU, the hesitant inclusion of so few potential sources in this instrument reflects the possible pessimistic view the EU has of its own ability to introduce new own resources sufficient to pay back the enormity of the debt. The contrast with the emphasis on the level of borrowing and the speed it achieved the same is stark.[38] Perhaps this is because there was a desire to leave the Commission some leeway and room for manoeuvre on putting forward proposals, and proposals which will be acceptable to Member States, or perhaps this is because the EU's reaction to the Covid-19 pandemic was to borrow first and consider the feasibility of repayment later.

There is an inescapable conclusion that in a legal instrument this important to the overall legal construction of NextGenerationEU there is a lack of focus, or acknowledgement, of the potential difficulties which can arise here in repaying the debt. The exceptional nature of the borrowing is mentioned numerous times in the Decision,[39] as paragraph 14 of the ORD illustrates, and the deadline for repayment of 31 December 2058 at the latest is repeated also, although not as frequently[40]. Whilst the language of this paragraph is indicative of the overall necessity of borrowing and the caution that it is exceptional and temporary, there is an emphasis on the borrowing and not on the repayment. We see some concentration on repayment in two subsequent paragraphs, being paragraphs 16 and 17 of the ORD, but this is more of a focus on the *need* for repayment, and indeed timely repayment, rather than *how* repayment will be possible, and at this scale, and by the deadline. Paragraph 16 emphasises that "the essential features of its [NextGenerationEU] repayment"[41] need to be certain, yet they are sparsely discussed, and when they are it is with hesitancy, rather than the level of certainty the ORD correctly identifies is necessary.

This makes paragraph 19 of the ORD all the more interesting, especially when read in conjunction with paragraph 23 of the ORD. Paragraph 19 states that the repayment of the grants should be funded by the Union budget and that the repayment of the loans should be funded by the Member States which have been the recipients of such loans. It goes on to state that, "The necessary resources need to be allocated and made available to the Union for it to be able to cover all of its financial obligations and contingent liabilities resulting from the exceptional and temporary empowerment to borrow funds in any given year and under any circumstances, in compliance with Article 310(4) and Article 323 of the Treaty on the Functioning of the European Union (TFEU)".[42] Art.310(4) TFEU provides that, "With a view to maintaining budgetary discipline, the Union shall not adopt any act which is likely to have appreciable implications for the budget without providing an assurance that the expenditure arising from

[36] Commission 'Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC' COM(2011) 594.
[37] Commission 'Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax' COM(2013) 71 final and Art.20 TEU and Art.326 to 334 TFEU respectively.
[38] For example, European Union, 'NextGenerationEU, Make it Real' https://europa.eu/next-generation-eu/index_en
[39] A total of 10 times, in paras 14, 15, 16, 17, 19, 20 and 22 of the Preamble and art.5.
[40] Just four times compared with 10, at Para 17 and 20 as well as art.5 and art.6.
[41] Own Resources Decision, 2020/2053 (fn6) para.16.
[42] Own Resources Decision, 2020/2053 (fn6) para.19.

such an act is capable of being financed within the limit of the Union's own resources and in compliance with the multiannual financial framework referred to in Article 312" and art.323 TFEU provides that "The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties". At this stage it seems straightforward that the ORD would include some reference to essentially how the EU envisions money borrowed from third parties on the financial market to be repaid because it would otherwise be in breach of its obligations under the treaty to fulfil its legal obligations and maintain budgetary discipline. Reading this provision in conjunction with paragraph 23 and indeed art.9 of the ORD, demonstrates the need for the legal construction of NextGenerationEU to ultimately make the Member States liable, and for all of the monies not just the repayment of the tranche disbursed as loans. As paragraph 23 makes clear:

> "In order to ensure that the Union is always able to fulfil its legal obligations in respect of third parties in a timely manner, specific rules should be provided by this Decision authorising the Commission, during the period of the temporary increase in the own resources ceilings, to call on Member States to provisionally make available the relevant cash resources … However, if a Member State fails, in full or in part, to honour a call on time, or if it notifies the Commission that it will not be able to honour a call, the Commission should nevertheless be authorised on a provisional basis to make additional calls on other Member States on a pro rata basis".[43]

Importantly, art.9 of the ORD reinforces this obligation at art.9(4) and (5).[44] Whilst the distinction in the terminology between "loans" on the one hand and "grants" on the other implies that it is only the former which will need to be repaid by the Member States, it is important to note the actual extent of Member States' financial liabilities according to the design of NextGenerationEU. The default position is laid out in art.9(4) of the ORD 2020/2053,[45] effectively placing the ultimate liability of repaying all of the borrowed monies, the total sum of NextGenerationEU being EURO 750 billion in 2018 prices, on the Member States. As art.9(4) states, "the Member States, as the Commission's last resort, shall make the resources necessary for that purpose available to the Commission" and in relation to which Member States would pay according to art.9(5) providing that the liability will be apportioned "('pro rata') to the estimated budget revenue of each of them". However, art.9(5) further provides that "If a Member State fails, in full or in part, to honour a call on time, or if it notifies the Commission that it will not be able to honour a call, in order to cover for the part corresponding to the Member State concerned, the Commission shall provisionally have the right to make additional calls on the other Member States".[46] It appears reasonable to suggest that it will be those Member States most able to pay that would ultimately shoulder the burden for repaying the entirety of the debt, all EURO 750 billion of it (in 2018 and steadily increasing prices).[47] Notably art.9(5) links the ability to pay to the Member States' "budget revenues",[48] which suggests it is the usual percentage of Gross National Income (GNI) the Member States pay into the budget as a usual source of EU revenue and not a proportion commensurate with the amount of the borrowed funds they would have received as a disbursement under

[43] Own Resources Decision, 2020/2053 (fn6) para.23.
[44] Own Resources Decision, 2020/2053 (fn6) art.9(4) and (5) respectively.
[45] Own Resources Decision, 2020/2053 (fn6)
[46] Own Resources Decision, 2020/2053 (fn6) art.9(4) and (5).
[47] At the time of writing in the latter half of 2022, the interest rates and borrowing terms mean that this is increasing.
[48] Own Resources Decision, 2020/2053 (fn6) art.9(5) para.2.

NextGenerationEU. It is therefore quite conceivable that the Member States which have received a large proportion of the NextGenerationEU monies, but do not necessarily pay the most into the EU's budget because they do not have the highest GNI, will have their liability ultimately underwritten by the wealthier Member States which do.

There are two main points to deduce from reading the provisions of the ORD preamble, namely paragraphs 19 and 23, in conjunction with art.9(4) and (5) of the ORD and in line with the treaty provisions in art.310(4) and art.323 TFEU. The first is that if it transpires that the EU can't repay the debt either through a lack of own resources, and consequently a lack of new own resources to generate fresh repayment income, or through the inability or unwillingness of Member States to answer a call from the Commission, the EU would be in breach not only of its obligations to repay the funds to third parties in the financial markets but also of its obligations under the treaties, specifically art.310(4) and art.323 TFEU. The second observation, which is important for the success and credibility of the legal construction of NextGenerationEU, is that it is a test of the legal mechanism itself, as to whether the EU can get itself into debt fast but in fact whether it can get itself out of debt just as fast. This is important because if the EU ever hopes to replicate this form of borrowing on the financial markets for any other purpose or to respond to other or future crises it would have to ensure that it was not likely to be in breach of its own treaty obligations.

The legal obligation to repay is included in art.5(2). This provision requires repayment of the debt and that repayment must occur by the deadline of the end of 2058. Otherwise, not only would the EU be in breach of its obligations but it would also fail to comply with its own statements on financial management, especially in the important context of the budget, as reference to art.314 TFEU is testament. It is therefore clear that there is a significant risk which the EU has undertaken by borrowing funds of this magnitude and in legally doing so through the budget. It is not an outrageous statement to say that failure to repay the debt could have the consequence of seriously undermining the foundations of the EU's budget by undermining its credibility. The importance of the EU's ability to repay these monies cannot be overstated.

However, art.9 is the default position and it is therefore hoped by the EU, and by certain Member States, that this should only ever be a last resort to facilitate the legal construction of the borrowing under NextGenerationEU, and never become a reality. To bring this into sharp relief, there is a time limit by which the NextGenerationEU borrowing has to be repaid. The ORD 2020/2053[49] states on multiple occasions[50] that the 31 December 2058 is "the latest"[51] date by which the funds should be repaid. There would therefore be a hope of new revenue streams, which will be allocated to repaying the debt to avoid recourse to the default position of requesting contributions from Member States. This novel, indeed revolutionary, legal arrangement of effectively borrowing from the financial markets to finance the EU's budget, at least to fund the exceptional NextGenerationEU recovery plan, may consequently create a revolutionary overhaul in the sources of revenue streams that the EU calls its own resources.[52] The debt will be honoured by the EU's own resources, or failing that by the Member States, and their taxpayers, themselves.

[49] Own Resources Decision, 2020/2053 (fn6).
[50] Including Own Resources Decision, 2020/2053 (fn6) paras.17, 20, art.5(2) and art.6.
[51] Including Own Resources Decision, 2020/2053 (fn6) paras.17, 20, art.5(2) and art.6.
[52] R. Crowe, 'The EU Recovery Plan: New Dynamics in the Financing of the EU Budget', in G. Barrett, J. Rageade, D. Wallis, and H. Weil (eds), *The Future of Legal Europe: Will We Trust in It? Liber Amicorum in Honour of Wolfgang Heusel* (Springer, 2021).

The EU's envisioned 'roadmap' to repayment and the proposed new own resources which could potentially achieve this are included in the IIA of December 2020. The details of the IIA are considered in the next section and thereafter the proposals for new own resources will be evaluated. The discussion of the potential proposals for new own resources will not however occur before the need to address the current suggested amendments to the Own Resources Decision 2020/2053 which have already been proposed at the time of writing in the latter half of 2022. The need for amendment to be made to this instrument already is demonstrable of both the progress which has been made towards a plan to repay the debt and the progress which importantly still needs to be made.

The Interinstitutional Agreement

The Interinstitutional Agreement of 16 December 2020[53] is an agreement between the European Parliament, the Council and the European Commission, which aims broadly to provide for the interrelationship between these institutions of the EU when it comes to the general management of the Budget. It is customary to have an IIA as part of the package of legal instruments which comprise the Union's budget and indeed these provisions are typically included. For instance, the IIA of 2 December 2013,[54] which was replaced by the 16 December 2020 IIA, contained such and similar provisions. Whilst there is always an IIA forming part of the budgetary legislative package, the IIA of 16 December 2020 is unusual in one crucial respect, it includes an additional second Annex providing for interinstitutional cooperation on a roadmap towards the introduction of new own resources. The crucial nature of these provisions is demonstrable when one considers the legal status of the Annex to the IIA.

The legal basis of the IIA is art.295 TFEU, which states, "The European Parliament, the Council and the European Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude interinstitutional agreements which *may* be of a binding nature"[55] (emphasis added). The binding nature of the IIA consequently depends on the wishes of the institutions.[56] Those wishes are expressed in paragraph 2 of the IIA of 16 December 2020, which states: "This Agreement is binding on the Institutions for as long as it is in force. The Annexes to this Agreement form an integral part thereof."[57] It is therefore clear that the provisions of the IIA, including the Annex regarding cooperation on a roadmap towards the introduction of new own resources, are binding on the institutions to which it applies, namely the European Parliament, the Council and the European Commission. The status of this agreement can only be subordinate to primary and secondary legislation, and therefore it cannot shift the balance of powers of the institutions involved, which means that the IIA cannot overrule the competences of the institutions in setting out and pursuing their respective goals relating to repaying the debt.[58] However, the IIA can bind the institutions within their competences and powers, for instance, to work to ensure that the introduction of new own resources contributes to the Union's priorities[59] or to take a certain action within a certain timeline in order to contribute to their introduction.[60] This highlights the importance of the IIA, especially for the Commission,

[53] Interinstitutional Agreement (fn20).
[54] Interinstitutional Agreement of 2 December 2013 (fn33).
[55] Art.295 TFEU.
[56] B. de Witte, (fn3) p666.
[57] Interinstitutional Agreement (fn20) preamble, paragraph 2.
[58] See also Interinstitutional Agreement (fn20), preamble, paragraph 3.
[59] Interinstitutional Agreement (fn20), Annex II, Part A, para.2(c).
[60] Interinstitutional Agreement (fn20) Annex II, Part B.

because of what it apparently binds the institutions to pursue in terms of introducing proposals for new own resources to repay the debt, and to ensure that those proposals are made in a timely manner, within the timeframe set out in the Roadmap contained in Annex II to the IIA.

The extent of the obligations to which the institutions have seemingly bound themselves in the provisions of the second Annex, including the proposals for own resources, and the roadmap for achieving implementation, will be discussed in some detail.

In light of the binding legal nature of the IIA, it is paragraph 1 of the introductory preamble which is the most pertinent provision in the main body of the IIA to consider for the purposes of this discussion. This provision sets out clearly what the purpose of the IIA is, in relation to repaying the NextGenerationEU debt, "… to implement a cooperation and establish a roadmap towards the introduction, over the period of the multiannual financial framework 2021-2027 ("MFF 2021-2027"), of new own resources that are *sufficient to cover the repayment* of the [NextGenerationEU] European Union Recovery Instrument established under Council Regulation (EU) 2020/2094" (emphasis added).[61] The question therefore arises as to whether the proposals for new own resources really are sufficient to repay the debt. The answer to this question necessitates a review of the proposed new own resources in the second Annex to the IIA.

Annex II to the IIA lays down the directional markers in its Preamble which predicate the principles for implementation that follow in Part A of Annex II to the IIA. Whilst some of the Preamble repeats the ORD 2020/2053, such as paragraphs (C) and (D) that refer to the extent of the borrowing and the repayment deadline on 31 December 2058 reiterating Article 5 of the ORD, there is an expected shift in focus from borrowing to repayment.[62]

The fact that it is the expenditure, or grants, disbursement tranche of the borrowing that the roadmap towards new own resources is aimed at is apparent from paragraphs (E) and (F), which also make clear that it is important to avoid recourse to Member States by increasing their contribution as a percentage of GNI, as paragraph (E) states, "It is also desirable to mitigate the increases in the GNI-based own resource for the Member States."[63] This is a rather weakly phrased acknowledgment however. A stronger indication of the underlying intent, or incentive, is evident from paragraph (F), where it states, "Therefore, and *in order to enhance the credibility* and sustainability of the European Union Recovery Instrument repayment plan, the Institutions will work towards introducing sufficient new own resources with a view to covering an amount corresponding to the expected expenditure related to the repayment"[64] (emphasis added). This is an important admission from the EU institutions, being the European Parliament, the Council and the European Commission, which are parties to the IIA, that the ability of the Union to raise funds successfully through new own resources sufficient to repay the grant expenditure incurred under the NextGenerationEU initiative can impact upon the credibility of NextGenerationEU itself, and presumably also the ability of the Union at some point in the future to replicate the borrowing for other purposes. Recourse to the default provisions permitting calls to be made on the Member States to repay the debt of monies supposedly given to them as a grant would therefore potentially equate to an admission that the repayment plan contained in the IIA, and in general the legal construction of

[61] Interinstitutional Agreement (fn20), preamble, paragraph 1 referring to the NextGenerationEU Council Regulation, Council Regulation (EU) 2020/2094 (fn2).
[62] Interinstitutional Agreement (fn20) Annex II, preamble, paragraph (A) and (D).
[63] Interinstitutional Agreement (fn20), Annex II, preamble, paragraph (E).
[64] Interinstitutional Agreement (fn20) Annex II, preamble, paragraph (F).

NextGenerationEU, is not sustainable and consequently not credible, with the inevitable implications for EU integration and uniformity which are associated with NextGenerationEU.

Contrastingly, the success of the proposed new own resources model, to repay the debt in the form of Union expenditure, is anticipated to impact positively in the development of greater resourcing of the Union's budget with a corresponding reduction in the need for Member States GNI contributions, as paragraph (G) illustrates, "The Institutions acknowledge that the introduction of a basket of new own resources should support the adequate financing of Union expenditure in the MFF, while reducing the share of national GNI-based contributions in the financing of the Union's annual budget. The diversification of revenue sources in turn could facilitate the attainment of a better focus of expenditure at Union level on priority areas and on common public goods with high efficiency gains compared to national spending."[65]

It is here in paragraph (G) that we see the initial mention of the "basket" of proposed new own resources which have a dual purpose, being based broadly on environmental improvements and tax reform, "support Union priorities such as the European Green Deal and a Europe fit for the Digital Age, and should contribute to fair taxation and the strengthening of the fight against tax fraud and tax evasion."[66] The frankness of what the EU institutions would ideally like to achieve is apparent in paragraph (I), "The Institutions agree that new own resources should preferably be created in a way that allows generating "fresh money"",[67] clearly to repay the debt but also to positively, so the intention seems, generate new sources of own revenue to perhaps permanently sustain the Union's spending and its current and indeed future objectives. The boldness of the ambition to provide sustainable revenue is matched by the boldness of the NextGenerationEU initiative but it starts to become clear here that the actual intention could be more significant and far reaching, being the intention to create not just new but also continual revenue. Reading these paragraphs of the preamble to the second Annex of the IIA together, we see the underlying premise of these proposals could be as bold as to find sources of revenue paid directly into the Union's budget slowly phasing out Member State contributions altogether. This is important when we reflect on the future of the EU and where the proposed sources of this revenue come from, especially in relation to taxation, a traditional area of State sovereignty. As the introduction to this article discussed, the success, or not, of NextGenerationEU could hang on the ability to raise new own resources and this could have significant ramifications for the development of EU integration. In essence, if the EU tries and fails to fund itself and instead has to go 'cap in hand' to the Member States to repay money it had purportedly given to them as grants, this casts significant doubt on the future of the EU to finance the expansion of its competences and fulfilment of its objectives.

It is noteworthy that even at this point in the evaluation of the legal construction of NextGenerationEU there has only featured brief reference to what the proposed sources of new own resources actually are, let alone the potential they have to raise funds, and the large amount of funds required, as well as within the timeframe. The principles guiding the proposals in Part A of Annex II of the IIA and the Roadmap in Part B of Annex II of the IIA hope to provide some information through listing the contents of the basket and corresponding timeframes. It is to these provisions and their current progress to which this article now turns.

[65] Interinstitutional Agreement (fn20) Annex II, preamble, paragraph (G).
[66] Interinstitutional Agreement (fn20) Annex II, preamble, paragraph (H).
[67] Interinstitutional Agreement (fn20)Annex II, preamble, paragraph (I).

Whilst the "Principles for the implementation" of the Roadmap, contained in Part A of Annex II to the IIA,[68] and which are intended to be used to guide the introduction of a basket of new own resources, repeat and reiterate much of what has been stated in the Preamble, paragraph 1 of the principles is so noteworthy, because it appears to create two categories of new own resources contained within the IIA 'basket' itself. When paragraph 1 provides, "The Commission will make the necessary legislative proposals for new own resources and for potential other new own resources as referred to in point 10 … Those legislative proposals will be accompanied by the relevant own resources implementing legislation"[69] it was making a distinction between what were, at the time the IIA came into force, the financial and corporate tax proposals for new own resources, and the other potential categories of new own resources contained in the basket. Point 10 of the Roadmap states, "The Commission will, based on impact assessments, propose additional new own resources, which could include a Financial Transaction Tax and a financial contribution linked to the corporate sector or a new common corporate tax base" therefore the basket appears to contain both new and *additional* new own resources.

The importance of the potential dual categories of new and additional new own resources becomes apparent when considering the contents of the Roadmap contained in Part B of the second Annex to the IIA, as well as the developments leading to the proposed amendments to the ORD 2020/2053, discussed in this article in the section immediately below. The Roadmap is split into three steps time limited by year. The first step is '2021', the second step is '2022 and 2023' and the third step is '2024 -2026.'[70] Of the four proposals for the new own resources category, the Roadmap describes, at Paragraph 4, the introduction of plastic packaging waste "As a first step"[71] under "First step: 2021".[72] This own resource comprises the "share of revenues from national contributions calculated on the weight of non-recycled plastic packaging waste".[73] This category of new own resource is already included in the Own Resources Decision of 2020/2053.[74]

Whilst this "first step" of the first step 2021 has been introduced, that is more than can be said for the remaining sources of new own resources listed under the remainder of that step and the second step, which are: the introduction of a Carbon Border Adjustment Mechanism (CBAM); amendments to the Emissions Trading Scheme (ETS); and a digital levy, ambitiously envisioned to be introduced by 1 January 2023.[75]

The details of the CBAM and the ETS are discussed in the section below, which addresses the viability of each of the new own resources proposed to repay the debt and in the stipulated timescale to which the EU has legally bound itself. Suffice it for present purposes to briefly address the progress of the two environmental proposals in the context of the Roadmap before turning to the current status of the digital levy.

[68] Interinstitutional Agreement (fn20) Annex II, Part A, Principles for the implementation.
[69] Interinstitutional Agreement (fn20) Annex II, Part A, Principles for the implementation, paragraph 1 referring to point 10 of the Roadmap contained in Part B.
[70] Interinstitutional Agreement (fn20) Annex II, Part B, Roadmap.
[71] Interinstitutional Agreement (fn20) Annex II, Part A, Principles for the implementation, paragraph 1 referring to point 10 of the Roadmap contained in Part B, paragraph 4.
[72] Interinstitutional Agreement (fn20) Annex II, Part A, Principles for the implementation, paragraph 1 referring to point 10 of the Roadmap contained in Part B.
[73] Interinstitutional Agreement (fn20) Annex II, Part A, Principles for the implementation, paragraph 1 referring to point 10 of the Roadmap contained in Part B, paragraph 4.
[74] art.2(1)(c) of Own Resources Decision, 2020/2053 (fn6).
[75] Interinstitutional Agreement (fn20) Annex II, Part B, Roadmap, paras. 5-9.

As paragraph 7 of Part B of the Roadmap intimates, the CBAM and the ETS amendments are linked because of their joint environmental credentials and their connections to the Union's "Fit for 55"[76] climate policy package.[77] There are therefore overlapping discussions which need to take place within and between the Institutions before a Regulation can be enacted for a new Carbon Border Adjustment Mechanism and for revisions to the ETS Directive to come into force. The current status of the CBAM illustrates this overlap, as the Council has agreed a General Approach[78] on 15 March 2022 but "still has to make sufficient progress on a number of issues which are closely related to CBAM, but are not part of the draft legal text of the CBAM regulation"[79] and these are likely to impact upon the progress of the ETS, and vice versa. As the European Parliament will need to agree its position and then negotiate with the Council on both the text of the CBAM and related issues, the introduction by 1 January 2023 looks very ambitious. In actual fact, the ambition of this time scale was demonstrated in the recent European Parliament debates.[80] Whilst the ETS is in place,[81] it is not yet fully in the form to which it needs to be revised in order to fulfil the EU's environmental ambitions nor act in concert with the CBAM to produce the necessary own resources revenue. In essence, the 1 January 2021 to 1 January 2023 timeframe envisaged in the Roadmap looks ambitious, although at the time of writing in the latter half of 2022 it is not impossible. This is more than can be said for the digital levy.

The resort to a digital tax has been on the EU's tax harmonisation agenda for some time[82] as it has struggled to implement its other tax, especially corporate tax, proposals.[83] The digital levy had been considered by the EU to be a second choice interim option to corporate tax harmonisation,[84] that is until the change in US Administartion and the progress on corporate taxation in the context of the digitalisation of the economy, which has been seen in the OECD.[85]

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76 Council "Fit for 55 package proposals (CBAM, ETD and SCF) - Progress report" 13850/21 of 26 November 2021 para.12

77 Ibid

78 Council Press Release 15 March 2022 https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/carbon-border-adjustment-mechanism-cbam-council-agrees-its-negotiating-mandate/ accessed 4 May 2022 and Council 7226/22 Draft regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism - General approach.

79 Council Press Release (fn93)

80 Financial Times, EU green agenda suffers blow after MEPs reject part of climate bill
Disagreements on carbon tax call into question Brussels' environmental ambitions, 8 June 2022 and there is the possibility of monies from the ETS ging towards other initiatives, such as REPowerEU, instead of repaying the debt, European Commission Press Release, 'REPowerEU: A plan to rapidly reduce dependence on Russian fossil fuels and fast forward the green transition', 18 May 2022
https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3131

81 Directive 2003/87/EC of the European Parliament and of the Council of 25 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC as amended OJ L 275/32

82 See M. Kendrick, 'The Future of Differentiated Integration: The Tax Microcosm', (2020) 7:2 Journal of International and Comparative Law 371 – 387, especially p385-6 and M. Kendrick, 'The EU Transatlantic agenda on 'fair' corporate taxation: Is a digital services tax a workable 'Plan B'? EU LAW Live, weekend edition No 52, https://eulawlive.com/weekend-edition/weekend-edition-no52/

83 M. Kendrick, (fn82) and M. Kendrick, 'The Legal (Im)possibilities of the EU Implementing the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting' GTCJ 17-1 (2022) 19-24

84 M. Kendrick, (fn82).

85 OECD/G20 Base Erosion and Profit Shifting Project, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy' 1 July 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf accessed 30 September 2021 and OECD/G20 Base Erosion and Profit Shifting Project, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the

During the course of the negotiations on the draft OECD Inclusive Framework[86] which occurred between July 2021 and October 2021,[87] the EU appears to have decided to pursue implementation of the two Pillar solution, proposed by the OECD, at the EU level in preference of the digital levy.[88] The political pressure to do so is evident in the text of the 8 October 2021 OECD Inclusive Framework, which was disapproving of unilateral measures, especially digital taxes, "No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the [multilateral convention]."[89] So the digital levy is suspended, even though the EU has maintained that it was complementary to, and not in contradiction with, the two pillar proposals. The potential for lifting the suspension is contingent on the successful implementation of the additional corporate tax own resources proposals. There is currently a suggested deadline from the European Parliament of 2025,[90] but this is just a suggestion at the time of writing on which more discussion follows in a later section of this article.[91]

The implications of this apparent decision for the digital levy in the context of the EU's proposals for new own resources to repay the NextGenerationEU debt are twofold. First, regarding the first and second steps contained in the Roadmap of Part B to the second Annex to the IIA, they are now inaccurate and certainly out of date, being superceeded by the EU's decision not to pursue implementation of a digital levy but instead to implement both Pillars to the OECD Inclusive Framework in separate EU Directives.[92] The state of play, likelihood of timely implementation, and potential revenue raising ability of the implementation of the Pillar One proposals selected to supposedly replace the digital levy into EU law will be addressed below (along with the environmental proposals). However, it is noteworthy in the context of the current discussion on the Roadmap to highlight that the binding agreement of these three steps already needs amendment to its outdated and inaccurate content and as a consequence it is now already necessary to amend the ORD 2020/2053. Second, this makes the third step of the Roadmap more prominent in terms of the EU's reliance on the new own resources proposals contained therein for the large volumes of revenue generation, and therefore the emphasis shifts in terms of new own resource options and revenue raising capacity to the later "2024-2026" timeframe and the proposals for *additional* new own resources.

Digitalisation of the Economy' 8 October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf accessed 10 October 2021.

[86] M. Kendrick, 'The Legal (Im)possibilities of the EU Implementing the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting' GTCJ 17-1 (2022) 19-24

[87] Statement on a Two-Pillar Solution (fn85).

[88] Commission Press Release, The Commission proposes the next generation of EU own resources, 22 December 2021 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7025 accessed 5 May 2022

[89] Statement on a Two-Pillar Solution (fn85).

[90] See European Parliament Draft Opinion of the Committee on Economic and Monetary Affairs, on the proposal for a Council decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union, of 26 August 2022, document 2021/0430(CNS), inserting into the new Article 2(1)(g) "provided that the OECD/G20 IF Pillar 1 Agreement has been successfully implemented by a critical mass of countries by 1 January 2025 otherwise a digital levy should be introduced as a new own resource https://www.europarl.europa.eu/doceo/document/ECON-PA-734455_EN.pdf accessed November 2022. See also Commission Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union COM(2021) 570 final.

[91]See European Parliament draft amendment to the ORD 2020/2053 amendment (fn90).

[92] Commission Press Release (fn88)

The latest step, and therefore time frame, stipulated in the Roadmap to the second Annex of the IIA may now turn out be the most important for introducing categories of new own resources. It is where the emphasis, and reliance, on taxation is clearly evident. The third step "2024-2026" provides:

> "10. The Commission will, based on impact assessments, propose *additional* new own resources, which could include a Financial Transaction Tax and a financial contribution linked to the corporate sector or a new common corporate tax base. The Commission shall endeavour to make a proposal by June 2024.
>
> 11. Following the applicable procedures under the Treaties and subject to approval by Member States in accordance with their respective constitutional requirements, such *additional* new own resources are envisaged to be introduced by 1 January 2026".[93] (emphasis added).

There are effectively two categories of additional new own resources identified under the third step, being a possible Financial Transaction Tax (FTT) and more broadly speaking a proposal on corporate taxation. As to the latter, the description in paragraph 10 "a financial contribution linked to the corporate sector or a new common corporate tax base" suggests a reference to the Common Consolidated Corporate Tax Base (CCCTB) and /or Common Corporate Tax Base (CCTB) Commission proposals of 2016,[94] which were withdrawn a matter of months after the date of agreement of the IIA.[95] The Commission has suggested, in its Communication to the European Parliament and the Council on "Business taxation for the 21st Century"[96] that there will be a Business in Europe: Framework for Income Taxation (BEFIT) proposal on corporate tax instead of the CCCTB/CCTB, and that the new proposal is to be tabled in 2023.[97] Furthermore, it was in December 2021,[98] that the Commission made new proposals for separate Directives on implementing Pillar One and Pillar Two of the OECD Inclusive Framework respectively, although it is only Pillar One which is suggested to be a potential new own resource for the EU to repay the debt. The current state of play on the implementation of a Directive on Pillar One will be addressed in detail below, and in the context of the Roadmap in the IIA a few observations need to be made. As is apparent from the date of the CCCTB and CCTB proposals and the digital levy, the EU has been trying to harmonise corporate tax for years, and has not as yet succeeded. The proposals are difficult to implement and contentious because their legal basis requires unanimity voting in the Council[99] consequent on taxation, especially direct taxation, being within the competence of the Member States, not the EU. A lack of competence and the presence of Member State vetos has been a thorn in the side of the Commission achieving implementation of its many proposals on tax reform.[100] The difficulty is evident in the history of EU legislative initiatives in corporate tax, and whilst trying to utilise the OECD Inclusive Framework as leverage to implement a Directive on Pillar One may prove to be of assistance to the Commission, this proposal is still contentious.

[93] Interinstitutional Agreement (fn20) Annex II, Part B, Roadmap, paras. 10-11.
[94] COM(2016) 685 final and COM(2016) 683 final.
[95] European Commission, Communication From The Commission To The European Parliament And The Council: Business Taxation in the 21st Century, COM(2021) 251 final, Brussels, 18.5.2021. https://ec.europa.eu/taxation_customs/system/files/2021-05/communication_on_business_taxation_for_the_21st_century.pdf accessed 31 August 2021, p12.
[96] COM(2021) 251 final (fn107).
[97] COM (2021) 251 final, (fn107) p13.
[98] Commission Press Release, (fn88).
[99] See art. 113 and 115 TFEU and for commentary M. Kendrick, (fn82).
[100] Ibid.

The issues with the proposals on corporate taxation, however, pale in significance when compared to the attempts at implementing a Financial Transaction Tax in the EU. Mentioned explicitly in Paragraph 10 of the Roadmap in the second Annex of the IIA as a category of new own resource under the 2024-2026 third step, the initial proposal for an EU FTT was made back in 2011.[101] The detail of this proposal, and the 2013 proposal which followed, will be discussed in a following section of this article, but if the other proposals and time frames in the Roadmap seem ambitious, the fact that even with recourse to the enhanced cooperation procedure for differentiated integration the EU is still awaiting implementation of it's 2013 proposal gives an indication of the difficulties with this particular tax. The wording in paragraph 10 of the Roadmap, which refers to the FTT is tentative, stating "propose additional new own resources, which *could include* a Financial Transaction Tax (emphasis added)"[102] and it is quite clear why.

It is apparent from the second Annex to the IIA that the new categories of own resources, being the CBAM and ETS, have their own timetable for introduction, the latest time stipulated in paragraphs 5 to 9 as being 1 January 2023, and that the *additional* new own resources, being the FTT and corporate tax proposals, have their own timetable, stipulated in paragraphs 10 to 12 as introduction by 1 January 2026. As this section of this article addressed the Roadmap, timing is therefore important, and the timeframes contained in the Roadmap have already changed, within 12 months of the date of the IIA. Although the IIA is referred to in the proposals for new own resources released by the Commission in December 2021, it is still the case that the EU institutions are already out of step with the supposedly binding timings contained in the IIA as there have already been changes to the 'basket' contents and therefore what has to be introduced and when. Furthermore, the reliance on repaying the debt is on tax, especially corporate and financial taxation, which is problematic because of the issues with the EU's competence and the requirement for unanimous voting, but also because the taxes contained in the third step are the more difficult and contentious taxes in terms of the tax base. The problem is that if these proposals on corporate and financial tax prove too contentious to introduce in time or at all, and this will be addressed below, the unavoidable conclusion is that there will be insufficient new own resources to repay the debt. The stick cunningly disguised as a carrot is the fact that the Member States are by default liable to repay the whole of the debt, being loans and grant expenditure, and therefore they have a source of motivation to try and implement proposals which shift the burden of repayment onto corporations and financial institutions.

Even if accomplishment of the introduction of these proposals is achieved ultimately in compliance with the Roadmap, timing of course is still an issue, because of the reliance potentially moving onto the latest step for introduction under the Roadmap, with the last possible time for introduction being 2026. This leaves thirty two years to repay the debt due at the latest by 31 December 2058,[103] which may sound like a long time, however, there are already adjustments to the implementation of these proposals which only need to be "introduced" by 1 January 2026, and there are also issues with the second most important aspect, which is the ability for these proposals to raise sufficient resources to repay the debt in order to avoid recourse to the Member States. It is to these elements of the new own resources proposals to which this article will turn, having first outlined the proposals already made to amend the MFF and ORD 2020/2053.

[101] Commission Proposal, 594 final (fn36).
[102] Interinstitutional Agreement (fn20) Annex II, Part B, Roadmap, para. 10.
[103] Own Resources Decision, 2020/2053 (fn6) paras.17, 20, art.5(2) and art.6

Proposed Amendments to the MFF and the Own Resources Decision

Whilst both the ORD 2020/2053 and the MFF Regulation 2020/2093[104] are still in force at the time of writing in the latter half of 2022, it has been necessary for the European Commission to propose amendments to both instruments, in light of the updated proposals for new own resources issued on 22 December 2021, because these proposals differ from those contained in the ORD 2020/2053 and the IIA, as outlined above.

The proposed legislative changes are, firstly, the Commission proposal to amend the Own Resources Decision 2020/2053 to add three new own resources to the existing ones.[105] The three new own resources, as set out in the Commission Communication to the European Parliament and the Council[106] are: the ETS;[107] the CBAM;[108] and a new own resource based on a share of the residual profits of the largest and most profitable multinational enterprises that will be re-allocated to EU Member States, also known as Pillar One of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting.[109] Article 1 of the proposed amending Directive[110] adds to the list of categories of traditional own resources, contained in Article 2 of the ORD 2020/2053, namely customs duties (art.2(1)(a) ORD),[111] Value Added Tax (art.2(1)(b) ORD),[112] a charge on the basis of the weight of plastic packaging wastage (art.2(1)(c) ORD),[113] and contributions from Member States based on their Gross National Income, or GNI (art.2(1) (d) ORD)[114] with three new paragraphs, which are: a new paragraph (e) containing the ETS with a formula for the calculation of the monies, 25% of which will be the uniform rate of monies generated from the ETS to be paid into the EU budget as own resources, including derogations to insert a minimum and a maximum Member State

[104] Regulation 2020/2093 MFF (fn10)
[105] Commission Proposal 570 final (fn91).
[106] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions *The next generation of own resources for the EU Budget* COM (2021) 566 final, para.2.1.
[107] Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation (EU) 2015/757, COM(2021) 551 final.
[108] Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, COM(2021) 564 final.
[109] At the time of writing in the latter half of 2022 progress is still being made at the OECD level on a Multilateral Convention the wording of which, once finalised in the OECD, the Commission intends to incorporate into a Directive.
[110] Commission Proposal 570 final, (fn91) art.1.
[111] Detailed in art.2(1)(a) of Own Resources Decision, 2020/2053 (fn6) as "traditional own resources consisting of levies, premiums, additional or compensatory amounts, additional amounts or factors, Common Customs Tariff duties and other duties established or to be established by the institutions of the Union in respect of trade with third countries, customs duties on products under the expired Treaty establishing the European Coal and Steel Community, as well as contributions and other duties provided for within the framework of the common organisation of the markets in sugar".
[112] Own Resources Decision, 2020/2053 (fn6) art.2(1)(b).
[113] Detailed in art.2(1)(c) of Own Resources Decision, 2020/2053 (fn6) as "the application of a uniform call rate to the weight of plastic packaging waste generated in each Member State that is not recycled. The uniform call rate shall be EUR 0,80 per kilogram".
[114] Own Resources Decision, 2020/2053 (fn6) art.2(1)(d).

contribution; a new paragraph (f) containing the CBAM, being the application of a uniform call rate equal to 75% of the revenues from the sale of certificates of the carbon border adjustment mechanism; and a new paragraph (g) which will effectively be the Pillar One implementing Directive, expected to contain the application of a uniform call rate of 15% on the share of residual profit of multinational enterprises reallocated to Member States. Therefore, the amendment proposal, if enacted, through unanimity under Article 311 TFEU will essentially create a list of 7 own resources in total. The amended Own Resources Decision needs to be approved unanimously in Council after consulting the European Parliament. The decision can then only enter into force once it is approved by all EU countries in line with their constitutional requirements.[115] Notably absent from this list is mention of the proposed Financial Transaction Tax. Although the FTT was included in the additional new own resources basket in the IIA Roadmap along with Pillar One, which is included in this own resources amendment list, it is to be assumed that proposals are so far off that it is not possible to say, even with a brief summary, what the FTT could look like or include. It is also possible that the absence of the FTT can be attributable to the Comission wishing to avail itself of most of the time it has available under step three of the Roadmap, and therefore it is too early to include it in an amendment to the ORD.

Secondly, the Commission has also put forward a targeted amendment to the Regulation on the current long-term EU budget 2021-2027, also known as the Multiannual Financial Framework (MFF Regulation). This amendment proposes to increase the relevant MFF expenditure ceilings for the years 2025-2027 to accommodate the additional expenditure for the Social Climate Fund[116] (hereinafter SCF, which will be discussed below in relation to the ETS). The amended MFF Regulation needs to be adopted unanimously by the Council after obtaining the consent of the European Parliament.

The importance of these legislative amendments is linked to their rationale, which is twofold. Initially, it is to ensure that the changes to the new and additional new own resources have a legal basis and are reflected in the legal construction of debt repayment for NextGenerationEU, albeit that they do not feature an amendment to the IIA itself which is, as explained above, inaccurate and out of date. This is however secondary to what arguably should be the most important, which is to ensure sufficient revenue raising to repay all of the NextGenerationEU "expenditure". The capacity of these new own resource proposals to ensure the credibility of NextGenerationEU inevitably relates to the details of the proposals themselves, as they impact on this significant assessment of the EU's ability to comply with its own treaty obligations by raising the amount of revenue sufficient to repay the debt, and by the deadline. The questions of revenue raising and timeliness will now be addressed, considering the proposed sources of new own resources in turn. Following this will be an assessment of differentiated integration to provide an avenue to address the likelihood that the EU otherwise will not be able to repay the debt from its own budget without heavy recourse to the budgets of Member States.

Environmental Own Resources: The ETS and CBAM

[115] On the likelihood of this see the German Federal Constitutional Court's views expressed in Bundesverfassungsgericht BVerfG, Order of the Second Senate of 15 April 2021 - 2 BvR 547/21 -, paras. 1-112 and the judgment of 6 December 2022 BVerfG, Urteil des Zweiten Senats vom 06. Dezember 2022 - 2 BvR 547/21 -, Rn. 1-43, especially the dissent.

[116] Proposal for a regulation of the European Parliament and the Council establishing a Social Climate Fund, COM(2021) 568 final

It needs to be reiterated that the proposals for new own resources should generate income sufficient to cover the repayment cost of NextGenerationEU (both principal and interest),[117] at least in relation to the grant expenditure element. It should also be reiterated that the EU has enshrined in law (as outlined above) a deadline by which to achieve this, being 31 December 2058.[118] With these two important factors in mind, this section, and the sections which follow, will be assessing the details of the proposals for new own resources and additional new own resources to evaluate specifically whether they have the required revenue raising capacity and whether they will be implemented in sufficient time before the deadline.

Two of the proposed means of raising revenue are through amendments to the ETS and the CBAM. They are the environmental proposals, which are interlinked because of their relationship to other EU policies, being the "Fit for 55"[119] package, which aims to implement the EU's targets to reduce emmisions by at leat 55% by 2030, as compared to 1990 levels.[120] This target on emmisions is a key promise forming part of the EU's Green Deal, featuring its important goal of reaching zero carbon emissions by 2050.[121] The time dependant targets of these EU policies impact on the timing and revenue raising capacity of the ETS and CBAM to repay NextGenerationEU, because both the target dates to achieve these climate goals are before the repayment deadline of 2058, and therefore alterations to the content and continuation of the proposals for new own resources could occur within the NextGenerationEU repayment timeline. Whilst the CBAM and the ETS are two of the initiatives linked to these EU policies, they are also themselves interlinked, because the CBAM "is an alternative to the measures that address the risk of carbon leakage in the EU's Emissions Trading System … and is meant to avoid that the emissions reduction efforts of the Union are offset by increasing emissions outside the Union through relocation of production or increased imports of less carbon-intensive products. Without such a mechanism, carbon leakage could result in an overall increase in global emissions."[122] In short, the two measures are complimentary because if only one measure was implemented on its own, it could actually incentivise carbon leakage elsewhere.

The CBAM[123] is designed to fulfil the EU's environmental targets by putting a carbon price on imports of certain products, to correspond with the carbon price that would have been paid had the goods been produced under the EU's carbon pricing rules. The ETS, currently in force in the EU,[124] essentially puts a price on carbon and lowers the cap on emissions from certain economic sectors every year. According to the Commission, the ETS has successfully brought down emissions from power generation and energy-intensive industries by 42.8% in the past 16 years.[125] The amendments to the ETS[126] are suggested to lower the overall emission cap,

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[117] Commission Proposal 570 final, (fn91) para.2 to the Preamble of the proposed Directive.
[118] Own Resources Decision, 2020/2053 (fn6) paras.17, 20, art.5(2) and art.6
[119] European Commission Press Release, 'European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions', 14 July 2021 https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3541
[120] European Commission, 'Delivering the European Green Deal', https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en
[121] Ibid and Financial Times, 'EU considers looser green standards as it seeks to replace Russian fossil fuels' 11 May 2022 https://on.ft.com/3yu7RxU
[122] COM (2021) 564 final, (fn108) preamble.
[123] COM (2021) 564 final (fn108).
[124] Directive 2003/87/EC (fn107).
[125] Commission Press Release, 'European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions' (fn119).
[126] Commission Press Release, 'European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions' (fn119).

phase out free emission allowances for aviation and include shipping emissions in the ETS, with a separate new emissions trading system set up for fuel distribution for road transport and buildings.[127]

Timing and Revenue Raising

The two most important factors which will dictate whether the EU will be able to repay the debt by 31 December 2058, are the timing of the implementation of the proposals and the amount of revenue they will raise as new own resources for the EU budget. It may, and quite reasonably, be presumed that all of the monies raised from the two proposals of the CBAM and the amendments to the ETS would pour into the EU Budget in order to ensure that the large amounts of borrowing are repaid in a timely manner, to safeguard the credibility of NextGenerationEU. This is not, however, what is envisaged.

In relation to the ETS, the Commission proposes that only 25% of the revenues generated by the ETS will become an own resource for the EU budget.[128] The amount of money the Commission envisages will be raised by this proposal, and the time scale within which this is anticipated, are suggested in its 22 December 2021 Communication to the other EU institutions on the amended new own resources proposals, “Revenues for the EU budget are estimated at around EUR 9 billion per year over the period 2023-2030.”[129] What is envisaged afterwards is not detailed, which may be because of the timescales in the other “Fit for 55” and Green Deal EU policies, and it should be noted that at the time of writing in Spring 2022 these proposals are still that, they are not yet enacted.[130] In fact, there are issues which relate to the scope of the proposed amendments, to include housing for example, as well as the timing, highlighting the linkage between the green measures as well as the complexity of the issues and the impact geopolitical events can have on their timing, as manifested in the recent Euorpean Parliament legislative debates on the proposals.[131] The time scale for achieving this amount of revenue is therefore rather ambitious. As will be seen from the analysis in the rest of this article, it may be said that the ETS amendments could be the more lucrative and therefore the EU’s best bet to raise significant revenue to repay the expenditure element of the debt, so the possibility of a corresponding reduction to its scope would detrimentally impact this revenue raising capacity.

In addition to this, a share of the ETS monies are effectively already spent, because they will be enabling the financing of the Social Climate Fund (SCF),[132] to which 25% of ETS own resource revenue is to be allocated. The SCF is described by the Commission as ensuring a “socially fair transition and support vulnerable households, transport users and micro-enterprises to finance investments in energy efficiency, new heating and cooling systems and cleaner mobility, as well as, when appropriate, temporary direct income support. The total financial envelope of the Fund in principle corresponds to an amount equivalent to around 25% of the expected revenue from the new emissions trading system for buildings and road transport.”[133] More specifically, the proposal for amending the ORD 2020/2053 states, “The total financial envelope of the Fund for the 2025-32 period will be EUR 72.2 billion in current

[127] COM/2021/551 final (fn107).
[128] Communication 566 final, (fn106) page 2.
[129] Communication 566 final, (fn106) page 3.
[130] Directive 2003/87/EC (fn95).
[131] See (fn90).
[132]COM(2021) 568 final (fn128)
[133] Commission Press Release, ‘The Commission proposes the next generation of EU own resources’, (fn88) and see also Communication 566 final, (fn106) page 5.

prices, corresponding in principle to an amount equivalent to around 25% of the expected revenue from the new emissions trading system for buildings and road transport for the period 2026-2032".[134] As noble as the SCF is, it does mean that the ETS proposal for a new own resource, of which only 25% of the total revenue raised was to be allocated to the EU budget for repayment gross of the SCF, has already lost money for debt repayment before it has even been enacted.

At this stage in analysing the potential revenue raising capacity of the ETS proposal, the application of some basic mathematics will have already alerted the reader to the difference in projected figures. The Commission stated in its 22 December 2021 Communication to the other EU institutions on the amended new own resources proposals, "Revenues for the EU budget are estimated at around EUR 9 billion per year over the period 2023-2030"[135] and in its 22 December 2021 proposal for amending the ORD 2020/2053, "The total financial envelope of the [SCF] Fund for the 2025-32 period will be EUR 72.2 billion in current prices, corresponding in principle to an amount equivalent to around 25% of the expected revenue from the new emissions trading system for buildings and road transport for the period 2026-2032".[136] If one were to total EUR 9 billion for seven years it is EUR 63 billion. It is quite clear that the EUR 72.2 billion for the SCF is not 25% of EUR 63 billion. These figures are vastly different. What could potentially explain the difference in these figures, apart from the two years difference in timescale, is that the amendments to the ETS to extend it to road and transport are anticipated to generate such significantly more revenue. If this is indeed the case, it is not clear why the Commission would not say so in its Communication made on the same day. Perhaps the fact that the amendments to the ETS are not yet in place means that the figures are just complete estimates. This is problematic because whilst the huge disparity in figures means that the estimates may be meaningless, if, on the other hand, the ETS does have the capacity to raise anything like the SCF estimate suggests, this may well be the best option the EU has for a new own resource that could raise enough money to repay the debt. However, this is dependant on revenue raising becoming the main motivation behind introduction of the amended ETS, it is dependant on other externalities impacting on carbon production[137] and it also depends on the operation of the other related EU policies, including the SCF and CBAM.

Also still yet to be enacted, is the CBAM.[138] The Commission proposes that a comparatively increased percentage of 75%, but not the entirety of the revenues, generated by a carbon border adjustment mechanism, become an own resource for the EU budget. It estimates, as stated in the Commission Communication to the other institutions, that in terms of revenue raising capacity, "Revenues for the EU budget are estimated at around EUR 0.5 billion per year over the period 2023-2030,"[139] whilst what happens after 2030 is not discussed in that Communication[140] nor is the incidence of the not unsubstantial cost of administering the mechanism. What is included in the Communication is a footnote, in which the Commission advises that there will actually be a transition period within which the CBAM will be phased in, between 2023 and 2025.[141] The Commission does not expect the CBAM to generate any

[134] Commission Proposal 570 final, (fn91) page 2.
[135] Communication 566 final, (fn106) page 3.
[136] Commission Proposal 570 final, (fn91) page 2.
[137] Financial Times, 'EU prepares to sell more carbon permits to pay for exit from Russian gas' 17 May 2022 https://www.ft.com/content/be8d95cc-273a-43b8-b6ab-e9f95685ddc7?emailId=628410589f8f6a00239ff614&segmentId=488e9a50-190e-700c-cc1c-6a339da99cab
[138] COM (2021) 564 final (fn108). And see fn90 on recent issues in the European Parliament.
[139] Communication 566 final, (fn106) page 3.
[140] Communication 566 final, (fn106) page 3.
[141] Communication 566 final, (fn106) page 3, footnote 14.

revenue in the transition period from 2023 to 2025.[142] The CBAM transition period, which applies when it does come into force,[143] could even be longer, as it is said, at paragraph 12 of the Council Progress Report of November 2021, that "To allow producers, importers and traders to adjust to the new regime, the reduction of free allocation should be implemented gradually, while the CBAM is phased-in, in order to ensure that these measures are not cumulative. In accordance with the Commission proposal, in 2023-2025, CBAM would function as a reporting obligation only, and be gradually phased-in from 2026 (over 10 years, until 2035)."[144] As to the timing of the CBAM enactment, and therefore the actual start date of this transition, there appears to be a delay on achieving agreement to the content of this proposal. The Council Progress Report of November 2021, stated at paragraph 20, "However, at this stage, it remains too early to draw any conclusive remarks on the contents of a possible compromise agreement for a general approach of the Council (its position in the future negotiations with the European Parliament) on this legislative file."[145] Given that the CBAM is still just a proposal at the time of writing in the latter half of 2022, and that the legal basis of the CBAM Regulation is Art.192(2)(a) TFEU, which relates to provisions primarily of a fiscal nature and therefore requires unanimity voting, it is not beyond the realms of possibility that the start time of the transition may be delayed, should it transpire that it is not possible to achieve the unanimous vote in the Council required to pass the Regulation, and further amendment and negotiation with the European Parliament becomes necessary. As the clock is ticking towards the 31 December 2058 repayment deadline, which underpins the credibility of NextGenerationEU, it is the timing as well as the sums predicted to be raised that are problematic in relation to the CBAM.

However, there is a more fundamental problem with both of these two proposals for new own resources. The purpose behind these environmental proposals is to disincentivise behaviour which pollutes and to incentivise "green" behaviour. Decarbonisation is the ultimate goal. The problem is therefore related to revenue raising. The 'fit for 55' package of which the CBAM is part and the ETS is linked, aims to meet the environmental target to reduce emmisions by at leat 55% by 2030 and the Green Deal seeks zero carbon emmissions by 2050. For the EU's green policies to be successful for the environment, they will disincentivise carbon usage, the EU hopes significantly by 2050. As it is carbon usage which is the basis on which revenue is raised, a significant reduction in carbon usage will result in a significant reduction in revenue. As the NextGenerationEU debt has to be repaid by 1 December 2058[146] that is 28 years of the repayment period when theoretically less and less money should be generated. Both these proposals will therefore be an ever diminishing source of own resource. However, if these proposals do not succeed in reducing carbon emmissions and the environmental targets are not reached, more money will be raised to repay the debt through generation of own resources. The EU has apparently designed part of its basket of new own resources in such a way that the success of one initiative is effectively dependant on the failure of another.

The focus is therefore likely to fall on the revenue raising capacity of the corporate and financial tax proposals.

Own Resources Proposals on Corporate Tax

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[142] Commission Press Release, 'The Commission proposes the next generation of EU own resources', (fn88)
[143] Commission Proposal 570 final, (fn91) para.8 to the Preamble of the proposed Directive.
[144] Council "Fit for 55 package proposals (CBAM, ETD and SCF) - Progress report" 13850/21 of 26 November 2021 para.12.
[145] Progress report (fn156) para.20.
[146] Art. 5 (2) ORD (fn6) reiterated in para d IIA (fn15) Annex II.

It is apparent from the second Annex to the IIA, that the CBAM and ETS, being new categories of own resources, have their own timetable for introduction, and that the *additional* new own resources have their own timetable, stipulated in paragraphs 10 to 12 as "introduction by 1 January 2026".[147] The contents of this basket of additional own resources was described in the IIA as a suggestion, that it "could include a Financial Transaction Tax and a financial contribution linked to the corporate sector or a new common corporate tax base."[148] The common corporate tax base, or Common Consolidated Corporate Tax Base (CCCTB) and /or Common Corporate Tax Base (CCTB) Commission proposals of 2016,[149] as stated above, have been withdrawn, and the Commission's intention is to replace them with BEFIT. It appears though that BEFIT will not in itself become part of the basket, as the Commission describes its intention thus, "This second package will *build on* the 'Business in Europe: Framework for Income Taxation (BEFIT)' proposal foreseen for 2023" (emphasis added).[150] Presumably use of the phrase "build on" rather than "includes", or similar epithets, means that the additional own resources in the basket are the corporate tax proposal of Pillar One and the financial tax proposal of the FTT. These proposals will now be considered in turn, within this and the next section.

The corporate tax proposals in this basket of additional new own resources, whilst not expressly referred to as being related to the OECD in the IIA, are identified a year later by the Commission in its 22 December 2021 proposals,[151] as emanating from the OECD's Base Erosion Profit Shifting (BEPS) project to address the corporate tax challenges arising from the digitalisation of the economy.[152] The project proposes to implement two Pillars, the second of which, "Pillar Two", effectively seeks to enforce a global effective minimum corporate tax rate of 15%.[153] The first pillar, "Pillar One", seeks to establish new nexus and profit allocation rules providing a share of residual profit allocated to market jurisdictions using a formulaic approach. Pillar One will only apply to MNEs within the scope of the Pillar, which are those with a global turnover above EUR 20 billion and a profitability above 10%. Members of the OECD Inclusive Framework reached a political agreement on the two Pillar solution on 8 October 2021, including its own timetable for drafting detailed rules on both Pillars, conducting public consultation, signing and adopting a multilateral convention on Pillar One and a multilateral instrument on Pillar Two, leading to eventual implementation.[154] Whilst Pillar Two is envisaged to move at a faster pace than Pillar One, both Pillars had an initial deadline for implementation by 2023, which has proved to be too ambitious and Pillar One has already been delayed to 2024.[155] The European Commission announced, in December 2021, that it will propose a separate Directive for each Pillar, but that only Pillar One will form part of the new

[147] IIA (fn15) Annex II para.10-12.
[148] IIA (fn15) Annex II para.10.
[149] COM(2016) 685 final and COM(2016) 683 final.
[150] Communication 566 final, (fn106) page 5.
[151] Commission Press Release, 'The Commission proposes the next generation of EU own resources', (fn88)
[152] OECD/G20 Statement on a Two-Pillar Solution (fn85).
[153] Thresholds and detailed rules on application of the Pillar will apply, see OECD/G20 Statement on a Two-Pillar Solution (fn85).
[154] OECD/G20 Statement on a Two-Pillar Solution (fn85).
[155] OECD Report, OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors', Indonesia, July 2022 https://www.oecd.org/g20/topics/international-taxation/oecd-secretary-general-tax-report-g20-finance-ministers-indonesia-july-2022.pdf and the cover note https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-cover-note-to-the-progress-report-on-amount-a-of-pillar-one.pdf The current consultation on Amount A of Pillar One is not due to end until 19 August 2022 https://www.oecd.org/tax/beps/progress-report-on-amount-a-of-pillar-one-july-2022.pdf and https://www.oecd.org/tax/oecd-invites-public-input-on-the-progress-report-on-amount-a-of-pillar-one.htm

own resources proposals, not Pillar Two, although it proposed a Pillar Two Directive at the same time.[156] The delays in agreeing the detail and the date of implementation at international level are therefore having an impact at EU level on the timing and potential revenue raising capacity of the corresponding own resources proposal and potential Directive.

Timing and Revenue Raising

In relation to the potential revenue raising capacity of the Directive on Pillar One, the proposal to amend the ORD 2020/2053 currently envisages a uniform call rate on the share of residual profit of multinational enterprises reallocated to EU Member States (being a fraction of the almost 140 States which make up the membership of the OECD Inclusive Framework)[157] equivalent to 15% of those residual profits the EU Member States have had allocated to them, as a category of new own resource for the EU Budget.[158] The thresholds which are anticipated to apply under Pillar One mean that only a limited number of very large MNEs will have the rules apply to them, they will not apply broadly throughout the corporate sector. The current delayed progress of Pillar One at the international level means that the rules are not as yet finalised at the time of writing in the latter half of 2022 and therefore the Commissions suggests, in its Communication to the other EU institutions, that "Pending the finalisation of the agreement, revenues for the EU budget could amount to up to EUR 2.5 - 4 billion per year".[159] This estimate is tempered with a heavy caveat at footnote 15 of the Communication; "A more precise number cannot be identified at this time given that the discussions on certain technical implementing details of the OECD/G20 'Pillar One' agreement are still ongoing. The range provided is based on a series of broad assumptions and cannot be further qualified also due to data limitation issues as regards the potential companies that may ultimately contribute to the reallocation of taxing rights under the agreement."[160] Therefore one can only conclude that how much revenue could be raised by an important new own resource, in reality the EU just doesn't know. It is not mean spirited to observe that when one incurs debt, one ought to have a good idea that one has enough money to repay it. Indeed, one would find that without a solid plan to pay the money back one would not receive financing at all. But of course the EU has found it easy to obtain the financing because in reality the duty of repayment ultimately lies with the Member States, not these new own resource proposals, hence borrowing has been easy.

If the OECD proposal is implemented in 2024 and the EU can agree to adopt Pillar One swiftly, alongside Pillar Two or otherwise, which is a feat not to be underestimated, then the Roadmap in the IIA timeframe of 2026 in step three may be met although the timescale for adoption anticipated in the proposed ORD amending Directive is written as:

> "Article 1(1), point (c), shall apply from
> the first day of the date of application of the [Directive on implementation of the global agreement on re-allocation of taxing rights] or
> the day of the entry into force and effect of the Multilateral Convention, whichever is the later."[161]

[156] Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union COM(2021) 823 final
[157] OECD/G20 Statement on a Two-Pillar Solution (fn85).
[158] Commission Proposal 570 final, (fn91) art.1(1)(c) of the proposed Directive.
[159] Communication 566 final, (fn106) page 3-4.
[160] Communication 566 final, (fn106) page 3, footnote 15.
[161] Commission Proposal 570 final, (fn91) art.2 of the proposed Directive.

However, the European Parliament[162] would seek to put a timescale on implementation of the presently stalled Pillar One proposals with a view to reinstating the digital levy if internationally “a critical mass of countries” has failed to implement Pillar One by 1 January 2025. Needless to say that this is not exactly aligned with the Roadmap in the IIA. On the contrary, the digital levy was a new own resource under the first and second step of the Roadmap contained in Annex II of the IIA and now it appears to have the potential as a replacement of Pillar One in step three. Consequently, there is the distinct possibility of fewer categories of new own resources. Whilst there is a lack of clarity on the timing, revenue raising and indeed future of Pillar One, there is still more clarity than can be said for the FTT. This means that if there is no FTT then the CBAM and the amended ETS will need to provide sufficient revenue to repay all the debt, but as they are an ever diminishing resource, unless the EU fails to fulfil its environmental objectives. It seems that time and options are running out and consequently a commitment to utilise differentiated integration will be needed to repay the debt without resort to Mamber State taxpayers.

The FTT

A proposal for a financial transaction tax in the EU as an own resource to raise revenue for the EU budget is nothing new, in fact the idea is over 10 years old.[163] There have been proposals for a Financial Transaction Tax in the EU since 2011.[164] The reason why these proposals have not been implemented, in a nutshell, is that there have so far been insurmountable issues in relation to the scope of the tax base, its territorial reach, and concerns that a FTT will just not raise enough revenue to warrant implementation. This section will address these issues in the context of the all important questions of timing and revenue raising. As the FTT is currently the subject of the differentiated integration mechanism in the Treaty, being enhanced cooperation, and is being considered in relation to another mechanism of differentiated integration, being minimum harmonisation,[165] the section which follows the discussion on the FTT will consider how these differentiated integration mechanisms could be utilised more widely in relation to the new own resources categories contained in the IIA.

Timing and revenue raising

The first proposal for a financial transaction tax in the EU was initially prompted by the financial crisis in 2008.[166] The rationale and objectives behind proposing a FTT were manifold, including ensuring that financial institutions make a fair contribution to covering the costs of the financial crisis. Also prominently advertised was the objective of creating a new EU own resource to gradually displace national contributions to the EU budget, resulting in a lesser burden on national taxpayers. This latter objective was actually advertised in 2012 as being so

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[162] See (fn76)
[163] European Commission Press Release, ‘The financial transaction tax will reduce Member States' GNI contributions to the EU budget by 50%’, 23 March 2012
https://ec.europa.eu/commission/presscorner/detail/en/IP_12_300
[164] The first proposal was in 2011 and the second in 2013. See respectively: Commission Proposal 594 final (fn36) and Commission Proposal 71 final (fn37).
[165] On the mechanisms of differentiated integration see my forthcoming book Differentiated Integration in the EU: Harmonising EU Tax Law to be published with Edward Elgar in 2023.
[166] See Commission Press Release, ‘Financial Transaction Tax: Making the financial sector pay its fair share’ (IP/11/1085, 28 September 2011) and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Taxation of the Financial Sector’ COM (2010) 549 Final

significant that the adoption of a FTT would "reduce Member States' GNI contributions to the EU budget by 50%".[167] It is reasonable to assume that this would be a real incentive for the Member States to have already adopted an FTT several years ago, on the basis of the first proposal made in 2011[168] but this is not the case, so fraught with issues is this tax. A further proposal was required in 2013,[169] but this still hasn't addressed the issues with the proposed tax.

The reasons why over ten years have passed without the FTT being successfully implemented is essentially due to its controversial design and conflicting priorities. The essence of the FTT is to raise revenue, but with so many financial transactions involving so many financial instruments and institutions in so many countries, in order to design a FTT which does not permit or even encourage tax avoidance, the scope of its application has to be wide. This has implications for State territorial sovereignty and EU competence. There is no easy compromise. To narrow the tax base to reduce the infringement on state sovereignty from spillover effects of a widely applicable tax will increase the opportunity for tax avoidance and reduce the amount of revenue which can be raised. To widen the scope of the tax base to ensure sufficient revenue is raised to warrant implementing the tax means that many transactions and financial institutions in many States, even those outside participating EU Member states, will be subject to the tax. The content of both the 2011[170] and 2013[171] proposals did nothing to provide a consensus solution to this conundrum because their design was based on a combination of widely applicable principles: the residence; the establishment; and the issuance principles. For example, art.4 of the 2013 proposal defines the concept of 'establishment' so widely as to cover many financial institutions, even those operating "from abroad" (outside the EU) and the art.2 definitions include a significant number and type of transactions, including derivatives, equities and repurchase agreements. It is therefore unsurprising that many Member States objected to the scope of the tax base, and in the case of the UK, to the extent that it took its challenge Court of Justice of the European Union (CJEU).[172]

The UK sought to have annulled, under Article 263 TFEU, the Council Decision authorising the enhanced cooperation mechanism to be used in relation to the 2013 proposal.[173] Enhanced cooperation, contained in Article 20 TEU and Articles 326 to 334 TFEU, will be discussed in more detail in the next section of this article, but suffice it for present purposes to outline the provisions currently most relevant as well as the process for its use. The enhanced cooperation mechanism contained in the Lisbon Treaty operates in effectively two stages. The first stage is to achieve authorisation to use the enhanced cooperation mechanism. The procedure to achieve this is the Member States which wish to pursue a legislative enactment submit a request to the Commission, which then submits a proposal to the Council, which in turn issues a decision authorising enhanced cooperation's use. The prerequisites to reach stage one are that negotiations on legislative proposals have reached a point where action by the Union as a whole is not possible and therefore use of the enhanced cooperation mechanism is a last resort.[174] Also, the number of Member States which wish to nevertheless pursue enactment and

[167] Commission Press Release, 'The financial transaction tax will reduce Member States' GNI contributions to the EU budget by 50%' (fn163).
[168] Commission Proposal 594 final (fn36)
[169] Commission Proposal 71 final (fn37)
[170] Commission Proposal 594 final (fn36).
[171] Commission Proposal 71 final (fn37).
[172] Case C-209/13 United Kingdom v Council [2014] ECLI:EU:C:2014:283
[173] Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax [2013] OJ L 22/11
[174] Article 20(2) TEU.

implementation of the proposed measure must number at least nine states.[175] The second stage occurs once authorisation has been obtained. Then it is for the few (but at least nine) Member States who are pursuing the legislative enactment under an enhanced cooperation endeavour to discuss and adopt between themselves the legislative enactments they wish to pursue. In relation to the FTT, enhanced cooperation was initially pursued by eleven Member States, being France, Italy, Belgium, Germany, Estonia, Greece, Spain, Austria, Portugal, Slovenia and Slovakia, and they successfully obtained stage one authorisation to use enhanced cooperation on the basis of the 2013 proposal.[176] Whilst the UK was unsuccessful in its challenge, that has not given the green light to implementation. Stage two has still not yet occurred. The then eleven Member States, whilst expressing a continued willingness to proceed with the enhanced cooperation attempt, however, also acknowledged that more technical discussions were needed on the implementation proposal.[177] Unless and until technical discussions result in an agreement among the participating Member States, the Directive cannot be adopted and published in accordance with the procedure referred to in the proposed legal basis of Article 113 TFEU.

Many years have passed and progress has stalled to the extent that the latest discussions under the Portuguese Presidency have seen no element of the previous proposals being off limit to reforming discussion. A reduced tax base, adjusted tax rates, reissuing the invitation to Member States to talk about adopting the tax, including those states which have adopted their own tax in the many years within which the EU has failed to do so, and extended use of differentiated integration with the gradual implementation of the FTT and on a minimum harmonisation basis are all up in the air, again.[178]

The scope of the tax in terms of the number of Member States included and the scope of the tax base, such as whether it include derivatives for example, will impact significantly on the ability to raise revenue to repay the debt. Whether the inclusion of derivatives for example, as was suggested by the Portuguese presidency,[179] is available as an opt-in will impact this too, as would the tax rate. Article 9 of the 2013 proposal envisages charging financial institutions a levy of 0.1%, or, in the case of derivative contracts, 0.01% of the consideration paid or of the market price on every financial transaction concluded by the institution caught by the tax.[180] Whether 0.1% or 0.01% may seem like small margins but they have the potential to make a difference when you are trying to raise money. Excluding Derivatives could also lead to distortionary behaviour and tax avoidance planning (if you tax shares but not equity derivatives then apart from voting rights there may be efforts to substitute transactions in shares by replicating these in equity derivatives instead).

Taxation imposed in order to raise the EU's own resources is not uncontroversial, and unless the proposed tax is able to achieve this efficiently so as not to impose costs on the Member States themselves in gathering this revenue, it is difficult to justify. Indeed, the consequence of the EU wanting to increase its own resources is that the proposed tax has to simultaneously increase the revenue of the Member States themselves in order to act as an incentive to

[175] Article 20(2) TEU.
[176] Council Decision 2013/52/EU (fn190).
[177] P. Van Cleynenbreugel and W. Devroe , 'The Financial Transaction Tax Project' in B. De Witte, A. Ott and E. Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 287-8.
[178] Council, Presidency, 'Financial Transaction Tax – the way forward' document 5737/21 of 12 February 2021. Paras. 24-27.
[179] Council, Presidency, (fn178)
[180] Article 9, Commission Proposal 71 final, (fn37), page 26.

participate. This has the potential to be the sticking point for the remaining Member States still interested in pursuing an FTT. In actual fact, lack of revenue is a reason Estonia has cited for dropping out of the proposed enhanced cooperation in March 2016.[181] With only ten Member States remaining, the EU is getting perilously close to not fulfilling the requisite minimum of nine Member States required to pursue an enhanced cooperation endeavour in Article 20 (2) TEU.

The timing is also important because of the binding nature of the IIA. In the framework of the MFF/Own Resources negotiations, the European Parliament supported the introduction of the FTT as an Own Resource. The Commission agreed to issue a declaration as part of the overall political agreement. The Commission has recently clarified that "should there be an agreement on this Financial Transaction Tax, the Commission will make a proposal in order to transfer revenues from this Financial Transaction Tax to the EU budget as an own resource. If there is no agreement by end of 2022, the Commission will, based on impact assessments, propose a new own resource, *based on a new* Financial Transaction Tax. The Commission shall endeavour to make these proposals by June 2024 in view of its introduction by 1 January 2026"[182]and this is repeated by the Council in ECOFIN.[183] It is important because the FTT is currently subject to enhanced cooperation and why this could be problematic for repaying the debt because the institutions should work together but if they don't achieve what is needed in the Council it could mean the IIA or at least the spirit of the IIA is not adhered to. How much revenue will be raised is really hard to even estimate in relation to the FTT because it is not certain whether a FTT can actually be implemented in the EU at all, as it has been trying for over 10 years. Even if this does transpire to be possible, the scope of the tax base, the number of applicable Member States and the tax rate are far from certain.

Adoption and implementation of an FTT appears, from the discussions on the other proposed categories of new own resources to be quite important financially but the issues should not be underestimated as they have so far proved unsurmountable obstacles to implementation. With the incentive on the Member States of the need to repay the debt, recourse to differentiated integration may become a necessity either to revive the 2013 proposal or to implement a new proposed FTT. Differentiated integration may also become important for the other categories of new own resource too, and it is to this issue which the next, and final section of this article will now turn.

The Need to Utilise Differentiated Integration

The discussion of the details of the proposals for new own resources thus far highlights how important taxation is to the EU's ability to repay the debt and to the future credibility of NextGenerationEU. The successful adoption of these tax proposals is, however, linked to other political and legal factors. Hungary and Poland have been (interchangeably) hold out country on the global minimum effective corporate tax rate, it is suspected to be linked to their requests

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[181] J. Strupczewski, 'Ten EU countries agree on aspects of a financial-transaction tax' *Reuters* (London, 8 December 2015) http://www.reuters.com/article/us-eu-ftt-progress-idUSKBN0TR19C20151208 accessed 7 July 2017.

[182] Council 'ECOFIN report to the European Council on tax issues – Approval' 14651/21 of 1 December 2021 para. 49 referring to European Parliament legislative resolution of 16 December 2020 on the draft Council regulation laying down the multiannual financial framework for the years 2021 to 2027 (09970/2020 – C9-0409/2020 – 2018/0166(APP)), Commission Declaration on establishing a Financial Transaction Tax based Own Resource and https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-financial-transaction-tax

[183] Ibid

for some of the NextGenerationEU monies to be disbursed to them.[184] If this is so and if this is indicative of future behaviour, it is not unreasonable to suppose that proposals to enact tax own resources to pay the NextGenerationEU monies back, will become difficult to achieve the requisite Member State agreement to implement unless it is first paid out to countries which have the lesser obligation to pay it back in light of art.9 of the ORD 2020/2053. Although this example is based on Pillar Two and it is Pillar One not Pillar Two which is part of the Roadmap, arguably NextGenerationEU monies won't be recovered until countries whose agreement is required for new own resources have first received their disbursements. Essentially, it is up to the EU what it wants to prioritise. Add in the green initiatives and it is foreseeable that it will tie itself up it knots with overlaps and contradictions and compromises, which means it will dilute all its priorities. Whilst there is a perception that this is because of the unanimity voting requirement in the area of tax, which allows for the use of Member State vetoes, this is a bit of a smokescreen disguising the fact that the issue is really one of competence. The few potential legal bases which could be used for tax and fiscal measures (such as Articles 113 and 115 TFEU and even Article 192(2) for the CBAM) are difficult to engage and are very restrictive in terms of the types of taxation and fiscal measures they will permit to be enacted. The provisions of the Treaty have to be attributed to the wishes of the Member States at the time the Treaty was drafted. A lack of competence conferred on the EU is due to the restrictive amount of competence conferral the Member States were happy with at the time. This may make the enactment of proposals on new own resources difficult now, but it is a result of the Member States' intentions. Whether or not one agrees with the Member States' intention is neither here nor there. The point is that competence conferral is the key underpinning the Treaty and this is arguably no more prominently demonstrated than in the area of taxation. There have been attempts to avoid this through uncomfortable compromises on unsuitable legal bases or suggested use of passerelle clauses, which require unanimity themselves to be used.[185] But for all the efforts in trying to bypass the unanimity requirement it is not addressing the root cause of the issue. Differentiated integration, it is suggested in this article, will allow the EU to continue with some initiatives and avoid the difficulty of unanimity consequent upon the issue of competence.

De Witte raises the question as to whether NextGenerationEU has marked a decline in the trend towards differentiated integration in the economic policy domain,[186] which is a reasonable enquiry in light of the appearance of consensus surrounding the borrowing. When it comes to repaying the debt, however, this article suggests that in relation to almost all of the proposals for new own resources, without considerable recourse to the legal mechanisms of differentiated integration - be that enhanced cooperation[187] or minimum harmonisation – the EU stands little chance of repaying the debt without recourse to Member State taxpayers. This section of this article will outline the mechanisms of differentiated integration arguably most relevant before briefly addressing differentiated integration in the context of each of the new own resources proposals.

[184] Financial Times, 'Hungary withdraws support for minimum corporate tax in EU', 17 June 2022 https://www.ft.com/content/995012c6-dcf8-458d-997e-ab4f1a63e3c2 and Financial Times, 'Poland ready to drop objection to minimum corporate tax deal', 15 June 2022 https://www.ft.com/content/3e387d88-16c4-4c14-9acc-6c1f257e9125

[185] Communication COM (2019) (fn11).

[186] B. de Witte, (fn3) p679.

[187] M. Kendrick, (fn14) pp165-182.

Mechanisms of Differentiated Integration

The two arguably most relevant mechanisms of differentiated integration in the context of the tax proposals for repaying the debt are minimum harmonisation and enhanced cooperation. Minimum harmonisation, as mentioned by the Portuguese Presidency in relation to the FTT, sets a floor above which Member States can be free to differentiate. It allows integration at the lowest common denominator, permitting the main principles and features of a measure to be adopted with room for the Member states to manouvre their own national laws over and above the provision of the minimum harmonisation measure.

Enhanced Cooperation is a mechanism provided for by Article 20 TEU and Articles 326 to 334 TFEU, which facilitates at least nine Member States to use the EU institutions to adopt a measures within the scope of the EU's non-exclusive competences, which applies to them only as participating Member States.[188] These Treaty articles provide for varied criteria, procedural and principled, which must be met in order to receive authorisation to engage in an enhanced cooperation endeavour. The enhanced cooperation must 'aim to further the objectives of the Union, protect its interests and reinforce its integration process', and must also be 'open at any time to all Member States', in accordance with Article 328 TFEU.[189] Enhanced cooperation can only be authorized by the Council 'as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole', in accordance with Article 329 TFEU.[190] All Member States may take part in discussions, but only participating Member States may vote on the measures implementing enhanced cooperation, in accordance with Article 330 TFEU.[191] Also, enhanced cooperation measures only bind participating Member States.[192] The TFEU further specifies that enhanced cooperation must: 'respect the competences, rights and obligations' of non-participants, who must however 'not impede' the enhanced cooperation.[193] An enhanced cooperation endeavour must follow a request to the Commission by a group of Member States, and then a subsequent proposal from the Commission to the Council, which must approve that proposal with the consent of the European Parliament.

How the Mechanisms of Differentiated Integration Fit with Each Proposal

The legal basis for the CBAM is Article 192(2) TFEU which requires unanimity voting in the Council and whilst the implementing measure for the proposed amendments to the ETS provide for QMV, as explained above, both measures are interlinked. These proposals have their difficulties because of their links to the EU's climate targets but they are not the most difficult. For the corporate tax proposals, whether it is Article 115 TFEU for Pillar One / BEFIT or Article 113 TFEU for the FTT it is unanimity which is required. The EU's competence relates only to indirect taxation under these two legal bases, not direct taxation, which is arguably what Pillar One intends to be. These legal hurdles explain why it will be hard to introduce the proposals and why enhanced cooperation[194] and / or minimum harmonisation may assist.

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[188] Article 20(1), first sub-paragraph TEU.
[189] Article 20(1), second sub-paragraph TEU.
[190] Article 20(2) TEU.
[191] Article 20(3) TEU
[192] Article 20(4) TEU
[193] Article 327 TFEU
[194] M. Kendrick, (fn14) pp165-182.

Whilst no proposals for Pillar One are yet available to consider because of waiting on the international situation, previous proposals to harmonise corporate taxation have been proposed on the basis of Article 115 TFEU, which requires unanimity, and therefore it is not unreasobale to assume the same Treaty Article will be selected. Although the EU may hope that as most Member States are also members of the OECD Inclusive Framework enactment of the Pillar One Directive will be plain sailing, there has been a necessity to have carve out and transition periods in the political negotiations at the international level. It is not unreasonable to expect that there will need to be differentiated integration at the EU level also to reflect these political compromises. Minimum harmonisation and / or enhanced cooperation may be necessary legal instruments here.

With regard to the FTT there is already an enhanced cooperation authorised. The Portugese Presidency seems to suggest that there may be a desire to try and involve more Member States, or at least discussions to take place with both participating and non-participating Member States involved. This could either go ahead on the basis of the 2013 proposal for the benefit of participating Member States currently within enhanced cooperation, therefore it will be done using the existing authorisation decision for enhanced cooperation but with a new set of implementation proposals. If the FTT is proposed afresh to try and reinvigorate the possibility of adopting it as a new own resource, this could occur possibly through repeal of the current authorisation Decision and a submission for a new authorisation Decision. The legal issues with the FTT arise because the Treaty was not drafted envisaging circumstances where stage one authorisation and stage two implementation occurs almost ten years apart. For legal authority it is possible to use Art. 330 TFEU to have all Member States involved in the deliberations and the spirit of openness in Art. 20 TEU and Art. 328 TFEU to reissue authorisation and repeal the old authorisation Decision and then enact an implementation measure, as long as this was done with the engagement of the instituions in accordance with the proposal and authorisation procedures,[195] but with the binding commitments in the IIA one can optimistically assume the institutions would be agreeable. Legally it can be done but crucially only if the contents of a compromise proposal can be agreed upon by at least nine Member States. Minimum harmonisation may be the other way, although it seems from the comments of the Portuguese Presidency that in order to get agreement both enhanced cooperation and minimum harmonisation may be necessary, i.e. the enhanced cooperation authorisation would be obtained for implementing a minimum harmonisation FTT. This would of course have a significant impact on the revenue raising ability of an FTT, but from the perspective of Member State taxpayers it may be better than nothing.

This leaves the amendments to the ETS and the introduction of the CBAM. As the environmental target these proposals are linked to are not uncontentious in themselves, hence the genesis of the SCF, compromise will also be necessary here. It may be easier to achieve in relation to the ETS because the amounts of money potentially to be raised by this own resource could act as a greater incentive. However, we are again dealing with a transition period for the CBAM and with competing priorities to juggle, minimum harmonisation may be required for one or both.

Whilst it should be acknowledged that the criteria for establishing an enhanced cooperation especially, are usually considered very hard to meet, there is an element of the necessity to repay the debt, stated in the legally binding IIA, to preserve the credibility of the NextGenerationEU borrowing which can act as evidence that some criteria are likely to be

[195] Especially Article 20(2) and (3) TEU and Articles 328, 329 and 331 TFEU.

considered easier to meet, or at least there is an increased incentive on the part of both the Member States and the EU institutions to do so. The FTT was tested in the CJEU[196] and the essence of the judgment was to defer assessment of whether the criteria for authorisation of enhanced cooperation had been met until the implementing measure was in place, in order to make an holistic assessment of both measures against the Treaty criteria. We therefore don't know if the CJEU would consider that the criteria for the first stage authorisation is met until the second stage implementation of each proposal had taken place. The likely questions to be raised as to whether the enhanced cooperation Treaty criteria had been met are in relation to the requirement that enhanced cooperation be adopted as a last resort, [197] although it is highly likely because the criteria in Article 20(1)TEU to "further the objectives of the Union, protect its interests and reinforce its integration process" couldn't be more prominently at stake than in repaying NextGenerationEU on time and without need to ask Member states' taxpayers for the money. Maintaining an open invitation for other Member States to join, in accordance with Article 20 TEU and Articles 328 TFEU long term, may be some compensation for the need for a shorter term compromise in using enhanced cooperation, that is as long as the short term option respected the competences, rights and obligations of the non-participating Member States in accordance with Article 327 TFEU. It is the balance between these often apparently opposing criteria which will need to be struck to achieve fresh money to repay the nextGenerationEU debt.

Conclusion

It is an old adage that Europe regains its momentum in times of crisis,[198] and for Federalists it may appear that in responding rapidly to the Covid-19 crisis with the borrowing under NextGenerationEU the EU has moved one step further towards integration.[199] However, repayment of the debt so lauded to be incurred in a constitutional moment for the EU, will actually test not just the credibility of the legal construction of the borrowing and repayment but the EU itself. It is clear from the NextGenerationEU initiative that any extension of EU integration on the basis of such shaky foundations is a fragile development. However novel and exceptional this initiative may be, it is a test of the EU's ability to respond to a crisis as a Union rather than as a group of individual States.

In relation to all the proposals for new or additional new own resources, there is a question, yet to be answered, as to whether the timings if the introduction of these proposals will be in compliance with or in breach of the roadmap in the IIA. Whilst there is certainly time yet for the additional new own resources timetabled for step three, these are the most difficult proposals to achieve consensus on. Differentiated integration could help to meet this deadline.

[196] Case UK v Council (fn178) see also M. Kendrick, (fn14).
[197] Article 20(2) TEU
[198] M. Kendrick, "A Question of Crisis (Mis) Management or Sovereignty (Mis) Management? (EUblog 14 October 2021) https://eublog.eu/articolo/34888/A-Question-of-Crisis-(Mis)-Management-or-Sovereignty-(Mis)-Management/Kendrick
[199] See resources at fn5 and European Parliament, Parliamentary Questions, question 2 "How does the Commission reconcile the issuance of debt with the fundamental principle enshrined both in the Treaties and national constitutions that budgetary autonomy must reside at national budgetary level, and that this must remain the case for as long as the EU has not been recognised as a state in international law?" 30 June 2020 https://www.europarl.europa.eu/doceo/document/O-9-2020-000043_EN.html On the role of taxation in the development of the State see, amongst others: J. A. Schumpeter, "The Crisis of the Tax State" (1918) 4 International Economic Papers 5-38; T. Besley and T. Persson, "Taxation and Development" in *Handbook of Public Economics* (Holland: Elsevier Science, 2013) Vol.5, p51-110, pp51-52.

The other deadline most relevant is that legally binding 31 December 2058 by which repayment has to be made or the EU will be in breach not just the terms of the borrowing but its own Treaty obligations on sound financial management. On 22 December 2021 the Commission suggested that "At cruising speed, in the years 2026-2030, these [CBAM, ETS and Pillar One] new sources of revenue are expected to generate on average a total of up to €17 billion annually for the EU budget."[200] In alternative documents issued by the Commission on the same day the figures of revenue suggested to be raised by each of these propsals was: in relation to Pillar One "Pending the finalisation of the agreement, revenues for the EU budget could amount to up to EUR 2.5 - 4 billion per year";[201] in relation to the ETS there were vastly different figures as previously highlighted but on the basis of the statement "Revenues for the EU budget are estimated at around EUR 9 billion per year over the period 2023-2030";[202] and in relation to the CBAM, the transition could mean either no money at all possibly until it is gradually phased-in from 2026 (over 10 years, until 2035)[203] or "Revenues for the EU budget are estimated at around EUR 0.5 billion per year over the period 2023-2030".[204] A basic calculation demonstrates that at the top of these figures, to be generous to the Commission, of EUR 0.5 billion for the CBAM, plus EUR 9 billion for the ETS, and EUR 4 billion for Pillar One, this amounts to EUR 13.5 billion, not EUR 17 billion. The differences in the figures offered on the same day by the Commission highlight that in reality these are just estimates. The NextGenerationEU debt appears to have been incurred without really knowing how much these proposals for new own resources *will* achieve. This is either irresponsible borrowing or a reflection of the fact that it is really the Member States which will be repaying the debt through their own taxpayers' money, and the extent of that financial commitment will depend on whether there are new own resources other than GNI to be utilised.

For the environmental proposals, it is the ETS, which has the potential – possibly – to raise the most money, depending on the EU's corresponding commitment to environmental targets and of course the enactment of the CBAM to prevent carbon leakage. If the environment isn't to come second to the need to raise resources the EU will have to move reliance on the other proposals. The need, or potential dependency, on corporate and financial tax proposals may come into increasingly sharp focus as time goes on. As this article has demonstrated that consequently without considerable recourse to the legal mechanisms of differentiated integration - be that enhanced cooperation[205] or minimum harmonisation – the EU stands little chance of repaying the debt through new own resources.

[200] Commission Press Release, 'The Commission proposes the next generation of EU own resources', (fn88)
[201] Communication 566 final, (fn106) page 3-4.
[202] Communication 566 final, (fn106) page 3.
[203] Progress report (fn156) para.12.
[204] Communication 566 final, (fn106) page 3.
[205] M. Kendrick, (fn14) pp165-182.