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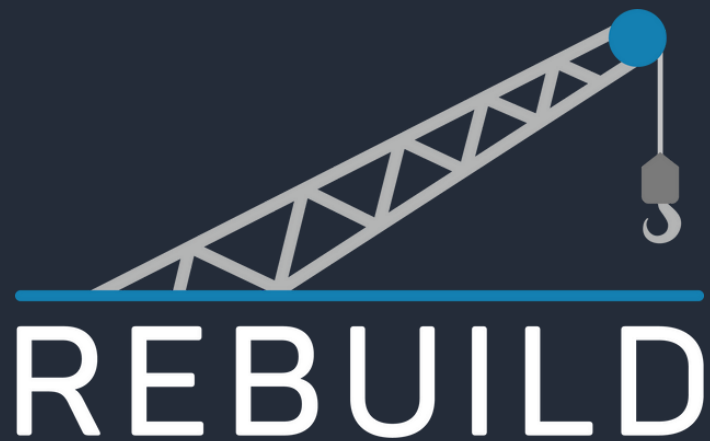
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Working Paper

The Emissions Trading Scheme (ETS) and
the Carbon Border Adjustment Mechanism
(CBAM)

Maria Kendrick



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Chapter 18

The Emissions Trading Scheme (ETS) and the Carbon Border Adjustment Mechanism (CBAM)

Maria Kendrick¹

Abstract

The CBAM and amendments to the ETS have been enacted but not in terms of becoming own resources for the EU, as there have already been two sets of proposed amendments to the 2020 Own Resources Decision so far, neither of which have resulted in legislative amendments. Assessing the capacity of either measure to produce sufficient revenue to repay the NextGenerationEU debt is difficult because of multiple issues, which this chapter divides into three categories. First, there is the uncertainty generated by the EU's conflicting objectives. Both measures depend on carbon usage in order to generate revenue, and significant continued carbon usage if they are to generate enough revenue to repay the debt. However, both measures are fundamental to the EU's green policy objectives. Second, the potential revenue either measure could raise is based on estimated figures. Third, it is unclear whether the revenue raised will be enough to repay the full cost of borrowing in the form of both principal and interest. This chapter questions whether the EU has the ability to repay the NextGenerationEU debt with these measures, or whether has it otherwise so far developed only debt capacity.

Keywords

NextGenerationEU, EU own resources, Own Resources Decision, Emissions Trading Scheme ETS, Carbon Border Adjustment Mechanism CBAM, debt.

1. Introduction

The invention of NextGenerationEU has been made possible through “extraordinary and temporary additional means”, at least this is how it is described in Article 5 of the Own Resources Decision 2020/2053 (ORD).² These means are in the form of debt borrowed on the financial markets at a significant level of over EUR 800 billion in today's prices.³ Whilst Article 5 of the ORD has facilitated the EU's debt incurrence through its legal empowerment of the Commission to borrow funds to provide loans and grants to the Member States, it also includes a legal obligation to repay the debt, in fact “All liabilities incurred by the exceptional and temporary empowerment of the Commission to borrow funds referred to in paragraph 1

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This paper is forthcoming in Federico Fabbrini & Christy Petit (eds), *Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law* (Elgar 2024).

² Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, Article 5. See also Chapter 17 in this volume.

³ NextGenerationEU https://next-generation-eu.europa.eu/index_en accessed 10 January 2024.

of this Article shall be fully repaid at the latest by 31 December 2058” including related interest.⁴ The EU has therefore been the author of its own legal obligation to repay the debt.⁵

The Union budget is bearing the cost of funds borrowed to be used for expenditure,⁶ essentially repaying the grant element, and in order to do so the ORD states that *new* own resources, being fresh revenue coming into the EU’s budget, would be introduced.⁷ Otherwise, the legal default position will be activated, which is that Member States are liable to pay the entirety of the debt, including the grant element, based not on the ratio of quantities of NextGenerationEU funding received, but on the basis of their typical Gross National Income (GNI) contributions.⁸

To this end the European Commission, European Parliament and the Council bound themselves in the 2020 Interinstitutional Agreement (IIA) to a Roadmap towards the introduction of new own resources.⁹ Included in the Roadmap, alongside corporate tax proposals, a digital levy and a financial transaction tax, are environmental measures, namely a statistical own resource based on plastics wastage, amendments to the Emissions Trading Scheme (ETS) and the introduction of a Carbon Border Adjustment Mechanism (CBAM).¹⁰ The latter two proposals, which form the focus of this chapter, essentially put a price on carbon produced from certain economic sectors. In relation to the ETS, this is effectively done through the scheme’s feature of auctioning emissions allowances. In relation to CBAM, in order to avoid carbon leakage, there is effectively a charge on the carbon emitted during the production of carbon intensive goods that are entering the EU.¹¹ Both measures therefore depend on carbon usage in order to generate revenue, and significant continued carbon usage if they are to generate enough revenue to repay the debt.

⁴ Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, Article 5(2).

⁵ For details of the Treaty Articles which expand the EU’s own legal obligations to repay see Maria Kendrick, ‘NextGenerationEU: will the debt be repaid by EU Own Resources or Member State Taxpayers?’, (2023) Vol 48 No 1, *European Law Review* 29-61, especially pages 34-36

⁶ Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, Article 5(1)(b) and Article 5(2) first paragraph.

⁷ Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, paragraph 6 to 8.

⁸ Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, Article 9(4) and (5). For the effect of this see: Maria Kendrick, Repaying the NextGenerationEU Debt, EUBlog, 13 April 2023, <https://www.eublog.eu/articolo/35065/Repaying-the-NextGenerationEU-Debt/Kendrick> accessed 8 January 2024.

⁹ 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 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 Annex II. The legal basis of the IIA is Article 295 TFEU according to the provisions of this Article and the IIA, it is legally binding on the EU institutions.

¹⁰ 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 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 Annex II.

¹¹ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism OJ L130/52 of 16 May 2023 and Directive (EU) 2023/959 Of The European Parliament And Of The Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system OJ L130/134 of 16 May 2023.

There is already non-compliance with the terms and timelines of the Roadmap contained in the IIA, with the corporate and financial tax proposals including a digital levy being delayed, postponed or abandoned.¹² Consequently, the current significant focus is on the amended ETS and CBAM to provide new own resources to repay the debt. However, it must be emphasised that in order for either to become own resources, their revenue needs to be attributed as such, through an amendment to the ORD. There have been two sets of proposed amendments to the ORD to date, neither of which have so far resulted in legislative amendments.¹³

The EU institutions have attempted to make the distinction in the legal construction of NextGenerationEU between genuine EU own resources on the one hand and Member State taxpayers' money on the other hand, stressing the need for the former because the ability to develop independent funding and effectively a fiscal Union depends on independent and accountable sources of EU revenue, not recourse to Member State GNI.¹⁴ However, direct recourse to the Member States is exactly the default enacted in the ORD. Consequently, if the need to repay the debt is of paramount importance to ensuring the credibility of NextGenerationEU and the EU as a borrower, how much more is it the case that repayment through new own resources is important for the future fiscal capacity of the EU, not just debt capacity?¹⁵

Multiple issues could impair the ability of the ETS and CBAM to provide sufficient new own resources, not least the fact that they are designed to disincentivise the carbon usage on the basis of which they raise revenue. The cost of the borrowing is also a concern, as expressed by some of the EU institutions, and the figures on the revenue side are uncertain and based on estimates, as is the repayment of the principal, let alone service of the interest in addition.

This chapter will discuss these issues in section 3, dividing them into the following three broad categories: conflicting objectives; revenue estimates; and the cost of borrowing. This chapter will first survey both sets of proposed amendments to the ORD in relation to the ETS and CBAM, having briefly accounted for the new own resource on plastics packaging, in section 2. As the forthcoming sections of this chapter will illustrate, all of these issues combine to ultimately question the ability of the EU to repay the NextGenerationEU debt and develop more than just debt capacity. This question will be explicitly addressed in section 4, before concluding.

2. Towards *New Own Resources*?

This section of the chapter will survey both sets of proposed amendments to the ORD in relation to the ETS and CBAM, analysing the potential debt repayment capacities of these proposals in relation to their transition and implementation dates, having briefly accounted for the new own resource on plastics packaging.

¹² 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 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, Annex II.

¹³ European Council Presidency report on new own resources, Brussels, 24 November 2023 (OR. en) 15858/23, RESPR 35, FIN 1233, ECOFIN 1273, FISC 271.

¹⁴ A discussion of tax incidence is outside of the scope of this chapter, on which see Glen Loutzenhiser and Rita de la Feria (eds), *The Dynamics of Taxation: Essays in Honour of Judith Freedman* (Bloomsbury 2020).

¹⁵ On which see the argument put forward by Federico Fabbrini in Federico Fabbrini, *EU Fiscal Capacity* (Oxford University Press 2022), especially chapters one and six.

The current own resources listed in the ORD include the traditional own resource of customs duties,¹⁶ a uniform call rate on the VAT receipts of Member States,¹⁷ and contributions from Member States based on their GNI,¹⁸ the latter accounting for approximately 80% of own resources income.¹⁹ This indicates not only the significant reliance of the EU on Member State taxpayers and national budgets but also the EU's lack of independent funding. To demonstrate the difficulty the EU has had historically in securing its own funding, according to a recent Resolution of the European Parliament,²⁰ the only new own resource to be introduced into the EU system since 1970, apart from direct contributions from Member State GNI, regards plastics wastage. However, it is essentially a statistical call rate on which additional contributions from Member States are sought so it is not an entirely independent source of revenue, even if it is technically a new own resource.²¹ In terms of revenue raising, it will not greatly assist in making inroads into the enormity of the NextGenerationEU debt, as of the time it entered into force on 1 January 2021, Member States contribute EUR 0.80 per kilogramme of their plastics packaging waste that is not recycled, with a potential to generate up to EUR 6 billion per year, but on a falling scale as revenue is likely to fall if the non-recycling of plastics is reduced.²²

The plastics waste own resource is the only one to comply with the terms of the IIA Roadmap.²³ The CBAM and amendments to the ETS have been enacted but not in terms of becoming own resources, as there have already been two sets of proposed amendments to the ORD so far, neither of which have resulted in legislative amendments at the time of writing.²⁴

On 22 December 2021, the Commission proposed that the CBAM and ETS, amended to include stationary installations, maritime and aviation sectors, the so-called ETS1, and a

¹⁶ Described in art.2(1)(a) of the ORD 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”.

¹⁷ Described in art.2(1)(b) of the ORD as “the application of a uniform call rate of 0,30 % for all Member States to the total amount of VAT receipts collected in respect of all taxable supplies divided by the weighted average VAT rate calculated for the relevant calendar year as stipulated in Council Regulation (EEC, Euratom) No 1553/89”.

¹⁸ Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, Article 2(1)(d).

¹⁹ European Parliament Resolution on Own Resources 10 May 2023, P9_TA(2023)0195 para.37.

²⁰ European Parliament Resolution on Own Resources 10 May 2023, P9_TA(2023)0195.

²¹ Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335 [2020] OJ L424/2, Article 2(1)(c).

²² Council Regulation (EU, Euratom) 2021/770 of 30 April 2021 on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income OJ L165/15 of 11 May 2021 and POLITICO Europe needs more cash, Belgian PM says Prime Minister Alexander De Croo, 2 January 2024 <https://www.politico.eu/article/belgium-de-croo-interview-pm-europe-needs-more-cash/> accessed 3 January 2024.

²³ 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 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, Annex II.

²⁴ In January 2024.

separate emissions trading scheme to include road transport and buildings, as ETS2,²⁵ should be introduced and then allocated as new sources of revenue for the EU budget by amending the ORD to add two new sources of revenue to Article 2 of that provision.²⁶ The IIA Roadmap envisioned the introduction of these own resources by 1 January 2023, but it was not until May 2023 that the CBAM²⁷ and then the amended ETS²⁸ were enacted. However, this does not mean that they are both currently generating own resource revenue. As a result of the “legislative discussions on the proposal made in December 2021 hav[ing] made limited progress”,²⁹ according to the Commission’s own assessment, it proposed, on 20 June 2023, a second amendment to the ORD. In relation to the ETS and CBAM, the most notable amendments proposed in June 2023 are the transition and implementation dates and the call rates and amounts. The former will now be outlined with the latter discussed in the next section of this chapter.

The ETS³⁰ is essentially the EU’s internal carbon pricing scheme in the sense that it is the carbon produced within its borders that is subject to its application, and therefore requires auctioned allowances to cover such Greenhouse gases (GHGs). In order to avoid carbon leakage, CBAM³¹ applies to goods imported into the EU from outside its border. The CBAM is subject to a lengthy transition period which will not generate revenue until 1 January 2026.³² In order to avoid carbon leakage during the transition period, the ETS provides for a limited duration of free allowances.³³ The timing of these transition and implementation periods with regard to their ability to raise revenue as an own resource, are contained in the second set of proposed amendments to the ORD, specifically Article 2. These proposed amendments would see a new paragraph (e) added to Article 2 of the ORD adding the ETS, that would apply as an own resource from 1 January 2024 (ETS1) and then 1 January 2028 (ETS2) to reflect the separate application of the ETS to road transport and buildings. In addition, a new paragraph (f) would see the CBAM added to Article 2 of the ORD to apply as

²⁵ European Court of Auditors Report, Opinion 04/2023, Pursuant to Article 322(2) TFEU concerning the Commission’s amended proposal for a Council Regulation on the methods and procedure for making available own resources based on the Emission Trading System, the Carbon Border Adjustment Mechanism, reallocated profits and the statistical own resource based on company profits and on the measures to meet cash requirements COM/2023/333, 2022/0071 (NLE)

²⁶ Commission Proposal for a Council Decision amending Decision 2020/2053 on the system of own resources of the European Union” COM(2021) 570 final

²⁷ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism OJ L130/52 of 16 May 2023.

²⁸ Directive (EU) 2023/959 of the European Parliament And Of The Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system OJ L130/134 of 16 May 2023.

²⁹ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee and The Committee of The Regions An adjusted package for the next generation of own resources, COM(2023) 330 final, 20 June 2023, Page 1.

³⁰ Directive (EU) 2023/959 of The European Parliament And Of The Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system OJ L130/134 of 16 May 2023.

³¹ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism OJ L130/52 of 16 May 2023.

³² Amended proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union COM(2023) 331 final/2.

³³ Directive (EU) 2023/959 Of The European Parliament And Of The Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system OJ L130/134 of 16 May 2023.

an own resource from 1 January 2026.³⁴ Whilst the CBAM and ETS transition and implementation periods may make logistical and practical sense within the measures themselves, they have an obvious impact on delaying revenue raising. However, this is essentially irrelevant in regard to their ability to raise revenue to repay the NextGenerationEU debt, because, as explained above, without an amendment to the ORD, the CBAM and ETS will not become new own resources. The issues do not stop there however, as the next section of this chapter will now demonstrate.

3. Issues with Repaying the NextGenerationEU Debt

This chapter will identify a non-exhaustive list of issues associated with the ETS and CBAM own resources and their related proposals to repaying the NextGenerationEU debt, broadly divided into three categories, namely the EU's conflicting objectives of debt repayment and environmental targets, the estimated status of CBAM and ETS revenues and the cost of borrowing. In assessing these issues, it needs to be borne in mind that the repayment obligation includes both principal and interest. This is because the cost of borrowing is as important as the repayment of the principal itself to the ability of the EU to develop more than just the capacity to incur expensive debt to be repaid by Member State contributions.

Crucial to this assessment of the potential emergence of a fiscal, not just debt, capacity, is consideration of how much revenue the CBAM and ETS could raise in contrast to how much needs to be repaid. Whilst the potential start date for the attribution of these revenues as new own resources remains a mystery, as the previous section of this chapter has explained, their revenue raising capacity is not much clearer. The first proposed amendment to the ORD included a proposal for a call rate of 75% for the CBAM and 25% for the ETS into the EU's budget, the rest will remain with the Member States.³⁵ The latter call rate has since changed in the June 2023 proposal, as the Commission has identified that the carbon price of GHG emitted has increased significantly from 55 to 80 Euros per tonne and has therefore proposed a corresponding increase in the call rate to 30%.³⁶ However, whether this price is sustainable remains to be seen, as even the Commission admits that this level of carbon price is unprecedented.³⁷

3.1. Conflicting Objectives

The revenue CBAM could generate may be negatively affected by its very existence in promoting awareness of carbon pricing abroad. This is because CBAM effectively operates on the basis of a credit system, where goods that have already been subject to a system of carbon pricing before they enter the EU will have the price paid credited against what would

³⁴ Amended proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union COM(2023) 331 final/2, Article 1(1)(a) and (b) and Article 2.

³⁵ Amended proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union COM(2023) 331 final/2

³⁶ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions An adjusted package for the next generation of own resources, COM(2023) 330 final, 20 June 2023, page 2

³⁷ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions An adjusted package for the next generation of own resources, COM(2023) 330 final, 20 June 2023, page 2, see also Edoardo Celeste and Goran Dominioni, 'Digital and Green: Reconciling the EU Twin Transitions in Times of War and Energy Crisis' REBUILD Centre, Working Paper 11 November 2023, and in this volume, Chapter 11.

have been due under CBAM.³⁸ It is therefore potentially³⁹ the EU's own external carbon pricing mechanism which may incentivise third countries to implement their own carbon pricing regime in order to keep the revenue raised for their own national priorities and away from the EU's, especially repaying the NextGenerationEU debt. As recently reported, the transition period is providing third countries with the ability to consider charging domestic emissions in order to avoid paying Brussels, and even the Commission is considering setting up an advisory service to help these third countries.⁴⁰ This should not be surprising however, as recently stated by the Director of the Directorate "Indirect taxation and tax administration" in the Directorate-General for Taxation and Customs Union (DG TAXUD) in the European Commission, "a successful CBAM is a CBAM which ceases to exist".⁴¹

These are, however, not the only issues of the EU's design which could impact the ability of the ETS amendments and the CBAM to raise sufficient revenue to repay the debt. As the current author has written elsewhere,⁴² the EU has explicit environmental objectives which, in the form of the 'Fit-for-55' package⁴³ and Green Deal,⁴⁴ seek to reduce carbon emissions by at least 55% by 2030, ultimately leading to climate neutrality by 2050, being 8 years before the NextGenerationEU repayment deadline. This establishes a fundamental conflict between the EU's objectives where the success of one is predicated on the failure of another. In essence, it is only if the environmental objectives fail that the ETS and CBAM will be able to continue to generate revenue for the duration of the repayment period. However, the EU has actually exacerbated this conflict of objectives through the requirement that Member States in receipt of NextGenerationEU funding should spend at least 37% of those funds on pursuing these environmental objectives.⁴⁵ In linking spending obligations to incentives to decarbonise, the EU is essentially incurring debt to be spent on reducing the revenue income it needs to repay the debt.⁴⁶ These issues essentially demonstrate a fundamental principle in taxation,

³⁸ How carbon prices are taking over the world: A quarter of global emissions are now covered, and the share is rising fast, *The Economist*, 1 October 2023.

³⁹ On the potentialities and pitfalls of carbon pricing and the limits of crediting mechanisms see the detailed account in Goran Dominioni and Daniel C. Esty, 'Designing Effective Border-Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes', (2023) *Arizona Law Review* 65(1), p1 – 41.

⁴⁰ Europe Express, *The Financial Times* "The EU's new carbon border tax is starting to have its desired effect: pushing countries to consider charging for emissions domestically to avoid paying it" 15 January 2024 <https://on.ft.com/3TYWXXs> accessed 17 January 2024.

⁴¹ Maria Elena Scoppio, Director for Indirect Taxation and Tax Administration, European Commission, DG TAXUD speaking on the Re-Thinking Europe podcast <https://open.spotify.com/episode/24RFIShgV8PpFTD2SWhf6?si=T-AvkdETTYiAKkR8CHNMw&nd=1&dlsi=ebf20b6849eb46ee> accessed 17 January 2024.

⁴² Maria Kendrick, 'NextGenerationEU: will the debt be repaid by EU Own Resources or Member State Taxpayers?', (2023) Vol 48 No 1, *European Law Review* 29-61 at p50.

⁴³ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality COM(2021) 550 final of 14 July 2021

⁴⁴ European Commission, The next generation of EU own resources, https://commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027/revenue/next-generation-eu-own-resources_en accessed 9 January 2024.

⁴⁵ Edoardo Celeste and Goran Dominioni, 'Digital and Green: Reconciling the EU Twin Transitions in Times of War and Energy Crisis' REBUILD Centre, Working Paper 11 November 2023, page 6, and in this volume, Chapter 11.

⁴⁶ See Maria Kendrick, Repaying the NextGenerationEU Debt, EUBlog, 13 April 2023, <https://www.eublog.eu/articolo/35065/Repaying-the-NextGenerationEU-Debt/Kendrick> accessed 8 January 2024. And whilst this affects 37% of spending, see Edoardo Celeste and Goran Dominioni, 'Digital and Green: Reconciling the EU Twin Transitions in Times of War and Energy Crisis' REBUILD Centre – Working Paper 11 November 2023 on why the digital agenda should be lined to the green transition, and in this volume, Chapter 11.

which is that if you introduce a tax in order to change behaviour, and it works, that tax will not be a big revenue raiser. Broadly speaking, if you meet your aims you reduce your revenue.

This is arguably implicit in the European Parliament's recent acknowledgment that "yields from the green own resources [CBAM and ETS] will diminish"⁴⁷ that these are essentially environmental measures and fundamentally not designed to raise revenue, or at least it is implicit that this is not their main priority. Therefore, any revenue they do raise, and this would essentially apply by extension to the plastics own resource being another environmental measure, is not designed to last. The ability of the ETS and CBAM to raise sufficient revenue for repayment is therefore apparently dependant on them raising significant funds in the immediate to short term. In the context of timings, as previously elucidated by this chapter, the generation and allocation of ETS and CBAM revenue as new own resources is awaited and in light of the transition periods, for some years to come. The development of a fiscal, rather than just debt capacity, with regard to these environmental proposals may therefore depend on the level of funding they could generate.

3.2.Revenue Estimates

In an attempt to address the issue of whether the ETS and/or CBAM are capable of raising sufficient funds, this chapter has resorted to compiling Commission estimates. According to the Commission, CBAM could raise a total of EUR 1.5 billion per year from 2028.⁴⁸ The ETS, on the basis of the increased price per tonne of carbon to 80 Euro could raise EUR 19 billion per year.⁴⁹ The estimated total annual repayment cost of NextGenerationEU is EUR 15 billion of principal, excluding interest. Revenues from the ETS are also being potentially hypothecated to finance the Social Climate Fund (SCF), at almost EUR 10 billion per year from 2028 the when it is transferred into the budget.⁵⁰ Further, REPower seeks to spend up to EUR 20 billion of redirected revenue produced through ETS auctioned allowances, detracting from funds which could have been made available to repay the debt.⁵¹ The most elementary mathematical calculation will demonstrate that there is a shortfall, as the European Committee of the Regions has pointed out to the Commission.⁵² The statistical own resource based on company profits, Pillar One and/or BEFIT new own resource has been excluded

⁴⁷ European Parliament Resolution on Own Resources 10 May 2023, P9_TA(2023)0195 para.6.

⁴⁸ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions An adjusted package for the next generation of own resources, COM(2023) 330 final, 20 June 2023, page 2

⁴⁹ European Commission, Questions and Answers: An adjusted package for the next generation of own resources, 20 June 2023 https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3329 accessed 6 January 2024.

⁵⁰ Commission Staff Working Document Accompanying the document Amended Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union SWD(2023) 331 final, page 17.

⁵¹ Regulation (EU) 2023/435 of The European Parliament And Of The Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC OJ L63/1 of 28 February 2023, especially Article 5 and see for a detailed discussion Rosalba Fama 'REPowerEU: Next Generation EU's architecture beyond the pandemic', Working Paper 6, February 2023, and in this Volume, Chapter 9.

⁵² It is worth reading the Commission's acknowledgement of the European committee of the Region's comments in the Staff Working Document in full: COMMISSION STAFF WORKING DOCUMENT Accompanying the document Amended Proposal for a Council Decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union SWD(2023) 331 final, page 17.

from this calculation partly because it is outside of the scope of this chapter⁵³ and partly because approval for this proposed new own resource is as yet still awaited.⁵⁴ The plastics own resource may assist but only to the extent that plastics wastage is not recycled. There is potentially therefore still a shortfall.

3.3. The Cost of Borrowing

It may be said that this chapter has been generously spirited in setting out such estimated calculations, even as to just repayment of the principal, due to the amount of uncertainty that surrounds them. As to the cost of borrowing, namely the interest, things are significantly more opaque. The European Court of Auditors (ECA) is required, under Article 322(2) TFEU to be consulted, as the Council is to “determine the methods and procedure whereby the budget revenue provided under the arrangements relating to the Union's own resources shall be made available to the Commission, and determine the measures to be applied, if need be, to meet cash requirements” but only after consulting the ECA.⁵⁵ Accordingly, the ECA has provided opinions on the new own resources proposals, including those put forward in June 2023. Overall, it has opined that “In the absence of official Commission estimates of the amounts of interest to be repaid for NGEU, the information available would not allow us to assess whether the expected annual revenues generated from the adjusted package for the next generation of own resources are sufficient to cover, as intended, the amounts needed to repay NGEU and to finance the SCF.”⁵⁶

Whilst the Commission has not satisfied the ECA as to the ability of the proposed new own resources to repay the debt⁵⁷ the European Parliament “is deeply worried, however, that the amounts generated by the new own resources will not be sufficient to cover all NGEU repayments and borrowing costs (estimated at at least EUR 15 billion per year on average until 2058)”.⁵⁸ One can only assume that the interest repayments are also estimated, to an undisclosed extent. Therefore, whilst the ETS appears to have the most potential of the two environmental proposals to raise significant revenue, it also appears justified to assume that the shortfall will only increase as interest payments fall due. This is especially so as money from the ETS is already being earmarked for spending on other objectives, such as the SCF and, as the EU hopes, its environmental objectives. Whilst there is uncertainty as to the impact of those objectives on CBAM revenue raising in particular, the small amount of revenue CBAM is estimated to produce may not greatly assist.

⁵³ See chapter 19 by Carlo Garbarino, ‘Global minimum tax’ in this volume.

⁵⁴ See European Council Presidency report on new own resources, Brussels, 24 November 2023 (OR. en) 15858/23, RESPR 35, FIN 1233, ECOFIN 1273, FISC 271.

⁵⁵ Article 322(2) TFEU.

⁵⁶ European Court of Auditors Report, Opinion 04/2023, Pursuant to Article 322(2) TFEU concerning the Commission’s amended proposal for a Council Regulation on the methods and procedure for making available own resources based on the Emission Trading System, the Carbon Border Adjustment Mechanism, reallocated profits and the statistical own resource based on company profits and on the measures to meet cash requirements COM/2023/333, 2022/0071 (NLE), Page 12, paras 20 and 31.

⁵⁷ European Court of Auditors Report, Opinion 04/2023, Pursuant to Article 322(2) TFEU concerning the Commission’s amended proposal for a Council Regulation on the methods and procedure for making available own resources based on the Emission Trading System, the Carbon Border Adjustment Mechanism, reallocated profits and the statistical own resource based on company profits and on the measures to meet cash requirements COM/2023/333, 2022/0071 (NLE), para.31.

⁵⁸ European Parliament Resolution on Own Resources 10 May 2023, P9_TA(2023)0195 para.10.

4. Is the EU Developing More Than Just Debt Capacity?

Where does this leave the analysis in terms of the EU's ability to develop more than just debt capacity? The EU has authored its own legal obligation to repay the NextGenerationEU debt. The issues associated with the ability of CBAM and the amended ETS to generate sufficient and certain revenue without compromising the environmental objectives they have been apparently designed to serve, questions the EU's progress and ability so far to repay the NextGenerationEU debt. It is notable that it is also suspected to be expensive debt, with the interest rates impacting the cost of borrowing. In the absence of new own resources in the form of taxes, be they the environmental measures discussed in this chapter or corporate and financial taxes, and their subsequent allocation as EU new own resources, the change in the EU's fiscal capacity which NextGenerationEU has brought about at the moment consists of the incurrence of debt.⁵⁹

The European Parliament has expressed its concern at the slow pace of progress in the adoption of new own resource measures and it is also notable that the corporate tax proposals in either the first or second set of proposed amendments to the ORD do not currently include Pillar Two. The default alternative written into the legal instruments, being continued reliance on Member State contributions, looks ever more likely to be invoked. Overall, the issues surrounding the ability of the ETS and CBAM to assist in repaying the debt illustrates that it could well be the next generation that will be left to repay.⁶⁰

The incurrence of debt is not a sound basis on which to develop a fiscal union, as the concerns regarding the ability to meet the repayment costs expressed by the EU institutions in earlier sections of this chapter have shown. In actual fact, it serves to make transparent that the EU lacks full taxing powers and that is a fiscal weakness tested, as well as demonstrated, by crises.⁶¹ The EU has therefore so far achieved more of a debt capacity than a fiscal capacity.

5. Conclusion

This chapter has considered the CBAM and amendments to the ETS as proposed new own resources, surveying the two sets of proposed amendments to the ORD made so far, neither of which have resulted in legislative amendments. It has demonstrated that assessing the capacity of either measures to produce sufficient revenue to repay the NextGenerationEU debt is difficult because revenue generation is impacted by transition periods and estimated figures. Uncertainty is also caused by conflicting objectives, whereby significant continued carbon usage is needed if they are to generate enough revenue to repay the debt. However, both measures are fundamental to the EU's green policy objectives. It is also unclear whether the revenue raised will be enough to repay the full cost of borrowing. Overall, the issues discussed in this chapter combine to ultimately question the EU's ability to develop more than just debt capacity.

⁵⁹ Rodríguez-Vives, Marta (2023), "Towards a Common EU Debt: Where Do We Stand?", *Intereconomics*, 58 (6). See also Federico Fabbrini, *EU Fiscal Capacity* (Oxford University Press 2022).

⁶⁰ European Parliament Resolution on Own Resources 10 May 2023, P9_TA(2023)0195 para 1.

⁶¹ Maria Kendrick, *Differentiated Integration in the EU: Harmonising EU Tax Law*, Edward Elgar forthcoming in 2024.