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RESEARCH ARTICLE

Will It Be FINE-for-EU? A Proposal for a Mechanism Funding Pan-European Green Investment to Promote the EU (Still) Meeting Its Climate Goals

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Abstract
Addressing climate change is a global priority. There is broad, science-based consensus that efficient environmental policy requires significant and rapid investments aimed at accelerating energy transition and safeguarding biodiversity. Yet, despite valuable improvements such as NextGenerationEU and the ETS, the EU and its Member States are still in search of extra financial resources. Here, we establish the FINE-for-EU mechanism to provide finance for pan-European green investment projects. We propose setting up a Pan-European Climate Fund to create a financial link between the benefits businesses derive from the cross-border legal framework and the specific responsibilities they have towards supporting climate objectives.

Keywords: environmental policy; international business responsibility; EU climate policy; fiscal policy; Pan-European Climate Fund

I. Unprecedented pressures create a window for opportunity

It is the defining crisis of our generation: climate change. It is a race we are losing but a race that can be won.[1] Bold steps are necessary to address this threat to humankind, which is recognised both on a global level[2] and at the level of the EU.[3] Needless to say, taking action against climate change is burdensome, expensive, and requires sacrifice. Yet, the cost of not acting is tremendously higher. As tax law scholars, we feel called upon to enrich the discussion and increase the portfolio of tools that policymakers have at their disposal. For this purpose, we aim to work out a model that may be used to raise additional money to finance necessary climate change spending.

The urgency of the need for action is displayed by recent figures predicting that the EU is about to miss its self-imposed Fit for 55 goals of a 55 per cent reduction, relative to 1990 levels, of net greenhouse gas emissions by 2030 and climate neutrality by 2050.[4] European projections indicate that, even

[1]A Guterres, 'Remarks at 2019 Climate Action Summit', United Nations Secretary-General (23 September 2019).
[2]See, eg, United Nations, *Paris Agreement* (2016).
[3]For an overview of a wide range of EU action against climate change, see European Council, 'Climate Change: What the EU Is Doing' (February 2023).
[4]European Council, 'Council' (June 2023), see Fit for 55, https://www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition/; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (2021).

with the additional policies and measures that Member States intend to launch in the coming years, only a 41 per cent reduction will be achieved by 2030.[5] What is needed to turn this trend around is an increase in the carbon price.[6] Furthermore, it needs a substantial increase in green investments; estimates suggest that merely to ensure achieving the Fit for 55 goals requires a *yearly additional* green investment of around EUR 520 billion until 2030.[7] Apart from this necessary increase in green investments to achieve the Fit for 55 goals, another EUR 300 billion are to be mobilised between 2022 and 2030 for the REPower Plan that aims to end the EU's dependence on Russian fossil fuels.[8] Thus, the amount of money to be raised is enormous. Reaching these investment goals requires a maximal effort, both on a national and on a European level.[9] Particularly the latter is regarded to be an integral part of the solution. Policymakers[10] and academics are calling for a coordinated EU approach, emphasising the decisive advantages that lie in the creation of climate-related European public goods.[11] They should be able to address the issue of limited returns on individual action in tackling the climate emergency. Furthermore, they should enhance spillovers, improve coordination through cross-border investments, and safeguard the occurrence of investment despite possible national political or fiscal constraints.[12] Our article is to add precisely here.

The starting obstacle to the creation of European public goods is the EU's financial architecture. As we will outline in more detail later, it gives rise to the – well-known – *juste retour* problem,[13] which

[5]European Environment Agency, *Trends and Projections in Europe 2022* (Publications Office, 2022).

[6]See A Avgousti et al, *The Climate Change Challenge and Fiscal Instruments and Policies in the EU* (ECB, 2023), noting that another important policy goal lies in ensuring a higher carbon price.

[7]Avgousti et al, *The Climate Change Challenge*; European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Kick-Starting the Journey towards a Climate-Neutral Europe by 2050: EU Climate Action Progress Report 2020 (2020). This estimate is also relied on in A Pekanov and M Schratzenstaller, *Options to Align the EU Fiscal Framework to Green Public Investment Needs* (WIFO, 2023).

[8]European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU Plan (2022).

[9]European Council, *Conclusions Following the European Council Meeting of 20 and 21 October* (2022); European Council, *Conclusions Following the European Council Meeting of 15 December* (2022); L Abraham, M O'Connell, and I Arruga Oleaga, *The Legal and Institutional Feasibility of an EU Climate and Energy Security Fund* (ECB, 2023).

[10]European Council, *Conclusions Following the … Meeting of 20 and 21 October*; European Council, *Conclusions Following the … Meeting of 15 December*; T Breton and P Gentiloni, 'Germany's Latest Response to Energy Crisis Raises Questions', *Irish Times* (3 October 2022); Abraham et al, *The Legal and Institutional Feasibility.*

[11]Abraham et al, *The Legal and Institutional Feasibility*; Pekanov and Schratzenstaller, *Options to Align*; L Garicano, 'Combining Environmental and Fiscal Sustainability: A New Climate Facility, an Expenditure Rule, and an Independent Fiscal Agency' (CEPR, 2022); NG Arnold et al, *Reforming the EU Fiscal Framework: Strengthening the Fiscal Rules and Institutions* (IMF, 2022); M Schratzenstaller, 'Elements of a European Green Fiscal Policy' (2023) 58 *Intereconomics* 300; C Fuest and J Pisani-Ferry, *A Primer on Developing European Public Goods* (ifo Institute, 2019); M Buti and G Papaconstantinou, *European Public Goods: How Can We Supply More?* (Luiss SEP, 2022); M Thöne and H Kreuter, *European Public Goods: Their Contribution to a Strong Europe* (FiFo/Bertelsmann Stiftung, 2020).

[12]Abraham et al, *The Legal and Institutional Feasibility*; Arnold et al, *Reforming the EU Fiscal Framework*, p 21.

[13]See, eg, C Fuest, F Heinemann, and M Ungerer, 'Reforming the Financing of the European Union: A Proposal' (2015) 50 *Intereconomics* 288. Compare further, eg, V Rant and M Mrak, 'The 2007–13 Financial Perspective: Domination of National Interests' (2010) 48 *JCMS (Journal of Common Market Studies)* 347; C Zimmer, G Schneider, and M Dobbins, 'The Contested Council: Conflict Dimensions of an Intergovernmental EU Institution' (2005) 53 *Political Studies* 403; S Richter, *Facing the Monster 'Juste Retour': On the Net Financial Position of Member States vis-à-vis the EU Budget and a Proposal for Reform* (Vienna Institute for International Economic Studies, 2008); F Brantner et al, '§ 4 Panel Discussion' (2021) 16 *Heidelberger Beiträge zum Finanz- und Steuerrecht* 79; J-C Defraigne and P Nouveau, *Introduction à l'économie européenne*, 3rd ed. (De Boeck Supérieur, 2022); Traversa, 'The Reform of EU Own Resources' in E Traversa (ed), *Tax Nexus and Jurisdiction in International and EU Law* (IBFD, 2022); C Fuest and J Pisani-Ferry, *Financing the European Union: New Context, New Responses* (2020); M Buti, 'When Will the European Union Finally Get the Budget It Needs?', *Bruegel* (7 December 2023); R Crowe, 'An EU Budget of States and Citizens' (2020) 26 *European Law Journal* 331; S Lehner, 'The Dual Nature of the EU Multiannual Financial Framework' in B Laffan and A De Feo (eds), *EU Financing for the Next Decade: Beyond the MFF 2021–2027 and the Next Generation EU* (European University Institute (EUI), 2020), pp. 21–42; I Kalfin, 'The Importance of Own Resources in the EU Budget' in B Laffan and A De Feo (eds), *EU Financing for the Next Decade: Beyond the MFF 2021–2027 and the Next Generation EU* (EUI,

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goes hand in hand with Member States preferring the maximisation of measurable backflows into their territory, instead of maximising the European value created.[14] For rather obvious reasons, this is problematic, particularly in the area of climate policy. Climate change does not stop at the border. Accepting this, the EU and its Member States also rely on a common climate policy – the EU Climate Law including the Fit for 55 goals. Their achievement is legally binding for the EU and, furthermore, represents the EU's and the Member States' commitment to the Paris Agreement.[15] Yet, putting these general policies into practice is politically rather difficult because it means, as far as green investment is concerned, that the allocation of funds does not follow distributional criteria; rather, it is oriented only by the maximisation of positive environmental impact for the achievement of the common Fit for 55 goals.[16] This can mean that investments are concentrated in certain sectors and/or Member States in which these green investment needs – and their marginal benefits – are larger. Furthermore, it can mean financing pan-European measures that do not have a specific connection (and backflows) to the Member States.[17]

In reaction to this problem, there have been various proposals made in the literature for EU climate finance facilities.[18] They are important. Yet, given that they rely on debt financing and/or financing through the EU budget – and, thus, possibly, after all by the Member States[19] – it is expectably politically challenging to set them up. This is particularly so in the current uncertain economic and geopolitical situation and considering the diminished fiscal capacity of states, which have, in light of the recent series of crises, increased their public debt levels.[20] As such, we intend to add to this overall endeavour a further mechanism that is not debt-financed or financed by the EU budget and that can serve as a further element in the obtaining of additional finance for climate-related European public goods. With regard to the recommendation made by staff of the European Central Bank (ECB) to raise EUR 500 billion over the years 2024–30 to cover the European share in additional public green

2020); M Citi, 'EU Budgetary Politics and the Paradox of Juste Retour' in MW Bauer, S Becker, and A De Feo (eds), *The New Politics of the European Union Budget* (Nomos, 2017), pp. 83–102.

[14]See on this, eg, P Lamy and J von Weizsäcker, 'Il faut développer les biens publics européens', *Le Monde* (27 November 2018); Brantner et al, '§ 4 Panel Discussion'; Buti, 'When Will the European Union Finally Get the Budget It Needs?'; M Buti, A Coloccia, and M Messori, 'European Public Goods' in F Cerniglia, F Saraceno, and A Watt (eds), *Financing Investment in Time of High Public Debt: 2023 European Public Investment Outlook* (2023); R García Antón, 'Mirroring Comparative Fiscal Federalism to Design the EU Revenue Side' (2024) 52 (11) *Intertax* 684; Fuest and Pisani-Ferry, *A Primer*; Thöne and Kreuter, *European Public Goods*; PC Padoan, 'The MFF Process and Global Challenges' in B Laffan and A De Feo (eds), *EU Financing for the Next Decade: Beyond the MFF 2021–2027 and the Next Generation EU* (EUI, 2020); G Papaconstantinou, 'European Public Goods: Just a Buzzword or a New Departure?' (2020) 3 *European Court of Auditors Journal* 145; LA Montoya, 'Rethinking the EU Financial Architecture' (2023) 58 (6) *Intereconomics* 289; Buti and Papaconstantinou, *European Public Goods*; P Pfeiffer, J Varga, and J in't Veld,*Quantifying Spillovers of Next Generation EU Investment* (European Commission, 2021); I Begg, 'EU Finances in Search of a New Approach' (2023) 58 (6) *Intereconomics* 295; Schratzenstaller, 'Elements of a European Green Fiscal Policy'.

[15]Council Decision (EU) 2016/590 of 11 April 2016 on the Signing, on Behalf of the European Union, of the Paris Agreement Adopted under the United Nations Framework Convention on Climate Change (2016). The Council has submitted a joint nationally determined contribution (NDC) on behalf of the EU and its Member States, that is based on the Fit for 55 goals. See Council of the European Union, Submission to the UNFCCC on Behalf of the European Union and Its Member States on the Update of the Nationally Determined Contribution (NDC) of the European Union and Its Member States (2023).

[16]For a broader elaboration on the legal and institutional challenges related to this, see Abraham et al, *The Legal and Institutional Feasibility*.

[17]See again Abraham et al, *The Legal and Institutional Feasibility*.

[18]Abraham et al, *The Legal and Iinstitutional Feasibility*; A Pekanov and M Schratzenstaller, *A Targeted Golden Rule for Public Investments? A Comparative Analysis of Possible Accounting Methods in the Context of the Review of the Stability and Growth Pact* (European Parliament, 2023); Garicano, 'Combining Environmental and Fiscal Sustainability'; Arnold et al, *Reforming the EU Fiscal Framework*. A more detailed elaboration on these proposals will be provided in Section V.

[19]This depends on whether or not new EU own resources are found or if Member States finance it through increased gross national income–based contributions. On the underlying mechanism, see Section II.B.

[20]This seems also accepted by those providing for the proposals. See, at least, Abraham et al, *The Legal and Institutional Feasibility*; Pekanov and Schratzenstaller, *A Targeted Golden Rule.*

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investment needed for achieving the Fit for 55 goals,[21] our proposal will not raise enough money. However, it would diminish the overall amount of climate-related European public goods that have to be funded otherwise.

Against this background, we have developed a model that should safeguard, or at least promote, a certain type of climate-related European public goods, which are pan-European green investments. Other than EU initiatives to boost green investment in certain Member States in particular need of it, the financing of pan-European investment projects is more difficult to base explicitly on solidarity – which is a core value of the EU.[22] Rather, it is about the structural improvement of the Union's environmental performance. This calls, as we will work out in more detail later, for arranging the finance structure differently towards demanding contributions not by Member States and/or future generations but by those that benefit from the internal market and the possibilities it gives: pan-European businesses.

For this purpose, and based on the legal precedent of the Single Resolution Fund (SRF) used in the banking sector, we have developed the FINE-for-EU mechanism, the name of which stands for 'Financial Instrument for New pan-European Environmental Undertakings'.[23] At the core of it stands the Pan-European Climate Fund, which is owned and managed by a Pan-European Climate Board. In aiming to fulfil predefined yearly funding goals, it collects money from businesses in scope and uses the funds to invest in pan-European green investment projects. The contributions levied will have a connection to the behaviour of the covered businesses and, thereby, give a possibility for steering.

To lay the groundwork for our model, we will first give a brief overview of the EU's climate policy and its shortcomings. Thereafter we will discuss the EU's financial architecture, which will reveal that, to achieve the above-mentioned goals, a solution outside the EU budget is necessary (Section II). Thereupon, we will develop the FINE-for-EU model. After a short discussion of the SRF serving as the legal precedent (Section III.A), we will elaborate on the scope of the measure and bring forward various arguments that speak in favour of filling the fund through imposing a levy – we call it a climate contribution – on multinational entities (MNEs) (Section III.B).[24] This will be followed by thoughts on the calculation and distribution of the payment obligations (Section III.C). Having set this broad framework, we will provide further considerations on the various incentives that the model provides for the involved stakeholders (Section III.D). This will be succeeded by an elaboration on whether the legal basis for this measure may be Article 192(2) of the Treaty on the Functioning of the EU (TFEU) on requiring unanimity or Article 192(1) on foreseeing the ordinary legislative procedure, which is, not least, a crucial question with respect to implementability (Section IV).[25] In Section V, we will discuss how the FINE-for-EU mechanism connects to other climate-related financing mechanisms.

[21] Abraham et al, *The Legal and Institutional Feasibility.*

[22] Treaty on European Union (TEU) Art 3(3); and see in this context also Treaty on the Functioning of the European Union (TFEU) Art 122.

[23] In developing this acronym the authors used the help of ChatGPT, but developed the final version themselves.

[24] We accept that the term 'climate contribution' is also used by other authors in a different context. See, eg, R Ismer, K Neuhoff, and A Pirlot, 'Border Carbon Adjustments and Alternative Measures for the EU ETS: An Evaluation' (DIW Berlin, 2020).

[25] Readers less experienced with EU tax law may note that unanimity in the Council has been very difficult to reach. This means that if the proper legal basis in EU primary law for the creation of secondary EU law is demanding the special legislative procedure foreseeing such unanimity, the chance for actual implementation is low, as the opposition of one single EU Member State would be enough to block the whole initiative. Instead, the ordinary legislative procedure, foreseeing co-legislation by the Council and the European Parliament, is lighter as it demands only qualified majorities. See, in more detail, European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council: Towards a More Efficient and Democratic Decision Making in EU Tax Policy* (2019); and, eg, E Scuderi, '"Provisions Primarily of a Fiscal Nature": Time to Dispel Doubts' (2022) 31 (5) *EC (European Community) Tax Review* 273.

II. Setting the scene

A. EU climate policy and its shortcomings

There is a wide range of national and EU measures that aim to address climate change. On the one hand, there are regulatory policies that set certain prohibitions, standards, or further requirements. The rationale of this command-and-control approach is, in essence, steering by legal obligation.[26] On the other hand, climate policies can involve financial incentives and disincentives. This field of policy comprises measures that increase the price of emissions[27] as well as measures that cut back on environmentally harmful policies.[28] In addition, there is the instrument of public spending for mitigating climate change.[29] Achievement of the Fit for 55 targets particularly needs a significant increase in public spending as well as in the carbon price.[30]

Concerning the latter, that is, the carbon price, the EU has been increasingly active. The long-standing Emissions Trading System (ETS)[31] will grow its impact through the gradual phase-in of the Carbon Border Adjustment Mechanism (CBAM)[32] and the corresponding gradual phase-out of the free allowances granted under the ETS in certain sectors.[33] In addition, the EU has implemented the ETS 2 system, which covers the CO_2 emissions from fuel combustion in buildings, road transport, and some small industry sectors not covered by the existing EU ETS.[34]

Yet, the so-called carbon price gap – which compares the percentile distribution of the actual carbon rate with a benchmark of EUR 60 per ton of CO_2[35] – is still too high in many countries,[36] which means that, with respect to the economy as a whole, the carbon price is too low. In part, this is explained by the fact that environmental taxation as such is rather small, with its share of the overall revenue from tax and social contributions in the EU being only 5.4 per cent in 2020.[37] Explicit carbon

[26] While EU law underlies a considerable amount of these measures, the number of regulatory policies appears to be rather diverging in Member States. For an overview, see Avgousti et al, *The Climate Change Challenge*, para 3.5.

[27] Such as environmental taxes or the ETS. Under the ETS, a cap is set on the total amount of certain greenhouse gases that can be emitted by the operators in the scope of the system. This cap is then reduced over time so that total emissions fall. Within the limits of the cap, operators buy, receive, and trade emission allowances. Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a System for Greenhouse Gas Emission Allowance Trading within the Union and Amending Council Directive 96/61/EC (Text with EEA Relevance) (2003).

[28] For example, the phasing out of transfers and tax abatements that distort price signals and reduce the incentive for energy savings. For an overview, see Avgousti et al, *The Climate Change Challenge*, para 3.3.

[29] It is worth stressing that the spending programs are rather heterogenous in the Member States. For an overview of relevant policies, see Avgousti et al, *The Climate Change Challenge*, para 3.2.

[30] In more detail, see European Environment Agency, 'Trends and Projections in Europe 2022' (Publications Office, 2022); Avgousti et al, *The Climate Change Challenge*.

[31] *Supra* n 27.

[32] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism (Text with EEA Relevance) (2023).

[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 (Text with EEA Relevance) (2023).

[34] Directive (EU) 2023/959.

[35] For more on this concept as well as the reasoning behind setting the benchmark, see OECD, *Taxing Energy Use 2019: Using Taxes for Climate Action* (2019); OECD, *Effective Carbon Rates 2018: Pricing Carbon Emissions through Taxes and Emissions Trading* (2018); European Commission, Commission Staff Working Document Impact Assessment Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Stepping Up Europe's 2030 Climate Ambition: Investing in a Climate-Neutral Future for the Benefit of Our People (2020).

[36] For an overview, see Avgousti et al, *The Climate Change Challenge*, para 4.2.

[37] Eurostat, 'Environmental Tax Revenues' (2023).

taxes are not very proliferated in the EU,[38] and the revenue raised by them is low.[39] On the other hand, also within states, the taxation of emissions is not uniform, but some emissions are subject to higher and some are subject to lower carbon taxation.[40] With regard to the fact that taxes on emissions are seen as a particularly powerful policy instrument,[41] this may be surprising at first sight. Yet, it is a well-known phenomenon that environmental taxes are inherently unpopular[42] despite the vast majority of people perceiving climate change as a serious problem.[43] This aversion is partly grounded on people simply not liking to pay taxes, not even as part of a larger environmental tax reform from which, overall, they even benefit.[44] In part, it may also play a role that people appear to maybe miss – or perceive as unimportant[45] – that the primary idea of these so-called Pigouvian taxes[46] is to influence behaviour and not to raise revenue.[47] People appear to care, too, about distributional issues attached to environmental taxes and how the revenue is spent.[48] Whatever the exact reasons, the fact remains that, on numerous occasions, it was stark political opposition that led to environmental taxes not being introduced even though they would have led to welfare gains.[49] As such, it does not appear to be easy for the EU to significantly increase the carbon price, particularly not in the short run when considering the current challenging economic and geopolitical environment.

With regard to spending, there is a wide range of EU instruments already in use. The multiannual EU budget (2021–7) foresees almost EUR 580 billion in climate-related spending,[50] which includes EUR 200 billion that are to be provided via the Resilience and Resolution Facility (RFF)[51] and EUR 92 billion via the Cohesion Fund and the Regional Development Fund.[52] Among the budget financed climate-related initiatives, important EU climate-related spending is organised via the Horizon Europe programme, which is attributing for 2021–7 approximately EUR 28.6 billion

[38] OECD, *Taxing Energy Use 2019*.

[39] Avgousti et al, *The Climate Change Challenge* and, for the underlying data, see World Bank, 'Carbon Pricing Dashboard' (2023).

[40] See with further references Agousti et al, *The Climate Change Challenge*, pt 4.2.

[41] 'Economists' Statement on Carbon Dividends Organized by the Climate Leadership Council' (2023).

[42] For an overview, see K Bachus, L Van Ootegem, and E Verhofstadt, '"No Taxation Without Hypothecation": Towards an Improved Understanding of the Acceptability of an Environmental Tax Reform' (2019) 21 *Journal of Environmental Policy and Planning* 321; A Baranzini and S Carattini, 'Effectiveness, Earmarking and Labeling: Testing the Acceptability of Carbon Taxes with Survey Data' (2017) 19 *Environmental Economics and Policy Studies* 197; Mildenberger et al, 'Limited Impacts of Carbon Tax Rebate Programmes on Public Suport for Carbon Pricing' (2022) 12 *Nature Climate Change* 141; S Anderson, I Marinescu, and B Shor, 'Can Pigou at the Polls Stop Us Melting the Poles?' (2023) 10 *Journal of the Association of Environmental and Resource Economists* 903.

[43] European Commission, *Climate Change: Report* (Publications Office, 2021), https://data.europa.eu/doi/10.2834/437, p 22 et seq. In total, 93 per cent of respondents regard climate change to be a serious problem and 78 per cent to be a very serious problem.

[44] Bachus et al, '"No Taxation Without Hypothecation"'.

[45] Interestingly, in a lab study, not even the explanation of the working and the effect of Pigouvian taxes increased the amount of support. S Kallbekken, S Kroll, and TL Cherry, 'Do You Not Like Pigou, or Do You Not Understand Him? Tax Aversion and Revenue Recycling in the Lab' (2011) 62 *Journal of Environmental Economics and Management* 53.

[46] In essence, a Pigouvian tax is a tax on negative externalities (eg pollution). The goal is to increase the private marginal costs of action to reflect the social marginal costs of it. See, eg, AC Pigou, *The Economics of Welfare* (Macmillan, 1920).

[47] S Dresner et al, 'Social and Political Responses to Ecological Tax Reform in Europe: An Introduction to the Special Issue' (2006) 34 *Energy Policy* 895.

[48] Baranzini and Carattini, 'Effectiveness, Earmarking and Labeling'. What we found striking in this regard are observations that people seem to pay less attention to the effects of environmental taxes on competition and employment.

[49] Anderson et al, 'Can Pigou at the Polls Stop Us Melting the Poles?'; Mildenberger et al, 'Limited Impacts of Carbon Tax Rebate Programmes'.

[50] For a useful overview, see the Council website: 'How Is the EU Financing the Transition to Climate Neutrality?' (February 2024).

[51] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility (2021).

[52] Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund (2021).

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to climate-related research and innovation.[53] Furthermore, the EUR 5.5 billion LIFE programme funds projects covering nature and biodiversity, circular economy and quality of life, climate change mitigation and adaptation, and clean energy transition.[54] Moreover, the Just Transition Mechanism includes a EUR 19.32 billion Just Transition Fund that is financed through the budget (EUR 8.45 billion) and the NextGenerationEU (NGEU) (EUR 10.87 billion).[55] Apart from that, the Just Transition Mechanism includes the InvestEU 'Just Transition' scheme, which will provide a budgetary guarantee under the InvestEU programme expected to mobilise EUR 10–15 billion in mostly private sector investments,[56] and a Public Sector Loan Facility that combines EUR 1.5 billion of grants financed from the EU budget with EUR 10 billion of loans from the European Investment Bank (EIB), aiming to mobilise EUR 18.5 billion of public investment.[57]

In addition, there are three funds that are funded through the ETS. First, the Innovation Fund,[58] which, at a carbon price of EUR 75 /tCO_2, will between 2020 and 2030 contribute around EUR 40 billion to the development of innovative low-carbon technologies. The fund awards grants through calls for proposals and through competitive bidding procedures.[59] Second, the Modernisation Fund,[60] which, with the same underlying carbon price, will between 2021 and 2030 provide for EUR 48 billion to support the modernisation of energy systems and the improvement of energy efficiency in 13 lower-income EU Member States.[61] Here the applications are made via the beneficiary Member States, after which the proposal is evaluated by the EIB and – in case the investment does not fall into a priority area of the fund – also by a dedicated Investment Committee.[62] Third, the Social Climate Fund[63] is to provide Member States with dedicated funding to support people and businesses that are most affected by the new ETS 2 system.[64] It will pool revenues from the auctioning of allowances from the ETS 2 as well as 50 million allowances from the existing EU ETS and demand that Member States provide a mandatory 25 per cent contribution. Over the 2026–32 period, this should raise at least EUR 86.7 billion.

Although the above numbers appear rather impressive, they are not enough. As mentioned, merely to safeguard reaching the Fit for 55 goals requires a *yearly additional* green investment of around EUR 520 billion per year until 2030.[65] The investment needs are different among different sectors

[53]Regulation (EU) 2021/695 of the European Parliament and of the Council of 28 April 2021 Establishing Horizon Europe – The Framework Programme for Research and Innovation, Laying Down Its Rules for Participation and Dissemination, and Repealing Regulations (EU) No 1290/2013 and (EU) No 1291/2013 (2021).

[54]Regulation (EU) 2021/783 of the European Parliament and of the Council of 29 April 2021 Establishing a Programme for the Environment and Climate Action (LIFE), and Repealing Regulation (EU) No 1293/2013 (Text with EEA Relevance) (2021).

[55]Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 Establishing the Just Transition Fund (2021).

[56]Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 Establishing the InvestEU Programme and Amending Regulation (EU) 2015/10*17* (2021).

[57]Regulation (EU) 2021/1229 of the European Parliament and of the Council of 14 July 2021 on the Public Sector Loan Facility under the Just Transition Mechanism (2021).

[58]Commission Delegated Regulation (EU) 2019/856 of 26 February 2019 Supplementing Directive 2003/87/EC of the European Parliament and of the Council with Regard to the Operation of the Innovation Fund (Text with EEA Relevance) (2019).

[59]For an overview, see European Commission, 'What Is the Innovation Fund? (n.d.).

[60]Commission Implementing Regulation (EU) 2020/1001 of 9 July 2020 Laying Down Detailed Rules for the Application of Directive 2003/87/EC of the European Parliament and of the Council as Regards the Operation of the Modernisation Fund Supporting Investments to Modernise the Energy Systems and to Improve Energy Efficiency of Certain Member States (2020).

[61]For an overview, see European Commission, 'Modernisation Fund'.

[62]On the actual composition of the Committee, see Modernisation Fund, 'Investment Committee'.

[63]Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060 (2023).

[64]*Directive (EU) 2023/959.*

[65]See with relevant references Avgousti et al, *The Climate Change Challenge*, ch 4.1; European Commission, *Kick-Starting the Journey* (2020).

(higher needs in the transport sector as well as in the residential and tertiary sector)[66] and different countries (higher needs in Central and Eastern European countries).[67] Importantly, this investment gap is to be closed by both the private as well as the public sector. While it is generally the private sector that will have to bear the larger share,[68] the situation is the opposite in some Member States.[69] Public investments can be direct and indirect through co-investments with the private sector or state guarantees.[70]

The FINE-for-EU initiative contributes to two of the above policy areas. First, and most relevantly, it adds to an already existing arsenal of climate spending instruments via promoting the so far still under-represented funding of pan-European green investment projects. Second, in so doing, it will be designed to set various incentives and disincentives that should contribute to behavioural changes. Thus, while it is not a carbon tax as such, it should have, at least to a minor extent, similar effects.

B. The financing architecture of the EU: the *juste retour* problem

The EU budget is financed via so-called own resources and other revenues. The latter, comprising one-third of EU revenues, includes funds that arise in the course of the implementation or enforcement of EU policies[71] as well as the revenues from borrowing activities linked to the non-repayable part of the NGEU.[72] The former, constituting two-thirds of EU revenue,[73] is money attributed from the Member States to the EU via the so-called own resource decision. This mechanism is based on Article 311 of the TFEU pursuant to which the Council unanimously agrees on the financing of the EU after which national parliaments have to ratify it.[74] Typically, this process is renewed every seven years[75] with the current own resource decision being valid from 2021 onwards. So far,[76] it is based on four

[66]See further Avgousti et al, *The Climate Change Challenge*, ch 4.1.

[67]European Investment Bank, *EIB Investment Report 2020/2021: Building a Smart and Green Europe in the Covid 19 Era* (2021), ch 4.

[68]For more detail on these estimates, see ibid.

[69]See ibid, identifying that there is a primary public need in Lithuania, Poland, and the Czech Republic but also with respect to Austria and Finland.

[70]See further Avgousti et al, *The Climate Change Challenge*, ch 4.1; European Investment Bank, *EIB Investment Report 2020/2021*, ch 4.

[71]This includes, for instance, fines or the taxes that EU servants need to be subject to as compensation for being exempt from the tax in their original home countries. See further, eg, 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 (2021); G Kofler, 'Das Steuerregime für Bedienstete der EU' in H Schaumburg and J Englisch (eds), *Europäisches Steuerrecht* (Otto Schmidt, 2020).

[72]This explains the increase in relevance of other revenues that, until 2020, constituted less than 10 per cent of overall revenue – *supra* n 71, Commission Staff Working Document, p 9 et seq.

[73]European Commission, 'EU Spending and Revenue 2021–2027' (2022).

[74]This is a rare form of decision-making at the EU level that is regarded to lie in between primary and secondary EU law. See H Kube, 'EU-Steuern: Zuständigkeit zur Regelung und Erhebung sowie Ausgestaltungsmöglichkeiten' in M Lang (ed), *Europäisches Steuerrecht* (Otto Schmidt, 2018), pp. 69–100; U Häde, 'Artikel 311 AEUV [Eigenmittel]' in M Pechstein, C Nowak, and U Häde (eds), *Frankfuter Kommentar AEV GRC AEUV* (Mohr Siebeck, 2017). However, it is not unique. See, eg, Art 48(6) TFEU. See further, eg, C Heber, 'European Legal Limits for the Recovery Fund' (2020).

[75]94/728/EC, Euratom: Council Decision of 31 October 1994 on the System of the European Communities' Own Resources; 2000/597/EC, Euratom: Council Decision of 29 September 2000 on the System of the European Communities' Own Resources; 2007/436/EC, Euratom: Council Decision of 7 June 2007 on the System of the European Communities' Own Resources; 2014/335/EU, Euratom: Council Decision of 26 May 2014 on the System of Own Resources of the European Union.

[76]Owing to the need to repay the debt taken out at the EU level, there is strong pressure to reform the own resource framework by adding new and additional own resources. See 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 Interinstitutional Agreement of 16 December 2020 between the European Parliament, the Council of the European Union and the European Commission on Budgetary Discipline, on Cooperation in Budgetary Matters and on Sound Financial Management, as well as on New Own Resources, Including a Roadmap towards the Introduction of New Own

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pillars.[77] The first one concerns traditional own resources that are customs and agricultural duties.[78] With the legislative and revenue competence being at the level of the EU, these traditional own resources are factually like an EU tax, although the administration[79] is left to the Member States that get rewarded by being allowed to keep 25 per cent of the collection costs.[80] The second pillar is constituted by value-added tax (VAT)–based own resources that, following a certain mechanism related to Member States' VAT base, allocate funds to the EU.[81] This VAT-based own resource is paid from the Member States' general budget, but here the underlying rules are subject to far-reaching harmonisation.[82] Third, the new own resource decision introduced a so-called plastic levy pursuant to which Member States must pay the Union EUR 0.80 per kilogram of non-recycled plastic waste.[83] While Member States can implement a plastic tax, and some have done this,[84] it is paid out of their general budget.[85] The fourth pillar is the so-called gross national income (GNI)–based own resources.[86] These are, by far, most relevant (in 2020, their share of overall revenues was 71.9 per cent) and serve as a residual revenue source.[87]

Importantly, the EU cannot raise money through borrowing unless there is explicit authorisation such as in Article 5 of the current own resource decision with respect to the European Recovery

Resources (2020); 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.

[77] 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).

[78] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the System of Own Resources of the European Union and Repealing Decision 2014/335/EU, Euratom (2020) Art 2(1) lit a).

[79] Compare, as mentioned, eg, the traditional own resources. Note that various further examples of such tax-based own resources are discussed on an institutional level as well as in the literature. See, eg, F Vanistendael, 'An EU Corporate Income Tax Filling the Hole in the EU Budget: An End to Tax Competition and "Tax Abuse"?' (2021) 75 (11/12) *Bulletin for International Taxation*.

[80] See Own Resources Decision, *supra* n 78, Art 9(2). Given that this is clearly above the actual collection cost, this mechanism'pollutes'the rationale behind the treaties assigning the revenues directly to the EU since particularly those Member States that levy a high amount of customs can retain income for the benefit of their national budget despite the compensation exceeding their collection costs and despite revenue belonging to the EU. Compare, eg, Häde, 'Artikel 311 AEUV', n 45, para 31; European Commission, Proposal for a Council Decision on the System of Own Resources of the European Union (EC, Euratom)(2011), p6. That said, the assignment of the share of the revenue in excess of collection costs has the decisive advantage of incentivizing Member States to properly enforce the rules. Hence, allowing those Member States that, for various reasons, levy more customs than others to retain a premium may be seen as a price to be paid for them acting in the common interest.

[81] Own Resources Decision, *supra* n 78, Art 2(1)lit (b). A ceiling is set for 50 per cent of GNI. See the version before the amendment taking effect in 2021, Council, Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the Definitive Uniform Arrangements for the Collection of Own Resources Accruing from Value Added Tax. For the amendment, see Council, Council Regulation (EU, Euratom) 2021/769 of 30 April 2021 Amending Regulation (EEC, Euratom) No 1553/89 on the Definitive Uniform Arrangements for the Collection of Own Resources Accruing from Value Added Tax.

[82] Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax (2022). See further Council, Council Regulation (EEC, Euratom) No 1553/89 of 29 May 1989 on the Definitive Uniform Arrangements for the Collection of Own Resources Accruing from Value Added Tax. Conceptually, this is similar to the proposed own resource based on the share of residual profit of multinational enterprises reallocated to Member States pursuant to a directive implementing Pillar 1 of the OECD/G20 agreement. Also, this should be paid from the general budget while the underlying rules are harmonised. Proposal for a Council Decision Amending Decision (EU, Euratom) 2020/2053 on the System of Own Resources of the European Union (2021).

[83] See ibid, Art 2(1) lit (c), with certain lump sum reductions for certain Member States being outlined in Art 2(2).

[84] A plastic tax, for instance, has been implemented in Spain.

[85] For criticism see, eg, S Geringer, 'The Future of the EU's Financing in Times of Disruption and Recovery: Normative and Technical Issues of Greening the EU's Own Resources System' in D de Cogan, A Brassey, and P Harris (eds), *Tax Law in Times of Crisis and Recovery* (Hart, 2023).

[86] See Own Resources Decision, *supra* n 78, Art 2(1) lit (d), with certain annual lump sum reductions applying. See also ibid Art 2(4).

[87] M Schratzenstaller et al, *New EU Own Resources: Possibilities and Limitations of Steering Effects and Sectoral Policy Co-benefits* (European Parliament, 2022), p. 26.

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Instrument.[88] Furthermore, the EU cannot directly levy taxes with a fiscal character as there is no legal basis for this in the TFEU.[89] Rather, there must be intermediation via the Member States that levy the tax – as the case may be, on the basis of harmonised rules – and then pass the money on to the EU via their own resource decision.[90]

The spending of EU funds is guided by a long-term plan – the so-called Multiannual Financial Framework (MFF). It sets out the EU's spending priorities and limits. The current MFF extends from 2021 to 2027 and includes spending of EUR 1.211 trillion.[91] This is combined with the temporary recovery instrument, the NGEU, including EUR 806.9 billion.[92] While these numbers are high in absolute terms, relatively they are not. Rather, the annual EU budget roughly corresponds to the budget of Denmark.[93]

Although decision-making on budgetary matters is shared between the Council and the European Parliament, it is factually the Council that has considerably more power in this regard.[94] This is because, under Article 312 of the TFEU, the Council sets out the MFF after which the European Parliament can agree or disagree. Although that gives the latter veto power, the agenda-setting remains with the Council.[95] The yearly budgetary negotiations that happen based on a Commission proposal between the Council and the European Parliament then need to stay within the limits set by the MFF.

With EU financing relying heavily on GNI-based own resources and the Council being able to set the agenda in spending, Member States have shown tendencies to think about the EU budget in terms of net balances – a well-known problem referred to as the *juste retour* dilemma.[96] This matters because it incentivises Member States to aim for a minimisation of their national contributions and a maximisation of their measurable flowbacks from the EU budget.[97] Ultimately, this phenomenon is responsible for (i) an under-provision of genuine EU-level public goods that lack visible benefits

[88] See Own Resources Decision, *supra* n 78, Art 5; See for a critical analysis, Heber, 'European Legal Limits'.

[89] See further, eg, Kube, 'EU-Steuern'; C Waldhoff, 'Legal Restrictions and Possibilities for Greater Revenue Autonomy of the EU' in T Buettner and M Thöne (eds), *The Future of EU-Finances* (Mohr Siebeck, 2016); E Traversa, '§ 3 The Long and Winding Road towards a Tax-Financed EU Budget' (2021); Heber, 'European Legal Limits'. On the competences of the EU in taxation, see, eg, G Kofler, 'EU Power to Tax: Competences in the Area of Direct Taxation' in CHJI Panayi, W Haslehner, and E Traversa (eds), *Research Handbook on European Union Taxation Law* (Edward Elgar, 2020), pp. 11–50.

[90] See, eg, as it is the case with respect to traditional own resources. Furthermore, see the Commission's reflections on various other new own resources that include a similar mechanism, eg, 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.

[91] Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 Laying Down the Multiannual Financial Framework for the Years 2021 to 2027 (2020).

[92] The NextGenerationEU fund is made up of various instruments with the most relevant being the Recovery and Resilience Facility. See European Union, 'Glossary – NextGenerationEU' and Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility (2021).

[93] European Commission, 'Fact Check on the EU Budget' (2020).

[94] Fuest et al, 'Reforming the Financing of the European Union'.

[95] Ibid.

[96] Ibid. Compare further, eg, Rant and Mrak, 'The 2007–13 Financial Perspective'; Zimmer et al, 'The Contested Council'; Richter, *Facing the Monster*; Brantner et al, '§ 4 Panel Discussion'; Defraigne and Nouveau, *Introduction à l'économie européenne*; Traversa, 'The Reform of EU Own Resources'; Fuest and Pisani-Ferry, *Financing the European Union*; Buti, 'When Will the European Union Finally Get the Budget It Needs?'; Crowe, 'An EU Budget of States and Citizens'; Lehner, 'The Dual Nature of the EU Multiannual Financial Framework'; Kalfin, 'The Importance of Own Resources'; Citi, 'EU Budgetary Politics'.

[97] Ibid. See further Defraigne and Nouveau, *Introduction à l'économie européenne*; Traversa, 'The Reform of EU Own Resources', p 251; Fuest and Pisani-Ferry, *Financing the European Union*; M Schratzenstaller and A Krenek, *Tax-Based Own Resources to Finance the EU Budget: Potential Revenues, Summary Evaluation from a Sustainability Perspective, and Implementation Aspects* (WIFO, 2019). See also M Schratzenstaller et al, *Sustainability-Oriented EU Taxes, FairTax Project* (WIFO/Mendel University, 2016–18). Various working papers are available at www.umu.se/en/fairtax/results/ (accessed 4 July 2023).

from the perspective of the Member States and (ii) an over-provision of EU-funded projects in the fields of agriculture and cohesion policy that have only a very limited additional EU value but contain certain and clearly quantifiable backflows to the Member States.[98]

This *juste retour* thinking is problematic for the endeavour of our model. When the goal is to maximise promoting achievement of the Fit for 55 goals, what primarily counts is maximisation of the impact of every euro spent towards reaching this objective. The question of how these investments are distributed among Member States should be of secondary relevance and matter only to the extent that the policies at stake are equally effective. This means that, if the result is that most of the pan-European investments funded by the FINE-for-EU mechanism are concentrated in certain regions, this would have to be accepted as a consequence of striving for optimisation. Distributional concerns, while not invalid as such, should not compromise the effectiveness of the model in terms of fighting climate change. To ensure this outcome and to escape the forces of net balance thinking, we suggest structuring the model outside the EU budget. Later, we will demonstrate how this can work.

III. The Fine-for-EU model

A. The legal precedent: The Single Resolution Fund

The aim of raising a particular amount of money that is to be spent for certain predefined purposes outside the EU budget is not new to EU law. Rather, in 2014, the SRF was established. Based on calculations by the Single Resolution Board (SRB),[99] it was determined that banks of participating Member States need to pay an annual contribution to the building up of the SRF.[100] This levy is collected by national resolution agencies and transferred to the fund.[101] The money in the SRF can, upon the decision of the SRB and with various conditions and limitations, be used in the process of the resolution of banks in participating Member States.[102] The legal basis for this regulation is Article 114 of the TFEU on foreseeing the ordinary legislative procedure. This is particularly interesting as the levy applies with respect not to banks in the whole EU but only to banking union countries.[103] As the money is earmarked for a specific purpose, it never reaches the EU budget, neither as an own resource nor as other revenue. In this context, the characteristic of the payments as an insurance fee also plays a role

[98] To stress an illustrative argument brought forward in the literature, while it makes good sense to provide for investments into drinking water reservoirs in Brandenburg, there is, but for potential redistribution targets, no pressing reason for doing this via the EU budget. However, Member States tend to prefer such investments as, in colloquial terms, they form something tangible that they get back for their money. This way of thinking is at risk of resulting in an under-provision of truly European goods, that is, goods that benefit the EU as a whole and do not directly give *ex ante* predictable flowbacks to specific Member States. See on that Fuest et al, 'Reforming the Financing of the European Union', who seem to regard regional funding policies going to poorer EU Member States as being more justifiable. However, doubts have been raised about whether this is the best way to achieve redistribution as rebates and direct transfer payments could be the more efficient option. See 'Reform der EU-Finanzierung: Subsidiarität und Transparenz stärken' (2016), at p 21. See further the statements of Brantner and Fuest at the panel discussion in the course of the conference 'Solid Financing of the EU', as reprinted in Brantner et al, '§ 4 Panel Discussion'. Examples of such European public goods are programmes like Erasmus, Horizon Europe, and EU4Health. See also, including further references, Fuest et al, 'Reforming the Financing of the European Union', who name foreign policy, external and internal security, military procurement, and development aid as further examples.

[99] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Resolution Fund and Amending Regulation (EU) No 1093/2010 (2014), at Art 70.

[100] Council of the European Union, Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (2014); Regulation (EU) No 806/2014, *supra* n 99; Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 Supplementing Directive 2014/59/EU of the European Parliament and of the Council with Regard to ex ante Contributions to Resolution Financing Arrangements (2014); Council Implementing Regulation (EU) 2015/81 of 19 December 2014 Specifying Uniform Conditions of Application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with Regard to ex ante Contributions to the Single Resolution Fund (2014).

[101] See Regulation (EU) No 806/2014, *supra* n 99, at Art 67(4).

[102] Ibid, Art 76 et seq.

[103] Ibid, Arts 69, 77.

because it gives the system a closed character; banks pay based on the risk they impose on society and, as a result, the whole sector – and society as a whole – benefits from the payments this fund makes when the risk materialises somewhere.

We propose to build up a Pan-European Climate Fund, based on Article 192(1) of the TFEU, that is similar to the SRF in structure and purpose. The Pan-European Climate Fund would be financed by 'climate contributions' charged to a predefined set of payers. The amount of each contribution would be calculated on a regular basis by the Pan-European Climate Fund Board that would also own and manage the fund. The members of the Pan-European Climate Fund Board would have to be appointed by the European Parliament.[104] The fund would be obligated to spend the money on pan-European green investments, as determined by the Pan-European Climate Fund Board. The latter should be equipped with the relevant Member State independent expertise to determine this. In choosing the investments, the Pan-European Climate Fund Board should be legally obliged to strive for spending to maximise promotion of the Fit for 55 goals. Distributional aspects may be considered, but are declared to be of secondary relevance. This means that if an investment with the overall highest marginal benefit can be effected in more than one region, the per capita value of Pan-European Climate Fund expenditure provided for the respective regions is to be taken into account, with the aim of striving for an equal distribution of the investments. The spending decisions must be transparent and well-reasoned, which would be audited by the European Court of Auditors. Furthermore, the Pan-European Climate Fund Board must report to the European Parliament on a yearly basis. Similar to the SRF, the funds would be earmarked and thus not be included in the general EU budget. As with the SRF, the payments to the Pan-European Climate Fund would also have some sort of social insurance character if, as we will also suggest, the payments made to the fund are linked to contributors' emissions and, as immanent in the model, the money is spent on policies and projects that help reduce emissions. To whom this climate contribution is to be charged and on what basis will be discussed in Sections III.B–III.C.

B. The scope: who has to pay?

When the overarching goal of the model is the collection of money to help achieve the Fit for 55 goals through the provision of additional climate-related pan-European public goods without having primary regard to the distributional effects on Member States, much speaks in favour of financing the measure to have a pan-European structure as well. It would, in other words, not appear feasible to aim for charging the climate contribution to those sectors that benefit from the spending. Neither would it appear wise to distribute the financing burden among Member States based on their relative wealth. Rather, it should be those that generally benefit from economic freedoms and the possibility to engage in pan-European business that should be called upon to pay the climate contribution. This way, pan-European economic actors take responsibility for pan-European policy.

To be clear, this requires a fair bit of approximation to be workable. Ultimately, the idea of the internal market is to promote the possibilities for everyone, that is, individuals, small and medium-sized enterprises (SMEs), and MNEs, to become economically active across the borders. Nonetheless, it is reasonable to say that it is particularly MNEs that have been reaping the benefits of economic freedom.[105] In doing so, they have given rise to significant emissions – both directly as a result of their business operations and indirectly in various ways, for example through lobbying activities for

[104] This is consciously different from the Single Resolution Board that includes members appointed by each participating Member State to represent their national resolution authorities. See Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Resolution Fund and Amending Regulation (EU) No 1093/2010, Art 43.

[105] To be clear, it is, ultimately, everyone that benefits from economic freedom. See, eg, K Gehring, 'Who Benefits from Economic Freedom? Unraveling the Effect of Economic Freedom on Subjective Well-Being' (2013) 50 *World Development* 74; Y Kandogan and SD Johnson, 'Role of Economic and Political Freedom in the Emergence of Global Middle Class' (2016)

softer regulatory policies.[106] In fact, 60 per cent of total industrial emissions are caused by only 157 large MNES.[107] This significantly outweighs their global share in economic output.[108] Furthermore, in 2022 MNEs invested USD 5 trillion in activities that are harmful to nature, which is a staggering 140 times larger than private sector investments into nature-based solutions.[109]

Apart from that, focusing on MNEs as the main contributors to the Pan-European Climate Fund could be attractive for the reason that it would potentially increase the progressivity of the climate policy as a whole. What underlies this effect is the so-called incidence of the measure, which, in simpler terms, describes who is worse off as a result of the payment obligations. While, formally, the corporation pays taxes and other contributions, it is ultimately always an individual that bears the burden of the payments. Shareholders, workers, or suppliers may receive less money from and consumers may pay more money to the corporation as a result of the obligation. The question of who bears the incidence has been subject to extensive research in the field of corporate taxation, with the result being that it ultimately depends on a variety of factors.[110] However, when the climate contribution is levied on a corporation that earns economic rents, it should typically be the shareholders[111] and, in the presence of rent sharing with workers, also the latter that bear the incidence.[112] When assuming, in line with the literature, that shareholders tend to be more affluent[113] and having regard to the observation that rents are disproportionally shared with high-income workers,[114] a contribution targeting rent-earning corporations could have an overall progressive effect. While this is a far-reaching generalisation, it is fair to assume that MNEs often earn economic rents.[115] This implies that focusing the model on MNEs could give it a progressive character.[116] If our assumptions hold, the result would be remarkable because both the effects of climate change[117] and, typically, environmental taxes tend to be regressive.[118] Breaking through this logic by introducing a measure that increases progressivity in the system and decreases the regressive consequences of climate change would be very appealing.

25 *International Business Review* 711. Yet, economic freedom is associated with an inflow of foreign direct investment. See, eg and with further references, PL Ghazalian and F Amponsem, 'The Effects of Economic Freedom on FDI Inflows: An Empirical Analysis' (2019) 51 *Applied Economics* 1111; N Sayari, R Sari, and S Hammoudeh, 'The Impact of Value Added Components of GDP and FDI on Economic Freedom in Europe' (2018) 42 *Economic Systems* 282. This suggests there being a benefit in it for those conducting the investment and setting up cross-border business.

[106] See further, eg, S Laurens, *Les courtiers du capitalisme* (Agone, 2015); Defraigne and Nouveau, *Introduction à l'économie européenne*; H Yu, P Bansal, and D-L Arjaliès, 'International Business Is Contributing to Environmental Crises' (2023) 54 *Journal of International Business Studies* 1151.

[107] When taking into account MNEs' own emissions (Scope 1 and 2) and the emissions from their supply chains (Scope 3), see V Steenbergen and A Saurav, *The Effect of Multinational Enterprises on Climate Change: Supply Chain Emissions, Green Technology Transfers, and Corporate Commitments* (World Bank, 2023), p 11 et seq.

[108] Ibid.

[109] United Nations Environment Programme, *State of Finance for Nature 2023: The Big Nature Turnaround – Repurposing $7 Trillion to Combat Nature Loss* (2023).

[110] MP Devereux et al, *Taxing Profit in a Global Economy* (Oxford University Press, 2021); C Fuest, A Peichl, and S Siegloch, 'Do Higher Corporate Taxes Reduce Wages? Micro Evidence from Germany' (2018) 108 (2) *American Economic Review* 393; RH Gordon, 'Taxation of Investment and Savings in a World Economy' (1986) 76 (5) *American Economic Review* 1086; AC Harberger, 'The Incidence of the Corporation Income Tax' (1962) 70 (3) *Journal of Political Economy* 215; M Jacob, MA Müller, and T Wulff, 'Do Consumers Pay the Corporate Tax?' (Accounting for Transparency, 2023).

[111] Devereux et al, *Taxing Profit in a Global Economy*; IMF, *Tax Policy for Inclusive Growth After the Pandemic* (2020).

[112] WG Gale and S Thorpe, 'Rethinking the Corporate Income Tax: The Role of Rent Sharing' (2022).

[113] Devereux et al, *Taxing Profit in a Global Economy*; IMF, *Tax Policy for Inclusive Growth After the Pandemic*; T Piketty, E Saez, and G Zucman, 'Distributional National Accounts: Methods and Estimates for the United States' (2018) 133 *Quarterly Journal of Economics* 553; E Saez and G Zucman, 'A Wealth Tax on Corporations' Stock' (2022) 37 *Economic Policy* 213.

[114] Gale and Thorpe, 'Rethinking the Corporate Income Tax'.

[115] J Bankman, M Kane, and AO Sykes, 'Collecting the Rent: The Global Battle to Capture MNE Profits' (2019) 72 *Tax Law Review* 197.

[116] To safeguard this effect, it may be feasible to rely on minimum profitability thresholds. See on this Section III.C.

[117] N Taconet, A Méjean, and C Guivarch, 'Influence of Climate Change Impacts and Mitigation Costs on Inequality between Countries' (2020) 160 *Climatic Change* 15.

[118] CA Grainger and CD Kolstad, 'Who Pays a Price on Carbon?' (2010) 46 *Environmental and Resource Economics* 359.

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This could ultimately give rise to a rather powerful political narrative and conceptual justification. On the one hand, as mentioned, MNEs have been causing significant emissions. On the other hand, however, one may argue that MNES do not contribute enough to address the problem. As emphasised by the World Bank (2023), the 157 large MNEs referred to earlier show insufficient commitment to decarbonising production and supply chains.[119] In addition, MNEs have been reacting to and exploiting the weaknesses of the tax system.[120] Their setting up of inefficient tax-driven structures has been giving rise to welfare losses[121] and has partly put pressure on the immobile tax base to make up for the forgone public revenue that is needed, inter alia, to address climate change and its consequences.[122] These numbers are substantial: As estimated by Tørsløv et al (2023),[123] in 2015, globally, MNEs shifted 36 per cent of their profits to tax havens. In absolute terms and using 2019 data, this concerns about USD 1 trillion.[124] High-profile cases, such as the infamous tax of 0.005 per cent that Apple Inc. recorded on its European profits in 2014,[125] have created public outcry on the unfairness of the international tax system. Although, in reaction thereto, an overhaul of the international tax regime has taken place since the aftermath of the 2008 financial crisis,[126] it remains the case that the ultimate extent of the reforms is rather incremental. Neither the OECD Base Erosion and Profit Shifting Project[127] nor the more far-reaching international commitment to implement – or accept the implementation of – a minimum taxation regime for large MNEs[128] fully addresses the shortcomings of the current international tax system. As long as the group entities of an MNE are treated as separate taxpayers and taxed under the various national tax systems, there will be an incentive for MNEs to shift activities and profits and for states to compete for them.[129] More fundamental proposals to overcome the weaknesses of the international tax system that have been presented in the literature are not at reach.[130] Against this background, a direct contribution by MNEs to the fight against climate change is well justified, and there is a chance that individuals will perceive it as such. In

[119] Steenbergen and Saurav, *The Effect of Multinational Enterprises*.

[120] JH Heckemeyer and M Overesch, 'Multinationals' Profit Response to Tax Differentials: Effect Size and Shifting Channels' (2017) 50 (4) *Canadian Journal of Economics / Revue Canadienne d'Economique* 965; E Crivelli, R De Mooij, and M Keen, 'Base Erosion, Profit Shifting and Developing Countries' (2016) 72 (3) *FinanzArchiv / Public Finance Analysis* 268; D Dharmapala, 'What Do We Know About Base Erosion and Profit Shifting? A Review of the Empirical Literature' (2014) 35 (4) *Fiscal Studies* 421; SL McGaughey and P Raimondos, 'Shifting MNE Taxation from National to Global Profits: A Radical Reform Long Overdue' (2019) 50 (9) *Journal of International Business Studies* 1668.

[121] See, eg, NJ Foss, R Mudambi, and S Murtinu, 'Taxing the Multinational Enterprise: On the Forced Redesign of Global Value Chains and Other Inefficiencies' (2019) 50 *Journal of International Business Studies* 1644.

[122] See more broadly, eg, Devereux et al, *Taxing Profit in a Global Economy*, s 2.

[123] T Tørsløv, L Wier, and G Zucman, 'The Missing Profits of Nations' (2023) 90 *Review of Economic Studies* 1499.

[124] L Wier and G Zucman, *Global Profit Shifting, 1975–2019* (UNU-WIDER, 2022).

[125] European Commission, 'State Aid: Irish Tax Treatment of Apple Is Illegal' (2016).

[126] Outlining that it was particularly also media attention that acted as a catalyst for these reforms, see A Christians and SE Shay, 'Assessing BEPS: Origins, Standards, and Responses' in *102A Cahiers de Droit Fiscal International: Assessing BEPS: Origins, Standards, and Responses* (International Fiscal Association, 2017), p 17.

[127] The OECD Base Erosion Profit Shifting (BEPS) project was launched after the financial crisis. It aims at a coordinated implementing of stricter anti-abuse rules. For more detail on the various action points and the relevant documents, see OECD, 'BEPS Actions – OECD BEPS' (2015).

[128] Council Directive (EU) 2022/2523 of 15 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union (2022).

[129] Devereux et al, *Taxing Profit in a Global Economy*.

[130] In very general terms, and with variations in the level of detail, the proposals may start from the current origin-based corporate tax system and strive to address profit-shifting abilities through, for instance, a formulary apportionment of profits. See, eg, RS Avi-Yonah and I Benshalom, 'Formulary Apportionment: Myths and Prospects – Promoting Better International Policy and Utilizing the Misunderstood and Under-Theorized Formulary Alternative' (2011) 3 (3) *World Tax Journal* 371. In other instances, the idea is to tax less-mobile tax objects such as, for instance, consumers. See, eg, Devereux et al, *Taxing Profit in a Global Economy*. Furthermore, there are various proposals that aim for improvements in the existing system. See, eg, JC Fleming, RJ Peroni, and SE Shay, 'Getting Serious About Cross-Border Earnings Stripping: Establishing an Analytical Framework' (2015) 93 (3) *North Carolina Law Review* 673; W Schön, 'International Tax Coordination for a Second-Best World (Part I)' (2009) 1 (1) *World Tax Journal*67.

fact, aside from the national governments (63 per cent), it is the EU (57 per cent) as well as businesses and industry (58 per cent) that people regard as being in charge of addressing climate change.[131] Thus, action to this end would respond to a public call[132] that would likely promote the social legitimation of the EU as a whole as well as, optimally, a social cohesion.[133]

A decision to focus the model on MNEs goes hand in hand with various follow-up questions on the precise determination of the scope. To begin with, the territorial scope must be established. In this regard, there are two possibilities. On the one hand, the rules could target genuine EU MNEs, that is, MNEs with their headquarters in the EU. This would be a very narrow scope, however, and would, on top of that, incorporate the risk that some MNEs escape the rules by shifting their headquarters outside the EU. On the other hand, it would be possible to target the mechanism on all MNEs that have a qualified level of presence or activity in the EU. This is, we think, the better option. In this respect, one may be concerned about the enforceability of the rules because, when there are only a few assets in the EU, there may not be enough to be seized in the event of non-payment. However, it is possible to use turnover as a (additional) basis for enforcement measures. The infrastructure and resources for this are available since customs authorities in the Member States have the information on sales in the EU.[134]

Furthermore, it must be determined whether a size threshold is to be introduced. This has the advantage of making the system easier to administer and ensures, from the outset, that it will mostly be economic rent-earning MNEs that are in scope. A value that is frequently used in international taxation for the purpose of targeting what may be called global firms is a global revenue threshold of EUR 750 million on a consolidated basis.[135] If setting such a threshold is desired, it would, for the sake of simplification, be feasible to bind the scope of the measure to rules that are already existing. In particular, the obligations of certain large groups to provide public country-by-country reporting could be an interesting starting point for determining the scope of the climate contribution if the intention is to apply the rules to large MNEs that have a qualified presence in the EU.[136] According to the Commission, approximately 6,000 MNEs fulfil the criteria, out of which approximately 2,000 are headquartered in the EU.[137] If, instead, no size threshold is used and an MNE is defined 'as an

[131] European Commission, *Climate Change: Report, supra* n 43, p 27, answering the question 'In your opinion, who within the EU is responsible for tackling climate change?' with multiple answers being possible.

[132] Note also that data point towards high support for the introduction of a European tax on the revenue of large internet companies (60 per cent net support) as well as with respect to the introduction of a European tax on carbon emissions (55 per cent net support). For sure, it is speculative to deduce from this high support for the model discussed here. Yet, it is not unreasonable to regard an expansion of this data to be possible. See A Hemerijck et al, 'SiE Survey Dataset on Solidarity in Europe (2021)' (GESIS, 2021).

[133] Fundamentally, see JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

[134] In case of non-payment of the contribution and insufficient assets to be seized, customs authorities can levy fees on sales into the EU to ensure that the climate contributions are paid by non-EU MNEs.

[135] As done, for instance, in EU law: Council Directive (EU) 2022/2523 of 15 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union. Yet, this threshold was also used at the OECD level. See OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 – 2015 Final Report* (2015).

[136] There are special rules applying to MNEs that have only small subsidiaries in the EU. See Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, Amending Directive 2006/43/EC of the European Parliament and of the Council and Repealing Council Directives 78/660/EEC and 83/349/EEC (Text with EEA Relevance) (2023), Art 48b. If desired, this can also be used for the purpose of determining the scope of the measure. We would abstain from this, however, as the rationale of this exemption lies in providing a simplification that is conceptually not required in the context of a climate contribution. Furthermore, the rules do not apply for the case of a group in scope having only domestic operations. Also, here, it would be possible to take this over on the basis of there being no pan-European business. Yet, we are reluctant to suggest this option given that such large domestic groups benefit from the pan-European business as well, eg through part of their suppliers and/or customers being in another state.

[137] European Commission, Proposal for a Directive of the European Parliament and of the Council Amending Directive 2013/34/EU as Regards Disclosure of Income Tax Information by Certain Undertakings and Branches (2016).

enterprise group that operates in at least two countries, with one of these being in the EU or EFTA',[138] it will, based on 2021 data, be 155,983 MNEs that the measure will target.[139]

C. The base and distribution of the climate contribution

Having determined the scope of the measure, the next step is to calculate the base and the mechanism to use to distribute the payment obligations of the climate contribution among those MNEs in the scope of the rules. In this regard it is, to begin with, important to recall that the model's purpose is to raise funds to decrease the gap in green investments by funding additional pan-European environmental projects, for the sake of advancing the achievement of the Fit for 55 goals. This requires reaching a certain revenue target that should be the starting point for calculation of the payment obligations. Similar to the context of the SRF, we suggest that the Pan-European Climate Fund Board calculates the yearly contributions based on a predefined procedure.

While the exact methodology for calculating the contributions is not within the scope of this article, we provide structural remarks on the steps and factors that should be of influence so as to ensure that the model sets certain incentives and disincentives. In addition, we attempt to provide for some rough and illustrative quantification.

The starting point should be the overall investment need for reaching the Fit for 55 goals. For this purpose – and noting that we do not have information on the parameters used in the context of making this approximation – we use the estimate that was relied on in a recent publication of the European Central Bank (2023),[140] that is, a yearly additional need for green investment of EUR 520 billion. Thereupon, three further refinements are to be made to arrive at a basis that forms the ground for distributing the climate contributions among the MNEs in scope.

First, it is necessary to multiply this number by a percentage that represents the share of *public* investment that needs to be made to ensure achievement of the Fit for 55 goals.[141] Merely for the sake of argument, say that the share of required additional public green investment lies at 45 per cent.[142] This would be the first factor with which the above-mentioned base is to be multiplied. If we use EUR 520 billion, this would amount to EUR 234 billion of required public investment.

Second, an estimate needs to be made as to how much of this share is to be borne through investment in pan-European climate-related projects. In this regard, an expert opinion is needed. This could be provided through the European Environmental Agency, based on which the Pan-European Climate Fund Board, potentially in collaboration with the European Parliament, sets the yearly funding goal for pan-European climate-related investments. This includes the yearly funds that are necessary both to continue the investments that are already effected and to implement new investment projects. Say, for the sake of illustration, that this amounts to 30 per cent of total public spending needs.

Third, this basis is to be multiplied by a factor that represents the share of the worldwide emissions that the in-scope MNEs have of total global emissions. Using global instead of European numbers slightly prevents carbon leakage as it means that the MNE sector as a whole would not be able to diminish this share by shifting production out of Europe. This factor, of course, depends strongly on whether approximately 6,000 or 150,000 MNE groups are in scope. When the literature – without applying a size threshold – refers to MNEs' share of global emissions being around 18 per cent,[143] we

[138] Eurostat, 'Structure of Multinational Enterprise Groups in the EU' (2023).

[139] Ibid.

[140] Avgousti et al, *The Climate Change Challenge*.

[141] As underlined earlier, it is generally the private sector that will need to bear the major part of these investments and, whenever this happens without any government support, it can be assumed to be in its own commercial interest. Hence, what needs to be financed through this climate contribution is the required share of public investment.

[142] Avgousti et al, *The Climate Change Challenge*.

[143] Z Zhang et al, 'Embodied Carbon Emissions in the Supply Chains of Multinational Enterprises' (2020) 10 *Nature Climate Change* 1096.

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will calculate with 15 per cent as the share to be used when a broader group of MNEs is to be targeted and 5 per cent as the share to be used when a narrower scope is in focus.

This results in a base for distribution of EUR 3.5 billion (narrow scenario) and EUR 10.7 billion (broad scenario). If these numbers are considered too little (large), it is relatively easy to change them by deciding to provide for a larger (smaller) share of pan-European climate investments. This would increase the second factor (here being 30 per cent) and, as a result, the basis for distribution. Importantly, the third factor, that is, MNEs' share of worldwide emissions, should not be manipulated as this would affect the incentive structure of the model.

Based on these estimates, in the narrow scenario with approximately 6,000 MNEs in scope, each MNE would, prima facie, have to pay about EUR 585,000 for the year in question. In the broad scenario with approximately 150,000 MNEs in scope, the yearly contribution would amount to about EUR 67,000 per group. These numbers need two further modifications. First, the precise allocation of yearly payment obligations is to happen via a formula that reflects the values that the whole model stands for, that is, pan-European business taking adequate responsibility for promotion of the Fit for 55 goals through financing pan-European investment. As such, the distribution mechanism should include parameters on size (reflected by profits and turnover), tax aggressiveness (reflected by a suitable value measuring this), and pollution (reflected by absolute emissions and the relative developments of emissions). Ultimately, larger, more tax-aggressive, and more polluting MNEs should pay more. Second, it must be ensured that the levy is not disproportionate. This is particularly relevant in the broad scenario as the definition of an MNE as a group operating in at least two countries[144] can obviously include rather small businesses as well. They may have literally nothing to do with profit shifting, they may not earn economic rents, and they may even be loss-making. Thus, the attributes of size and minimum profitability are important and also serve towards reducing the required climate contribution to zero, if necessary. This ensures that only economic rents are captured and, furthermore, relates the payment obligation to the group's actual ability to pay. Importantly, this is also a legal requirement.[145]

D. Considerations on the incentives set by the model

As outlined so far, the model to create the Pan-European Climate Fund consists of four parameters: (i) public investment needs for closing the green investment gap; (ii) the desired level of pan-European green investment; (iii) the share of global emissions that is to be allocated to the MNEs in scope, which forms the basis of the calculation of (iv) the respective shares allocated to the individual MNE groups that need to pay. In this regard, various considerations with respect to the incentive structure of the model are on point.

The connection of the model to the overall investment needs that are required to achieve the Fit for 55 goals sets an important general incentive for MNEs in scope to improve their own environmental performance, as well as, maybe more crucially, to lobby for and not against stronger climate policies of Members States and the EU. This comes as a successful climate policy will reduce the overall green investment needs and thereby also the share to be carried by MNEs through contributions made to the Pan-European Climate Fund.[146] We perceive this to be one of the main arguments that speak in favour of adopting the model because when MNEs lobby in favour of instead of against stricter climate policies, this might have a substantial effect.[147]

[144] Eurostat, 'Structure of Multinational Enterprise Groups in the EU'.

[145] Here, having special regard to the *Charter of Fundamental Rights of the European Union*, at Arts 17, 20.

[146] This presupposes that the contribution savings resulting from more ambitious climate policy exceed any benefits that MNEs receive from the policy not being executed (eg savings in production costs owing to lower environmental standards).

[147] See, eg, J Child and T Tsai, 'The Dynamic between Firms' Environmental Strategies and Institutional Constraints in Emerging Economies: Evidence from China and Taiwan' (2005) 42 (1) *Journal of Management Studies* 95; B Eberlein and D Matten, 'Business Responses to Climate Change Regulation in Canada and Germany: Lessons for MNCs from Emerging

Furthermore, with the allocable share of overall emissions of the MNEs in scope being relevant, there is a common incentive for the covered businesses to decrease this share. This could motivate MNEs to engage in cross-sectoral cooperation, which has been regarded as a key factor in promoting sustainability.[148] This incentive could even be strengthened by providing businesses with premiums for reaching preset goals.

Apart from these macro-incentives, the model would also be able to affect the behaviour of the single MNEs in scope. The connection of an MNE's contributions to its environmental performance may have a positive steering effect on a micro level. In this regard, a decision can be made between (i) using absolute values (demanding that those that, overall, pollute more and are more tax-aggressive pay more) or (ii) focusing on environmental performance relative to the overall sector (with those polluting more than the industry average being obliged to contribute more than those who pollute less). Whether tax-aggressiveness is – as we propose – taken into account or not is not a decisive element and can be renounced or replaced by another factor if so wished. Yet, a relationship to turnover and profitability will remain necessary as there is a need to avoid disproportionate outcomes.

In addition, we suggest considering giving paying MNEs a say in how the money is spent. This does not mean that they should be able to decide on this alone. Rather, this would happen by the Pan-European Climate Fund Board striving to maximise the marginal benefit that can be achieved by the funding. Nonetheless, it could be beneficial to give MNEs a voice in this respect. For instance, the Pan-European Climate Fund Board may narrow down the projects that can be considered for financing, among which MNEs can choose.[149] Likewise, when feasible, MNEs can be given the opportunity to provide for contributions in kind. The rationale behind this inclusion of MNEs into the process is, on the one hand, a notion of empowerment steered towards increasing acceptance by MNEs. On the other hand, it could allow the MNEs to reap the goodwill created through the payment as part of their environmental, social and governance (ESG) strategy. For sure, MNEs would act out of a legal obligation. Yet, it is not a novelty for legislators to impose by law corporate social responsibility duties on MNEs.[150] At the core is, ultimately, a phenomenon that is well expressed in the literature: MNEs can and should be natural partners for governments in achieving a green transition.[151]

IV. The legal basis

The Pan-European Climate Fund would promote achievement of the goals outlined in Article 191 of the TFEU.[152] Thus, the legal basis for this Climate Fund would be in Article 192 of the TFEU.[153] The

Economies' (2009) 86 (2) *Journal of Business Ethics* 241; A Kolk and J Pinkse, 'Multinationals' Political Activities on Climate Change' (2007) 46 (2) *Business and Society* 201; S Patnaik, 'A Cross-Country Study of Collective Political Strategy: Greenhouse Gas Regulations in the European Union' (2019) 50 (7) *Journal of International Business Studies* 1130.

[148] JA van Zanten and R van Tulder, 'Multinational Enterprises and the Sustainable Development Goals: An Institutional Approach to Corporate Engagement' (2018) 1 *Journal of International Business Policy* 208; V Maksimov, SL Wang, and S Yan, 'Global Connectedness and Dynamic Green Capabilities in MNEs' (2022) 53 *Journal of International Business Studies* 723.

[149] In this regard, it should be the MNE's management that is involved in the process, as this may form part of the MNE's overall CSR strategy.

[150] Consider in this regard particularly the Commission's proposal for a corporate sustainability due diligence directive: European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (2022).

[151] M Nippa, S Patnaik, and M Taussig, 'MNE Responses to Carbon Pricing Regulations: Theory and Evidence' (2021) 52 *Journal of International Business Studies* 904.

[152] As outlined in Art 191(1) TFEU: 'Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.'

[153] As outlined in Art 192(1) TFEU: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.'

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crucial question in this regard is whether the measure, in its aim and content, is primarily of a fiscal nature.[154] If it is, it would fall under Article 192(2)(a) of the TFEU. This would mean that, as usual in the field of tax law, the special legislative procedure applies. It would then need unanimity in the Council for the proposal to get accepted.[155] If, on the other hand, the measure is not considered to be primarily of a fiscal nature, it would fall under Article 192(1) of the TFEU. This, in turn, would go hand in hand with the ordinary legislative procedure being applicable.[156] As such, this question is of utmost relevance with regard to the implementability of the measure, given that getting unanimity in the Council has proven to be much more difficult to achieve than reaching a decision based on the ordinary legislative procedure.[157]

The term 'primarily of a fiscal nature' lacks a precise definition and is interpreted rather differently.[158] This concerns, first, the notion of 'fiscal nature'. Some have attached a rather wide meaning to it towards extending the concept to taxes, fees, and charges.[159] Following this understanding, arguably the climate contribution to be paid to the Pan-European Climate Fund would also count as a measure of a fiscal nature. Others, instead, provide for a more differentiated view and regard only proper taxes as falling under the scope of the provision.[160] Under this view – which is implicitly supported by the fact that the ETS[161] and CBAM[162] are also based on Article 192(1) of the TFEU – the climate contribution would not be classified as being of a fiscal nature. This comes as the climate contribution, through its character as an insurance payment and the fact that it is earmarked, should not count as a tax.[163]

The term 'primarily', again, qualifies the balance that is to be struck between environmental and fiscal objectives. Convincingly, this has been interpreted towards imposing a centre of gravity test, meaning that if the budgetary goal is not the primary purpose, but only a side effect of the policy, at stake is not a measure of primarily fiscal nature.[164] Based on this, environmental taxes would not be

[154] See, eg, Scuderi, '"Provisions Primarily of a Fiscal Nature"', referring to, eg, *Commission of the European Communities v Council of the European Communities* (1993); *Kingdom of Spain v Council of the European Union* (2001); *European Parliament v Council of the European Union* (1999); *Commission of the European Communities v Council of the European Union* (2000).

[155] As outlined in Art 192(2)(a) TFEU: 'By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: a) provisions primarily of a fiscal nature.'

[156] See, further, eg, S Heselhaus, 'AEUV Art. 192' in M Pechstein, C Nowak, and U Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV. Band 3: AEUV: Artikel 101-215* (Mohr Siebeck, 2017), pp. XXX–VII; A Käller, 'AEUV Artikel 192' in J Schwarze et al (eds), *EU-Kommentar* (Nomos, 2019); Scuderi, '"Provisions Primarily of a Fiscal Nature"'. Generally on EU carbon taxation, see also, eg, DA Weisbach, 'Carbon Taxation in the EU: Expanding the EU Carbon Price' (2012) 24 *Journal of Environmental Law* 183.

[157] See on this problem, especially, European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council – Towards a More Efficient and Democratic Decision Making in EU Tax Policy*. The Commission's initiative towards gradually going away from the burdensome unanimous decision-making process has, however, not been welcomed by the Council. See *Outcome of the Council Meeting: 3671st Council Meeting Economic and Financial Affairs* (Council of the European Union, 2019).

[158] For a detailed analysis, see Scuderi, '"Provisions Primarily of a Fiscal Nature"'.

[159] For an overview of the discussion, see Scuderi, '"Provisions Primarily of a Fiscal Nature"'; *Opinion of Mr Advocate General Léger Delivered on 16 May 2000, Kingdom of Spain v Council of the European Union*, Case C-36/98 (*European Court Reports 2001*, p. I-00779, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61998CC0036).

[160] See, eg, Scuderi, '"Provisions Primarily of a Fiscal Nature"'; *Opinion of Advocate General Campos Sánchez-Bordona Delivered on 21 April 2016* (2015).

[161] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a System for Greenhouse Gas Emission Allowance Trading within the Union and Amending Council Directive 96/61/EC (Text with EEA Relevance).

[162] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism (Text with EEA Relevance).

[163] *Opinion of Advocate General Campos Sánchez-Bordona Delivered on 7 March 2018, Messer France SAS v Premier ministre and Others*, Case C-103/17 (2017). See also Scuderi, '"Provisions Primarily of a Fiscal Nature"'.

[164] Scuderi, '"Provisions Primarily of a Fiscal Nature"'.

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covered by Article 192(2)(a) of the TFEU, as they primarily mean to steer behaviour. However, taxes related to the environment would be covered, if they are mainly meant to raise revenue.[165]

In the context of the Pan-European Climate Fund, this is rather difficult to distinguish because the Pan-European Climate Fund is primarily meant to raise revenues. In fact, it has been argued that parafiscal levies that, as in our model, give rise to substantial revenues are of a predominantly fiscal nature if the size of the revenues that are, owing to the measure, missing from the public budget are of a notable extent. It is even climate measures that should finance a fund that are named as examples in this regard.[166] On the other hand, however, it must be emphasised that the climate contribution payments are earmarked to finance expenditure-side environmental policy that without such a mechanism could not be executed. In other words, the Pan-European Climate Fund is intrinsically linked to the policies it is financing because the latter would not, to a comparable extent, be possible without it. As such, the Pan-European Climate Fund constitutes an *additional* and *temporary* measure that would help to fulfil an urgent need, namely, an increase in green funding to meet a legally binding goal,[167] and would not aim to give the state additional financial leeway.[168] Neither would the measure interfere with the general budget, since a payment going to the Pan-European Climate Fund would not, in the absence of the latter, have gone to the general budget. Rather, it would not have been paid. This is relevant because – as correctly argued in the literature[169] – the ultimate objective of Article 192(2)(a) of the TFEU lies in the protection of Member States' budgetary integrity, which is not at stake here.[170]

Furthermore, as worked out in Section III.D, the Pan-European Climate Fund also sets incentives that can steer behaviour. While the connection between taking a socially harmful action and triggering the tax is not as linear as in the case of environmental taxes,[171] the Pan-European Climate Fund can, as outlined already, be structured towards affecting the private marginal costs of economic actors dependent on the person having to make the payment showing desired and/or undesired behaviour.[172] Although this is more of a second-order effect that comes along with the primary goal of financing and executing green spending, it is a further aspect that speaks against the EU Climate Fund having a *primarily* fiscal character.

Lastly, it needs to be stressed that the SRF is also based on Article 114 of the TFEU.[173] The carve-out provision of Article 114(2) TFEU that denies the application of Article 114 TFEU for fiscal measures does not apply here. Also in the context of the SRF, the national budgets are not interfered with. Rather, the SRF is built up to protect the integrity of national budgets in the event that there is a need for intervention to protect society from the large costs caused by bank failure.[174] This mechanism of relying on earmarked insurance-like payments has inspired the architecture of the Pan-European

[165] With further references, ibid.

[166] Heselhaus, 'AEUV Art. 192'.

[167] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law').

[168] Which is what Heselhaus appears to bind the understanding of fiscal measure to; see Heselhaus, 'AEUV Art. 192', paras 36–38.

[169] With further references, see Scuderi, '"Provisions Primarily of a Fiscal Nature"'.

[170] To the contrary, Member States would have to finance investments through their budgets, which they would, in the absence of the Pan-European Climate Fund, have to finance with debt or tax increases.

[171] Fundamentally, see Pigou, *The Economics of Welfare*.

[172] See Section III.D.

[173] See, in more detail, Proposal for a Regulation of the European Parliament and of the Council Establishing Uniform Rules and a Uniform Procedure for the Resolution of Credit Institutions and Certain Investment Firms in the Framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and Amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council.

[174] See the references provided in Section III.A.

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Climate Fund, which serves as an additional argument that, *mutatis mutandis*, speaks in favour of Article 192(1) TFEU being the relevant legal basis for the measure.

V. The relationship to other climate-related instruments

In this section, we aim to discuss how the FINE-for-EU mechanism relates to other climate-related financing instruments. To start with, we should focus on environmental taxes and levies that aim at internalising the social cost of behaviour into the actor's private cost function. These so-called Pigouvian taxes[175] are a very powerful tool[176] that can reach a double dividend of reducing pollution and raising revenue that can reduce more distortive taxation.[177] To achieve the Fit for 55 goals, an increase in the carbon price is needed, as mentioned earlier.[178] As such, environmental taxes and levies are an important complementary policy to the green investment that the Pan-European Climate Fund should finance, since they make polluting more costly and upon succeeding in decreasing emissions, will also reduce the overall required green spending needs.[179] In doing so, they will also raise some revenue that will accrue to the national budgets and, thus, help in financing national public green investment. The ETS, for instance, raised about EUR 14.4 billion in 2020[180] and EUR 31 billion in 2021.[181] Against the background of the typically stark political resistance against environmental taxes and levies, we do not expect a significant increase in the short run.[182] We note, however, that if we are wrong then this may have an effect on the overall green investment needed, since the pollution may decrease more strongly than was assumed by those estimating the current additional green investment needs.

Furthermore, additional green investment may be financed through taking out additional debt. Different approaches as to how the EU fiscal rules could be adopted towards better accommodating such debt-financed public green investment have been discussed by Pekanov and Schratzenstaller (2023).[183] What is particularly interesting is their proposal of an 'EU Climate Fund' as a vehicle – following the example of the EU Recovery and Resilience Facility (RRF) – to take out common debt at an EU level, which Member States can then apply for to finance public green investment.[184] Conceptually similar ideas have been expressed by Garicano (2022), who proposes a European Climate Investment Facility (ECIF) and an independent European Fiscal Agency to assess the good standing of Member States to access this new facility.[185] Under his proposal, the ECIF should provide grants and loans worth EUR 57 billion on average to Member States. Similarly to the proposal of Pekanov and Schratzenstaller (2023),[186] there should be no direct transfers to Member States, but the benefit would lie in enabling borrowing with a lower interest rate.[187] A third and slightly different proposal was made by the IMF (2022), which suggests introducing an EU Fiscal Capacity that should, among other things, finance green public investment through a debt-funded Climate

[175] In essence, a Pigouvian tax is a tax on negative externalities (eg pollution). The goal is to increase the private marginal costs of action to reflect the social marginal costs of it. See, eg, Pigou, *The Economics of Welfare*.

[176] Economists' Statement on Carbon Dividends Organized by the Climate Leadership Council.

[177] European Environmental Agency, 'Double Dividend' (2023).

[178] See Section II.A.

[179] In more detail, see Avgousti et al, *The Climate Change Challenge*, s 4.

[180] Schratzenstaller et al, *New EU Own Resources*, p 66 et seq.

[181] European Commission, Report from the Commission to the European Parliament and the Council on the Functioning of the European Carbon Market in 2021 Pursuant to Articles 10(5) and 21(2) of Directive 2003/87/EC (as Amended by Directive 2009/29/EC and Directive (EU) 2018/410) (2022).

[182] See Section II.A.

[183] Pekanov and Schratzenstaller, *Options to Align*; Pekanov and Schratzenstaller, *A Targeted Golden Rule*; also taking account of European Commission, *Communication on Orientations for a Reform of the EU Economic Governance Framework* (2022).

[184] Pekanov and Schratzenstaller, *A Targeted Golden Rule*.

[185] Garicano, 'Combining Environmental and Fiscal Sustainability'.

[186] Pekanov and Schratzenstaller, *A Targeted Golden Rule*.

[187] Garicano, 'Combining Environmental and Fiscal Sustainability'.

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Investment Fund.[188] We understand that under this initiative transfers to the Member States could be granted.[189] A fourth proposal was made by ECB staff members Abraham, O'Connell, and Oleaga (2023), who suggest setting up an EU Climate and Energy Security Fund that could provide EUR 500 billion by 2030.[190] The legal design of this is drawing from the NGEU fund, with money being borrowed on the basis of Article 311 of the TFEU.[191] Repayment is to happen via additional new own resources or, to the extent that this does not succeed, GNI-based own resources.[192]

The above-mentioned models, obviously, differ from the Pan-European Climate Fund proposed in this article, as they foresee debt-financed investment and, at least to some extent, repayment through the Member States' budgets. This may not be easy politically. As Pekanov and Schratzenstaller (2023) also explicitly underline, in the current insecure economic and political setting, debt-financed green investment 'may incur considerable future costs for public budgets and may thus be problematic from the perspective of fiscal sustainability',[193] should the trend towards rising long-term interest rates continue.[194] However, it seems that such debt-funded climate facilities will have to play a role – and we hope that our model can take away some pressure of future generations to repay the debt. After all, we have already sufficiently managed to make their lives much harder.

VI. Conclusion

When urgent and extraordinarily high funding needs are to be met, it calls for maximum efforts on any level. This also includes the much-demanded increase in climate-related European public goods. The money needed for this will likely have to be partly debt-financed, and proposals to this end have been brought forward in the literature. Yet, in the current uncertain economic and geopolitical situation, it may be difficult to take out debt of such a substantial extent. To decrease the amount of money that needs to be raised otherwise, and as a means to further support the endeavours of increasing climate-related European public goods, we developed the FINE-for-EU mechanism, which consists of a Pan-European Climate Fund and a Pan-European Climate Board. Inspired by the SRF that is relied on to insure society against the risks of bank failure, the Pan-European Climate Fund aims to establish a link between cross-border business and the emissions this is giving rise to. This way pan-European policies are funded by pan-European actors that benefit from the EU's legal framework promoting such business.

Demanding that cross-border businesses take responsibility is, not least, conceptually justified by their being prone to aim at escaping their obligations. In fact, the literature points out that MNEs are still heavily involved in profit shifting to tax havens.[195] For sure, there are differences in how businesses behave. Our model takes this into account, on both a micro and a macro level, and therewith incentivises each covered MNE, as well as the corporate sector as a whole, to act more sustainably. In addition, the Pan-European Climate Fund empowers MNEs and gives them a say in how the funds are to be spent. Furthermore, like private citizens, MNEs are potential or even actual victims of natural events caused by climate change;[196] they therefore have a direct interest in participating in investments today that will minimise future risks and damages. This allows the model to more strongly

[188] Arnold et al, *Reforming the EU Fiscal Framework.*

[189] Ibid.

[190] Abraham et al, *The Legal and Institutional Feasibility.*

[191] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the System of Own Resources of the European Union and Repealing Decision 2014/335/EU, Euratom.

[192] Abraham et al, *The Legal and Institutional Feasibility.*

[193] Pekanov and Schratzenstaller, *A Targeted Golden Rule*, p 25.

[194] Ibid.

[195] See Section III.B. Note that the model is taking into account differences between the tax aggressiveness of MNEs.

[196] Huang, Kerstein, and Wang, 'The Impact of Climate Risk on Firm Performance and Financing Choices: An International Comparison' (2018) 49 *Journal of International Business Studies* 633.

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align public and private interest and, although primarily aimed at ensuring a desired level of green investments, create favourable secondary steering effects.[197]

Having in mind the goals and set-up of the Pan-European Climate Fund, we consider that the better arguments speak in favour of Article 192(1) of the TFEU serving as a legal basis for the measure. Thus, the ordinary legislative procedure is applicable, enabling co-decision-making by the Council and the European Parliament and demanding qualified majority, instead of unanimity.[198]

We live in extraordinary times; it will only be through extraordinary, that is, unconventional means that we will be able to solve the challenges that lie ahead. With the Pan-European Climate Fund, we introduce a simple, yet powerful model that involves MNEs in raising substantial amounts of money in a rather short time.

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[197] See Section III.
[198] See Section IV.

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