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Revision of the Energy Taxation Directive: A Brief Overview of Key Novelties

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ABSTRACT

Tax law has always been an important tool to promote existing energy policies and investments, and it is understood that new E.U. rules on energy taxation have the potential to accelerate the energy transition process.

Both the European Green Deal and Fit for 55 Package have pointed to the revision of the Energy Taxation Directive (E.T.D.) regulating the taxation of energy products and electricity. Besides, the idea of revising the legislation related to energy taxation has been emphasised in the European Climate Law which is binding in its entirety in all E.U. countries.

The E.T.D. is an important instrument that has been in force since 2003. However, it is widely accepted that this instrument must be updated in light of the E.U. 's Climate Change Policy and Sustainable Development Goals (S.D.G.s). Hence, on 13 April 2011, the E.U. Commission published a proposal for a Council Directive amending Directive 2003/96/EC. Should all procedural requirements be met, the revised E.T.D. is expected to enter into force; therefore, it is essential to evaluate the key novelties brought by the Revision of the Energy Taxation Directive.

This paper aims to provide an analysis of the E.U.'s existing energy taxation policy and recent developments related to the revision of the E.T.D.. To do this: firstly, energy transition, taxation and the link between them will be outlined. Secondly, the European environmental tax policy system and the E.U. general legal framework on energy taxation will be explained by considering the novelties introduced by the E.U.'s Fit for 55 Package and the European Green Deal. Lastly, the E.T.D. and the revised E.T.D. will be comparatively evaluated together with the questions regarding business taxation.

KEYWORDS

Energy Transition; Energy Taxation; Energy Taxation Directive; European Union

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H23, K34, H25

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1. ENERGY TRANSITION AND TAXATION

Energy transition[1] refers to the change of main energy sources used to sustain socio-economic activities. However, today, this term particularly points to the global energy industry's shift from fossil energy sources to renewable energy sources.[2] Due to the climate emergency, countries are expected to be part of the energy transition and update their legal frameworks accordingly. In this sense, behaviours of energy consumers play an essential role in the energy transition. Hence, public or private individuals and companies that engage with environmentally friendly activities should be supported through tax policies.

Tax systems are part of legal systems,[3] and are centred around the idea of legitimisation.[4] This also means that energy taxation does require a delicate balance between policy and legitimisation. Since it is not easy to balance factors associated with these spheres, energy taxation rules tend to remain a part of a domestic legal order rather than an international one. For instance, because the energy sector is classified as *different* from other sectors, neither the rules of the General Agreement on Tariffs and Trade [hereinafter G.A.T.T.] nor the World Trade Organisation [hereinafter W.T.O.] specifically address the general rules governing this area.[5] It is seen that energy and tax related issues are treated differently in the EU too.

[1] According to the International Renewable Energy Agency [hereinafter I.Re.N.A.], Energy transition refers to "transformation of the global energy sector from fossil-based to zero-carbon by the second half of this century." *I.Re.N.A., irena.org/energytransition*energy transition,https://www.irena.org/energytransition.
[2] *Id.*
[3] *See* Tulio Rosembuj, *Tax Complexity and the Return of the State*, Wolter Kluwers Italia Professionale 975, (2021).
[4] *Id.*
[5] *Energy in W.T.O. Law and Policy*, World Trade Organisation https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_7may10_e.htm.

Because of the climate crisis, the international legal order necessitates energy transition; therefore, even though the W.T.O. law does not clearly cover the energy sector, reducing CO2 emissions is also considered among the W.T.O.'s priorities.[6] The E.U.'s Climate Change Law aimed at reducing greenhouse gas emissions and achieving climate neutrality is another important example in this regard.

The energy transition can be eased thanks to public procurement or green taxation. In this way, , clean energies would be promoted and energy transition costs could be reduced with the help of governments.[7] Besides, true financial and fiscal measures can finance renewable energy technologies.[8] Governmental policy instruments, i.e., subsidies or tax benefits, are among the examples in this regard; therefore, it is believed that state aid rules are of particular importance in the E.U. energy taxation.[9]

It is predicted by some scholars that the energy transition process might not be sufficient to achieve indicated targets due to the current liberal market conditions and technological atmosphere.[10] This perspective can be true for many countries. However, by considering the E.U.'s previous reductions in greenhouse gas emissions[11] and binding emission targets,[12] it can be argued that climate neutrality is still possible for the E.U. by 2050.

There are many energy transitions in history and different driving forces behind them. Such driving forces can be associated with socio-economic and political factors. For instance, the first major energy transition was the shift from wood to fossil fuels, which happened after the Industrial Revolution.[13] Even though the current energy transition is heavily relied on technology and innovation, energy transition policies are regarded as more crucial tools than technology improvements.[14] In other words, the current energy transition is strongly interconnected with governmental policies.[15] Hence, it must not

[6] *Id.*
[7] Report of the U.N. Secretariat of the High-level Dialogue on Energy 2021 on Energy Access Towards the Achievement Of SDG 7 and Net-Zero Emissions, 25, (Sept., 2021).
[8] *Id.* at 20.
[9] *See* Marta Villar Ezcurra, *State Aids and Taxation in the Energy Sector: Looking for a New Approach in* 1 STATE AIDS, TAXATION AND THE ENERGY SECTOR (Marta Villar Ezcurra ed. 2017).
[10] *See* Jorge Blazquez et al., *A Road Map to Navigate the Energy Transition*, OXFORD INST. FOR ENERGY STUD., 2019, at 1.
[11] *See, e.g.*, Amanda M. Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 POL. & POL'Y 30 (2015).
[12] *Climate Change: What the E.U. is Doing*, EUROPEAN COUNCIL, https://www.consilium.europa.eu/en/policies/climate-change/#:':text=At%20least%2055%25%20fewer%20greenhouse%20gas%20emissions%20by%202030&text=By%202017%2C%20the%20EU%20had,three%20years%20ahead%20of%20schedule.
[13] *See, e.g.*, Barry D. Solomon & Karthik Krishna, *The Coming Sustainable Energy Transition: History, Strategies, and Outlook*, 39 ENERGY POL'Y, 7422 (2011).
[14] Blazquez, *supra* note 10.
[15] *Id.*

be unnoticed that environmental tax policies are of paramount importance for a just and speedy energy transition.

From a tax perspective, energy efficiency can be supported either by implementing new taxes on polluting energy sources or by providing incentives for the environmentally friendly activities of consumers. Unfortunately, the Organization for Economic Cooperation and Development [hereinafter O.E.C.D.] statistics show that polluting energy sources are not taxed enough. In fact, even the developed and emerging market countries have not taxed seventy percent of the CO2 emissions related to the energy field.[16] In this sense, the data on energy taxes in European countries can be evaluated comparatively. When the O.E.C.D.'s 2019 report on taxing energy use is examined, it is seen that the rates of fuel excise tax (outside road transportation) were quite common in some Member States. For instance, the Netherlands, Denmark, Italy, Greece, Lithuania and Norway can be considered the leading countries in this regard.[17] It has been observed that these leading countries also apply effective carbon taxes on energy use successfully.[18]

2. THE ENVIRONMENTAL TAX POLICY SYSTEM IN THE EU

The European Union, together with its twenty-seven Member States, is amongst the world's top emitters. On a sectoral basis, the primary source of CO2 emissions in the E.U. stems from the energy sector. Hence, the E.U.'s environmental taxation policy, which is a catalyst for energy transition, should be explained briefly.

Given the E.U. history, the very first concerns regarding taxation were about the removal of custom duties rather than environmental taxation.[19] Nevertheless, in the early 1970s, environmental protection was referred as a guarantee and a prerequisite for the development of economic activities in the European Economic Community.[20]

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[16] *Taxes on Polluting Fuels Are too Low to Encourage a Shift to Low-Carbon Alternatives*, O.E.C.D. https://www.oecd.org/tax/taxes-on-polluting-fuels-are-too-low-to-encourage-a-shift-to-low-carbon-alternatives.htm.

[17] O.E.C.D, TAXING ENERGY USE 2019: USING TAXES FOR CLIMATE ACTION (2019), https://www.oecd-ilibrary.org/docserver/058ca239-en.pdf?expires=1667485866&id=id&accname=ocid71015720&checksum=F6193F68E0D8C4D385C517712BEB5EEF.

[18] *Id.*

[19] *See, e.g.*, Alice Pirlot, *Exploring the Impact of E.U. Law on Energy and Environmental Taxation* 1 (Saïd Business School, Working Paper, Paper No. 19/13, 2019).

[20] *See Id.* at 19.

Further, both the "polluter pays" principle and the nexus between environmental protection and taxation were highlighted by the Commission in 1972.[21]

The polluter pays principle was first introduced by the O.E.C.D. in 1972.[22] With the Single European Act [hereinafter S.E.A.], this principle has become a guiding principle for the E.U.'s Environmental Actions as well.[23] More importantly, the S.E.A. has brought the integration clause[24] which necessitates an E.U. level integration regarding environmental protection requirements.[25] The integration clause is included in Article 11 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.] which states, "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".[26]

The first political discussions regarding the environmental taxation in the E.U. can be traced back to the 1990s.[27] In spite of the Commission's efforts, previous harmonisation attempts in direct taxation fields failed in the beginning. Thus, the current approach has been preferred by the Commission since 1990.[28] Even though the Directive on the taxation of mineral oils was adopted by the E.U. in the 1990s,[29] Member States could not agree on an E.U.-level CO2 tax which was proposed by the Commission.[30] Even today, CO2 taxation is not the case at the Union level. Yet, following the Paris Climate Change Agreement, the main goal in the E.U. is now reducing emissions at certain levels with the help of environmental tax reforms[31] and different market based instruments, such as tradable permits and quotas, producer responsibility schemes, tariffs and environmental taxes.[32]

[21] *See Id.* at 19.
[22] *See* European Court of Auditors, Special Report 12/2021, *The Polluter Pays Principle: Inconsistent Application Across EU Environmental Policies and Actions*, at 6 (July 5, 2021).
[23] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 191(2), May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].
[24] *See* TFEU art. 11.
[25] *See* Pirlot, *supra* note 19 at 2.
[26] TFEU art 11.
[27] *See* Charalambos Louca, *Environmental Tax Policy Reforms in the European Union, in* HANDBOOK OF RESEARCH ON POLICIES AND PRACTICES FOR SUSTAINABLE ECONOMIC GROWTH AND REGIONAL DEVELOPMENT 318 (George M. Korres et al. eds., I.G.I. Global, U.S.A. 2017).
[28] *See* Georg Kofler, *EU Power to Tax: Competences in the Area of Direct Taxation, in* RESEARCH HANDBOOK ON EUROPEAN UNION TAXATION LAW 13 (Christiana HJI Panayi et al. eds., Edward Elgar Publishing Ltd., U.K. 2020).
[29] *See* Council Directive 92/82, on the approximation of the rates of excise duties on mineral oils, 1992 O. J. (L 316), 19 (EC).
[30] *See* Pirlot, *supra* note 19 at 2.
[31] *See* Marta Villar Ezcurra et al., *State Aids and Taxation in the Energy Sector: Looking for a New Approach, in* STATE AIDS, TAXATION AND THE ENERGY SECTOR (Thomson Reuters Aranzadi ed., 2017).
[32] *See* European Environmental Agency [EEA], *Environmental Taxation and EU Environmental Policies*, at 5, EEA Report No.17/2016 (Aug. 22, 2016), Publications Office of the European Union .

The European Commission's early taxation policy is based on the Communication of 1 October 1997,[33] which highlights the need for greater tax coordination within the E.U.[34] It can be argued that several achievements in the direct and indirect taxation fields have been recorded after the publication of this communication, forming the basis for debates on the E.U.'s current taxation policy.[35]

The European Commission's Communication, published on 10 October 2001, namely "Tax policy in the European Union - Priorities for the years ahead",[36] explains the Union's current tax policy and objectives by focusing on the actualisation of a competitive market. This communication is important as it indicates that harmonisation is not necessary for each field of taxation, and it clarifies that Member States are free to choose their own tax system as long as they respect E.U. Rules. Harmful tax competition and the elimination of the tax obstacles to operation of internal market are among the other important headlines. Besides, it is seen that tax problems of private individuals and businesses have been at the forefront of this Communication.[37] As indicated in the Communication, harmonisation of direct taxation is *neither necessary nor desirable,* while it is crucial to achieve *a high degree of harmonisation* in indirect taxation.[38] Yet, it should be noted that areas affecting the establishment or functioning of the internal market can be excluded from this perspective.[39] In other words, by virtue of the T.F.E.U. Article 115 (*ex* Article 94), the approximation of laws, in the areas that fall within the scope of direct taxation and affect the internal market directly, is also possible. It should be noted that this general competence can exclusively be exercised, provided that unanimity in the Council is achieved.[40]

Even though tax remains the sole responsibility of each Member State in the E.U., national governments are asked to consider internal market rules while collecting taxes.[41] To be more precise, Article 110 of the T.F.E.U. particularly addresses the protection of competitive market conditions against internal discriminatory taxation.[42]

[33] *Communication from the Commission to the Council - Towards tax co-ordination in the European Union - A package to tackle harmful tax competition*, COM(1997) 495 (Oct. 1, 1997).
[34] *Id.* para. 3 -11.
[35] *See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. Tax policy in the European Union - Priorities for the Years Ahead*, COM (2001) 260 final (Oct. 10, 2001) - introduction.
[36] *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. Tax policy in the European Union - Priorities for the Years Ahead*, , COM (2001) 260 final (Oct. 10, 2001).
[37] *See Taxation: Commission outlines its priorities)* , https://ec.europa.eu/commission/presscorner/detail/en/IP_01_737 (Last visited May 23, 2001).
[38] *Id.* at 36.
[39] *See Id.*
[40] Kofler, *supra* note 28.
[41] *Taxation*, European Union, https://european-union.europa.eu/priorities-and-actions/actions-topic/taxation_en (Last visited Nov. 1st, 2022).
[42] *See* TFEU, ch.2, arts. 110-113.

In order to facilitate competitive market conditions and operation of the internal market, Article 113 of the T.F.E.U. provides that indirect tax rules need to be harmonised because such taxes have the potential to hinder the free movement of goods or services.[43] For instance, while personal income taxation is not regarded as crucial for the operation of the internal market, it is widely accepted that the functioning of the internal market is linked with the Value Added Tax [hereinafter V.A.T.] and energy taxation.[44] In any case, Article 352 of the T.F.E.U. allows the European Council to take any action to protect the operation of the common market, and such actions can be tax-related as taxation is not excluded under this provision.[45]

There is a legal discussion as to whether Article 116 of T.F.E.U., which does not require unanimity in the Council, could be used as a legal basis for the harmonisation of direct taxation.[46] Some scholars also argue that the Union has a fairly limited competence allowing the positive harmonisation of direct tax matters under certain conditions.[47] These conditions refer to the matters that are affecting the realisation of the internal market and require unanimous harmonisation actions and the application of the subsidiarity principle.[48] Yet, due to the principle of conferral, it is widely accepted that the European Union is not competent in direct tax matters.[49] The principle of conferral, also known as the "principle of attribution of powers", is codified under Article 5(2) of the T.E.U., and according to this, if a competence is not explicitly conferred on the E.U. by the E.U. Treaties, it remains with the Member States.[50]

3. THE EU GENERAL LEGAL FRAMEWORK ON ENERGY TAXATION

In terms of indirect taxation, the Council Directive 2003/96/EC[51], regulating energy taxation at the Union level, can be considered one of the most important achievements.[52] This directive covers the taxation of energy products, including coal, gas and

[43] *See, e.g., Commission Tax Strategy (Frequently Asked Question)*, EUROPEAN COMMISSION https://ec.europa.eu/commission/presscorner/detail/en/MEMO_01_193 (Last Visited May 23rd, 2001).
[44] *See* CHRISTIANA HJI PANAYI ET AL., RESEARCH HANDBOOK ON EUROPEAN UNION TAXATION LAW - EU POWER TO TAX 13 (Edward Elgar Publishing Ltd, 2020).
[45] *See* MARJAANA HEELMINEN, EU TAX LAW DIRECT TAXATION 4 (IBFD, 2021).
[46] *See* Panayi et al., *supra* note 44, at 17.
[47] *See* Heelminen, *supra* note 45.
[48] *Id.*
[49] *See* CHRISTIANA HJI PANAYI, EUROPEAN UNION-CORPORATE TAX LAW 3 (Cambridge Tax Law Series, 2013).
[50] *See* TFEU art 5 (2).
[51] Council Directive 2003/96, Restructuring the Community Framework for the Taxation of Energy Products and Electricity, 2003 O.J. (L283) 51(EC).
[52] *Id.* at article 4 (2).

electricity.[53] However, because the thermal power of a nuclear reactor is not within the scope of the term of energy products,[54] the E.T.D. is not applicable for nuclear heat.[55]

Because energy taxation is connected with many other areas, tax harmonisation is not sufficient to achieve efficient results on its own. Therefore, the legislation governing energy prices, efficiency and security should be coordinated to support tax harmonisation.[56] In this sense, the General Block Exemption Regulation [hereinafter G.B.E.R.],[57] the Energy and Environmental Aid Guidelines [hereinafter E.E.A.G.].[58]and the Energy Efficiency Directive are noteworthy to mention.

Both the G.B.E.R. and the E.E.A.G. are relevant to the state aid rules. While the G.B.E.R. regulates the state aid categories that are in conformity with Articles 107 and 108 of the T.F.E.U.,[59] the revised E.E.A.G., which has been in force since 2014, includes rules for Member States to support energy projects associated with environmental protection.[60] The E.E.A.G. has been revised to keep up with the European Green Deal and 2050 targets.[61] Also, Directive 2012/27/EU on energy efficiency, setting rules and obligations to achieve energy efficiency targets, has been amended by the Directive 2018/2002/EU. Thus, a non-binding E.U. energy efficiency target (minimum 32.5 % efficiency improvements by 2030) has been brought forward.[62]

European Climate Law that is binding for all Member States is a remarkable development for the energy transition and taxation in the E.U.[63] As is known, this law

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[53] *See, e.g.*, Ezcurra et al., *supra* note 9.

[54] Council Directive 2003/96, Restructuring the Community Framework for the Taxation of Energy Products and Electricity, Art 2, 2003 O.J. (L283) 51(EC). For more information see Art 2 O.J. of the E.T.D., < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0096:en:HTML#d1e337-51-1> (Last visited Aug. 8, 2022).

[55] *See* Case C-606/13, OKG AB v. Skatteverket, 2015 E.C.R. VII - 636.

[56] *See* Ezcurra et al., *supra* note 9.

[57] *See* Commission Regulation 651/2014 of June.17, 2014, Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty (Text with E.E.A. relevance), 2014 O.J. (L 187) 1–78.

[58] Energy and Environmental State aid guidelines. *See* COMMUNICATION FROM THE COMMISSION- Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01), https://ec.europa.eu/commission/presscorner/detail/en/ip$_2$1$_2$784

[59] *See Competition Policy*, European Commission, https://competition-policy.ec.europa.eu/public-consultations/2021-gber_en (last visited August 8, 2022).

[60] *See* European Commission Press Release IP/21/6982, State aid: Commission endorses the new Guidelines on State aid for Climate, Environmental protection and Energy (Dec. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2784 (Last visited Aug. 8, 2022).

[61] See Chaterine BaneT, State Aid Guidelines for Environmental Protection and Energy (EEAG): Review Process, Possible Changes and Opportunities (2020). https://cerre.eu/publications/state-aid-guidelines-energy-eeag/> accessed 8 August 2022.

[62] *See* International Energy Agency (I..E.A.): E.U. Directive 20orientamento.bologna@er-go.it18/2002 on Energy Efficiency <https://www.iea.org/policies/13353-eu-directive-20182002-on-energy-efficiency> accessed 8 August 2022.

[63] *See* Regulation 2021/1119 of the European Parliament and of the Council of June. 30, 2021, Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), 2021 O.J. (L 243) 1–17.

has been adopted by virtue of Article 192(1) of the T.F.E.U. and is in the form of a Regulation.[64] In the preamble of this Climate Change Law, taxation has been mentioned twice clearly: in Paragraphs 26 and 37. Even though preambles or recitals are not binding as articles, they may take supplementary normative roles and consequently affect judicial interpretations.[65] Paragraph 37 of European Climate Law relates that the Commission would explore methods of benefiting from the E.U. tax system to promote the European Green Deal. In this sense, Regulation 2020/852/EU of the European Parliament and of the Council would be taken into account.[66]

In Paragraph 26, it is highlighted that relevant climate change and energy taxation legislations would be revised.[67] Having said that, the E.U.'s newly introduced Fit for 55 Package and the European Green Deal[68] include revision of the E.T.D.[69] According to the Commission, the E.T.D. no longer meets the E.U. 's environmental objectives as this directive facilitates and promotes the use of fossil fuels.[70].

In addition to the revision of the E.T.D., implementing environmental taxes at the Union level could reduce energy usage and improve energy efficiency as well. Environmental taxes, also called "green taxes", refer to the taxes relating to energy, transportation, pollution and resources.[71] Such taxes, for sure, are crucial tools in order to reduce the amount of CO2 and for the success of environmental policies. However, as of today, environmental taxes are not applied at the Union level because the adoption of fiscal measures requires the unanimous agreement of the Member States.[72] Moreover, due to complex procedures, this method cannot be actualised at the Union level in the short term. Yet, there are different methods developed in order to achieve E.U. climate targets under the European Green Deal; among them, the E.U. Emissions Trading System [hereinafter E.T.S.], set up in 2005, is worth mentioning because participation in this system is mandatory for some companies.[73] This system mainly measures carbon

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64 *Id.*

65 *See generally* 19th Quality of Legislation Seminar *"EU Legislative Drafting: Views from those applying EU law in the Member States"* European Commission Service Juridique - Quality of Legislation Team Brussels, 3 July 2014 (Charlemagne Building) Complexity of EU law in the domestic implementing process <https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf> accessed 4 July 2022.

66 *See* Regulation 2021/1119 of the European Parliament and of the Council of June. 30, 2021, *supra* note 63.

67 *Id.*

68 *But see* Proposal for a Council Directive to Restructure the Union Framework for the Taxation of Energy Products and Electricity (Recast), COM (2021) 563 final (July 14, 2021).

69 *See, e.g.*, Council Directive 2003/96, 2003 O.J. (L 283) 51–70.

70 *See, e.g.*, Briefing of the Revision of the Energy Taxation Directive: Fit for 55 Package, (Jan. 19, 2022) https://www.europarl.europa.eu/thinktank/it/document/EPRS_BRI(2022)698883.

71 *See Green Taxation – in Support of a more Sustainable Future*, EUROPEAN COMMISSION, https://ec.europa.eu/taxation_customs/green-taxation-0_en.(last visit 10 August 2022).

72 *See* Jaume Freire-González & Ignasi Puig-Ventosa, *Reformulating Taxes for an Energy Transition*, 78 ENERGY ECON. 312 (2019).

73 *See* E.U. *Emissions Trading System (E.U. E.T.S.)*, EUROPEAN COMMISSION, https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en.

emissions by following the polluter pays principle.[74] The main areas covered by the E.T.S. are industrial activities, electricity generation and intra- European flights.[75]

4. E.T.D. AND E.T.S.

The European Union's climate change policy depends on energy transition which can be put into practice by means of individual components, such as pricing, targets or rules.[76] In this sense, the revision of the E.T.D. and E.T.S. is an important step towards a greener Europe. It is important to notice that the current E.T.D. is in force and will be in force till the revision takes place. As is known, unlike decisions and regulations, directives must be implemented into national laws.[77] Since the E.T.D. and its revision have been designed in the form of a "directive", Member States would be asked to achieve the goals set out in this directive by meeting the deadline given.[78] By virtue of the Commission's proposal, the deadline given for this is 31 December 2022.[79]

When it comes to the Council's voting system, some areas - including the harmonisation of national legislation on indirect taxation- are classified as sensitive matters.[80] It is unfortunate that the proposal is subject to the special legislative procedure, requiring the Council to decide by unanimity.[81] Between 2011 and 2015, previous revision attempts for the E.T.D. failed due to this requirement.[82] Hence, a major

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[74] *See* E.U. *Emission Trading System (*E.U. E.T.S.*)*, Florence School of Regulation, https://fsr.eui.eu/eu-emission-trading-system-eu-ets (last visited February 19th 2021).

[75] *See Taxing Energy Use 2019 : Using Taxes for Climate Action (Executive Summary)*, o.e.c.d. ilibrary, https://www.oecd-ilibrary.org/sites/058ca239-en/index.html?itemId=/content/publication/058ca239-en.

[76] *See* KLoek Helderman , Barbara Bell, Warwick Ryan&Christopher Morgan, Energy Taxation Directive, KPMG(2021).

[77] *See*, e.g., *Types of Legislation*,European Unionhttps://european-union.europa.eu/institutions-law-budget/law/types-legislation_en.

[78] *See, e.g.*, *Applying EU Law*, European Commission, https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en#: :text=Regulations%20and%20decisions%20become%20automatically,and%20takes%20action%20if%20not.

[79] *See* generally Revision of the ETD, Proposal for a Council Directive amending Council Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity, 23, art. 4 para 3, COM(2021) 563 final (Jul. 14, 2021)(EC).

[80] *See Voting System* (*Unanimity*), Council of Europe, https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/.

[81] *See* Proposal for a Council Directive amending Council Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity, 23, art. 4 para 3, COM(2021) 563 final (Jul. 14, 2021) (EC).

[82] Tim Gore, *The revision of the Energy Taxation Directive Could Underpin a Fair and Green Tax Reform in Europe*, Heinrich Boll Stiftung (Sept. 13, 2021) https://eu.boell.org/en/2021/09/13/revision-energy-taxation-directive-could-underpin-fair-and-green-tax-reform-europe.

challenge is to achieve a unanimous agreement on a revised text. Until this process is completed, the E.T.D. will continue to operate in the E.U.

Even though the special legislative procedure is set out in Article 113 of the T.F.E.U., there is no clear description thereof.[83] Yet, both Articles 113 and 192 of the T.F.E.U. refer to the special legislative procedure for the harmonisation of tax related issues. To be more precise, the legal basis for the Commission's proposal is Article 192, Paragraph 2 of the T.F.E.U. However , unlike the revision of the E.T.D., it is possible to follow the ordinary legislative procedure for the revision of the E.T.S. Directive.[84]

The Energy Taxation Directive (2003/96/EC) (E.T.D.) [85]	Revision of the Energy Taxation Directive (Revised E.T.D.) [86]
E.T.D. includes the minimum rates of excise duty. In other words, Member States are able to decide on their own taxes by determining their domestic rates, but they have to meet the E.T.D. minimum.[87] Both the E.T.D. and the revised E.T.D. consider the E.T.S. as the main instrument for reducing emissions.[88] E.T.D. grants exemptions to the aviation and shipping sectors by not considering the taxation of kerosene and heavy oil of the maritime sector.[89]	Broadly speaking, the revised E.T.D. brings the following novelties: ● Introduction of the E.T.S.-2 [90] ● New Tax Rates calculated based on the environmental impact (rather than the volume).[91] ● Recognition and consideration of new energy products (such as hydrogen).[92] ● Kerosene and heavy oil of the maritime sector will be taxed as well. ● the use of CO2 taxation (in the circumstances where the E.U. E.T.S. is not applied). [93]

[83] *Legislative Procedures,* EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0016 (accessed Feb. 9, 2022).

[84] *See* Sabine Schlacke, Helen Wentzien, Eva-Maria Thierjung, Miriam Köster, *Implementing the EU Climate Law via the "Fit for 55" Package 1*, Oxford Open Energy ioab003 (2022), https://academic.oup.com/ooenergy/article/doi/10.1093/ooenergy/oiab002/6501634.

[85] *See*, e.g., Directive 2003/96 of the Council of 27 October 2003 on the Restructuring the Community framework for the taxation of energy products and electricity, 2003 O.J. (L283) 51.

[86] *See, e.g.*, Proposal for a Council Directive amending Council Directive 2003/96, Restructuring the Community framework for the taxation of energy products and electricity, COM (2011) 169 final (Apr. 13, 2011).

[87] *See* Helderman et al., *supra* note 76.

[88] *Id.*

[89] *Id.*

[90] *See* Schlacke et al., *supra* note 84

[91] *See* Helderman et al., *supra* note 76.

[92] *Id.*

[93] *See* generally Proposal for a Council Directive amending Council Directive 2003/96, Restructuring the Community framework for the taxation of energy products and electricity, at 38, COM(2011) 169 final (Apr.13, 2011).

Another important point is that if the E.T.D. is revised, carbon tax would be applied in the E.U. countries too. For instance, Italy's current energy taxation is in conformity with the E.U. Energy Taxation Directive,[94] regulating minimum rates of energy taxation.[95] In this sense, electricity consumption taxes and excise duties are the main taxes on energy use in Italy.[96] As an active participant of the E.U. E.T.S. system, Italy imposes fuel excise levies on the road sector too.[97] On the other hand, even if Italy is among the top countries regulating the aforementioned "green taxes" on energy use, there is no explicit carbon tax applied in the country.[98] This can, for sure, change if the E.T.D. is revised.

Some scholars argue that electricity generation from fossil fuels should be taxed, while electricity generation from renewable energy should remain untaxed.[99] Thus, consumers opting for electricity generated *via* renewable energy sources could pay less tax, and the transition would gain *momentum*.[100] This perspective is similar to the *Pigouvian* role of the tax system.[101] The revised E.T.D. includes reduced tax rates for electricity generated from renewable energy sources.[102]

5. QUESTIONS REGARDING BUSINESS TAXATION

Successful Pigouvian taxes change the behaviour of taxpayers. As is known, mostly energy areas are taxed for consumption and production; therefore, rules as to energy taxation have effects on behaviour of energy consumers and producers.[103] For example, because the consumption tax increases the price of electricity, consumers may try to reduce their consumption; this also applies to the businesses which are consumers of energy. However, due to the existing tax burden on taxpayers, the introduction of new environmental taxes is not welcomed by taxpayers; therefore, there is no widespread use of environmental taxes in the E.U. yet.[104]

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94 *See, e.g.*, Council Directive 2003/96, 2003 O.J. (L 283) (EC).
95 *See* O.E.C.D., *supra* note 75.
96 *Id.*
97 *Id.*
98 *Taxing Energy Use 2019*, O.E.C.D. https://www.oecd.org/tax/taxing-energy-use-efde7a25-en.htm.
99 *See* Freire-González & Ventosa, *supra* note 72.
100 *Id.*
101 Also known as Taxe de Pigouvian. According to the information provided by the O.E.C.D.,this term refers to "the tax levied on an agent causing an environmental externality (environmental damage) as an incentive to avert or mitigate such damage." *Glossary of Statistical Terms (Pigouvian Tax)*, O.E.C.D., https://stats.oecd.org/glossary/detail.asp?ID=2065 (Last visited Nov. 20, 2001).
102 *See* Miroslava Kostova Karaboytcheva, "Briefing- EU Legislation in Progress Revision of the Energy Taxation Directive: Fit for 55 package" (2022).
103 *See* Freire-González & Ventosa, *supra* note 72.
104 *See* Louca Charalambos, *Environmental Tax Policy Reforms in the European Union, in* 27 HANDBOOK OF RESEARCH ON POLICIES AND PRACTICES FOR SUSTAINABLE ECONOMIC GROWTH AND REGIONAL DEVELOPMENT 318 (2017).

Compliance by taxpayers ensures the operation of the system; however, non-compliance is also possible *via* exclusions that affect the most vulnerable taxpayers.[105] Therefore, at first glance, minimising tax exclusions may seem to be a sustainable and just way. However, it should be noted that businesses, as important energy consumers and probable actors of energy projects, play an essential role in the energy transition. Hence, businesses that engage with environmentally friendly activities should be supported through tax incentives. These tax incentives used by Member States to support clean energies must be in conformity with Article 107(1) of the T.F.E.U., the fundamental freedoms, the E.T.D., the G.B.E.R.,[106] the E.E.A.G.,[107] and any other E.U. level energy related specific provisions.[108] In fact, pursuant to established E.U.-case law practice, if there is no harmonisation of tax provisions in a particular field, Member States are enabled to provide tax advantages in this field.[109]

Even though eco-friendly or sustainable business terms are used in our daily lives, these terms mostly are not defined by existing laws. Yet, broadly speaking, businesses that are preventing pollution, reducing the amount of waste they produce, purchasing or producing renewable energy, adopting sustainable business travel policies etc. can be considered eco-friendly or sustainable.[110]

It is important to draw attention to the impact of taxation on businesses. As it is known, businesses investing in renewable energy projects can be encouraged through various routes, such as tax allowances, income tax deductions, tax credits, differentiated V.A.T., tax exemptions, public funds and accelerated or free depreciation and many other incentive regimes.[111] This support can also be actualised by promoting sustainable business practices. For example, some small businesses and cooperatives can be considered as prosumers by virtue of the Renewable Energy Directive [hereinafter R.E.D.I.I.].[112]

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[105] *See* Tulio Rosembuj, *Tax Complexity and the Return of the State*, RASSEGNA TRIBUTARIA WOLTERS KLUWER ITALIA S.R.L. (October 1, 2021), https://onefiscale.wolterskluwer.it/document/tax-complexity-and-the-return-of-the-state/10AR0000285244ART1?searchId=735509404&pathId=773a0938a7cd8&offset=3&contentModule Context=all.

[106] *See generally* General Block Exemption Regulation - Council Regulation No 994/98 of May 7, 1998, on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, 1998 O.J. (L142) 1 (EC), amended by Council Regulation No 733/2013 of July 22, 2013.

[107] E.E.A.G.

[108] *See* Ezcurra et al., *supra* note 9.

[109] *Id.*

[110] *See* Georgia Makridou, *Why Should Business Embrace Sustainability? Lessons from the World's Most Sustainable Energy Companies*, ESCP IMPACT PAPER NO 2021-33-EN, https://academ.escpeurope.eu/pub/IP%20202133EN.pdf.

[111] *See* Silvia Rezessy, & Paolo Bertoldi, *Financing Energy Efficiency: Forging the Link Between Financing and Project Implementation* (Report prepared by the Joint Research Centre of the European Commission) (2010).

[112] *See generally* Directive (EU) 2018/2001, of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, 2018 O.J. (L328) 82.
See JENS LOWITZSCH, ENERGY TRANSITION: FINANCING CONSUMER CO-OWNERSHIP IN RENEWABLES (Jens Lowitzsch ed. 2019).

Unlike the R.E.D.I.I., the revision of the E.T.D. introduces new rules to the detriment of Small and Medium-sized Enterprises [S.M.E.s] which are operating in the transportation sector. In fact, the revision of the E.T.D. includes the harmonisation of the tax levels for petrol and diesel used in the transportation sector, and this would neither promote the use of diesel nor distinguish diesel from the oil.[113] It is well-known that the use of diesel causes a clear increase in nitrogen oxide (NO) and nitrogen dioxide (NO2) emissions leading to health problems for humans.[114] Hence, the E.U.'s new strategy can be justified under health concerns. Besides, in the revision of the E.T.D., taxation of the non-commercial and commercial diesel consumption is treated in the same way, and it is believed by some scholars that this would result in certain anti-competitive situations or concern some countries which provide tax incentives for fuel-based manufacturing.[115]

CONCLUSION

The effect of governmental policies on the current energy transition is quite visible. Hence, the environmental tax policy, the European Green Deal and the Fit for 55 Package are of particular importance for energy taxation. Broadly speaking, other than the E.T.D., the harmonisation of energy taxation is not yet a reality at the E.U. level.[116] The reasons behind this is that energy and taxation fields tend to remain part of national legal orders because they are seen as integral parts of sovereignty. In the E.U., on the other hand, some energy related areas are in the scope of shared competences by virtue of Article 194 (1) of the T.F.E.U..[117] Also, in addition to environmental taxes, other market-based instruments are combined together to achieve environmental targets and increase efficiency.[118] As a result, it is not always possible to classify all energy taxes as direct, indirect or environmental taxes.[119] Hence, the E.U. energy taxation rules are quite complex.

[113] *See* Gerhand Huemer, *Revision of the Energy Taxation Directive*, SME United (Jan. 18, 2022), https://www.smeunited.eu/admin/storage/smeunited/20220118-etdreview-pp-final.pdf.
[114] *See* Charles W. Schmidt, *Beyond a One-Time Scandal: Europe's Onging Diesel Pollution Problem*, 124 Env't Health Perspect A19-A29 (2016).
[115] *See* Huemer, *supra* note 113.
[116] *See* Ezcurra et al., *supra* note 9.
[117] *See* TFEU art. 194 (1): "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks."
[118] *See, e.g.*, Ezcurra et al., *supra* note 9.
[119] *Id.*

The E.T.D., as its very name signifies, draws from the E.U.'s legal framework for the taxation of energy products and electricity. However, this legal instrument is not in conformity with the E.U.'s carbon neutrality goals and the polluter pays principle which has been promoted thanks to the European Green Deal. In other words, the E.U. tax system may require a more proactive *Pigouvian* role so that taxation can be used as a tool to limit the use of energy sources that have adverse effects on society and the environment.[120] Yet, it should be noted that it remains contentious whether the implementation of the revised E.T.D. and E.T.S.-2 would be possible by the deadlines given.[121] Besides, given the previous revision attempts that failed due to lack of consensus, the special legislative procedure can be an important barrier to the revision of E.T.D..

[120] *See Climate Change: What the EU Is Doing*, EUROPEAN COUNCIL , https://www.consilium.europa.eu/en/policies/climate-change/#: :text=At%20least%2055%25%20fewer%20greenhouse%20gas%20emissions%20by%202030&text=By%2020017%2C%20the%20EU%20had,three%20years%20ahead%20of%20schedule (last reviewed October 21, 2022).

[121] *See* CÉCILE BROKELIND AND SERVAAS VAN THIEL, TAX SUSTAINABILITY IN AN EU AND INTERNATIONAL CONTEXT (2020).