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Getting the price right

Exploring the legal possibilities of taxing meat and dairy
consumption in the EU on environmental grounds

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

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Semester of graduation: period 1, spring semester 2016

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Summary

This paper argues that industrialized meat and dairy production create substantial environmental costs that are currently not being reflected by the price paid by consumers. One way of addressing this could be by taxing those products proportional to the environmental damage they cause based on the principle that the polluter should pay. The question is if such a tax could be legally motivated under EU law, looking at the EU treaties, the environmental principles as well as the Union's international obligations, in particular relating to climate change mitigation. If action at the EU level is not legally possible or politically feasible the paper also investigates the scope for introducing national measures in relation to EU law.

The responsibility to protect the environment is shared between the EU and its member states, and the treaties allow for the introduction of fiscal measures that promote the EU's environmental objectives. Apart from this, the EU has a separate mandate to harmonize taxes to ensure the functioning of the single market and the treaties require that the environmental objectives be integrated into such legislation as well. However, since the member states retain their power to levy taxes, complete unanimity is needed if the EU wants to introduce measures of a fiscal nature. Member states can introduce unilateral environmental levies on food products since that is not an area where the EU has taken harmonizing action yet and national environmental taxation could eventually pressure the EU to harmonize the area. Another option could be to reform the EU's VAT system in order to increase the possibility for member states to use differentiated VAT rates on environmental grounds. The environmental principles, most notably the polluter pays principle and the precautionary principle, form an integral part of EU law but does not seem to create any positive legal obligations for the EU legislator. Consequently, there is no obligation to take legislative action in this case, although the principles do serve a guiding purpose.

The paper concludes that a EU consumption tax on meat and dairy could be designed in a way that avoids legal obstacles. However, since there is limited public and political awareness concerning the environmental damage caused by industrialized meat and dairy production, a consumption tax should preferably be accompanied by a broader policy package that includes public awareness campaigns as well as production-side command and control measures, to minimize the risk of economic or political backlash.

Sammanfattning

Kopplingen mellan en växande produktion av kött och mjölk och storskalig miljöförstöring, i synnerhet gällande klimatförändringar, har synliggjorts i en rad vetenskapliga rapporter på senare tid. Trots detta så verkar det finnas en låg medvetenhet hos allmänhet och beslutsfattare kring hur stor miljömässig roll våra matvanor faktiskt spelar. Den här uppsatsen bygger på idén att de externa miljöskador som vår konsumtion ger upphov till borde speglas i priset vi betalar och stå i proportion till varje produkts miljöpåverkan. Baserat på den premissen har jag valt att undersöka ifall det finns en rättslig grund för att införa en skatt på mjölk och kött i EU med hänsyn taget till respektive produkts proportionella miljö- och klimatpåverkan. Som ett andrahandsalternativ, ifall det saknas juridisk grund eller politisk vilja på EU-nivå, har jag även valt att titta på vilket handlingsutrymme som finns på medlemsstatsnivå för att införa den här typen av skatt utan att komma i konflikt med EU-rätten.

EU delar det juridiska ansvaret för att skydda miljön med medlemsstaterna och miljöskatter kan införas för att främja EU:s miljömål. När det gäller harmonisering av nationella lagar som hindrar den fria rörligheten har EU exklusiv kompetens. Samtidigt finns det en skyldighet enligt fördragen att integrera EU:s miljömål i all lagstiftning. Alla 28 medlemsstater måste emellertid vara helt överens för att skattelagstiftning ska kunna godtas. Uppsatsen kommer fram till att det saknas juridiska hinder för att införa en miljöbaserad konsumtionsskatt i EU, förutsatt att den utformas på ett genomtänkt och proportionerligt sätt. Eftersom det krävs enhällighet för skatteåtgärder i EU är det emellertid realistiskt att ett sådant förslag skulle gå igenom. Medlemsstaterna kan införa nationella punktskatter vilket i slutändan kan driva EU till harmoniseringsåtgärder eller använda sig av det begränsade utrymme som finns inom det delvis harmoniserade momsområdet för att tillämpa differentierade momssatser av miljöskäl. De miljörättsliga principerna, i synnerhet principerna om att förorenaren ska betala och att försiktighet ska iakttas, är inkorporerade i EU-rätten men det framstår inte som att lagstiftaren kan hållas till svars juridiskt för underlåtenhet att respektera dem.

Eftersom det finns ett kunskapsglapp kring animaliekonsumtionens miljöpåverkan bör en konsumtionsskatt, oavsett på vilken nivå den införs, åtföljas av en bredare strategi som inbegriper informationskampanjer såväl som lagstiftningsåtgärder i produktionsledet för att minimera risken för ekonomiska och politiska bakslag.

Preface

It has been a tumultuous couple of months since I first decided that I wanted to write something about the role of meat eating in an environmental context. This is the last thing I do as a law student and a bit naively I thought that I would try and produce something worthwhile. The end result is not precisely what I had in mind but I guess that is part of the learning process.

As I leave Juridicum, I am grateful for having met so many bright and inspiring people during my time as a law student. I have taken several detours to get to where I am today and looking in the rear view mirror it is starting to seem as if I had a plan all along, although the truth is that I have always just jumped from one thing to the next based on gut instinct and natural curiosity. So far that has taken me exactly where I wanted to go and now it is time to jump again...

Thanks to my supervisor, Annika Nilsson for being candid and straightforward when I was veering too much off course.

Thanks to Märta for making me want to be the best person I possibly can and for being a constant source of inspiration and adventures.

Thanks to my family for always being there.

Somewhere over Iraq, May 27, 2016.

Johan Arvidsson

Abbreviations

AoA	Agreement on Agriculture (WTO)
CAP	Common Agricultural Policy (EU)
CJEU	Court of Justice of the European Union
CO ²	Carbon Dioxide
FAO	Food and Agriculture Organization (UN)
GATT	General Agreement on Tariffs and Trade (WTO)
GHG	Greenhouse Gas Emissions
IPCC	Intergovernmental Panel on Climate Change
PPP	Polluter Pays Principle
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNEP	United Nations Environment Programme
VAT	Value Added Tax
WTO	World Trade Organization

1 Introduction

“In terms of immediacy of action and the feasibility of bringing about reductions in a short period of time, [reducing meat consumption] clearly is the most attractive opportunity.”¹

/Dr Rajendra Pachauri, former chair of IPCC, on the topic of climate change.²

That humans eat animals is old news. That we are doing it on such a massive scale is, however, a fairly recent development. Globally, the consumption of meat has quadrupled in the last 50 years³ and demand for meat and milk is projected to increase by an additional 73 and 58 per cent, respectively, by 2050.⁴ If we take Sweden as an example, individual meat consumption has increased by close to 50 % since 1990 and Swedes now consume, on average, 88.5 kg of meat per person and year,⁵ half of which is being imported.⁶ We are also spending less of our disposable income on food⁷ and the price of meat is declining compared to other food products according to the consumer price index.⁸

A 2006 study by the United Nation’s Food and Agriculture Organization concluded that the livestock sector “emerges as one of the top two or three most significant contributors to the most serious environmental problems, at every scale from local to global” and that reducing its impact “should be a major policy focus when dealing with problems of land degradation, climate change and air pollution, water shortage and water pollution and loss of biodiversity”.⁹ This corresponds to the UN’s Sustainable Development Goals¹⁰, where at least 7 of the 17 goals are connected to our consumption of animal products.¹¹

¹ The Guardian, 2008.

² The Intergovernmental Panel on Climate Change is the international body for assessing the science related to climate change and was set up in 1988. It was awarded the Nobel peace prize in 2007, jointly with former US vice-president Al Gore.

³ FAOSTAT, UN Food & Agriculture Organization (electronic source).

⁴ Gerber et al., FAO, 2013, p. 1.

⁵ A 47 % increase was recorded from 1990-2013, according to the Swedish Board of Agriculture (electronic source - *Press statement 2013-12-19*). The figure of 88,5 kg is in carcass weight, i.e. the weight after intestines and head has been removed.

⁶ Lööv et al., Report 2013:2, Swedish Board of Agriculture, p. 7.

⁷ Lööv & Sköld, Report 2010:20, Swedish Board of Agriculture, p. 25.

⁸ Swedish Meat, 2016.

⁹ Steinfeld et al., FAO, 2006, section xx.

¹⁰ UN General Assembly Resolution A/RES/70/1.

¹¹ For instance goals 2) *End hunger, achieve food security and improved nutrition, and promote sustainable agriculture*, 12) *Ensure sustainable consumption and production patterns* and 15) *Protect, restore and promote sustainable use of terrestrial ecosystems*,

Although livestock production is evidently contributing to a number of problems¹², this paper is limited to its effects on climate change from a EU legal perspective. The reason for this is two-fold and based on the fact that (1) the role of animal agriculture in climate change remains largely unaddressed, despite scientific evidence to the contrary, and (2) that climate change mitigation is an issue where the EU has both an ambition and a mandate to act, which might provide a legal basis to take action.¹³

Against that backdrop, this paper looks into the possible legal basis for introducing consumption taxes on meat and dairy in the EU based on environmental impact and with the focus on greenhouse gas (GHG) emissions. This approach combines two legislative trends – the increased use of economic incentives to combat environmental damages and climate change¹⁴ and the taxing of food to promote public health¹⁵.

The European Union is targeted for its legal structure, economic power and environmental ambitions. The EU (and its associated countries) constitutes the world's largest economy with the highest household expenditure on the planet¹⁶ and it has also set a target of reducing GHG emissions by 80-95% by 2050.¹⁷ According to the European Commission, reaching this goal will require a “fundamental transformation within a generation – in energy, industry, agriculture, fisheries and transport systems, and in producer and consumer behaviour”¹⁸. Even from a purely financial perspective it makes sense to act as swiftly as possible since the damage is expected to increase exponentially. Figures from the Commission puts the estimated minimum cost of not adapting to climate change to 100 billion euros per year in 2020 and 250 billion euros per year in 2050 for the whole Union.¹⁹

By taxing environmentally harmful products, European countries that are struggling to recover from the recent recession could also bring in much needed revenue that could be used to finance green tax reforms, where for example taxes on labour are lowered in order to boost economic growth and

sustainably manage forests, combat desertification and halt and reverse land degradation, and halt biodiversity loss.

¹² This will be presented in more detail below, see Steinfeld, FAO, 2006, section xx.

¹³ The scientific and legal basis will be presented in the following section.

¹⁴ Such as subsidies for renewable energy, taxes on fossil fuels or emissions trading schemes, see e.g. Helfand et al., 2003 for a review.

¹⁵ E.g. the Danish tax on saturated fat, which will be discussed below.

¹⁶ Bryan, The Guardian, 2015.

¹⁷ European Council Conclusion, EUCO 169/14.

¹⁸ COM (2011) 0571 final, p. 1, para. 1.

¹⁹ European Commission, *The EU strategy on adaptation to climate change*, 2013, p. 3 (electronic source).

employment.²⁰ This dual positive effect on the environment and the economy is known as a double-dividend²¹, whereby a tax on damaging products reduce harmful behaviour and environmental damage, while simultaneously promoting goods and services that are beneficial to society. An environmental tax of this kind is fiscally neutral²² if the proceeds are used in full to reduce other taxes on societal goods.²³ Aside from creating public revenue, taxes have been shown to serve as a stronger incentive than subsidies for consumers to switch to another product.²⁴

1.1 Purpose and research questions

The purpose of this paper is to investigate how the environmental costs created by meat and dairy can be incorporated into the consumer price, proportional to the damage caused by each product. This is based on the rationale that polluters should bear the cost of rectifying the environmental damage they cause²⁵ (as opposed to societies) and that the price of products should reflect their actual cost²⁶. The assumption is that the proceeds from such a levy could be used to rectify that environmental damage, or alternatively to promote products and services that are sustainably produced. At the same time, it is presumed that a higher and more environmentally accurate price would have both a signalling and a deterring effect. In theory this approach is applicable to all products and services but since meat and dairy stands out from an environmental perspective, while also being complementary products²⁷, I have chosen to address them together.

Based on those initial delimitations I have chosen the following research questions:

- Can an environmental consumption tax on meat and dairy products be legally motivated under EU law?

²⁰ COM (2011) 0571 final, 2011, p. 5

²¹ The term was first coined by author David Pearce in an article from 1990, see reference.

²² I.e. that it does not elevate the overall tax burden.

²³ Pearce, 1990, p. 938, 940.

²⁴ Reisch et al, 2013, p. 22.

²⁵ Known as the polluter pays principle, which is enshrined in art. 191.2 TFEU and will be discussed below.

²⁶ Known as a Pigovian tax, used to assign costs that are not included by the market. This concept will be discussed in the next section.

²⁷ Even though animals are usually bred and reared to produce either milk or meat, milk-producing animals are normally slaughtered and sold as meat when their productivity decreases. India has for example become the world's largest exporter of beef, mainly as a side effect of its large dairy production. See Chemnitz & Becheva, 2014, p. 11.

- Looking at the treaties²⁸, the principles as well as the EU's international obligations.
- If such a legal basis exists, what type of tax would be the most effective and feasible to introduce?
- What is the scope for national measures, in case EU action is not achievable?

1.2 Delimitations

First of all it should be noted that other policy measures such as voluntary labelling or command and control legislation will not be further investigated in this paper. The focus is on the legality of a tax and the reasons for choosing this particular regulatory instrument will be investigated in the following section.

Similarly, production side policies and subsidies play an important role, especially in a EU context where the agricultural sector is harmonized to a large extent. Efforts to increase sustainability at the production stage deserve a separate analysis and will only briefly be dealt with in this paper. This delimitation is further explained in the section covering the EU's Common Agricultural Policy.

A reduced consumption of meat and dairy would likely have a number of positive effects on animal welfare and human health. It could also contribute to a more equitable distribution of food around the globe if more animals in developed countries were removed from the industrialized food chain. However, this paper will focus on the environmental impact of the consumption of meat and dairy in Europe, particularly relating to climate change. The specific products chosen should be seen as a starting point that helps to illustrate a broader problem. Some of the reports referenced in this paper have only investigated meat consumption and that is why some figures relate only to meat whereas others relate to both meat and dairy.

Lastly, it should be emphasized that this paper looks at *if* a consumption tax on meat and dairy in the EU is *legally possible*, not how it should actually be implemented from a scientific or practical perspective. The presentation touches on several interlinked issues relating to international law, EU tax and environmental law, as well as economic and political theory. These

²⁸ Referring to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

areas will be covered to the extent that they are relevant to the subject and sometimes very briefly. References for further reading is made throughout the text.

1.3 Research landscape and material

As mentioned above, this paper studies a legal issue that is grounded in scientific research and influenced by economic theory, which has made it hard to stick to one main category of sources. First of all, there is a wealth of scientific studies on the topic of livestock's impact on the environment, most notably from the FAO and the IPCC but also from independent researchers and authors. Simultaneously, there has been a lot written on how market based instruments can be used to account for negative externalities in the field of climate change mitigation, mainly relating to emissions from fossil fuels. Research into taxing or subsidizing food consumption, on the other hand, has instead largely focused on public health concerns (in particular the consumption of sugar and fat). In recent years, a couple of studies, in particular two Swedish ones (Wirsenius et al; Säll & Gren) and one from the UK (Wellesley et al.), have looked into the possibility of a meat tax on environmental grounds, albeit based on economic theory and not looking at the legal implications of such a tax.²⁹

However, the specific combination of issues investigated in this paper, i. e. the legal implications of a tax on animal products in the EU based on GHG emissions, have received very limited attention in academic writing. To my knowledge, the only author that has studied this particular aspect of livestock's impact on the environment from a EU legal perspective is Austrian scholar Cordelia Bähr, in a research article titled *Greenhouse Gas Taxes on Meat Products: A Legal Perspective* that was published last year in the journal *Transnational Environmental Law*.³⁰ However, Bähr's study did not deal explicitly with a consumption tax, nor did it incorporate dairy products, which sets it apart from this paper. Furthermore, its focus was mainly on the potential conflict between EU law and international law, in particular with regards to international trade law and human rights, which is not the main aspect investigated here. Marya Torrez has also done a similar

²⁹ Wirsenius et al., *Greenhouse gas taxes on animal food products: rationale, tax scheme and climate mitigation effects*, 2011; Säll & Gren, *Green consumption taxes on meat in Sweden*, 2012; Wellesley et al., *Changing Climate, Changing Diets Pathways to Lower Meat Consumption*, 2015.

³⁰ Bähr, Cordelia, *Greenhouse Gas Taxes on Meat Products: A Legal Perspective*, *Transnational Environmental Law*, 4, p. 153-179, 2015.

study of trade law implications but from an American perspective.³¹ Both authors have been used as references for this paper, in particular Bähr.

1.4 Method and disposition

In order to discuss the legal implications of a consumption tax in the EU, I have taken the view that it is first necessary to establish the scientific basis for that discussion, while also accounting for the political aspects that influence the legislative process. Consequently, the methodology shifts a little bit throughout the presentation as a result of how the presentation is structured.

Section 2 is descriptive and based on scientific reports and literature on economic theory. It presents the environmental impact of industrialized meat and dairy production and the arguments in favour of a EU tax on the consumption of those products. The aim is to answer (1) why there is a problem, (2) why action at the EU level is motivated, (3) what arguments there are for looking at a tax rather than other regulatory options, and finally (4) why a tax at the consumption stage is motivated. This initial presentation might be perceived as biased or one-sided but it should be viewed as an attempt to highlight a perceived problem that has received limited attention, not to give a full scientific account of all facts.

After having laid out the rationale for looking at a EU consumption tax on environmental grounds, the division of competences between the EU and its member states to take action in this area is investigated in section 3. Section 4 maps out the legal basis for EU action by looking at the primary legal sources (treaties), the general principles of law and doctrine. Relevant treaty provisions on taxation and environmental action are then discussed, alongside the EU's international obligations and some more practical aspects of the legislative process. This investigation follows largely the traditional legal method.

Section 5 is focused on finding the most adequate type of EU measure from a legal and political perspective. This implies using a sociological legal approach, whereby the various policy instruments and their implications are analysed based on examples of how environmental taxation and related taxes on consumption have been used in the past. The objective is to

³¹ Torrez, Marya, *Accounting for Taste: Trade Law Implications of Taxing Meat to Fight Climate Change*, The Georgetown International Environmental Law Review, Vol. 27, p. 61, 2014-2015.

demonstrate how the treaty provisions and principles function in reality and provide some insight into the political obstacles involved.

Section 6 deals with the scope for unilateral measures and follows the same methodology as the preceding chapter on EU measures. In the closing analysis the findings are summarized and conclusions are drawn.

2 Outlining the problem

2.1 Animal agriculture and the environment

“Environmental impact from agriculture is expected to increase substantially due to population growth and increasing consumption of animal products. Unlike fossil fuels, it is difficult to look for alternatives: people have to eat. A substantial reduction of impacts would only be possible with a substantial worldwide diet change, away from animal products.”³²

/United Nations Environment Programme,
Report, 2010.

In this day and age we are constantly bombarded with information on how much damage we are doing to the planet, to the extent that people are seeking counsel for “climate anxiety”³³ due to their sense of disengagement and apathy. However, as the former chair of the IPCC noted, small individual actions can have a substantial collective effect.³⁴ A recently published article in *Nature*, written by 22 climate scientists from all over the world, highlights exactly how urgent the need for action really is. The report, which looked at sea level and climate change over the past 20 000 years and made projections 10 000 years into the future based on current level of emissions, concluded that “the next few decades offer a brief window of opportunity to minimize large-scale and potentially catastrophic climate change that will extend longer than the entire history of human civilization thus far”.³⁵ According to the report, even a 2° C rise in global temperature would lead to the flooding of cities such as New York, London, Rio de Janeiro, Cairo, Calcutta, Jakarta and Shanghai and eventually force 20% of the world’s population to migrate away from uninhabitable coasts.

A 2006 study from the FAO concluded that the rearing of animals for food is responsible for 18 per cent of total anthropogenic³⁶ greenhouse gas (GHG) emissions, making it the largest emitting sector.³⁷ As a comparison, worldwide emissions from transport, including all road, rail, air, and marine

³² Hertwich et al., UNEP, 2010, p. 82.

³³ Deutsche Welle, *Group therapy tackles climate change anxiety*, 2014-08-14.

³⁴ Quote above, footnote 1, *The Guardian*, 2008.

³⁵ Clark et al., *Nature Climate Change*, 2016.

³⁶ I. e. due to human activity.

³⁷ Steinfeld, FAO, 2006, p. 112.

transportation, accounts for 13 %.³⁸ The study was based on a life cycle analysis that took into account the role of livestock as a driver of deforestation, environmental degradation, agricultural intensification and industrialization, and as a competitor for natural resources.³⁹ Subsequent studies have put livestock's share of global GHG emissions at anything between 51⁴⁰ to 14.5⁴¹ per cent of the annual total.

Methane emissions from ruminants⁴² are often given most of the blame for animal agriculture's contribution to climate change⁴³ but the picture is a lot more complex than that. Today 70% of global meat production is made up of poultry and pork⁴⁴ and the majority of that meat is produced in industrialized systems that require large inputs of high-protein feed such as soybeans, grains or fish meal.⁴⁵ This has led to a situation where three quarters of the world's agricultural land is used to feed animals⁴⁶, which in turn is pushing crop production and pastures onto less suitable lands and into areas of high biodiversity value⁴⁷ and causing a third of the world's deforestation⁴⁸. The priority given to feeding animals is driving up world market prices on grains and pulses and creates a competition between humans and animals for the finite amount of cultivable land available.⁴⁹ To keep feed production on par with the rising demand, large amounts of nitrogen-based fertilizers are applied, which creates nitrous oxide, a GHG that is close to 300 times as potent as CO² and is now responsible for a third of all emissions from livestock production.⁵⁰

On the other hand, sustainably managed livestock has for the longest time been an integral part of human life, one which contributes to maintaining biodiversity and grasslands while converting waste and inedible plants into food. This suggests that, from an environmental perspective, it is not livestock per se that is the problem but rather the industrialization of the

³⁸ Steinfeld, FAO, 2006, p. 270.

³⁹ Steinfeld, FAO, 2006, p. 112.

⁴⁰ Goodland & Anhang, 2009, p. 11. The report included data that previously had been allegedly misinterpreted or overlooked by the FAO. Among other things, the authors claimed that the FAO report made false assumptions about livestock as a carbon sink and that emission from livestock respiration was ignored.

⁴¹ Gerber et al., FAO, 2013, p. 15.

⁴² Animals with more than one stomach, such as cows, sheep, buffalos etc.

⁴³ Methane is up to 33 times more warming to the atmosphere than carbon dioxide and its climate impact over a 100-year period is 40-50 % higher than previously assumed. See Shindell et. al., 2009, p. 718 and IPCC 2013, Ch. 8.

⁴⁴ Figure based on carcass weight. The share of industrialized production is over 50 % for pork and close to 75 % for poultry is done, according to Galloway et al, 2007, p. 622.

⁴⁵ Galloway et al, 2007, p. 622.

⁴⁶ Chemnitz & Becheva, 2014, p. 31

⁴⁷ Machovina et al., 2015.

⁴⁸ European Commission, *The Impact of EU Consumption on Deforestation*, 2013, p. 63-68.

⁴⁹ Potthast & Meisch, 2012, p. 197.

⁵⁰ Chemnitz & Becheva, 2014, p. 34.

whole sector, driven by the escalating demand for animal products. Ideally, a tax on meat and dairy consumption would account for the positive externalities created by animal agriculture, as well as the negative ones. If we take organic farming as an example, it has several environmental benefits compared to industrial systems and is also encouraged by EU policy.⁵¹ However, evidence indicates that a shift towards organic production does not necessarily entail reduced GHG emissions.⁵² Consequently, even if consumption shifted towards more organic products it would not be possible to reduce GHG emissions without an overall reduction in meat and dairy consumption.⁵³ This illustrates the complexity of the subject and the need for coherent and comprehensive policies.

2.2 Why focus on the EU?

As evidenced above, the EU has a unique legal structure, clear environmental objectives and substantial economic power. Green reforms that have been successful in the EU have also served as an inspiration for other regional entities and countries in the past. For instance, the EU introduced the world's first Emissions Trading System (ETS), which was subsequently replicated in other countries around the world.⁵⁴ Even if the success of the ETS is debated it is still an example of the EU's ability to lead by example by spreading policy ideas beyond its own borders.⁵⁵ As exemplified by the ETS and other programmes, most of the EU's efforts to reduce its environmental impact are currently directed at the energy, transportation and waste management sectors, not agriculture.⁵⁶ As a consequence the agricultural sector is estimated to increase its share of total GHG emissions to a third of all EU emissions by 2050.⁵⁷ The European Commission has therefore stated that a re-orientation towards less carbon intensive food is prompted but no concrete legislative steps have been taken so far.⁵⁸

It is estimated that 80 per cent of all agricultural GHG emissions comes from the feeding and breeding of livestock⁵⁹ and a study by a group of scientist connected to the European Commission has concluded that by

⁵¹ Oosterhuis et al., 2008, p. 116.

⁵² Oosterhuis et al., 2008, p. 116.

⁵³ Hertwich et al., UNEP, 2010.

⁵⁴ European Commission, Climate Action, *The EU ETS* (electronic source).

⁵⁵ See for example *The Rise and Fall of Carbon Emissions Trading*, by Kuch, D, 2015.

⁵⁶ Roadmap to a Resource Efficient Europe, COM (2011) 0571 final, 2011

⁵⁷ COM (2011) 0571 final, 2011.

⁵⁸ COM (2011) 0571 final, 2011.

⁵⁹ McMichael et al., 2007, p. 1253.

halving consumption of meat, dairy and eggs, agricultural GHG emissions could be reduced by up to 42% and nitrogen pollution by 40%, while keeping protein intake well above the recommended levels.⁶⁰ In addition, the amount of land needed to grow food for each EU citizen would also decrease and the reduced intake of saturated fats and red meat would have considerable health benefits. Individual member states could potentially introduce reforms of their own to address these issues but research indicates that action at the EU level would have a greater impact.⁶¹ However, as a second-best option, this paper will also investigate what can be done at the national level if EU action is not possible or feasible.

2.3 Why a tax on consumption?

Policy makers wishing to achieve a reduced consumption of meat and dairy on environmental grounds have the choice between command and control instruments (such as prohibition), market based instruments (such as taxes or incentives) and informative approaches (like voluntary labelling or public awareness campaigns).⁶² Historically, the EU has favoured market based and fiscal mechanisms, over command and control legislation, to tackle climate change⁶³ and the European Commission has stated that environmental taxes should be used to make up for market failures where external environmental costs are not reflected in the consumer price.⁶⁴ Several studies looking at the environmental impact of the EU agricultural sector have pointed out market based mechanisms, and environmental taxation in particular, as the most cost effective policy tool for abating undesired emissions.⁶⁵ This conclusion is based on economic theory⁶⁶, as well as on the polluter pays principle.⁶⁷

It should be noted that the strongest support for market based solutions come from economists, for obvious reasons. That their arguments are given such prominence in this paper is explained by the fact that almost all research into consumption taxes on animal products for environmental reasons has either been conducted by economists or by climate scientist, not by experts in environmental law. However, in order to achieve the kind of

⁶⁰ Westhoek et al., 2014.

⁶¹ Lööv et al., *Report 2013:1*, p. 62.

⁶² Edjabou & Smed, 2013, p. 85.

⁶³ Kosonen & Nicodème, 2009, p 1.

⁶⁴ COM (2011) 0571 final, 2011, p. 5.

⁶⁵ See for instance Povellato et. al, 2007, p. 486; Wirsenius et. al, 2011, p. 172.

⁶⁶ Schmutzler & Goulder, 1997.

⁶⁷ See for instance Bryngelsson et al 2013; Säll, & Gren, 2012. The polluter pays principle will be discussed in detail further down.

transformation that the European Commission envisions there is a need for broad and multi-faceted policies that includes all legislative instruments available.⁶⁸ Environmental taxation is just one of several policy instruments available but potentially a very effective one.⁶⁹ Any form of fiscal measures should be complemented with command and control regulation on, for instance, how feed is grown or how manure is stored and handled in the agricultural sector⁷⁰, as well as with softer measures such as voluntary labelling options and awareness-raising campaigns.⁷¹

Under ideal circumstances, a tax would be most effective if it were imposed on actual emissions from production.⁷² However, in a widely cited article from 1997, economics professors Schmutzler and Goulder devised three criteria to determine when it is most optimal for society to introduce output taxes, meaning taxes on consumption, rather than input taxes at the production stage, to deal with external costs created by emissions.⁷³ According to their findings, a consumption tax is preferable when (1) the cost of monitoring emissions from production is very high, (2) the options for reducing emissions at that stage is limited, and (3) the end-product can easily be substituted for something else. A study conducted by a team of Swedish researchers led by Stefan Wirsenius reached the conclusion that these three criteria are met when it comes to meat production in the EU.⁷⁴ Their study shows that the cost and administrative effort required to monitor emissions from each individual food item at farm level would make an input tax ineffective and excessively complex.⁷⁵ It could also push producers to re-locate outside the EU in order to avoid taxation, or lead consumers to avoid European products, causing so-called emission leakage.⁷⁶

A tax on consumption in the EU avoids these problems since it would be applicable to both imported and European products, thereby creating a level playing field for all actors on the European market.⁷⁷ Furthermore, the study concludes that there is limited potential for cutting GHG emissions in the EU at the production stage through further intensification or technical improvements, which means that even a comparatively high tax at that stage

⁶⁸ Reisch et al, 2013, p. 23-25, Oosterhuis et al. 2008, p. 112.

⁶⁹ Reisch et al, 2013, p. 22.

⁷⁰ Wirsenius et al., 2011, p. 178.

⁷¹ Oosterhuis et al. 2008, p. 112, Wellesley et al., 2015, p. 45.

⁷² Povellato et al., 2007, p. 486, Schmutzler & Goulder, 1997, p. 63.

⁷³ Schmutzler & Goulder, 1997, p. 63.

⁷⁴ Wirsenius et al., *Greenhouse gas taxes on animal food products: rationale, tax scheme and climate mitigation effects*, 2011.

⁷⁵ Wirsenius et al., 2011, p. 162.

⁷⁶ Wirsenius et al., 2011, p. 164. Emission leakage is defined as the effect that regulation of emissions in one country or sector has on the emissions in other countries or sectors that are not subject to the same regulation.

⁷⁷ Wirsenius et al., 2011, p. 164.

would only have a minor impact.⁷⁸ Substitutability between different food products is also considered to be high, since there are several alternative sources of protein.⁷⁹ The UN has for instance proclaimed 2016 the year of pulses, and in a resolution said that lentils, beans, peas, chickpeas and other pulses “are a critical source of plant-based proteins and amino acids for people around the globe” that have positive effects on the environment, human health and the sustainability of the global food production.⁸⁰

In conclusion, Wirsenius et al. recommend a tax on meat consumption of 60 euros per ton of CO² equivalent based on a flat rate for different categories of meat products, i.e. average emission levels for all meat products within an entire market segment, rather than on specific emission levels of individual producers and products.⁸¹ According to their findings, a levy of that amount would decrease yearly EU emissions by 32 million tons of CO² equivalent GHG. If the land previously used for pastures and feed production was instead used to plant bioenergy crops to replace coal, the reduction would be six times greater.⁸² On the topic of placing the tax at consumption rather than production, Edjabou and Smed notes that the market for food products is characterized by a very high level of competition, which leads them to assume that it is irrelevant from a practical perspective whether the producer or the consumer is taxed, since the long term cost of the tax will in any case most likely fall on the consumer.⁸³

A tax that internalizes the external costs⁸⁴ created by a product or service (in this case meat and dairy production) is known as a Pigovian tax, after the British economist Arthur C. Pigou. In his book *The Economics of Welfare* from 1920, he first proposed the idea that everything should be priced according to its true cost and that taxes should be used when the market is unable to set the correct price on its own.⁸⁵ Applied to meat and dairy, a Pigovian tax could be a reliable, long-term incentive to reduce environmentally damaging practices in meat and dairy production, while also providing revenue for governments that could be used to subsidize other food groups or sectors. This concept closely resembles how the

⁷⁸ Wirsenius et al., 2011, p. 160, see also Smith et al., p. 796, 2008.

⁷⁹ Wirsenius et al., 2011, p. 163.

⁸⁰ General Assembly Resolution 68/231, A/RES/68/231, 20 December 2013.

⁸¹ Wirsenius et al., 2011, p. 164.

⁸² Wirsenius et al., 2011, p. 159.

⁸³ Or, using their words, competition is “near-perfect” in the market for food products; see Edjabou & Smed, 2013, p. 85.

⁸⁴ Meaning the monetary value of the environmental damage caused.

⁸⁵ Pigou, A. C., *The economics of welfare*, 1st. ed., Macmillan, London, 1920.

Council⁸⁶ has defined the polluter pays principle⁸⁷, describing it as ensuring “that prices reflect the real costs to society of consumption and production activities and that polluters pay for the damage they cause to human health and the environment”⁸⁸.

The principle of proportionality also plays an important role when choosing between different regulatory instruments at the EU level. It requires the legislator to choose the least burdensome form of legislation to achieve the legitimate goal pursued and is enshrined in article 5.4 TEU.⁸⁹ Since a tax is generally perceived as being more onerous than other types of legislation it has to be motivated why such action is appropriate and necessary. A more in-depth discussion on the role of proportionality will be conducted below.

Economist and author Philippe Legrain argues that since it is irrelevant where emissions come from, European policy must either stimulate the development and spread of low-emitting products and technologies or alternatively inspire other countries to adopt policies that make emissions more costly in order to have a global impact.⁹⁰ According to Legrain, a progressive tax on emissions achieves both these things, since it provides long-term incentives to develop more sustainable products and practices, while also being an attractive policy model that generate revenue and allows for green tax reforms.⁹¹ He also agrees that the tax should be levied on consumption, not production. His argument is that a tax on emissions from production would only have a real impact if implemented globally, since production would simply move elsewhere otherwise and as a consequence cause emissions leakage and weaken the European economy. A consumption-stage tax is the better option if only the EU and a few others are going ahead first and it also does not put EU production at a disadvantage.⁹²

2.4 Accounting for alternatives

The arguments motivating a tax on consumption have been briefly presented in the section above. Due to the scope of this paper, the following

⁸⁶ The Council of the European Union, not to be confused with the European Council which consists of the heads of government.

⁸⁷ The principle will be further discussed below.

⁸⁸ Council of the European Union, 10117/06, 9 June 2006.

⁸⁹ Art. 5.4 TEU: “Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. For a more detailed definition see the CJEU’s ruling in case C-331/88, para. 3.

⁹⁰ Legrain, 2014, p. 330.

⁹¹ Legrain, 2014, p. 332.

⁹² Legrain, 2014, p. 330-334.

presentation will move on to look at the legal aspects of a consumption tax in a EU context, based on the premise that a tax of that kind makes sense from a scientific and economic standpoint. There are, however, two related aspects that will be addressed before moving on to the legal investigation. First of all, the EU has a harmonized agricultural policy that is largely based on direct financial support to the farming sector. A tax on consumption would be counter-productive if those same animal products were subsidized at the production stage. Therefore, an overview of the Common Agricultural Policy (CAP) and its latest reforms is required, to find out if the two instruments could function together. Second, in order to give a balanced picture, a short presentation of the non-legal arguments against a tax on meat and dairy will be provided.

2.4.1 The Common Agricultural Policy

The Common Agricultural Policy (CAP) has been the single largest component of the Union's budget since its formal conception in 1962.⁹³ It was initially conceived as a mechanism to ensure food security and fair compensation for farmers in post-war Europe. According to article 29 TFEU, its main objective is to increase agricultural productivity, stabilize markets and ensure the availability of affordable agricultural products for consumers. During the CAP's long existence it has undergone several major reforms, the most recent one in 2013, which has set the agenda for many years to come.⁹⁴ The latest reform has put an end to the product-specific subsidies of the past, meaning that farmers no longer receive financial support based on what or how much they produce.⁹⁵ Instead, support is given based on acreage and additional incentives have been introduced to promote sustainable practices and rural development.⁹⁶ Historically, the CAP has been geared towards subsidizing EU production through export refunds and intervention purchases, which represented over 90% of total expenditure in 1992.⁹⁷ These mechanisms were aimed at ensuring a guaranteed price for farmers for products such as beef and pork, regardless of how much they produced, and therefore implicitly encouraged over-production and environmental degradation. Today such market interventions have become a thing of the past and in 2013 only 5 % of the budget was

⁹³ The basic guiding principles for a common agricultural policy was included in the Treaty of Rome in 1957 but 1962 is seen as the year of the policy's formal inception. European Commission, *The Common Agricultural Policy: A story to be continued*, 2012, p. 3.

⁹⁴ European Commission, *Agricultural Policy Perspectives Brief N°5**, 2013.

⁹⁵ The term for this is "decoupling", see the diagram on the CAP's development in EC, *Agricultural Policy Perspectives Brief N°5**, 2013, p. 4.

⁹⁶ European Commission, *Agricultural Policy Perspectives Brief N°5**, 2013, p. 4.

⁹⁷ European Commission, *Agricultural Policy Perspectives Brief N°5**, 2013, p. 7.

allocated for these purposes, to be used as an emergency fund in times of crisis.⁹⁸ Under the new system, 30 % of national payments⁹⁹ are specifically allocated to sustainable practices through a compulsory scheme called the green direct payment. These funds will be available for farmers that maintain permanent grasslands, promote soil quality, biodiversity and utilize crop diversification.¹⁰⁰

In conclusion, The CAP is still a market mechanism for direct financial support to farmers and producers and environmental sustainability has never been its primary goal. However, since the direct production based subsidies are now almost completely abolished it can be argued that it no longer interferes with the possible introduction of a consumption-based tax.

2.4.2 Drawbacks of a consumption tax

There are several non-legal arguments against a tax on meat consumption. For one, it could be seen as a taxation of basic needs that punishes low-income consumers and interferes with personal lifestyle choices.¹⁰¹ In addition, such a tax would most likely be unpopular with farmers, especially the ones that are already finding it difficult to compete in an increasingly competitive market place. These issues have been investigated in a study prepared for the European Commission's Directorate General for the Environment, where the authors recommend that any proposed initiative to tax meat consumption would need to be accompanied by a comprehensive public awareness campaign as well as an appropriate impact assessment.¹⁰² A survey conducted by the British Royal Institute of International Affairs showed that the general public's understanding of how dietary choices affect the planet is rather low. Knowledge around these issues is also lacking among decision makers and the survey suggested that governments around the world therefore have little interest in proposing measures to achieve, what they perceive to be, unpopular demand-side behaviour changes, especially if the problem is viewed as being of limited importance.¹⁰³ The survey revealed, however, that policy makers tend to overestimate the risk of political repercussions resulting from the introduction of taxes. Focus group respondents answered that they thought

⁹⁸ European Commission, *Agricultural Policy Perspectives Brief N°5**, 2013, p. 7

⁹⁹ National direct payments are the key component of the CAP, currently accounting for 277,851 billion euros for the period 2014-2020 out of a total budget of 362,787 billion euros. See, European Commission, *Agricultural Policy Perspectives Brief N°5**, 2013, p. 3.

¹⁰⁰ European Commission, *Agricultural Policy Perspectives Brief N°5**, 2013, p. 7

¹⁰¹ Oosterhuis et al. 2008, p. 9.

¹⁰² Oosterhuis et al. 2008, p. 112.

¹⁰³ Wellesley et al., 2015, p. 45.

public resistance towards taxing meat and dairy consumption on environmental grounds would be short-lived, especially if people had a good understanding of why that policy was being pursued and the revenue from it was used for the common good.¹⁰⁴

There is also a range of practical difficulties associated with designing an emissions-based tax since it is hard to measure agricultural emissions in an accurate and cost-effective way. Several scientific studies that have looked into this issue have therefore recommended that a tax, initially, should be levied on categories of animal products rather than on each individual product.¹⁰⁵ A standardized approach of this kind would be a more blunt instrument but also one that is easier to administrate. It would, however, lead to negative side-effects if the categories were to broadly defined and the products included in each category differed considerably in their environmental impact but were nonetheless taxed the same. As scientific progress is made, the idea would be to further fine tune and evaluate the system, thereby making it progressively better.¹⁰⁶

¹⁰⁴ Wellesley et al., 2015, p. 15.

¹⁰⁵ See for instance Wirsenius et al., 2011, p. 164, Edjabou & Smed, 2013, p. 85.

¹⁰⁶ Wirsenius et al., 2011, p. 164, Kihlberg, 2015, p. 14.

3 Competence to act

3.1 Division of competences

In order to find out if there is a legal ground for the EU to introduce a consumption tax on meat and dairy it first has to be established if such a measure is within the EU's legislative competence. As a basic rule, the Union can never act outside the area of conferred competences that it has been granted by the member states and the treaties.¹⁰⁷ Within the sphere of conferred competences, three categories can be discerned. The first category covers areas where the EU has exclusive competence, meaning that the member states have completely relinquished their ability to legislate.¹⁰⁸ Areas covered by the EU's exclusive competence are for example matters concerning the customs union, the conservation of marine biological resources, the common commercial policy and the establishment of competition rules that are necessary for the functioning of the internal market.¹⁰⁹

The second category consists of the areas where member states share the competence with the Union institutions but if the Union decides to legislate, member states lose their competence in the area where the Union has exercised its competence.¹¹⁰ This is referred to as the EU's ability to pre-empt national legislation.¹¹¹ Issues concerning environmental policy, agriculture and public health concerns all fall within the ambit of shared competences, where the EU can use its pre-emptive legislative powers, as outlined in article 4.2 (d)-(f) TFEU. According to article 192.2, the EU can introduce environmental measures of a fiscal nature but only through consensus in the Council and following a special legislative procedure.¹¹²

According to legal scholar Ludwig Krämer¹¹³, the shared environmental responsibility is motivated by the fact that protecting the environment is a fundamental general interest, for the EU and member states alike. If the Union fails to take action on environmental issues, the member states can still use their retained powers to adopt protective measures. In so far as the EU has pre-empted national legislation, member state competence would

¹⁰⁷ Art. 2 TFEU and articles 4.1 and 5.2 TEU.

¹⁰⁸ Art. 3 TFEU.

¹⁰⁹ Art. 3 TFEU.

¹¹⁰ Art. 4 TFEU.

¹¹¹ Terra & Kajus, 2015. p. 13.

¹¹² This will be analysed in-depth further down.

¹¹³ Professor in environmental law and former head of the unit for environmental governance in the Commission's Directorate General for the Environment.

only be precluded with respect to the particular area covered by Union legislation.¹¹⁴

Lastly, there is an area of shared competences without pre-emption, where the EU only has a mandate to support, coordinate or supplement, without overriding the national competence of member states. This category includes measures on the European level to protect and improve human health as well as actions concerning the broader areas of industry and culture for instance.¹¹⁵

The distribution of power between the member states, as well as between the various EU institutions, has become much clarified since the introduction of the Lisbon Treaty.¹¹⁶ However, the EU's core mission is still to secure the smooth functioning of the single market, which is also reflected in how the competences are divided and gives the EU a mandate to harmonize national provisions and putting new ones in place to allow for people, goods, services and companies to move as freely as possible between the EU's 28 member states.¹¹⁷ Since harmonization is the EU's main objective, the scope for introducing measures that do not serve any harmonizing purpose at all is very limited.

3.2 General principles of EU law

Any exercise of EU competences is subject to the two fundamental principles of proportionality and subsidiarity.¹¹⁸ A measure or action is deemed proportional if its content and scope does not go beyond what is “necessary to achieve the objectives of the treaties”.¹¹⁹ The principle of subsidiarity applies to areas where the EU does not have exclusive competences and stipulates that the EU may only act if “the objective of a proposed action cannot be sufficiently achieved by the EU countries, but could be better achieved at EU level”.¹²⁰ Article 5.4, paragraph 2, of the TEU refers to the “protocol on the application of the principles of subsidiarity and proportionality”, according to which, “any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and

¹¹⁴ Krämer, 2011, p. 91.

¹¹⁵ Art. 6 TFEU.

¹¹⁶ Craig & de Búrca, 2011, p. 73.

¹¹⁷ See art. 3 TFEU.

¹¹⁸ Art. 5 TEU, these principles will be discussed in-depth further down.

¹¹⁹ EUR-Lex, *Division of competences within the European Union* (electronic source).

¹²⁰ EUR-Lex, *Division of competences within the European Union* (electronic source).

proportionality”.¹²¹ This shows that the principles carry legal weight and that proposed legislation, such as a consumption tax on meat and dairy, has to be compliant with them.

3.2.1 The principle of proportionality

According to the Court of Justice of the European Union (CJEU) the principle of proportionality requires all legislative acts to be “*appropriate* and *necessary* in order to achieve the objectives *legitimately* pursued by the legislation in question, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued”.¹²² The Court’s formulation includes a number of interconnected requisites. First of all, legislation needs to be *appropriate*, which means that the choice of regulatory instrument has to be motivated and that there is an obligation to choose the least burdensome. When it comes to introducing a consumption tax on meat and dairy, a ban is arguably more intrusive than a tax, whereas compulsory labelling for example is usually perceived as being less onerous. The arguments in favour of a tax, as opposed to other possible regulatory instruments, have been discussed in the preceding section.

Second, it must be shown that a consumption tax is a *necessary* measure that aims to achieve a *legitimate* objective. Concerning the legitimacy of the objective, the EU’s environmental goals are broadly formulated and include combatting climate change and protecting the environment.¹²³ Therefore the objective of reducing the consumption of meat and dairy is assumed to be legitimate for the purposes of this presentation, since it is deemed to be highly probable that a reduced consumption of meat and dairy would contribute to a more sustainable development and reduce GHG emissions in the EU based on the scientific evidence that has been presented above.

That a consumption tax on meat and dairy is necessary to reach the environmental objectives is more difficult to prove. If the environmental goals can be attained through the use of alternative measures that are less intrusive, then it would not be possible to argue that a consumption tax on meat and dairy is absolutely necessary. According to Austrian legal scholar Cordelia Bähr there are three main policy alternatives for achieving the environmental objectives that do not involve taxing consumption – (1)

¹²¹ Article 5 of the protocol.

¹²² From Case C-331/88, *FEDESA and Others*, para. 3 (own emphasis).

¹²³ They are set out in article 191.1 TFEU and will be presented below.

improving the efficiency of the production methods in the agricultural sector, (2) increasing the use of emissions trading to include the agricultural sector as well, or (3) target other polluting sectors instead.¹²⁴ If it can be shown that any of these alternatives are better at achieving the legitimate objective, then there would be no case for a consumption tax.

Concerning the first alternative, Wirsenius et al. have shown that the technical potential for further emission reductions in the EU agricultural sector is limited and a report by the UK Department for Environment, Food & Rural Affairs reached the conclusion that it is not possible to deliver “further efficiency from complex biological systems” that are already geared towards maximum output.¹²⁵ The UN Environment Programme has also said that the only way to substantially reduce the environmental impact of meat and dairy production is to reduce the consumption of those products.¹²⁶ In spite of these findings, the EU’s main focus is currently on trying to increase the production-side efficiency of EU agriculture by providing economic incentives for farmers who reduce GHG emissions per produced unit, however, with limited result.¹²⁷

Another potential alternative could be to expand the EU Emissions Trading System (ETS) to cover agricultural emissions as well. The ETS currently covers 45 % of EU GHG emissions¹²⁸ and is perceived as a flexible mechanism that does not hamper trade, as opposed to emissions taxation.¹²⁹ It has, however, received a lot of criticism for being ineffective¹³⁰ and it only covers power stations and manufacturing plants.¹³¹ The system is also geared towards production, which means that it could only cover emissions emanating from the EU since it is not possible to apply the emissions trading scheme to producers outside the EU if no similar legislation exist in those countries. This would put meat and dairy produced in the EU at a comparative disadvantage and could potentially be counterproductive by leading to emission leakage for example.

If it could be proven that mitigating efforts in other sectors are sufficient, then that would be an argument for why a meat tax is unnecessary. Due to the scale of the problem, however, and the fact that agriculture’s relative

¹²⁴ Bähr, 2015, p. 174.

¹²⁵ DEFRA, 2012, p. 8.

¹²⁶ UNEP, Hertwich et al., 2010, p. 82.

¹²⁷ See for example the European Commission’s *Roadmap for Moving to a Competitive Low Carbon Economy in 2050*, COM(2011)112 final, 2011.

¹²⁸ European Commission, Factsheet, *The EU ETS*, 2013.

¹²⁹ Baldwin et al, 2011, p. 199, 222.

¹³⁰ See Bähr, 2015, p. 175 for a summary and analysis of the academic viewpoints.

¹³¹ European Commission, Factsheet, *The EU ETS*, 2013.

share of total EU GHG emissions is only expected to increase in the coming years¹³², this cannot be considered as an argument that completely precludes the utility of a consumption tax.¹³³

According to Javier de Cendra de Larragán, Dean of IE Law School and a specialist in European climate change law, it is not politically popular to suggest taxing consumption since that is perceived as a threat to the economy.¹³⁴ However, the more politically palpable efforts of increasing production-side efficiency or expand the ETS can only lead to an improvement in relative efficiency as long as the overall consumption continues to grow, and De Cendra de Larragán points out that the only way to reduce absolute GHG emissions is therefore by reducing the total consumption level.¹³⁵ Since none of the proposed alternatives can be said to address consumption, that could be another argument in favour of the necessity of a consumption tax.

3.2.2 The principle of subsidiarity

The subsidiarity principle guides EU action in all areas, alongside the principle of proportionality and is used as a motivation for when the EU should legislate and when it should not.¹³⁶ It is enshrined in article 5.1 TEU, which states that “under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. In other words, within areas of shared competence (for example the protection of the environment) the EU legislator needs to show that action at the Union level is the best solution, otherwise it cannot act.

According to legal scholar Jonathan Golub, the subsidiarity principle is a compromise between member states that favoured increased Union powers over other member states that preferred to limit those powers.¹³⁷ Its formulation has also varied slightly over the years, illustrating the balancing act between these two opposed interests. In its current form in article 5.1

¹³² COM (2011) 0571 final, 2011

¹³³ Bähr, 2015, p. 174.

¹³⁴ De Cendra de Larragán, 2011, p. 414-415.

¹³⁵ De Cendra de Larragán, 2011, p. 414-415.

¹³⁶ See article 5.4 para. 2 TEU, which refers to the protocol on the application of the principles of subsidiarity and proportionality.

¹³⁷ Golub, 1996, p. 689.

TEU, the principle allows for EU action “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States”. However, the old version of the treaty article on the environment¹³⁸ (which also included the subsidiarity principle) stated that “the Community shall take action relating to the environment to the extent to which the objectives ... can be attained better at the Community level than at the level of the individual Member States”.¹³⁹ This now replaced provision seemed to provide the EU legislator with a wider scope for Community action than the current, narrower formulation.

Krämer and Bogaart both reach the conclusion that the subsidiarity principle should generally be understood as favouring action at the lowest political level possible, not the other way around.¹⁴⁰ However, when it comes to transnational environmental problems the principle has been used as an argument for why EU level action is necessary. In 1992, the Commission proposed a Union wide CO² tax and justified EU legislation by saying that “the global dimension of the greenhouse effect has been recognized” and that “this phenomenon should be tackled at that level”.¹⁴¹ Similarly, article 191.1 p. 4 TFEU states that “measures at the international level” should be promoted “to deal with regional or worldwide environmental problems and, in particular, to combat climate change”.

¹³⁸ Article 130r(4) of the Treaty Establishing the European Community.

¹³⁹ Bogaart, M, p. 53. In Peeters & Uylenburg, 2014.

¹⁴⁰ Krämer, 2011, p. 91, Bogaart, M, 2014, p. 53.

¹⁴¹ OJ C-1992:196/01, preamble.

4 EU legal basis

4.1 Sectors and policy areas

The EU treaties set out a number of objectives to be achieved, within areas of economic, agricultural or environmental policy for instance. In order to discuss an environmental consumption tax, it is necessary to look at both the legal basis for the protection of the environment and for taxation, in order to see where they overlap. This is because taxation is not a policy area per se within the EU legal framework, but rather a tool that is made available under certain circumstances and linked to specific policy areas, the environment being one of them and the single market being another.¹⁴² The member states have retained their fiscal sovereignty, which means that the EU has no autonomous power to collect or levy taxes.¹⁴³ As a consequence, fiscal measures can only be introduced if there is complete unanimity in the Council, which means that any member state has the power to veto a legislative proposal of that kind.¹⁴⁴ This is the case even if the proposed measure relates to an area where the EU has exclusive competence, for instance concerning the customs union.¹⁴⁵ Measures that are not of a fiscal nature fall under the ordinary legislative procedure, which is a lot more relaxed than the stringent process that fiscal measures have to pass through.¹⁴⁶

The environmental objectives, relevant treaty articles and other legal grounds will be presented below but to avoid confusion there are some things that need to be clarified. First of all, the only treaty provision that allows the EU to introduce a tax based solely on the environmental objectives is article 192 TFEU, which will be discussed below as the primary alternative.¹⁴⁷ However, the EU's main competence to legislate on fiscal matters is found in article 113 TFEU, which allows for the introduction of fiscal measures relating to the single market. Via the use of article 113 TFEU, the EU has already harmonized taxes on meat, dairy and almost everything else through the system for value added tax – VAT.¹⁴⁸ The article has also provided the legal basis for the harmonization of excise duties on energy, alcohol and tobacco for environmental or public health

¹⁴² Articles 113 and 192 TFEU, they will be discussed below.

¹⁴³ EUR-Lex, Glossary of summaries – “Taxation”.

¹⁴⁴ See for instance arts. 113 and 192.2 TFEU.

¹⁴⁵ Art. 3 TEU.

¹⁴⁶ Articles 114 and 192.1 TFEU are the corresponding articles for non-fiscal measures.

¹⁴⁷ Jans & Vedder, 2012, p. 90.

¹⁴⁸ Directive 2006/112/EC on the common system of value added tax.

reasons.¹⁴⁹ In addition to this, the two articles (192 and 113 TFEU) have been used in combination to motivate legislation that serve both a harmonizing and an environmental purpose.¹⁵⁰

The European Commission also appears to have an ambition to increase the use of fiscal tools to achieve environmental benefits within the context of harmonizing measures. In its “Tax policy in the European Union: priorities for the years ahead”¹⁵¹, the Commission noted the efficiency of taxation as an economic instrument for tackling environmental problem and as a stimulus for broader policy goals.¹⁵² Taxation for environmental purposes is not a new concept in the EU and already the first action programme on the environment from 1973 encouraged the use of economic instruments to achieve environmental goals.¹⁵³ In spite of this, the Commission has pointed out that coherent Union level measures is lacking in several important areas, due to resistance in the Council from individual member states, and that the “the shift towards environmental taxes has clearly been a very slow one”.¹⁵⁴ At the time of writing, the Commission noted that there was 16 proposed tax directives currently hold up in the Council, some which had been there for over a decade without any progress being made.¹⁵⁵

The systems for VAT and excise duties are, however, already well established in the EU and could potentially offer a cost-effective policy tool that would require fewer institutional innovations (and face less political resistance) than a brand new environmental tax on meat and dairy consumption.¹⁵⁶ Historically speaking, there has also been a close connection between articles 192 and 113 TFEU when it comes to taxation that serve an environmental purpose. Therefore both the legal basis for a straight EU environmental tax, as well as a reform of the existing systems will be investigated below. Apart from the treaty provisions, the EU is also bound by international climate change agreements and has commitments to the World Trade Organization, which might influence what legislative measures can be taken. This will also be discussed as a component of the legal basis.

¹⁴⁹ Directive 2008/118/EC *concerning the general arrangements for excise duties*,

¹⁵⁰ See for example Commission proposal OJ C-1992:196/01 and Directive 2003/96/EC *restructuring the Community framework for the taxation of energy products and electricity*. Both will be analysed below.

¹⁵¹ COM (2001) 260 final.

¹⁵² COM (2001) 260 final, p. 6

¹⁵³ OJ C112/1, p. 31.

¹⁵⁴ COM (2001) 260 final, p. 7.

¹⁵⁵ *Ibid.*

¹⁵⁶ Albrecht, J. p. 88.

4.2 Legal basis for protecting the environment

4.2.1 Article 3.3 TEU

Article 3.3 TEU contains a portal paragraph where the EU's environmental and economic objectives are combined in what can be described as the concept of sustainable growth.¹⁵⁷ The provision states that the EU "shall work for the sustainable development of Europe based on balanced economic growth and price stability (...) and a high level of protection and improvement of the quality of the environment". According to Ludwig Krämer, former EU official and professor in environmental law, this shows that the protection of the environment is of general Union interest, and of equal importance to other objectives, such as the free circulation of goods for instance.¹⁵⁸

Jos Delbeke, the Director-General of the European Commission's Climate Change Directorate, considers that there is a broad understanding of the need for environmental fiscal reform in the EU based on this objective of achieving sustainable growth. In his view, this concept entails shifting tax burdens towards environmentally harmful activities in order to achieve a double dividend, meaning simultaneous environmental and economic gains.¹⁵⁹

4.2.2 Articles 191-193 TFEU

Article 191.1 TFEU contain the objectives of the EU's environmental policy, which are:

- To preserve, protect and improve the quality of the environment;
- To protect human health;
- To ensure the prudent and rational utilization of natural resources
- To promote measures at the international level to deal with regional or worldwide environmental problems and, in particular, to combat climate change.

The following paragraph, 191.2 TFEU, states that EU policy on the environment "shall aim at" a high level of protection and that it "shall be based on" the precautionary principle and the principle of preventative

¹⁵⁷ Delbeke & Bergman, 1998, p. 244

¹⁵⁸ Krämer, 2011, p. 95.

¹⁵⁹ Delbeke & Bergman, 1998, p. 244, the term has also been briefly mentioned above.

action. It also says that environmental damage should be rectified at the source and that the polluter should pay. These environmental principles carry legal weight and can restrict other basic rights if need be.¹⁶⁰ They are also incorporated into the more general constitutional fabric of the EU, for example in article 114.3 TFEU (“high level of protection”) and article 3.3 TEU (“the Union ... shall work for the sustainable development of Europe ... and a high level of protection and improvement of the quality of the environment”). Article 191.3 TFEU lists what specific factors the legislator needs to take into account when formulating environmental policies, including “available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action” as well as “the economic and social development of the Union as a whole and the balanced development of its regions”.¹⁶¹

Article 192 TFEU describes how legislation to promote the environmental objectives in article 191 TFEU is passed, and paragraph 2 (a) of that article allows for the introduction of “provisions primarily of a fiscal nature” to achieve those objectives.¹⁶² However as mentioned above, such fiscal measures fall under a special legislative procedure where the Council has to be unanimous and the Parliament consulted, among other things.¹⁶³

The last of the treaty articles in the chapter on the environment, article 193 TFEU, gives member states the possibility to adopt “more stringent protective measures” than the ones introduced based on article 192 TFEU if they wish to do so, provided that such national measures are compatible with the Treaties and notified to the Commission.¹⁶⁴

4.2.3 Article 11 TFEU

Article 11 TFEU mandates that “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.” Krämer considers article 11 TFEU to be of great importance since it bridges the gap between the relatively few environmental provisions and all other EU provisions, regulations and directives.¹⁶⁵ Nowhere else in

¹⁶⁰ For instance, the principles of precaution and prevention were used by the CJEU to justify legal measures prohibiting the export of British beef, suspected to be infected with mad cow disease, against the farmers right to property: C-180/96, United Kingdom v. Commission, at para. 99.

¹⁶¹ Art. 191.3 TFEU.

¹⁶² Jans & Vedder, 2012, p. 90.

¹⁶³ Article 192.2 TFEU.

¹⁶⁴ Article 193 TFEU.

¹⁶⁵ Krämer, 2011, p. 365.

the treaties is there a similar provision for the free circulation of goods for instance, which shows that the protection of the environment has a rather unique standing in the treaties.¹⁶⁶ However, Krämer also notes that in practice the integration requirement is vague and difficult to implement, which might very well be intentional since it is the result of political compromises.¹⁶⁷

4.2.4 Environmental principles

EU law has a distinctly teleological emphasis that sets it apart from other domestic and international legal systems, according de Cendra de Larragán.¹⁶⁸ At the core of the EU is the idea of creating an “ever closer union”¹⁶⁹, which means European integration is seen as a progressive force that is supposed to constantly expand the harmonized area of law. The protection of the four freedoms¹⁷⁰ remains the EU’s primary focus but environmental objectives and principles have been incorporated bit by bit, as demonstrated in article 191-193 TFEU.¹⁷¹

I will now move on to look at two of the core environmental principles from article 191.2 TFEU – the principle that the polluter should pay and that precautionary action should be taken when faced with risks of unknown probability, to see what legal role they play in this context. The more loosely defined concept of sustainable growth will also be discussed briefly as well as what legal status these principles could be said to have in general.

4.2.4.1 The polluter pays principle

The polluter pays principle (PPP) was included as in the European Community’s first “Action Programme on the Environment”¹⁷², dating back to 1973. It has since been incorporated into the treaties and is now enshrined in article 191.2 TFEU. In its strategy for sustainable development, the European Council stated that the principle means to “ensure that prices reflect the real costs to society of consumption and production activities and that polluters pay for the damage they cause to human health and the environment”¹⁷³. The idea is that by charging polluters the cost of mitigating

¹⁶⁶ Krämer, 2011, p. 95.

¹⁶⁷ Krämer, 2011, p. 366

¹⁶⁸ De Cendra de Larragán, 2011, p. 9.

¹⁶⁹ Preamble, Treaty on the Functioning of the European Union.

¹⁷⁰ Referring to the free movement of goods, capital, services and persons, which constitute the founding freedoms of the EU and are incorporated in multiple articles in the treaties.

¹⁷¹ De Cendra de Larragán, 2011, p. 9.

¹⁷² OJ C112/1, 1973.

¹⁷³ European Council, 10117/06, 9 June 2006.

the pollution they cause, they will be encouraged to reduce that pollution and strive to find less polluting products.¹⁷⁴ Krämer notes the difficulty of determining a more detailed meaning, since the principle is formulated differently in various EU language versions.¹⁷⁵ He also considers it to be near impossible to identify the polluter after the fact when dealing with environmental problems that are caused by the cumulative actions of a very large number of polluters, such as climate change.¹⁷⁶ In those cases, the responsibility to ensure that pollution is mitigated or prevented instead falls on the public authorities and one way of dealing with that responsibility is by introducing fiscal legislation.¹⁷⁷

Austrian legal scholar Cordelia Bähr argues that the treaty objectives of pursuing a high level of protection of the environment, coupled with the polluter pays principle¹⁷⁸, provides the Commission with a legally valid argument to propose a tax on meat consumption.¹⁷⁹ In fact, in her view the EU might be under a legal obligation to introduce such a tax based on these two principles.¹⁸⁰ Krämer, on the other hand, does not consider the PPP to constitute a self-standing obligation, neither for the EU nor for those who pollute.¹⁸¹

4.2.4.2 The precautionary principle

The precautionary principle is a more recent addition to EU law and was first presented in a European Commission communication from 2000.¹⁸² It can be said to express the EU's take on environmental risk management.¹⁸³ In brief terms the principle means that if a certain policy or action could potentially cause harm to the environment, although it is currently impossible to say for sure due a lack of scientific agreement, the action should not be pursued. If new scientific evidence is revealed then the action can be reviewed.¹⁸⁴ The EU's regulatory framework for chemicals, known under the acronym REACH¹⁸⁵, was based on the precautionary principle, as well as the EU's general regulation on food law^{186, 187}. At present, there is

¹⁷⁴ Jans & Vedder, 2012, p. 37.

¹⁷⁵ Krämer, 2011, p. 26.

¹⁷⁶ Krämer, 2011, p. 27.

¹⁷⁷ Krämer, 2011, p. 27.

¹⁷⁸ Both objectives are incorporated in Art. 191.2 TFEU.

¹⁷⁹ Bähr, 2015, p. 172.

¹⁸⁰ Bähr, 2015, p. 172.

¹⁸¹ Krämer, 2011, p. 28.

¹⁸² COM (2000) 0001 final.

¹⁸³ EUR-Lex, Glossary of summaries – “The precautionary principle”.

¹⁸⁴ EUR-Lex, Glossary of summaries – “The precautionary principle”.

¹⁸⁵ REACH stands for Registration, Evaluation, Authorisation and Restriction of Chemicals and was adopted through Regulation 1907/2006/EC.

¹⁸⁶ Regulation 178/2002/EC.

close to universal consensus on the fact that climate change is anthropogenic.¹⁸⁸ There is also scientific evidence showing that industrialized animal agriculture is responsible for a significant share of global emissions of GHG's and other polluting substances.¹⁸⁹ Therefore, the precautionary principle would serve to lower the threshold for justifying legislation on consumption, according to De Cendra de Larragán.¹⁹⁰

4.2.4.3 The role of principles in EU environmental law

According to Dutch law professors Jan Jans and Hans Vedder, the environmental principles are not legally enforceable on their own.¹⁹¹ In order for member states to be directly bound, the EU legislator first needs to transform these broad formulations into concrete secondary legislation.¹⁹² Krämer suggests that the principles in article 191.2 TFEU, including the polluter pays principle, the precautionary principle and the principle of a high level of protection, should be seen as general guidelines that could only be considered violated if they are systematically disregarded.¹⁹³ Other authors have, however, taken a diametrically opposed view and see these principles as mandatory legal rules that need to be respected whenever the EU enacts legislation.¹⁹⁴

It should be clarified that this debate concerns whether or not a regulatory act can be declared void on the grounds that it does not respect one of the environmental principles. The fact that the principles are often used to provide a justification for environmental legislation, while also playing a big role in shaping environmental policies, appears to be undisputed.¹⁹⁵

4.3 Legal basis for tax harmonization

4.3.1 Articles 110-113 TFEU

In the Treaty on the Functioning of the European Union, under the heading titled “tax provisions” we find articles 110-113 TFEU, which allow the EU

¹⁸⁷ EUR-Lex, Glossary of summaries – “The precautionary principle”.

¹⁸⁸ See for instance, IPCC, 2013.

¹⁸⁹ See for instance Gerber et al. 2013, and Steinfeld, 2006.

¹⁹⁰ De Cendra de Larragán, p. 108, 133.

¹⁹¹ Jans & Vedder, Europa Law Publishing, 2012, p. 41.

¹⁹² Jans & Vedder, 2012, p. 41.

¹⁹³ Krämer, 2011, p. 14-15.

¹⁹⁴ For a comprehensive overview of different opinions on the matter, see for instance R Macrory (ed.) *Principles of European Environmental Law*, 2004.

¹⁹⁵ Krämer, 2011, p. 15. See also as an example the Commission's proposal to introduce a EU-tax on CO² which will be analysed further down, OJ C-1992:196/01.

to introduce harmonizing fiscal measures or prohibit certain national fiscal measures in order to protect the single market. Article 110 prohibits member states from applying different tax rates to products that are produced domestically and products that are imported from other EU countries. This echoes the central trade principle of non-discrimination, which is also found in article 1 of the World Trade Organization's main agreements.¹⁹⁶ Article 111 and 112 TFEU are of lesser importance in this context and deal with how internally collected taxes and charges are repaid for products that are exported. Article 113 gives the EU the right to introduce harmonizing legislative measures "concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition". In other words, this provision allows the EU to act when there is a risk that diverging national taxation policies create obstacles for the single market or distort competition.

Since the EU does not have any freestanding fiscal competence, article 113 TFEU stipulates that all measures concerning taxation need to be adopted unanimously by the Council after a special legislative procedure.¹⁹⁷ The article also mandates that a special legislative procedure be applied and that the European Parliament and the Economic and Social Committee is consulted. With 28 member states it is becoming increasingly difficult to achieve unanimity and this has led to the use of softer approaches, like recommendations, to promote tax coordination instead.¹⁹⁸ Another middle-way is to allow member states that wish to deepen their collaboration in the tax field to do so on a voluntary basis, albeit using the EU framework.¹⁹⁹

Article 114 TFEU concerns the harmonization of laws to ensure the functioning of the single market and it stipulates that legislative proposals in the area of the internal market must be based on a high level of environmental protection.²⁰⁰ However, article 114 TFEU does not cover fiscal measures and no similar mentioning of the environmental objectives exists in article 113 TFEU.

¹⁹⁶ This will be discussed further in section 4.4.2.

¹⁹⁷ Terra & Kajus, 2015. p. 6-8.

¹⁹⁸ Tax coordination is a lower level of harmonization that is employed as a second best alternative when harmonizing secondary legislation cannot be introduced, see EUR-Lex, Glossary of summaries – "Taxation".

¹⁹⁹ For example, a group of 11 EU countries was recently authorised to establish enhanced cooperation in the area of financial transaction tax, see EUR-Lex, Glossary of summaries – "Taxation".

²⁰⁰ Art. 114.3 TFEU.

4.3.2 Examples - VAT and excise duties

Value added taxes (VAT) and excise duties are the two main types of indirect consumption taxes at the EU level and they are regulated through directives²⁰¹ that were enacted by virtue of what is now article 113 TFEU. VAT is a general tax on all consumption, which distinguishes it from an excise duty that is only levied on specific products. Furthermore, excise duties are normally based on volume, whereas VAT is charged proportionally to the price of the product.²⁰²²⁰³ They are both output taxes, meaning they are levied at the consumer stage. The EU has set minimum rates for VAT and excise duties but the member states still have considerable discretion in what rates they apply to what products. These are the two legislative alternatives that will be analysed in the following section.

4.4 International obligations

As mentioned above, the EU is bound by various international agreements that need to be accounted for when it enacts legislation. Concerning environmental taxation the EU has obligations under international climate change agreements that could serve to strengthen the case for a consumption tax. Simultaneously, the EU's also has commitments to the World Trade Organization and is not allowed to introduce fiscal measures that can be perceived as a barrier to trade.

4.4.1 Climate change agreements

The Kyoto Protocol²⁰⁴ expired in 2012 and has been partially renewed until 2020 by the Doha amendment.²⁰⁵ It covers emissions from agriculture²⁰⁶, has an emphasis on market based solutions and supports unilateral measures. According to an analysis by Bähr, neither the main protocol nor the amendment prohibits the introduction of a consumption tax on meat and dairy.²⁰⁷ The Paris Agreement, to which the EU is a party, was adopted in

²⁰¹ Directive 2008/118/EC *concerning the general arrangements for excise duty* and Directive 2006/112/EC *on the common system of value added tax*.

²⁰² See article 1.2 of Directive 2006/112/EC, which states that the VAT is levied "exactly proportional to the price of the goods and services".

²⁰³ See Case C-434/97, para. 24, for a good summary of the "incompatible characteristics" of VAT and excise duties.

²⁰⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed in Kyoto Japan, 10 Dec. 1997, in force 16 Feb. 2005.

²⁰⁵ Kyoto Protocol, UNFCCC website (electronic source).

²⁰⁶ Annex A to the Kyoto Protocol.

²⁰⁷ Bähr, 2011, p. 162.

December 2015 and is now open for ratification.²⁰⁸ It will enter into force as soon as 55 of the adopting nations, responsible for at least 55 per cent of total global GHG emissions, have ratified it.²⁰⁹ Since the agreement is not yet legally binding it is still unclear if it will provide the EU with an additional legal basis for taxing environmentally harmful products. The EU, and France in particular, was instrumental in getting the Paris deal in place and appears to be prepared to take on a leading role in its implementation.²¹⁰ It was the first “major economy” to submit its reduction plan (in March 2015) and has already started to implement that plan, ahead of schedule.²¹¹ The European Commission has called the Paris agreement “a last chance to hand over to future generations a world that is more stable, a healthier planet, fairer societies and more prosperous economies, also in the context of the (UN’s) 2030 Agenda on Sustainable Development”.²¹²

4.4.2 Complying with WTO rules

In order for a consumption tax to be legal under EU law it has to be compliant with the EU’s international commitments, in particular under international trade law. The World Trade Organization’s General Agreement on Tariffs and Trade (GATT) from 1994 is the central global trade agreement and applies to trade in products. It is based on the key principle of non-discrimination or “most-favoured-nation”²¹³, which is enshrined in the first article of the GATT. This principle can be problematic when it comes to introducing unilateral tax measures, since it mandates that all products must be treated equally.²¹⁴ For agricultural products there is also a separate Agreement on Agriculture (AoA).²¹⁵

According to Cordelia Bähr, it is possible to design a tax so that it does not come into conflict with the GATT, and by extension with the AoA.²¹⁶ In her view no discrimination would occur if the tax was based on objective

²⁰⁸ The Paris Agreement, UNFCCC website (electronic source).

²⁰⁹ Article 21.1 of the Paris Agreement: “This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession”.

²¹⁰ European Commission, Climate Change, *Paris Agreement, Policy* (electronic source).

²¹¹ European Commission Communication, *The Road from Paris*, COM(2016) 110 final.

²¹² COM(2016) 110 final, p. 2.

²¹³ The principle prohibits countries from providing favorable trading conditions to one party to the WTO that they do not provide to other parties, see Torrez, 2014-2015, p. 72.

²¹⁴ Bähr, 2015, p. 162.

²¹⁵ Agreement on Agriculture (AoA), 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

²¹⁶ Bähr, 2015, p. 163.

criteria and levied on both imported and European products.²¹⁷ American legal scholar Marya Torrez has investigated the compatibility of a meat tax levied on production with WTO obligations. According to Torrez' findings, it would be possible to avoid breaching WTO rules by taxing domestically produced goods nationally while adjusting the tax on products that are exported at the border through a so-called "border tax adjustment".²¹⁸ This second solution does not entail a consumption tax but it illustrates that several types of fiscal measures could be compliant with the GATT, not just a tax on consumption.

²¹⁷ Bähr, 2015, p. 163.

²¹⁸ Torrez, Marya, *Accounting for Taste: Trade Law Implications of Taxing Meat to Fight Climate Change*, The Georgetown Int'l Env Law Review, 2014-2015, p. 61.

5 EU legislative options

It follows from the preceding section that a EU environmental tax is possible through the use of article 192 TFEU and a reform of the system for value added tax is also within the EU's competence, based on article 113 TFEU. The legislative alternatives will be presented below, alongside relevant examples of how they have been used in the past. As previously mentioned, the principles of proportionality and subsidiarity also come into play when deciding on regulatory instruments and have an impact on both the type of legislation as well as on what level it is introduced.

5.1 EU wide environmental tax

5.1.1 A type of excise duty

Article 192.2 (a) TFEU offers a legal basis for environmental taxation to achieve the environmental objectives in article 191 TFEU but since that provision is hardly ever used in practice its scope remains unclear.²¹⁹ The few times it has been employed it has been in combination with article 113 TFEU to support taxation that serve both an environmental and a harmonizing purpose. As mentioned above, minimum rate excise duties are mandatory in the EU on tobacco, alcohol and energy used for heating, motor fuels and electricity²²⁰ and charged based on how much of the damaging substance is included in the end product, whether it be tobacco, alcohol or GHG content.²²¹ They serve as an interesting example because they are based on volume, aimed at consumption and can be used for environmental purposes. The existing duties were harmonized at the EU level because member states were already applying similar taxes nationally based on environmental or public health concerns, which created a need for the EU to harmonize the rates via the use of article 113 TFEU in order to protect the single market.

²¹⁹ Jans & Vedder, 2012, p. 59.

²²⁰ Art. 1, Directive 2008/118/EC.

²²¹ The separate directives are covered by the "umbrella" Directive 2008/118/EC. P. (3) of the preamble lists all the relevant secondary legislation that is covered by the general provisions.

5.1.2 Two examples of emissions taxation

In order to estimate how article 192.2 (a) TFEU could be applied to the current situation it is first necessary to look at how it has been used in the past. The first such example is a legislative proposal for a EU CO² tax on energy to combat climate change from 1992, based on the equivalent of articles 113 and 192 TFEU.²²² The proposal did not make it past the Council but the way it was motivated can still provide some insight to how a consumption tax could be designed. A similar proposal had better success in 2003, when the Council adopted a directive to harmonize excise duties on GHG emissions from energy and electricity based on the equivalents of articles 113 and 11 TFEU.²²³ Both these EU acts will be examined and analysed below.

5.1.2.1 Proposed CO² tax on energy

The proposal from 1992 described global warming as a problem that required an efficient and coherent solution on a transnational level.²²⁴ The idea was to levy an additional tax on energy sources according to their respective CO² emissions.²²⁵ In the preamble of the proposed directive the Commission said that multiple member states had already introduced, or were planning to introduce, taxes on CO² emissions from energy use, and therefore a harmonized approach was needed to ensure the functioning of the internal market. This was the motivation for basing the proposal on article 113 TFEU, which could not have been used if there was no harmonizing purpose.

At the time, there were three European countries that had introduced such taxes unilaterally - Finland, Sweden and Norway but none of those countries were members of the European Community in 1992.²²⁶ Consequently, there did not seem to be a legal basis for using article 113 TFEU. In the end, the Council did not approve the proposal since a number of member states were opposed to EU taxation, the United Kingdom in particular.²²⁷ The Commission then re-drafted the directive, making it voluntary for member states to adopt a carbon tax on the premise that they had to comply with certain provisions in the proposal if they did adopt such a tax but since the modified proposal was still a fiscal measure it too required unanimous

²²² OJ C-1992:196/01, the preamble refers to articles 99 and 130s EC of the Maastricht Treaty, which correspond to articles 113 and 192 TFEU.

²²³ European Parliament, *Fact Sheet on the EU, Indirect taxation* (electronic source).

²²⁴ OJ C-1992:196/01, preamble.

²²⁵ Carraro & Metcalf, 2009, p. 114.

²²⁶ Carraro & Metcalf, 2009, p. 112.

²²⁷ Krämer, 2011, p. 177.

support to pass through the Council, which it did not receive.²²⁸ In 1996, the Netherlands and Austria introduced national CO² taxation but by then the proposal was no longer on the table.²²⁹

5.1.2.2 Directive 2003/96/EC on the taxation of energy products and electricity

In 2003, the Council adopted Directive 2003/96/EC²³⁰, which harmonized the minimum tax rates on all energy products (with a few exceptions²³¹) while also allowing member states to set reduced rates for renewable energy and biofuels, thereby creating economic incentives to choose sustainably produced options.²³² The directive was formally based on article 113 TFEU but with a clear consideration of the environmental objectives. By this time, there were however several member states that applied GHG emissions taxes domestically, providing a genuine reason for harmonization²³³.

The preamble of the directive made a reference to what is now article 11 TFEU²³⁴, saying that “environmental protection requirements must be integrated into the definition and implementation of other Community policies”. It further stated that the directive was necessary to ensure “the proper functioning of the internal market” but also promoted the objectives of “other” policies and said that the EU had an obligation to mitigate climate change under the Kyoto Protocol.²³⁵ This indicates that even if article 113 TFEU is technically the sole legal foundation for legislation there is considerable scope to take the EU’s environmental objectives and international obligations into consideration through the use of article 11 TFEU.

²²⁸ Commission, COM (1995) 172 final.

²²⁹ Carraro & Metcalf, 2009, p. 112.

²³⁰ Directive 2003/96/EC *restructuring the Community framework for the taxation of energy products and electricity*.

²³¹ Energy intensive industries, agricultural and forestry sectors can be exempted from the tax, provided they participate in national environmental agreements, emissions-trading schemes or otherwise contribute to lowering their emissions, see Krämer, 2011, p. 325.

²³² Krämer, 2011, p. 325.

²³³ Carraro & Metcalf, 2009, p. 112.

²³⁴ Art. 11 TFEU: “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”.

²³⁵ Preamble, Directive 2003/96/EC.

5.2 Value Added Tax reform

A reform of the VAT system could be a possible alternative to environmental taxation based on article 192 TFEU, since it is the only EU tax system that is currently applied to both meat and dairy.²³⁶ VAT is levied on more or less all products and services and account for 17.5 % of all public revenue in the EU.²³⁷ This makes it a powerful policy tool since member states use different tax rates to pursue various national policy goals.²³⁸ In spite of the fact that the directive regulating VAT²³⁹ is based on article 113 TFEU, the environmental objectives are supposed to be incorporated into all EU secondary legislation²⁴⁰ and the Commission has also stated that EU tax policy should be used as an instrument to achieve wider environmental goals.²⁴¹

For those reasons it is motivated to investigate if the VAT directive could be used to achieve any form of relative price difference for meat and dairy on environmental grounds, either as a tax on the most harmful products or by lowering the rates on sustainably produced alternatives.

5.2.1 Legal structure and rationale

The VAT directive contains a number of specified categories, foodstuffs being one²⁴² and the general rule is that a standard VAT rate of no less than 15% has to be applied, with the exception of one or two product categories where a reduced rate of minimum 5% is allowed.²⁴³ There are also a number of areas where VAT is prohibited, such as medical care and social services.²⁴⁴ VAT is normally levied in the member state where the consumer resides based on the destination principle and the revenue befalls that state.²⁴⁵ Currently the standard rate differs between 15-27% and the reduced rate between 5-13.5% in most countries, although the directive does not stipulate a maximum rate.²⁴⁶

²³⁶ Directive 2006/112/EC.

²³⁷ Eurostat, *Main national accounts tax aggregates*, 2016-04-21.

²³⁸ This will be discussed below, see for example Oosterhuis et al., 2008, p. 15.

²³⁹ Directive 2006/112/EC.

²⁴⁰ See arts. 3.3 TEU and 11 TFEU.

²⁴¹ European Commission, *Excise Duties: Energy* (electronic source).

²⁴² Annex III of Directive 2006/112/EC.

²⁴³ Article 98, Directive 2006/112/EC, the reduced rate can however only be applied to categories listed in Annex III of the directive.

²⁴⁴ Chapter 2, Directive 2006/112/EC.

²⁴⁵ Oosterhuis et al., 2008, p. 22.

²⁴⁶ European Commission, Taxud.c.1 (2016), p. 2, not counting “special” or “zero” rates.

Aside from the general provisions, chapter 4 of the directive includes a long list of individual exceptions that are to be applied “until the adoption of definitive arrangements”²⁴⁷, which permits member states to retain so-called super-reduced rates, or even zero rates, for certain categories until further notice. These derogations were negotiated when the respective states joined the Union and are allowed as long as they comply with Union law, are motivated by clearly defined social reasons and benefit the end consumer.²⁴⁸ However, no new goods or services can be added to the list of exemptions and once a product or service has been re-classified as falling under the standard or reduced rate it can never go back to the super-reduced or zero rate. Many member states currently apply different VAT rates for different types of food, for example a reduced rate for vegetables and a higher rate for ice cream and snacks, but those exemptions from the standard rate were negotiated when the directive came into force (or during the accession process) and the directive does not allow for further differentiation.²⁴⁹

A 2008 study, funded by the European Commission on how differentiated VAT rates could be used to promote changes in consumption, noted that there are two underlying political reasons for why VAT rates are being unevenly applied.²⁵⁰ The first reason is distributional and has to do with the fact that a high VAT on basic needs will hit low-income households proportionally harder. The second has to do with promoting the common good by lowering VAT rates on products and services that benefit society or the environment, such as labour or education. In many cases, these two interests are aligned, for example when it comes to applying a low rate for public transportation, which can be said to serve both an environmental and a distributional purpose. This exemplifies that the VAT system is already used as a policy tool to achieve environmental and societal benefits.

The current rigidity of the system can lead to some less logical consequences. For instance, in the UK a zero VAT rate is applied for most foodstuffs, including products such as kangaroo steak and alcoholic dessert jellies, while the reduced rate of 5 % is applied for sanitary products, like tampons, which are classified as “non-essential luxury items”.²⁵¹ This has sparked demands in several countries for the removal of what has been dubbed the “period tax”.²⁵² However, the VAT directive in its current form does not allow for a reduction of the VAT rate for sanitary products below 5

²⁴⁷ Chapter 4, Directive 2006/112/EC.

²⁴⁸ Article 110, para. 2, Directive 2006/112/EC.

²⁴⁹ European Commission, Taxud.c.1 (2016), p. 4.

²⁵⁰ Oosterhuis et al., *The use of differential VAT rates to promote changes in consumption and innovation*, 2008, p. 15.

²⁵¹ VAT Notice 701/14, HM Revenue & Customs.

²⁵² EU Law Analysis, 28 Oct 2015.

% and if the VAT rate for foodstuffs is raised it can never be reversed to the zero rate again.²⁵³ Reform of the VAT system is, however, underway as will be seen below.

5.2.2 Potential effects of a reform

One of the things that the EU funded VAT study from 2008 looked at specifically, was how changed rates could induce a decreased consumption of meat and dairy. The authors found that meat and dairy was presently subjected to various reduced rates in many member states, and that if those products were taxed at the standard rate throughout the Union (which would imply a harmonization of the VAT rates) their price would increase by an average of 12%.²⁵⁴ Since meat and dairy are considered to be relatively price inelastic the price increase would lead to a reduced consumption, which in turn would reduce EU GHG emissions by up to 27.5 million tons of CO² equivalent per year from meat and 6.9 million tons for dairy, according to the study.²⁵⁵ The reduction would lead to a corresponding decrease in land use and reduce levels of eutrophication and acidification of the marine environment, while providing the member states with increased revenue.²⁵⁶ If the reduced rate was retained for substitute products with a lower environmental footprint, that would also help stimulate a shift in consumption.²⁵⁷

The results of the EU led study described above focused on harmonizing efforts, which is in line with the EU's overall ambition.²⁵⁸ However, another way of reforming the VAT system could be by introducing additional VAT subcategories, thereby increasing the possibilities for diversified rates and giving member states more flexibility in deciding what policies to pursue. For instance, by allowing for a more nuanced definition of "foodstuffs"²⁵⁹ in the directive, divided into more categories (such as meat, vegetables etc.) or distinguished by production method (organic, conventional etc.). Similarly, by allowing for more than two exceptions from the standard rate, more types of sustainable or otherwise societally beneficial consumption could be promoted.

²⁵³ See articles 98-99 of Directive 2006/112/EC.

²⁵⁴ Oosterhuis et al., 2008, p. 9.

²⁵⁵ Oosterhuis et al., 2008, p. 9.

²⁵⁶ Oosterhuis et al., 2008, p. 9-10.

²⁵⁷ Oosterhuis et al., 2008, p. 106.

²⁵⁸ European Commission Communication, COM(2011)851 final, p. 6.

²⁵⁹ P. 1, Annex III of Directive 2006/112/EC.

5.2.3 Obstacles to reform

However, even the existing level of diversification in the EU's VAT system is seen by some as hampering the internal market. In a public consultation made in 2011 by the Commission, several internationally active companies answered that the complexity caused by the current lack of harmonisation was creating extra compliance costs and causing legal uncertainty.²⁶⁰ Another problem with differentiating VAT rates that based on environmental concerns is that products must be clearly distinguishable from each other based on objective criteria in order for different rates to apply.²⁶¹ It is, for example, entirely possible to apply a lower VAT rate for books but not for toilet paper because those categories are objectively distinguishable, but the distinction is harder to make between products that are either organically or conventionally produced, since the only separating factor is environmental impact.²⁶²

However, the EU sponsored study from 2008 on the effects of a raised VAT rate on meat and dairy consumption, reached a different conclusion.²⁶³ The authors of that study considered that the existing EU certification schemes for organic agriculture and sustainable production could provide a clear and objective way of distinguishing between different products based on their environmental impact.²⁶⁴ It would then depend on the certification requirements if GHG emissions were included as a criterion or not. On the EU level, this is currently not the case, although it has been introduced as a component of voluntary labelling schemes in Sweden.²⁶⁵

5.2.4 The new action plan on VAT

A modernization of the VAT system has been in the pipeline for several years and in April 2016 the Commission formally launched an action plan on how to change it.²⁶⁶ The plan does not carry any legal weight in its current form but the Commission is expected to submit a legislative proposal based on it by 2017²⁶⁷ and the Council has already said that it “welcomes the intention of the Commission to include proposals for increased flexibility for Member States with respect to reduced rates of VAT” and noted specifically that this “would provide the option to Member

²⁶⁰ COM(2011)851 final, p. 3.

²⁶¹ Jans & Vedder, 2012, p. 90.

²⁶² Jans & Vedder, 2012, p. 90.

²⁶³ Oosterhuis et al., 2008, p. 104-106.

²⁶⁴ Oosterhuis et al., 2008, p. 110.

²⁶⁵ Initiative for Climate Certification of Food, report 2012:2.

²⁶⁶ European Commission, COM(2016) 148 final, 7 Apr. 2016.

²⁶⁷ European Commission, Press release, 7 Apr. 2016.

States of VAT zero rating for sanitary products”²⁶⁸. The Council’s statement is a direct reference to the “period tax”²⁶⁹ that has been debated in the UK in particular but it is also an indication that there is a legislative will to open up for more overall national flexibility when it comes to applying reduced rates. The action plan proposes to scrap the list of goods and services that are eligible for reduced rates²⁷⁰ and give member states the freedom to choose entirely for themselves, based on the subsidiarity principle.²⁷¹ It would also open up for the introduction of new zero rates on more than just sanitary items. To balance out the potential disharmonizing effect this could have, the Commission added that any such reform would be “subject to appropriate safeguards to prevent excessive complexity and distortion of competition, and to ensure that the operation of the Single Market is not affected”.²⁷² What these reforms will lead to in reality remains to be seen.

²⁶⁸ European Council meeting - Conclusions, 18 Mar. 2016, EUCO 12/1/16 REV 1, p. 15.

²⁶⁹ EU Law Analysis, 28 Oct 2015.

²⁷⁰ Currently Annex III of Directive 2006/112/EC.

²⁷¹ European Commission - Press release, *VAT Action Plan*, 7 Apr. 2016.

²⁷² European Commission, *Action Plan on VAT* (electronic source).

6 Legal margin for unilateral measures

While comprehensive EU level policies are the most desirable from an environmental perspective, individual member states can help push that process along by introducing unilateral measures that eventually promotes harmonizing EU measures.²⁷³ Former Swedish chief negotiator on climate change agreements, Anders Turesson, has said that small and progressive countries such as Sweden, the Netherlands, Denmark and Finland, play an important role as test laboratories, where progressive environmental policies can be tried out and serve as inspiration for other countries if they are successful.²⁷⁴

With regards to the division of competences, the EU taxation framework respects member states fiscal sovereignty and right to freely decide on their own tax systems as long as that does not interfere with the functioning of the single market.²⁷⁵ Below are some examples of measures introduced by member states that independently have gone ahead with taxing consumption on environmental or public health grounds, or were doing so prior to their accession to the Union. This aims to illustrate both what environmental taxation could look like in practice and how wide the member states margin of discretion is vis-à-vis EU law when it comes to introducing unilateral fiscal measures.

6.1 National excise duties

The only excise duties where minimum levels of taxation are decided at the Union level are the ones on alcohol, tobacco and energy, Outside those areas, member states are free to do as they please when it comes to excise taxation or at least until such time as the EU uses its pre-emptive legislative powers to harmonize a new area.²⁷⁶ If the EU does not act within this area of shared responsibility, then the member states can take unilateral action.²⁷⁷ National consumption taxes on foodstuffs, such as the Danish “fat tax” that is discussed below, constitute a form of excise duty but one that is currently

²⁷³ Blom et al., 2010, p. 54.

²⁷⁴ Interview, Anders Turesson, 2016-02-14.

²⁷⁵ Remeur, C., 2015, p. 2. See also Zidianaki, 2013, p. 8.

²⁷⁶ Alemanno & Carreño, 2013, p. 103.

²⁷⁷ See the section on division of competences.

not harmonized.²⁷⁸ Consequently, member states are free to introduce national consumption taxes without explicitly coming into conflict with EU law.

6.1.1 Example: Green tax reform - Denmark

In 2009, Denmark launched a tax reform package aimed at replacing parts of its comparatively high income tax with taxes on activities and products that were deemed environmentally damaging and unhealthy. The package consisted of modified taxes on GHG emissions, waste, tobacco and heating oil among other things but it gained notoriety for also including a new tax on saturated fats.²⁷⁹ The “fat tax” (which it was dubbed by various media outlets²⁸⁰) was motivated by public health reasons and targeted oils, animal fats and certain dairy products, which led to an increase in the consumer prices of meat and dairy, as well as oils²⁸¹ and applied to imported as well as domestically produced goods.²⁸² After less than a year, however, the tax was scrapped since it achieved the opposite of what it was intended to do.²⁸³ Instead of shifting their consumption towards healthier alternatives, the majority of Danish consumers chose to either buy the same products in neighbouring countries or buy cheaper and possibly even less healthy alternatives at home. The decrease in domestic consumption resulted in the loss of up towards 1300 jobs in the Danish food retail and production sector according to estimations by the Danish Agriculture and Food Council²⁸⁴ and the tax created significant administrative costs for the affected companies.²⁸⁵

6.2 National VAT differentiation

Since value added tax is levied on almost all goods and services and harmonized through EU secondary legislation, the margin left for unilateral measures is currently much smaller than for excise duties. The VAT directive²⁸⁶, however, only sets out minimum rules and it is up to the member states to decide on what rates they apply within that framework.

²⁷⁸ Alemanno & Carreño, 2013, p. 103, after analysing the OECD criteria for excise duties.

²⁷⁹ *Danish Tax Reform 2010*, Paper to the OECD WP 2 meeting November 2009 prepared by the Danish Ministry of Taxation.

²⁸⁰ See for example BBC News, *Denmark introduces world's first food fat tax*, and The Independent, *Denmark imposes 'fat tax' on food to curb obesity*.

²⁸¹ Petkantchin, V., 2013, p. 3.

²⁸² The Danish Act on a tax on saturated fat (*Lov nr 247 af 30/03/2011*).

²⁸³ Petkantchin, V., 2013, p. 4.

²⁸⁴ Danish Agriculture and Food Council, 2012.

²⁸⁵ ECSIP report, 2014, p. 182.

²⁸⁶ Directive 2006/112/EC.

The long list of national exceptions that member states negotiated to keep during their accession period constitute a compromise between the EU's harmonizing agenda and the unilateral fiscal interests of certain countries.²⁸⁷ These exemptions were intended to be phased out over time, which is exemplified by the fact that Portugal's reduced rates on renewable energy was not tolerated indefinitely, as will be discussed below.²⁸⁸

6.2.1 Example: Czech Republic & Portugal

Prior to becoming a EU member state, the Czech Republic applied reduced VAT rates to a range of environmentally friendly products such as renewable energy equipment, biofuels and recycled paper. Since the Czech Republic did not specifically negotiate to keep the reduced VAT rates during its accession period, the reductions had to be discontinued when the country became a part of the Union.²⁸⁹ Portugal previously applied a reduced VAT rate of 5 % on particular equipment for the production and use of renewable energy. In 2001, however, the EU advised Portugal to increase the rate to 12 % due to European fiscal harmonization.²⁹⁰

These are two examples of how the EU objective of harmonisation constricts the scope for national VAT differentiation on environmental grounds. However, with the Commission's new action plan on the VAT it seems as if the political direction might have swung in the opposite direction and that increased national flexibility and even the introduction of additional zero or super-reduced rates could be allowed in the future.²⁹¹

6.3 Proposed national legislation

6.3.1 Excise duty on meat and dairy – Sweden

In 2012, Swedish members of parliaments proposed that a national tax on animal food products based on emissions should be investigated.²⁹² According to their proposal, a simplified consumption tax based on flat rates for different categories of products would be the best alternative. In 2013, the Swedish Board of Agriculture reached the same conclusion and added

²⁸⁷ See chapter 4 of Directive 2006/112/EC.

²⁸⁸ Note for instance that chapter 4 of the VAT directive is titled "Special provisions applying until the adoption of definitive arrangements".

²⁸⁹ Oosterhuis et al., 2008, p. 28.

²⁹⁰ Oosterhuis et al., 2008, p. 28.

²⁹¹ European Commission - Press release, VAT Action Plan, 7 Apr. 2016.

²⁹² Parliamentary motion (*motion till riksdagen*), 2012/13: MJ404.

that the tax should be implemented at the EU level to have the greatest effect.²⁹³ The Swedish Society for Nature Conservation followed suit in 2015 with a study of their own, in which they suggested that a nationally introduced tax on meat and dairy consumption could serve to expedite the process of EU level reform.²⁹⁴

From the analysis of the Danish consumption tax on saturated fat it follows that EU harmonization of excise duties only covers a limited number of categories at present. As a result, any legislative measure that falls outside those categories remains within the member states competence and would be allowed under EU law as long as it did not obstruct the single market. Consequently, a national excise duty on consumption based on emissions, like the one proposed by the Swedish parliamentarians, is currently not in conflict with the EU's legal framework.

6.3.2 Changed VAT rate on meat – Netherlands

A team of researchers were asked by the Dutch government to look at how the national share of environmental taxation could be increased in order to make the Dutch tax system more resilient, sustainable and green.²⁹⁵ Among other things, the authors looked at the agricultural sector and the consumption of meat and dairy products as a potential new tax base. The report concluded that EU harmonization would be crucial if a sustainable and effective green reform of the national tax system was to be achieved.²⁹⁶ A meat tax at the consumption stage was pointed out as the single most effective measure within the agricultural sector and one that would also have the least distortionary effects on national competitiveness and the EU single market.²⁹⁷ Even if the EU did not introduce such a tax, the report stated that other green tax measures relating to household consumption could be introduced unilaterally, since they did not come into conflict with EU law and would not require a EU consensus. The authors consequently suggested that the Netherlands abolish its reduced VAT rate on meat immediately, as one of the measures that could be implemented directly by a member state without EU level approval.²⁹⁸ The Commission's recently unveiled plan to reform the VAT system could allow for an even wider national margin for VAT differentiation on environmental grounds.²⁹⁹

²⁹³ Lööv et al., 2013, p. 62.

²⁹⁴ Kihlberg, 2015.

²⁹⁵ Blom et al., 2010.

²⁹⁶ Blom et al., 2010, p. 54.

²⁹⁷ Blom et al., 2010, p. 55.

²⁹⁸ Blom et al., 2010, p. 56.

²⁹⁹ European Commission - Press release, *VAT Action Plan*, 7 Apr. 2016.

7 Conclusions

7.1 EU legal basis for an environmental consumption tax

Starting with the question of EU competence, the protection of the environment is a shared responsibility, as is agriculture and public health concerns. The power to levy taxes, however, is left with the member states. Therefore, any measures that are of a fiscal nature or intended to harmonize member states fiscal legislation, requires complete unanimity. This structure ensures that the EU is powerless in the area of taxation without the expressed consent of every single member state. Plainly speaking this means that a legal basis exist for introducing environmental taxation but it is up to the member states to agree if they want to use it or not. It can be discussed whether or not the environmental principles impose an obligation on the EU to act in order to protect the environment but the likely answer is no. The environmental principles that are enshrined in the treaties state that the polluter *should* pay, that the EU *shall aim* at a high level of protection of the environment and that Union policy *shall be based on* the precautionary principle. Leading scholars in EU environmental law such as Krämer, Jans and Vedder have interpreted this as supporting their view that the environmental principles do not constitute legally enforceable positive obligations - neither for the EU, nor for the member states.

Bähr and De Cendra de Larragán, however, is of the opinion that the polluter pays principle has to be incorporated into EU secondary legislation and that the precautionary principle actively lowers the threshold for Union action in this case. Bähr also considers that the EU's international commitments to mitigate climate change borders on an obligation to act. However, it is possible to act in many different ways and there is no specific obligation to reduce meat and dairy consumption. It is clear, though, that the environmental principles guide policy development and can be used as a motivation for introducing legislation, through the integration requirement in article 11 TFEU.

On the contrary, when it comes to the general principles of proportionality and subsidiarity there is an explicit obligation to respect them whenever the EU enacts legislation in article 5.4 TFEU and in the additional protocol. Starting with proportionality, Bähr has shown that it is not possible to simply dismiss a tax on meat and dairy as unnecessary. Whether or not it is an appropriate measure for achieving a legitimate objective depends by and

large on how the tax is designed and implemented. Concerning the legitimacy of the objective there are both treaty objectives as well as targets set out in the Commission's various roadmaps on the environment and climate change that support the goal of decreasing the environmental footprint of consumption in the EU and promoting a sustainable development. Overall, the EU projects an image of being a key global player in combatting climate change and a frontrunner in introducing innovative policies to tackle environmental problems, especially since the conclusion of the Paris agreement. In my view this further underscores the legitimacy of pursuing the environmental objectives as broadly as possible and using the full range of legislative tools at hand.

If we move on to the principle of subsidiarity, it is generally understood to imply that action should be taken at the lowest available political level, or in other words, as close as possible to the people it affects. There is, however, a legal basis for interpreting the subsidiarity principle as supporting high-level action when necessary to combat global environmental problems and climate change, due to the inherent transnational nature of those problems. This is evidenced by the treaty objectives concerning the environment as well as by how the Commission has used the principle to motivate EU wide measures to cut emissions in the past. Consequently, the subsidiarity principle does not pose a legal obstacle to a EU wide consumption tax on meat and dairy, provided that it can be verified that the objective can be better achieved at the Union level, or in other words, that a coordinated attempt at reducing the environmental impact from animal consumption in 28 member states would prove more efficient than unilateral measures.

As for the EU's international obligations, the new Paris agreement provides a strong political mandate for ambitious and immediate action. However, it has not yet become legally binding and therefore the extent of the legal obligations arising from the agreement cannot be fully analysed at this point. The Kyoto protocol is still valid for another couple of years and it clearly supports the use of fiscal incentives to reduce GHG emissions, according to Bähr's analysis. The WTO rules influence what kind of tax can be introduced but both Bähr and Torrez agree that it is possible to design a tax that does comply with the GATT, although it might be technically challenging. In my view, a consumption tax appears to be the fiscal alternative that is least likely to conflict with the principle of non-discrimination, since it is applied irrespective of country of origin and based on objective criteria.

In conclusion, Article 192 TFEU is the only EU legal basis for an environmental consumption tax on meat and dairy. If carefully designed,

such a tax would not be in breach of the general principles of law since it does not appear to be intrinsically disproportionate, unnecessary or over-reaching. It could also find support in the EU's environmental objectives and international climate change commitments while avoiding conflict with the WTO obligations. Consequently, it follows from this presentation that there are no obvious legal obstacles to why the EU cannot introduce an environmental consumption tax on meat and dairy.

Article 113 TFEU is also of relevance since it has been used, not only to harmonize excise duties and value added taxes at the EU-level, but also in combination with articles 11 and 192 TFEU to support the introduction of measures that were motivated partly on environmental grounds. However, article 113 TFEU could only come into play if there was a need for harmonization, at which point it is conceivable that environmental considerations could play a role in influencing such legislation through the use of article 11 TFEU. Fiscal legislation would in any case require that 28 member states agreed that it is a good idea to tax the products from two of the EU's major industries (meat and dairy) for environmental purposes, which brings us the second research question.

7.2 What type of tax (if any) could realistically be introduced?

In theory, there are no formal limitations to what kind of fiscal measures the EU can introduce as long as they serve either the environmental or the harmonizing objectives and meet the additional criteria of being proportionate and enacted at the appropriate political level. A tax charged on consumption based on actual environmental impact from each individual product would be the most effective in theory, but since there is no cost effective method for measuring impact that precisely such a tax is unrealistic. Several researchers have agreed that as a second-best option a tax should instead be designed as a flat rate that is levied on average environmental impact from each category of products, for example as an excise duty grounded in article 192 TFEU.

Excise duties are based on volume of certain substances that are considered to be harmful, either to the environment or to human health. In the case of spirits, cigarettes and fossil fuels it is possible to measure the "damaging" substance very precisely, i. e. the alcohol, tobacco or carbon content. The big difference with meat and dairy is that the environmental impact is not included in the final product.

If we look at article 113 TFEU, an excise duty could not be legally motivated by that article since there is no national legislation of this kind to harmonize. If member states unilaterally started levying excise duties on high-emitting animal products then the EU might have a reason to step in and harmonize that area as well. Swedish politicians and researchers have begun discussing a national tax on meat consumption but it would require that a few member states actually went ahead and introduced unilateral measures before the EU would have any legal grounds to activate article 113 TFEU. As have been noted above, however, harmonization is an interest in itself and the prominence given to environmental concerns differs depending on what other interest are at stake.

Concerning the EU system for value added tax, there appears to be a political ambition to create fewer and simpler rules that would allow for larger national variations but under a more unified umbrella. Under the current structure it is possible for member states to apply a higher VAT rate on all meat and dairy products if they so wish but in my opinion that is a very blunt regulatory tool since it does not take into consideration differences in environmental impact between products within those very large product categories. In theory, the EU could harmonize the VAT rates for meat and dairy in all member states at the standard rate. However, this could be seen as breaching the principles of proportionality and subsidiarity if there were no conclusive evidence that the cumulative advantages of taxing all meat and dairy regardless of its origin or production method clearly outweighed the probable negative side effects.

Another VAT-related approach would be to link the existing voluntary labelling schemes for sustainable and organic production to the VAT system, as proposed by De Cendra de Larragán. In that scenario, the reduced rate could be applied to products that were certified as being sustainable, organic or climate smart for instance. Currently however, the EU's labelling system does not take GHG emissions into consideration, though there have been some national initiatives in that direction most notably from Sweden. A VAT differentiation of this latter kind would not be feasible without a well established and comprehensive labelling system for sustainably produced food at the EU level and the current system is unfortunately not there yet. Neither would it be possible to turn the VAT into a system for environmental taxation since that is not its objective - the reason why national VAT rates were harmonized to begin with was to ensure the smooth functioning of the single market and legal action was taken based on article 113 TFEU.

7.3 Scope for national measures in an EU context

In this paper I have also looked at national measures as a secondary option if no EU measure is achievable, either legally or politically. Fiscal competence rests with the member states, which means that there is considerable scope for unilaterally taxing meat and dairy consumption for environmental reasons without involving the EU if the member states so wish. The Danish attempt at a fat tax is, however, an example of how well-meaning fiscal policies can backfire, especially if the fiscal reform is (1) not accompanied by a clear public awareness campaign, (2) the revenue is not invested in subsidizing other substitution products and (3) neighbouring countries are unsupportive.

The EU could find legal support for introducing an environmental consumption tax but since that would require unanimity it is unrealistic in my estimation. In a broader sense public awareness and political pressure is what drives the development of legislation and at the moment (according to the British study discussed in the second section) there is a limited understanding of how dietary choices affect the planet among decision makers as well as the general public. According to the same study, however, as awareness grows, public resistance towards taxing meat and dairy consumption on environmental grounds would likely wane, especially if people saw that it was part of an overall plan that benefitted them in some other way. The fact that a CO² tax was blocked in the Council in 1992 but made into legislation in 2003 could indicate that the level of environmental awareness has changed over time. However, it could also be that the only reason the EU decided to set minimum rates for emissions taxation on energy in 2003 was because there was an actual need for harmonization, which did not exist in 1992.

I have heard the argument that if public awareness of how excessive meat and dairy consumption contributes to climate change increases to the point where a consumption tax is politically accepted, there would no longer be any need for such a tax. The rationale being that informed consumers would then make more sustainable choices based on their newfound knowledge of the consequences their consumption is having. This line of reasoning is, however, not applied to any other products that create external costs – such as fossil fuels, tobacco or alcohol. In all those cases, a tax is still collected to pay for the damage caused by those products in the form of environmental degradation and increased public health and social services expenditure. Apart from the purely mitigating aspects of a consumption tax, the

signalling effect should not be underestimated as a deterrent. In today's society, people are well aware of the environmental and societal problems linked to the consumption of oil, tobacco and alcohol but for various reasons that is still not preventing people from using them. The parallel to animal products is admittedly somewhat flawed but the core function of these taxes is, in my view, the same. In addition, when it comes to alcohol, tobacco and fossil fuels, governments are trying to dissuade people from using those products through a variety of other means besides mere taxation, for instance by promoting the use of alternative products and introducing proper labelling, which complements and amplifies the effects of the tax.

In conclusion, there is ample room for individual member states to introduce taxes unilaterally without coming into conflict with EU law. It is also true that if several countries introduce environmental taxes on the consumption of certain high-emitting food products then more pressure will be put on the EU to harmonize that area. Member states might be discouraged from going ahead with this type of tax if there is limited understanding of the problem, as well as the potential economic and political gains that could be had from a green tax reform. The Danish experiment with consumption taxes has shown how much economic damage a unilateral tax can cause if it is not well conceived. Therefore the situation resembles a catch 22, where the EU has no reason to harmonize unless national legislation is passed, and individual states are reluctant to be frontrunners and introduce a tax that they perceive as being a political and economical loser.

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