How a drop in US aid to Ukraine may hasten a digital tax in the EU.

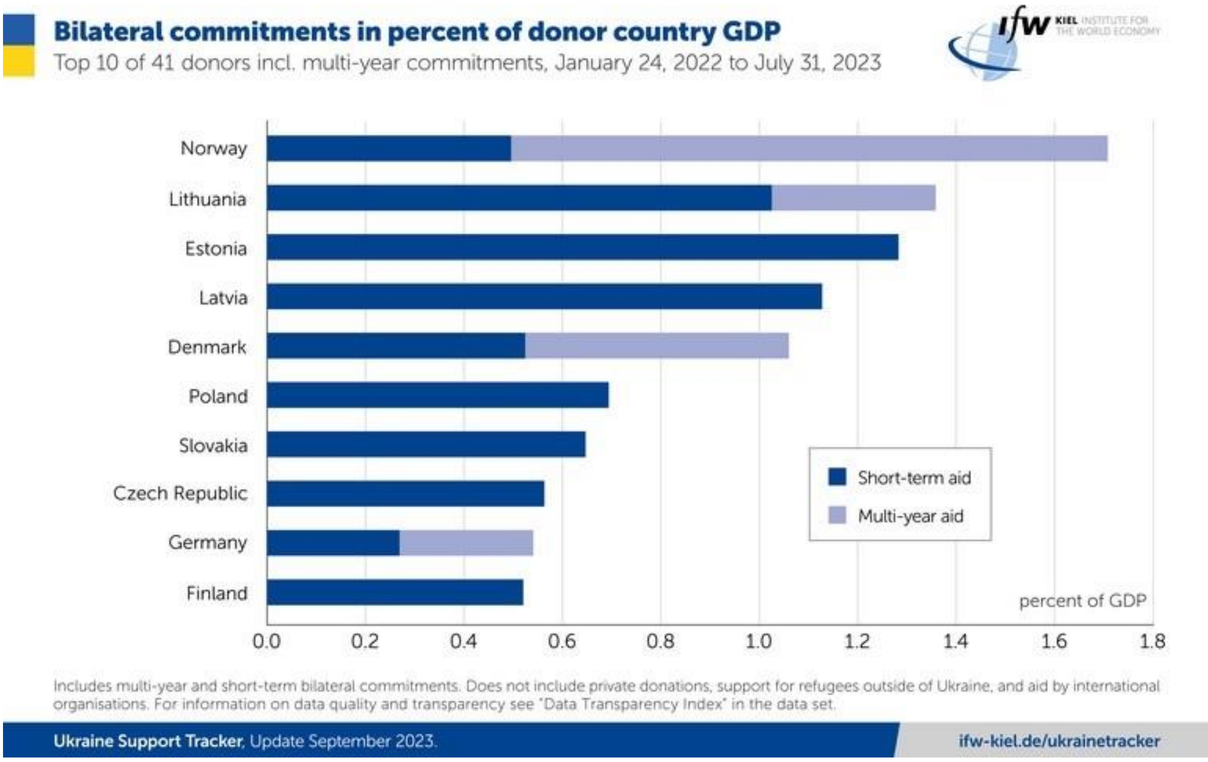
During the 24 and 25 October 2023 EU Tax symposium organized by the Tax Committee of the European Parliament and the European Commission several panels wondered how the financing of the efforts of the European Union could look like regarding a short-term increase of spending needs on both the climate and the Ukrainian fronts. Can new own resources for the European Union form an efficient answer in due time? What measures can be in turn reasonably implemented in 2024 on the level of the European Union or on the level of the Member States? Given frenemy-attitudes about the war in Ukraine as were lately seen in the European Council on 26 October 2023 when Hungary voted against further military spending on Ukraine and on 2 November 2023 in the Congress of the United States of America where in a context of the upcoming Presidential elections no additional budget was voted for Ukraine. Leaving the U.S. military to report that their military aid to Ukraine will dry up in the next couple of months if this is not solved swiftly. And what with financing the efforts on the Green Deal in light of the increased frequency of calamities throughout the European Union?

Why is there an urgent need for increased military spending by the European Union?

On 5 September 2023 the European Defence Agency (EDA) ordered shells and missiles for Ukraine for one billion euro worth. It was reported to be the first collective weapon purchase by an entity of the European Union, financed by the participating Member States. Regarding another entity, the European Peace Facility (EPF), the Council decided on 13 March 2023 to increase the level of financing for its policies to eight billion euro. In June 2023 this became 12 billion euro. More will still be needed. What are these entities and who's money are they spending or going to spend? And what is already spent on the war in Ukraine ; how much more would be needed and what does this mean for the budget of Member States that must face also demographic, digital and environmental transitions?

Several studies that follow up on who is spending how much on the war in Ukraine are referred to on the website of the Council. These studies are mainly provided by U.S. or E.U.-based organizations. The 21 September 2023 study by the Council of Foreign Relations, an organization that presents itself as a non-profit and nonpartisan membership organization dedicated to improving the understanding of U.S. foreign policy and international affairs through the free exchange of ideas, learns that the U.S. spent 75 billion USD so far. Around 2/3 was used for military spending. Germany spent nearly 20 billion USD and several other countries also spent billions USD on military aid. Prior to the 5 September 2023 purchase by the EDA, the aid by the European Institutions exceeds 80 billion USD on solely non-military aid. Around 1/5 was used for refugees within the European Union. In percentages of the 2021 GDP, the USA spent so far 0,4 %, the European Institutions around 0,5 % and several EU Member States over 1 % (Lithuania, Estonia, Latvia and Denmark), as did Norway.

In a study of 7 September 2023 of the Kiel Institute, an organization that describes itself as an independent foundation, mainly funded by the German Federal Government and the state of Schleswig-Holstein, an overview is presented of the pledges to aid Ukraine in the coming years. The Member States committed jointly to spent 50 billion euro more between 2023 and 2027. Individual Member States committed also consisted aids over the next five years (Germany : 10,5 billion euro, Norway : 6,6 billion euro,..) as well as short term aid.



In short, as the voting of 2 November 2023 in the U.S. Congress forebodes, if by the lack of budget voted in the coming months the U.S. were to withdraw or significantly reduce their efforts for Ukraine, this would result in a yearly additional cost of approximately 50 billion euro to be shared between committing Member States and the European Institutions. The largest part of that amount being military spending. Just the increase of that type of help was blocked by Hungary on 26 October 2023 on the level of the European Council.

Another issue that arises from the analysis of these studies, is the question if it is fair to let the 'little ones' such as Lithuania, Estonia, Latvia, Denmark and Norway that spent already 1 % of their GDP to contribute further on increased military spending needs, while other Member States spent 0,5 % (Germany, Poland, Slovakia, Czech Republic and Finland), or even far less?

For the Kingdom of Belgium, who will preside the Council in the crucial first months of 2024, there are for instance already political issues about a 500-to-800-million-euro effort increase on Ukraine that was requested recently by the European Union. This amounts to approximately 0,10 tot 0,13 % of the Belgian GDP (2023) that would come on top of the 0,5 billion euro already spent according to government sources. Together 0,2 % of the GDP. But Belgium also committed in October 2023 as aid for Ukraine to reserve 1,7 billion euro out of the extra withholding taxes perceived on the revenue from the 200-billion-euro frozen Russian assets. This would take in theory that 'joint Belgian-Russian' effort against M. Poetin's expansionist policies up to approximately 2,5 billion euro, or 0,5 % of the Belgium GDP, not taking in account the costs for harbouring 65.000 Ukrainian refugees and providing them with a monthly income when unemployed, but even then still not near an effort of 1 % total of its GDP.

Next to these issues, there are the costs for the war on climate change. Climate change takes each year a deadlier toll in human lives and causes greater havoc throughout the European Union. Such events are going to increase in frequency and in intensity over the coming years, making literally that no one will be safe from them as they can strike anytime, anywhere. Would some sort of insurance mechanism between Member States to fund reconstructing infrastructure and first aid not be more effective for mitigating the effects of these calamities? Out of the 1.216 billion euro the European Commission planned to spend between 2021 and 2027, 401 billion euro were to go to climate change and 14,9 billion euro on security and defence. In December 2023 the European Union is to debate over an adjustment of that 1.216-billion-euro budget. Approximately 80 billion euro spent over the war in Ukraine and twice that amount is likely to be required over the next years if the U.S. falls out in the coming months for a longer period. Can such own resources be organized in the coming four years? This comes down to tax matters, so we asked how a tax lawyer looks at these issues.

Wanted Law asked lawyer Paul Verhaeghe of Wanted Law Tax.

Who is our blogger ?

Our blogger is a tax expert.

Paul Verhaeghe is a lawyer in Brussels. He is a tax lawyer with experience in financial criminal law, insurance law, liability law for the accountancy professions and inheritance law.

Is military spending a European Union competence to begin with?

Answering that question takes us to the Treaties that organise the European Union. In the Treaty on the European Union (TEU), there is a distinction between 'own' competences the Member States decided on to give to the European Union, yielding an exclusive competence, and 'mixed' competences where the European Union can only act when pursuing its objectives in accordance with the principle of subsidiarity (Article 5 (3) TEU). This means that the European Union can only step in by adopting legal acts if it is established that Member States are less effective to do so on their one. For competences of Member States, the European Union can seek to facilitate the cooperation among Member States.

The TEU also organizes a procedure for enhanced cooperation that can be activated by at least nine Member States that wish to further unite their competences (Article 20). However, in the matter of common foreign and security policies, this must be endorsed by a unanimous vote of the Council. This means that all Member States must agree with such an enhanced cooperation even if they do not joint it. Moreover, Article 24 TEU excludes the competence of the ECJ in the matter of common defence policy that may lead to a common defence since no legal acts are allowed in that matter. This explains why the Council takes only decisions in this matter and no directives or regulations.

This means that no taxes can be adopted. Since an own resource, meant to finance a common defence, would require a legal act (regulation or directive) to organize, the TEU so excludes own resources in that matter. Even though Article 28 (1) TEU grants competence to the Council to act upon 'international situations that requires action by the Union', this cannot lift the second interdiction for legal acts under Article 31 (1) TEU that recalls that interdiction under an enhanced cooperation regarding a common defence.

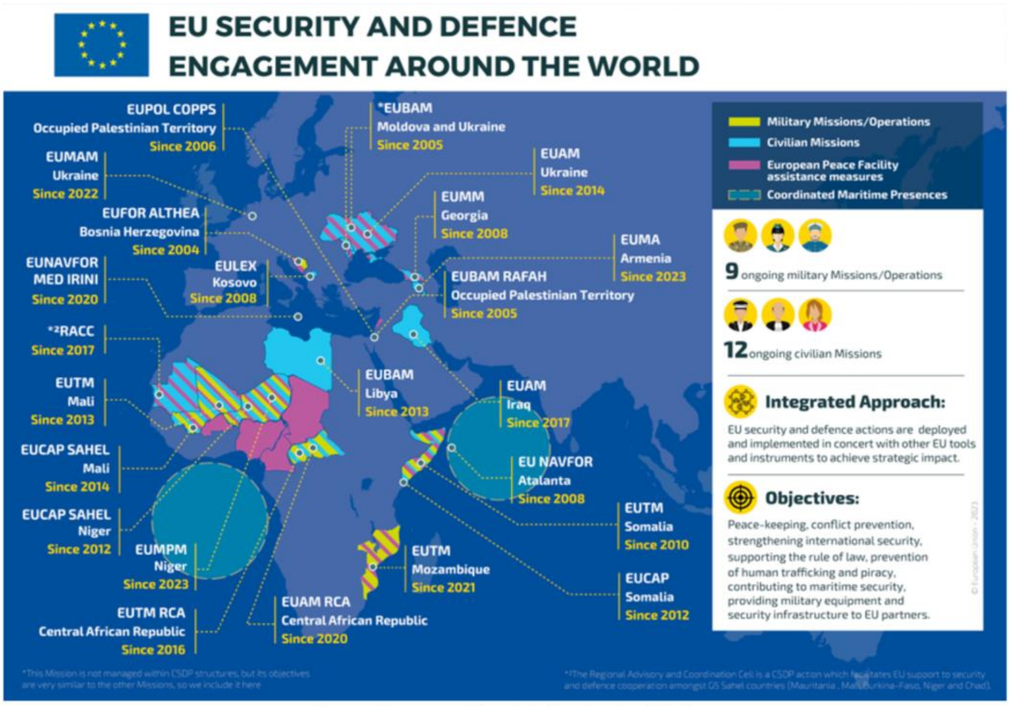
Defence is clearly a protected competence of Member States under the TEU ; but the TEU does organise in Article 41 (2) a procedure for financing expenditures that arise from military or defence implications. One could consider this as a form of financial cooperation that is organized by the TEU itself among Member States and that stands next to the more general enhanced cooperation allowed under Article 20. Article 41 (2) states that when not charged to the Union budget, the cost for such measures shall be charged to the Member States in accordance with a given gross national product scale, unless the Council, acting unanimously, decides otherwise. It gives an opt out for Member States that do not wish to contribute to these measures when they explicitly state so when such measure is voted in the Council. Again, no legal acts can be adopted as a measure under Article 41 (2) TUE.

The other treaty that organizes the Union is the Treaty on the functioning of the European Union (TFEU). It states in Article 2 (4) that the European Union can define and implement a common foreign and security policy, including the progressive framing of a common defence policy. But it recalls in Article 348 that even in the presence of 'war', meaning for me a direct involvement of the European Union in an armed conflict, or 'serious international tension constituting the threat of war' meaning for me also an armed conflict where the European Union is at risk of becoming part of, it is upon the Member States to consult. Article 352 (1) organizes then some sort of general exception to their competence ; Member States can decide, unanimously, to resort to the European Union, but Article 352 (4) excludes measures that may serve as a basis for objectives pertaining to the common foreign and security policy.

In this highly complex ping-pong of competences, Protocol n° 10 to the TFEU stands out by organizing a clear legal basis for a European Defence Agency ; it can act for strengthening international security but basically depends on the willingness of Member States to contribute. So, there is a clear legal base under the Treaties for a European Union competence regarding military spending, but it is in turn organized under a very narrow budgetary scrutiny by the Member States.

How is military spending by the European Union organized by the Member States?

The Council has exercised the option under Articles 21 (1) and 42 (1) TEU for an enhanced cooperation, that includes all Member States, as updated with its decision of 22 March 2021[1], through the European Peace Facility (EPF). It aims at strengthening both Member States and third States if deemed in the European Union's interest and is active in several countries outside and inside Europe. It can provide aid to military responses and coordinate with third States.



Source: European External Action Service (EEAS)

Similar decisions were made by the Council on 12 July 2004 and 12 October 2015[2], organizing further the European Defence agency (EDA). This on the basis of Article 14 TEU since the initial goals of the EDA relates to organizing a European defence industry for armament of the military of the Member States. Later on, that objective was broadened to support the policies of the EPF but it remains basically an organism that is aiming at collective purchases of arms, financed by the budget of Member States, accordingly to their General National Income (GNI) or by an additional revenue from the general budget of the European Union or even third parties[3]. Article 46 of the Protocol n° 10 to the TFEU allows for that, so the decisions of the Council had to observe this option granted under that Protocol to the TFEU.

No own resources are or may be organized under these two entities. Only in the EDA the general budget of the European Union can intervene for specific missions. How the European Union can in turn tap on own resources to make up for the allocated funds to the EDA is a question that relates to the general competences of the European Union outside the matter of defence. Hence the importance of the upcoming discussion of 3 December 2023 on that general budget. An increase of own resources that

[1] COUNCIL DECISION (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 (*O.J.*, L 102 24.3.2021, p. 14).

[2] Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency (OJ L 245, 17.7.2004, p. 17) completed by COUNCIL DECISION (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency (OJ L 266 13.10.2015, p. 55)

[3] COUNCIL DECISION (EU) 2016/1353 of 4 August 2016 concerning the financial rules of the European Defence Agency and repealing Decision 2007/643/CFSP (*O.J.*, L 219 12.08.2016, p. 98)

boosts the general budget could so be considered indirectly to serve the financing of armament purchases through the EDA.

Given the veto by Hungary on 26 October 2023 in the Council over that general budget ; can it also block an increase on military spending organized through the EPF or the EDA?

As for the increase of the general budget of the European Union ; one Member State in the Council can block this effectively under the general rules for adopting both the yearly and the multi-year budget of the European Union.

In as far as a direct new own resource would be adopted to finance military expenditure, such legal acts are simply not allowed under the Treaties. In a more general way, Article 311 TFEU requires that the Council takes unanimous decisions on new own resources for the European Union and the approval of the Member States in accordance with their constitutional requirements. New own resources require a very lengthy process and will be unsure in their outcome if the constitution of a Member Stater requires a referendum on that matter.

For immediate needs for increased military spending only Member States can be requested to intervene in an effective manner, given the lack of consensus. The analysis on how such military spending can be blocked under the EPF and the EDA leads to a mitigated answer. The decisions of the Council that organize the EPF and the EDA state that they are compliant with Article 42 (1) TEU, meaning that some Member States may request to undertake actions, while others don't. But for the EPF, Council decisions that seek to increase its funding require unanimity. One unfriendly Member State to the cause of Ukraine can veto in the EPF. Regarding the decisions in the EDA, other Member States that are no part of EDA or no part of a presented project by a groupe of Member States cannot block under the EDA the intent to increase military spending by friendly Member States to the cause of Ukraine. They just do not contribute.

In a general way, new own resources require such a lengthy procedure to come into force that they cannot be considered as an effective measure to aid the war effort of Ukraine in the coming year. Furthermore, in the matter of common defence no taxing competence can be exerted through legal acts, so new own resources would have to be adopted for general purposes in discussions over the general budget and affected for military spending through the EDA.

One unwilling Member State can block all initiatives on increased military spending under the EPF, on new own resources the European Union wishes to adopt, and on military spending under the general budget of the European Union through the EDA. It is up to the willing Member States to step up on an individual basis and/or as a grouped effort under the EDA to ensure finances for the military expenditures of Ukraine in 2024 and probably beyond.

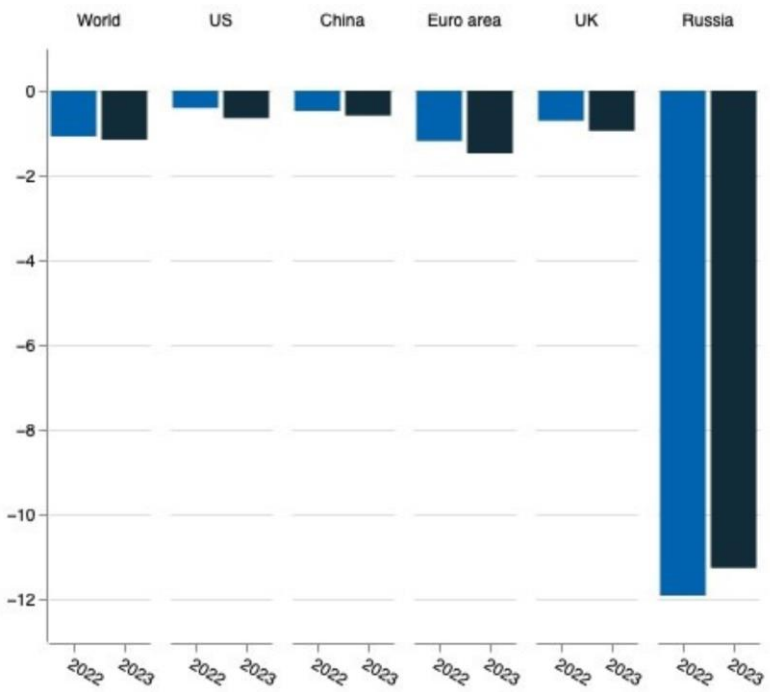
How much is to be contributed?

That is a political question. Some would even say an ethical question in the context of M. Poetin's expansionist policies.

When a consensus is reached on further military spending and the level of such spending among friendly Member States towards Ukraine under the EDA or even outside the EDA when needed, it is fair one should take in account the efforts that have already been made.

But even then, a role could be played by the European Institutions. The European Commission could for instance boost the abilities for such Member States to step up on their spending by considering it as an exceptional deficit that does not fall under the stability requirements on minimum levels of deficit. These limits are meant to preserve the financial stability of the euro, that serves in turn the stability of the market.

The long-term effects of M. Poetin's expansionist policy may well proof to be far more damaging for the Union as a whole and the stability of the market. Just imagine the situation of hostage our food prices would find themselves in if the largest grain exporting country would be controlled by a hostile regime. A policy that sustains and centralizes the aid to Ukraine would have the additional advantage to bring in the fight the full weight of the economic bloc of the European Union : the war efforts can be spread over multiple years while maintained at a 1 % GDP cost. When multiple Member States engage as one block, they can get better conditions for armament. The loss of potential GDP caused by the war-event is even significantly increased for Russia through the Western sanctions.



Source : National Institute Global Econometric Model (NiGEM) simulations cited by Economics Observatory in October 24 2023 Article.

This is simply not sustainable for the Russian economy. Its aptitude to pay back war deficit is crippling, resulting in higher costs. A joint Member State step up in sharing the budgetary burden of the Ukrainian military may well proof to be a significant factor in the ultimate outcome of this conflict. As indicated above, in the present state a level of at least 1 % of the GDP for several years is to be considered effective aid, given the uncertainty on the further involvement of the U.S., so the 'tolerance' could be set at the 3 % standard + 1% for aid to Ukraine, military or other.

Doesn't a Member State risk sanctions if deficit surpasses 3 % deficit?

Article 126 (2) TFUE requires Member State to keep their deficit under control. Protocol n° 12 to the TFUE requires as a maximum yearly 3 % GDP deficit and to keep total debts under 60 % GDP. Several regulations organise these obligations under the Stability and Growth Pact[4]. A regulation forms a binding legal act for Member States.

In short, ultimate activation of sanctions must be approved by the Council by a quantified majority (Article 12 (2) Regulation (EU) n° 1183/2011 of 16 November 2011). So, a frenemy Member State to the Ukrainian cause cannot use a veto right here. And there is a general escape clause when an exceptional and temporary event occurs, either by a severe economic downturn or by an unusual event that falls outside

---

[4] COUNCIL REGULATION (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (O.J., L 209, 2.8.1997, p. 1) ; COUNCIL REGULATION (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (O.J., L 209, 2.8.1997, p. 6) and REGULATION (EU) No 1173/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (O.J., L 306, 23.11.2011, p. 1–7).

the control of the Member State and that has a major impact on the financial position of the general government. The Covid-19 pandemic justified that general escape clause to be activated for the budgets of the Member States until 2023. Starting 2024, the Stability and Growth Pact obliges Member States to set again course to these objectives, this under a budgetary pressure that is already extended by demographic, digital and environmental transitions.

A regulation is secondary Union Law that must be compliant with the primary Union Law, meaning the Treaties, when implemented by the Member States. When exerting a power that is granted to the Council under a regulation, the Council can motivate not to exert that power to sanction if it finds that in that case, the effect of such a sanction would be contrary to other objectives that are pursued by the Treaties. Such as ensuring peace over the long turn, allowing the Council to react upon international situations and enabling Member States to take effective action in the presence of threats to that peace (Articles 3(1) and 28(1) TUE & 222 (4) TFEU). Stopping M. Poetin's expansionist policies in its tracks in Ukraine, offers the best security on the long turn for the east-border Member States and for the European Union as a whole.

Member States that must increase their deficit spending over 3 % GDP for the purpose of urgent military spending on the war in Ukraine in the next years, could agree that they will not vote to activate sanctions against each other in the Council. That same logic could also be applied when interpreting the general escape clause. Member States that increase their deficit because of the needs of the European Union to address a common threat that is not of their making, could invoke that there is an overall economic effect in the European Union of minus 1,75 % of GDP caused by this war (a major impact on their financial position) and that this additional deficit of approximately 1 % will be temporary (for the duration of the war and rebuilding Ukraine) and does not pose a structural threat to their budgets.

It is also up to the Commission and the Council to make an assessment in accordance with the other goals pursued by the Treaties and decide if a general waver such as voted for Covid-19 could be allowed for military spending that puts the deficit in excess of 3 %. One could argue that the objective of the stability of the markets under the Stability and Growth Pact is also served by putting an early hold to M. Poetin's expansionist policies.

Suggestions :

If forced to step in for the U.S. in part or in whole, efforts may raise up to a level of 1 % of GDP. Member States that reached already that level of spending, can decide not to join EDA efforts until the other Member States reach that level or limit their input in a joint effort outside the EDA until that level is reached by all willing Member States.

Member States could decide by qualified majorities in the Council that sanctions for a deficit spending of more than 3 % of GDP, when provoked by aid to Ukraine, would be contrary to other objectives pursued by the European Union and by the Stability and Growth Pact itself.

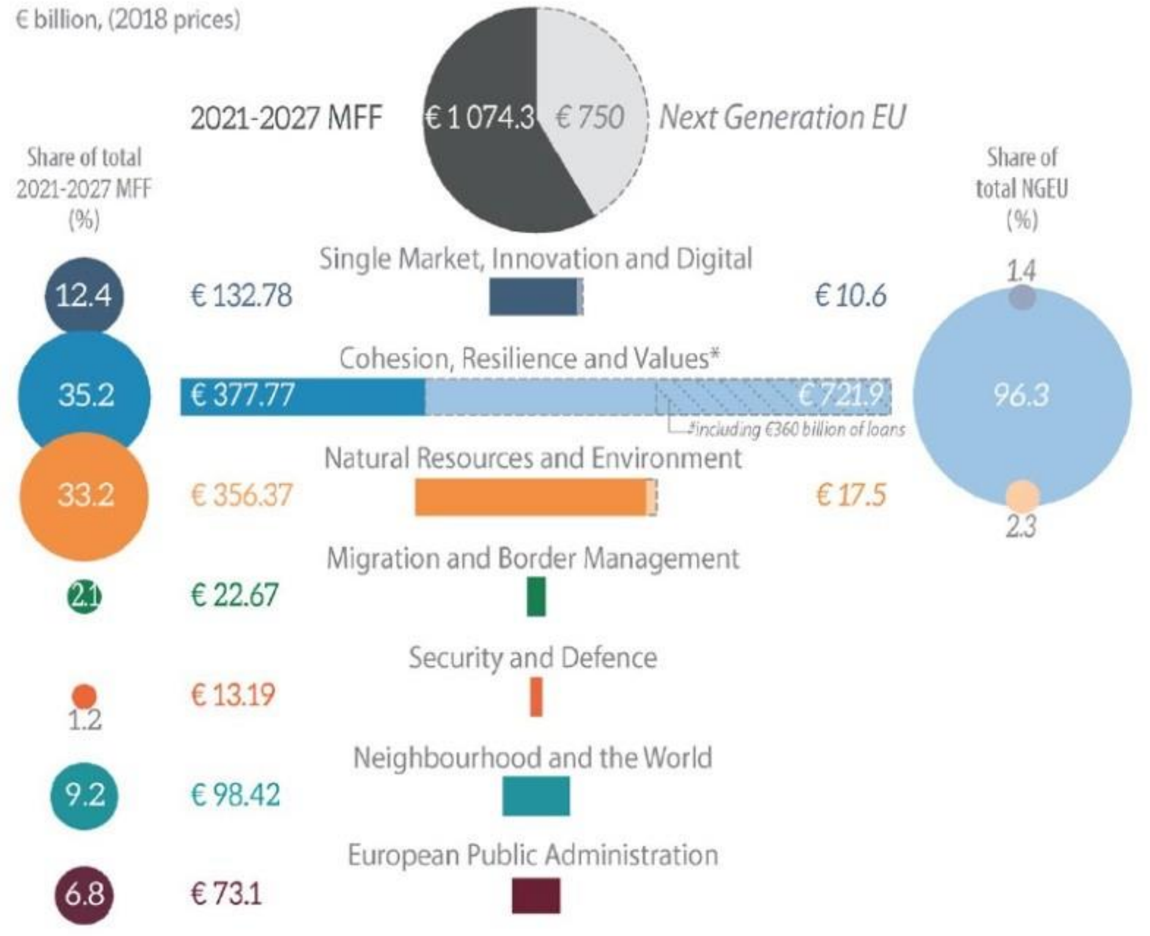
For both suggestions, the Belgian Presidency in the first six months of 2024 will prove crucial.

The European Commission could in accordance with the Treaties adjust the budgetary requirements for Member States on deficits by not taking in account spending on the efforts for Ukraine that are in excess of the 3 % deficit objective under the Stability and Growth Pact.

How do the European Institutions plan to finance their efforts?

As said above, the hands of the European Institutions are tied in this matter. They cannot adopt taxes in the matter of common defence. The present general budget for 2021 – 2027 has two main-components : a program NextGenerationEU until 2026 that aims to rebuild the European Union economy in a post Covid time for 806,90 billion euro and a program until 2027 for 1.216 billion euro for boosting environmental and other objectives. It is the latter that is under review in the winter 2023 negotiations within the Council.

European Council figures for the MFF and NGEU



Source: EPRS, based on data from the European Council, 2020.

The outcome is probably an increase of the general budget with the type of aid to Ukraine on which the Council finds consensus (non-military spending only it seems) and/or shifting the budget from other objectives to such objective.

The 401 billion euro on climate change (current prices) would come first in view since that money is to serve the longest-term objectives. Facing urgent needs, it is the first type of concession that is to be logically made. This of course if no other way of funding is found. Without that, the Member States would have to look for themselves for financing the obligations that are required from them under the Green Deal. In the end, they finance directly or indirectly both.

The current four main sources of revenue for the 2021-2027 E.U. budget are customs duties, contributions based on the Value Added Tax (VAT), direct contributions by E.U. countries (Gross National Income (GNI)-based) and a relatively new contribution on the non-recycled plastic packaging waste.

To finance NextGenerationEU, the European Commission is borrowing from the capital markets up to €806.9 billion. The borrowed amounts will be repaid over a long-term period, until 2058, with Member States themselves repaying the loan component of the instrument.

To help with the repayments of the grants under NextGenerationEU, the Commission presented on 20 June 2023 a new temporary statistical own resource based on company profits. Following the political agreement on the Fit For 55 package, regarding climate neutrality, the Commission has also adjusted the own resources proposals based on the Emissions Trading System (ETS) and Carbon Border Adjustment Mechanism (CBAM) compared to the original proposals from December 2021.

In addition, a new own resource based on the share of residual profits from multinationals that will be re-allocated to EU Member States under the OECD/G20 agreement on a re-allocation of taxing rights ("Pillar One") is being examined.

The EU Tax symposium of last October took place in that context, hoping to gather new insights through the exchanges with various stakeholders. But my outlook for the discussions on the general budget is a shift in objectives within the adopted general budget for allowing further non-military aid to Ukraine as the most likely scenario.

What can you tell us on the own resources that were debated in the EU Tax symposium?

There were panels debating on developing advanced artificial intelligence to detect fraud on VAT once all invoicing will be mandatory trough a platform run by the European Commission. This is estimated to give a very considerable boost over the long term to both the recourses for Member States and the European Union. Hence boosting their reimbursement capacity. But given the out roll of that program for mandatory electronic invoicing during 2024 – 2027, these additional revenues cannot help on the short term regarding the needs of Ukraine. They can however boost reimbursement capacity from 2028 to 2058 and so allow lower interest-rates for the Member States that provide immediate aid to Ukraine through deficit spending.

Other panels exchanged views on taxation of wealth, pointing out that 8 % of the European citizens hold 25 % of that wealth, and in the field of personal income taxes, by using for instance citizenship, as the U.S. do, to levy a European tax or behavioural taxation to boost further the objectives on climate. The downside for that last type of taxes is that when they are effective, they will only provide for short term revenues. Own resources require also much time, if adopted at all, and these recourses cannot be allocated on military spending by the European Union without changes to the Treaties. They seem in a general manner not effective to contribute to the immediate needs of the Member States that seek to provide Ukraine with the means to defend itself properly start 2024 and beyond.

New own resources under consideration will not be timely to play a part in the outcome of the war in Ukraine. Some that are presently in the phase of implementation increase the long-term reimbursement capacity for Member States and the European Union, reducing today the lending cost for willing Member States for military and other aid to Ukraine.

So, according to you, Member States must just face this task on their one for the next years, on top of their spending caused by the demographic, digital and climate transitions?

Basically, yes. But, as already pointed out, allowing them to make deficits in excess of 3 % or not sanctioning them for doing so, could offer considerable help from the side of the European Institutions. Such help would be compliant with other objectives pursued under the Treaties and a better long-term stability for the market.

There is also another policy the European Commission could consider to immediately boost the income for Member States. This relates in part to an agreement to tax the largest Multi-National Enterprises (MNE) on their excess-profits. The European Commission is hoping that some of that additional tax income may form an own resource for paying back the loans under NextGenerationEU.

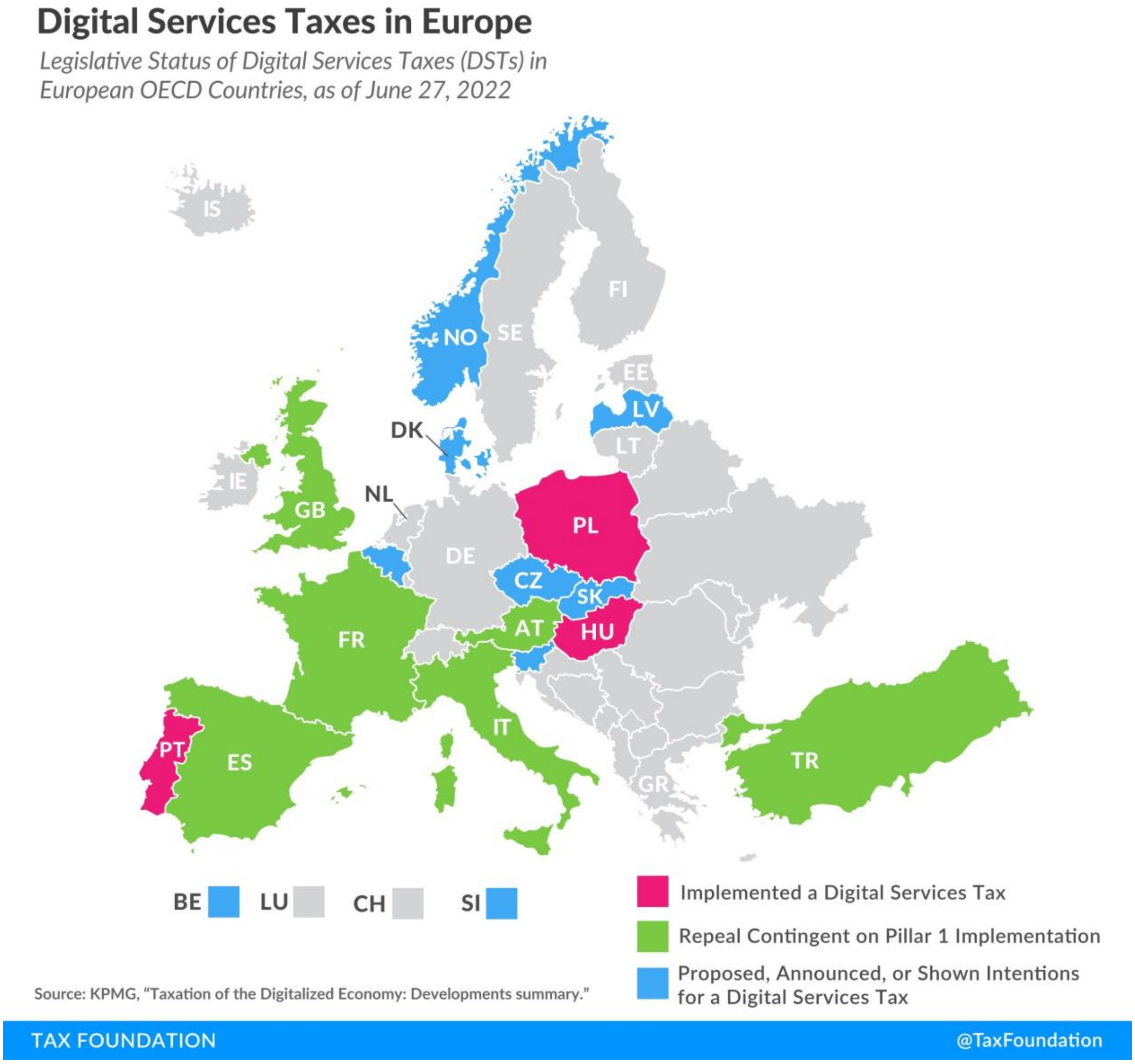
An Indian lady that formed part of a panel in the EU Tax Symposium voiced however unmistakably the concerns of developing countries with the outcome of the OECD Multi-Lateral-Convention (MLC) under Pillar One ; it does simply not leave an minimal share to work with for them. If no diplomatic solution comes up that provides minimal tax certainty to these market-jurisdictions, a large group of developing countries may activate the 'nuclear option'. Meaning that they will adopt unilateral taxes on digital activities occurring in their territories, setting the scenery for an all out trade war. It was further mentioned throughout the panels that neither China nor the United States intent to implement the MLC that would allocate large parts of excess-profits of their major MNE's to other States. In short, dark clouds are already gathered over the coming into effect of the MLC - Pillar One before the implementation of that MLC even starts.

The way how that Indian lady made her point was quite impressive and reminded me of the 'The Expanse' series where in future times an Indian actress plays the role of a high-ranking United Nations official. I will say no more for those who haven't seen that series yet. Reality and fiction blurred for a moment there. In comments I provided in August 2022 to the OECD on Pillar One, I made similar conclusions as that Indian lady did. I already strongly warned the OECD in not going down a path that didn't leave a minimal share for market-jurisdictions. This for the purpose of allowing developing countries to work with withholding taxes on outgoing payments. Their tax administrations can simply not engage with MNE's in discussions over the allocation of group profits.

Such a setting concerning Pillar One, must be a strong warning for the European Institutions and the Member States on the future effectiveness of such own resources. But even when everything can be sorted out, the signing and coming into effect of the MLC may yet take up a couple of more years. For sustaining the budgets of Member States engaging in the military needs of Ukraine starting from 2024 on, this all is simply ineffective.

In short, the agreement reached on the level of the OECD concerns only excess-profits of major MNE's. When a country joins the MLC – Pillar One, it requests that country not to adopt or put an end to taxes that combine three elements: taxation based on users and profit, aiming mostly at foreign based companies and not compliant with tax treaties.

In a panel sat the chair of the Tax committee in the French parliament. According to his calculations a French tax on digital activities could raise up to 47 billion euros, yearly, for France alone. With Roel Deseyn, also a tax lawyer and a former member of the Tax committee in the Belgian Parliament, I analysed already in 2019 the possibilities of what a Belgian tax on digital activities may yield. We estimated around 8 billion euros then. Given that France has six time more inhabitants with comparable spending-capacities as Belgian inhabitants, these estimations seem to roughly confirm each other. My submission to the USTR of June 2020 covered the technical aspects of a non-discriminatory taxation of digital activities, in compliance with international law, pleading for some common sense on both sides of the Atlantic Ocean to avoid a pointless trade war. Pointless, since from a historic perspective, taxation of digital activities is simply unavoidable.



I suggest not to formally change but interpret the thousand and more existing tax treaties in accordance with the customary international law on the interpretation of treaties (CILIT) under the criterions as agreed upon in the General Assembly of the United Nations in December 2018. All revenue that can be sourced back to digital activities in a market-jurisdictions would be subject to a minimum 10 %, maximum 25 % tax base of the revenue under the national Corporate Income Tax Rate, next to an indirect tax on that revenue. Both these taxes would apply equally for all resident and non-resident companies that exceed a certain quantity of digital activities in that jurisdiction. Boosting a level playing field between competing enterprises and revenues for that market jurisdiction. Since 50 % of telecommunication in Europe is used by 'Big Tech' and 25 % of all electricity produced in the European Union goes to internet-connectivity and IT, such a taxation is fair. In the light of the major investments on electricity and telecommunication for achieving the carbon zero objective, it is even ethical that all these costs are not only supported by the residents of these jurisdictions. Under both the benefit and the ability-to-pay principles such taxes can be levied on all enterprises that engage in a minimum quantity of digital activity in that jurisdiction.

The European Commission could issue by end 2023 a recommendation to the Member States on how they can adopt in early 2024 national taxes on digital activities occurring in their territory, that does not unite the three criterions under the Pillar One MLC. Such position from the European Institutions that is clearly not discriminatory in any way, provided these forementioned criterions are observed, may provide the Biden administration with arguments to convince the U.S. Congress in voting further aid to Ukraine and with incentives in reviewing its position on implementing the MLC - Pillar One.

Without such a recommendation by end 2023, implementing such a policy on the level of Member States in early 2024 would be both timely and effective in the quantity of raised revenues, for aiding the budgets of Member States that are willing to step up on their efforts for the military and other needs of Ukraine. Such taxes would be compliant with Union law when observing the criterions and even leave enough new revenues for other needs and boost a common fund to address in a more efficient way the costs for rebuilding or mitigating climate calamities. Such a fund may also have the effect of reducing insurance fees that local authorities must pay when they seek to reduce their exposure to increasingly intensifying and more frequent climate hazards in their region.

Such a recommendation by the European Commission or adopting such taxes without a recommendation by Member States does not exclude an initiative from the Council to request the Commission to come up with a legal act that organizes new own resources for both the European Union and the Member States if no sufficient progress on the MLC is observed.

Suggestions :

The effort of willing Member States can be sustained both timely and effectively in early 2024 by adopting taxes on digital activities occurring in their territory that are not discriminatory and compliant with the Customary International Law on the Interpretation of Treaties as updated in November 2018 by the General Assembly of the United Nations. Such taxes can be implemented next to the MLC - Pillar One since they are not affected by joining the MLC.

Member States can do so on their own in early 2024 or the European Commission could issue by end 2023 recommendations on how to observe Union Law when adopting such taxes in early 2024.

The Council can request a legal proposal from the Commission on taxing digital activities when no progress is observed during 2024 on implementing the MLC - Pillar One by key-jurisdictions nor on how to adapt that MLC to the needs of developing countries.

Finally, I wish to point out that the Belgian Presidency of the Council will have a key role to play in the first six months of 2024 in assessing and addressing the challenges posed by both the U.S. Congress and Hungary in the past ten days. The initiatives of that Presidency or the lack of it may well determine in no small part the outcome of the war in Ukraine. I hope this blog may contribute to create awareness for that consequence.

Thank you for reading this blog.

Brussels, 5 November 2023,

Paul Verhaeghe

Paul Verhaeghe
Advocaat-vennoot
Paul@wanted.law

WANTED LAW

Wanted Law Tax
Avenue de Villegas 6, 1083 Ganshoren
T. + 32 2 358 65 19
tax@wanted.law
KBO 817.146.212
www.wanted.law/tax