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The reform of the EU own resources system: resource based on non-recycled plastic packaging waste and proposal for the carbon border adjustment mechanism

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Abstract

This paper analyzes the reform of the Community own resources system carried out by Council Decision (EU, Euratom) 2020/2053, within the Multiannual Financial Framework 2021-2027. It addresses the background of the reform and its substantial aspects, with special emphasis on the new resource on non-recycled plastic packaging waste, as part of the European strategy on circular economy and its translation to the domestic level in some Member States, in the case of Spain, through a new excise tax on non-reusable packaging approved by Law 7/2022, of April 8. In accordance with the binding timetable approved by the Community institutions for the progressive introduction of own resources, the proposal for a carbon border adjustment mechanism, published by the Commission in its Communication COM(2021) 564 final, is analyzed, with the aim of contributing to the reduction of greenhouse gas emissions within the framework of the Paris Agreement and the Commission's Fit for 55 package.

El presente trabajo analiza la reforma del sistema de recursos propios comunitarios efectuada por la Decisión (UE, Euratom) 2020/2053 del Consejo, dentro del Marco Financiero Plurianual 2021-2027. Se abordan los antecedentes de la reforma y sus aspectos sustanciales, incidiendo especialmente en el nuevo recurso sobre los residuos de envases de plástico no reciclado, como parte de la estrategia europea sobre la economía circular y su traslación al ámbito interno en algunos Estados miembros, en el caso de España a través de un nuevo impuesto especial sobre envases no reutilizables aprobado por la Ley 7/2022, de 8 de abril. De acuerdo con el calendario vinculante aprobado por las instituciones comunitarias para la progresiva introducción de recursos propios, se analiza la propuesta de mecanismo de ajuste en frontera de las emisiones de carbono, publicada por la Comisión en su Comunicación COM(2021) 564 final, con la finalidad de contribuir a la reducción de la emisión de gases de efecto invernadero en el marco del Acuerdo de Paris y la estrategia Fit for 55.

Keywords: EU own resources system; Resource based on non-recycled plastic packaging waste; Circular economy; carbon border adjustment mechanism; Environmental taxes.

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1. The European Union Recovery Instrument and the reform of EC financing.

The exceptional economic impact of the COVID-19 pandemic has led the EC institutions to adopt extraordinary measures to address the EU recovery, making unprecedented financial resources available to the Member States. The Multiannual Budgetary Framework 2021-2027 and the Next Generation EU (NGEU) Recovery funds make up, in the words of the Commission, the largest stimulus package ever financed[1]. The repayment of the loans contracted by the Commission to finance this expenditure has required the reform of the own resources system which supplies the EC budget, in need of a thorough review even before the health crisis broke out.

The inadequacy of the own resources system has indeed been a recurring issue in the negotiation of the multiannual financial frameworks of the last decades. The crisis caused by the pandemic, with the need to raise resources to finance economic reconstruction, precipitated a long-simmering reform, with many preliminary drafts and proposals that culminated in Council Decision (EU, Euratom) 2020/2053 of 14 December 2020, regulating the own resources system and in the Interinstitutional Agreement of 16 December 2020, approving the Multiannual Financial Framework 2021-2027. These rules introduce important reforms to the former system in order, among other things, to incorporate a new resource into the EC budget, calculated based on the weight of non-recycled plastic packaging waste generated in each Member State (hereinafter, plastic own resource). The commitment is also adopted to progressively introduce, by 2026 and through a binding roadmap, new resources in order to meet the expenses derived from the European recovery, such as the carbon border adjustment mechanism, the proposal of regulation of which was published in the Commission's COM(2021) 564 final of 14 July 2021.

In addition to providing revenue, both resources have a "non-revenue" purpose linked to the achievement of environmental goals and the fight against climate change, major issues in the Union's recent agenda[2]. Introducing the plastic resource is part of the *European strategy for plastics in a circular economy* and the *European Green Deal* and it tends to encourage the disposal of waste and its reuse[3]. The carbon border adjustment mechanism serves the objective of combating climate change by reducing the emission of greenhouse gases, avoiding the so-called "carbon leakage", in accordance with the commitments made in the Paris Agreement and the *Fit for 55* package of the Commission[4].

1. https://ec.europa.eu/info/strategy/recovery-plan-europe_es.

2. On the implementation of own resources of an environmental nature as EC recovery financing instruments, vide GIL GARCÍA, E. "Una reflexión sobre diferentes opciones de política fiscal en materia ambiental en una Unión Europea pospandemia" [A reflection on different tax policy options in environmental matters in a post-pandemic European Union], *Revista Aranzadi Unión Europea*, No. 2/2021, p. 67-84.

3. Vide Communication from the Commission COM (2018) 28 final of 16 January 2018 "A European strategy for plastics in a circular economy" and Communication COM(2019) 640 final "The European Green Deal", 11 December 2019.

4. Vide Agreement of 19 October 2016, DOUE L 282/4 and the Communication from the Commission COM (2021) 550 final "Fit for 55: reaching the EU climate target for 2030 towards climate neutrality", of 14 July 2021.

Next, we address the reform of the own resources system undertaken by these standards, the characteristics and essential elements of the two new resources, the one on plastics, already in force, and the proposal for the carbon border adjustment mechanism, whose gradual introduction will begin in 2023. Although the work focuses on the analysis of EC resources, we will also refer to the effects at the national level of these measures, on occasion of the upcoming enforcement in Spain, on January 1, 2023, of two new taxes, on single-use plastic packaging and landfill, incineration and co-incineration of waste, collected in the Law 7/2022, of 8 April, on Waste and Contaminated Soils for a Circular Economy. The Own Resources Decision does not impose the establishment of an EC-harmonised state tax on plastics, but the contributions to be made by the Member States will require new financing channels that also encourage the reduction of this waste to reduce the national contribution, its implementation thus being foreseeable in the different Member States[5].

2. Council Decision 2020/2053 of 14 December 2020 on the own resources system of the European Union.

2.1. Background and previous proposals.

In the chapter on financial provisions of the TFEU, Article 311 provides that the Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources.[6] The own resources system was introduced by the Decision of 21 April 1970, replacing the system based on financial contributions from the Member States and is supplied by three main types of revenue[7]:

I) The so-called traditional own resources, customs duties and other levies, considered the "true" own resources of the system as a direct source of income from individuals and entities to the EU budget, even if collection is carried out at national level[8].

II) VAT-based own resource which, unlike customs duties, has no tax nature. State contribution that takes this tax as a basis to determine the amount; it is not a levy on top of national taxation for VAT payers[9]. The share is calculated by applying a uniform percentage in all Member States

5. Work does not include the analysis of the financial transactions tax regulated by Act 5/2020, of 10 October, given its approval prior to its implementation as an EC own resource, not scheduled before 2024-2026.

6. As noted by PÉREZ VEGA, the financial autonomy of the EU determines its decision-making capacity with regard to obtaining revenues and carrying out public expenditures, through which to comply with the objectives and policies undertaken. "La necesaria reforma del sistema de recursos propios de la Unión Europea ante el actual escenario de crisis económica y financiera" [The necessary reform of the European Union's own resources system in the face of the current scenario of economic and financial crisis], in ADAME MARTÍNEZ, F.D. and RAMOS PRIETO, J., *Estudios sobre el sistema tributario actual y la situación financiera del sector público: homenaje al Profesor Dr. D Javier Lasarte Álvarez* [Studies on the current tax system and the financial situation of the public sector: a tribute to Professor Dr. Javier Lasarte Álvarez], IEF, 2014, p. 885.p. 876.

7. The Treaty of Rome distinguished, in this regard, between a first stage in which the European Community would be financed through contributions from the Member States (art. 200 TEEC), to later draw from their own resources (art. 201 TEEC). On the notion of "own resources", their features and possible tax nature, vide MORENO GONZÁLEZ, S. "El sistema de recursos propios de la Unión en el Tratado por el que se establece una constitución para Europa" [The Union's own resources system in the Treaty establishing a constitution for Europe", in GARRIDO MAYOL, V., GARCÍA COUSO, S. and ÁLVAREZ CONDE, E. (Coords.) *Comentarios a la Constitución Europea* [Comments on the European Constitution], Enrique Álvarez Conde, Vol. 3, 2004, p. 1610 et seq.; STRASSER, D., *La Hacienda de Europa. El derecho presupuestario y financiero de las Comunidades Europeas*[The Finances of Europe. The budgetary and financial law of the European Communities], IEF, Madrid, 1993, p. 105 et seq.; and RUIZ GARIJO, M."Crónica de una insuficiencia anunciada: el delicado sistema de recursos propios de la Unión Europea" [Chronicle of a shortage foretold: the delicate own resources system of the European Union], *Noticias de la Unión Europea*, 199-200/2001, p. 89 et seq.

8. These are levies, premiums, additional or compensatory amounts, additional amounts or factors, common customs tariff duties and other duties established or to be established by the institutions of the Communities in respect of trade with non-member countries, customs duties on products regulated by the ECSC Treaty, which has expired, as well as contributions and other duties provided for in the framework of the common organisation of the markets in sugar.

9. In this regard, vide FALCÓN Y TELLA, R. *Introducción al Derecho Financiero y Tributario de las Comunidades Euro-*

on a harmonised basis and calculated on the total value of the sales volume, based on the statistics of the national accounts relating to final consumption. The contribution is modulated according to gross national income, to avoid regressive effects.

III) And the own resource based on gross national income (GNI), conceived as a balancing and residual element to guarantee the total financing of approved expenses, which is calculated once the difference between expenses and disposable income is known. This component was introduced in Council Decision 88/376 (EEC EURATOM) of 24 June 1988, in view of the increase in expenditure resulting from the implementation of the single market and Community enlargement. Other resources lost relevance and it became the main component of the system, providing more than 70 % of the EU's revenues, which thereby re-established its funding, in terms of the weight of the financial contributions of the Member States, returning to the pre-70s situation[10].

Since the introduction of the GNI component, there have been no significant reforms in the configuration of Community revenues, despite the fact that there have been numerous reports, communications and documents that, since late 90s, have revealed the inadequacy[11]. Attempts at reform intensified after 2004, with the Commission advocating the creation of new resources that would progressively reduce the weight of the GNI-based resource[12].

Following the financial crisis of 2007, the Commission proposed simplifying the VAT resource and creating a new type of resource based on a financial transaction tax, highlighting the opacity and complexity of a system that limited democratic control and generated the perception of national budgetary overload as a result of the burden of national contributions[13]. In the absence of the needed unanimity, the reform never came to fruition, but the agreement on the 2014-2020 multiannual financial framework included a joint statement on own resources, which concluded the need of an overall revision of the system, by the creation of a high-level interinstitutional Panel, whose report was published in December 2016[14]. This report recommended abandoning the correc-

peas [Introduction to the Financial and Tax Law of the European Communities], Cívitas, Madrid, 1988, p. 308; LÓPEZ ESPADAFOR, C.M., "La nueva regulación de los recursos propios de la Unión Europea y la recaudación de estos por los Estados Miembros" [The new regulation of the own resources of the European Union and collection of revenue by the Member States, *Nueva Fiscalidad*, 3/2002, p. 117.

10. This is highlighted in the report "Future financing of the EU. Final report and recommendations of the High-level Panel on Own resources".

    https://ec.europa.eu/info/sites/default/files/about/the/european/commission/eu/budget/future-financing-hlgor-final-report/2016/en.pdf

11. On the evolution and previous proposals for reform of the own resources system, vide OLESTI RAYO, A. "La financiación del presupuesto de la Unión Europea y la necesidad de revisar el sistema de recursos propios" [Financing the European Union budget and the need to review the own resources system], *European Law Journal,* No. 37/2015, p. 1-24; MORENO GONZÁLEZ, S., "El sistema de recursos propios de la Unión en el Tratado por el que se establece una constitución para Europa" [The system of the UE's own resources in the Treaty establishing a constitution for Europe], ob.cit., p. 1620 et seq; PÉREZ VEGA, L. "La necesaria reforma del sistema de recursos propios de la Unión Europea" [The necessary reform of the European Union's own resources system], ob. cit., p. 884 et seq.; RUIZ GARIJO, M. "Crónica de una insuficiencia anunciada: el delicado sistema de recursos propios de la Unión Europea" [Chronicle of a shortage foretold: the delicate own resources system of the European Union], ob.cit., p. 100 et seq. and GARCÍA-OVIES SARANDESES, I. "Financing of the EEC: proposal for a Council Regulation (ECSC, EEC, Euratom) implementing the Decision of 24 June 1988 on the system of the Communities' own resources), *Noticias de la Unión Europea*, No. 55-56, 1989, p. 93-100.

12. Vide Communication from the Commission *Building our common future Political challenges and budgetary means of the enlarged Union (2007-2013)* of 10 February 2004 COM (2004) 101 final, which considered three possible alternative resources: a corporate income tax, a genuine VAT resource and a tax on energy products, in particular on the emission of CO2, already proposed in previous documents. In its subsequent communication *Revision of the EU budget* {SEC(2010) 7000 final}, of 19 October 2010, the Commission considered the progressive introduction of six possible new own resources: a EU tax on financial activities, EU revenues from auctions under the greenhouse gas emissions trading scheme; a EU levy on air transport; a genuinely fiscal EU VAT tax, a EU energy tax and a EU corporate income tax.

13. The proposal for a Council Decision on the own resources system of 29 June 2011 COM(2011) 510 final 2011/0183 (CNS).

14. https://ec.europa.eu/info/sites/default/files/about/the/european/commission/eu/budget/future-financing-hlgor-final-report/2016/en.pdf

tion mechanisms in effect until then, to reform the VAT-based recourse and include new categories of own resources linked to Community policies and values, particularly social, economic and environmental sustainability, the value of the single market and fiscal coordination. These resources should be used in a similar way to national non-fiscal levies, the incentive being the imposition of certain political preferences[15]. Thus, along with the resources based on corporate tax and a tax on financial transactions or banking entities, the gradual introduction of others linked to the EU's energy, environmental, climate and transport policies was proposed, such as a tax on CO2 through the EU emissions trading system, a tax on electricity, on diesel or an indirect tax on imported goods from non-member countries with high emissions.

In the framework of the preparatory work for the negotiation of the current budgetary framework, the proposal for a Council Decision on the system of own resources of the European Union, 2 May 2018(COM (2018) 325 final 2018/0135 collected some of the proposals of the report, incorporating as own resources a proportion of the common consolidated tax base of corporate tax, once adopted by the Member States; a proportion of the auction revenues from the emissions trading system and a national contribution calculated based on the amount of non-recycled plastic packaging waste, as an incentive to Member States to develop the circular economy[16]. This was intended to address the loss of resources that the United Kingdom's exit from the Union would entail and to extend spending schemes to new political priorities in areas such as the environment, research and development or external security. The European Parliament was in favour of the introduction of these resources when issuing its Resolution of 10 October 2019, in which it noted that, in the exercise of its powers under Article 312 TFEU, it would not approve the MFF 2021-2027 without an agreement on the reform of the system with new funding sources in line with the EU goals[17].

The emergence of the COVID-19 pandemic ultimately boosted this reform at the European Council held between 17 and 21 July, 2020, which agreed to provide extraordinary funds to prevent deterioration of the economy and employment and to boost economic recovery. The varying economic impact of the measures adopted by the Member States to contain the spread of the virus and their unequal budgetary capacity motivated the Community intervention given its effects on the single market, social and territorial cohesion. The European Recovery Instrument "Next Generation EU", regulated in Council Regulation (EU) 2020/2094 of 14 December 2020, would make it possible to offer loans to Member States and non-refundable aid linked to the fulfilment of the objectives of the recovery and resilience plan. Its financing is achieved by temporarily authorising the Commission to incur debt in the markets on behalf of the European Union, its repayment being funded by reforming the EC financing system, by introducing as of 1 January 2021 a new resource based on the weight of the non-recycled plastic packaging waste, enabling new sources of income in subsequent years[18] .

15. Cfr. *Future EU funding. Final report and recommendations of the High-level Panel on Own resources*, December 2016, also called the Monti Report https://ec.europa.eu/info/sites/default/files/about/the/european/commission/eu/budget/future-financing-hlgor-final-report/2016/en.pdf

16. Vide also, communications from the Commission *A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020* of 14 February 2018 COM (2018) 98 final and *A Modern Budget for a Union that Protects, Empowers and Defends The Multiannual Financial Framework for 2021-2027*") 1 COM(2018) 321 of 2 May 2018.

17. Although the European Parliament has no direct decision-making capacity on own resources, its major role in the negotiation of the MFF determines the decision on own resources to the detriment of state power. Cfr. PÉREZ VEGA, L. "La necesaria reforma del sistema de recursos propios de la Unión Europea" [The necessary reform of the European Union's own resources system], ob. cit., p. 881.Vide the Resolution P8_TA-PROV(2018)0076, *Reform of the UE's own resources system* - G. Deprez and J. Lewandowski; the Resolution of 10 October 2019, on *the multiannual financial framework 2021-2027 and own resources: time to meet citizens' expectations* Texts Adopted, P9_TA(2019)0032 and the subsequent Resolution of 15 May 2020, on the new multiannual financial framework, own resources and the recovery plan (2020/2631(RSP)) and the European Parliament resolution of 23 July 2020 on the Conclusions of the extraordinary European Council meeting of 17 to 21 July 2020 (2020/2732(RSP)).

18. The loans, authorised on a temporary and exceptional basis, would be contracted for a maximum value of 750,000 million euros. Of these, a maximum of 360,000 million euros would be used to grant loans and the remaining 390,000 million to cover expenses, in both cases, with the exclusive purpose of dealing with the consequences of the COVID-19

These agreements were reflected in Council Decision (EU, Euratom) 2020/2053 of 14 December 2020, on the own resources system of the European Union, which repeals the previous Decision 2014/335/EU, Euratom, of 26 May and introduces various modifications on the system so far in force[19].

2.2. Essential elements of the reform.

Firstly, the limits established for own resources are increased, so that the appropriations allocated to the Union to finance annual payment appropriations may not exceed 1.40 % of the sum of gross national income (GNI) of all Member States. The total amount of the annual commitment appropriations in the Community budget, the expenditure ceiling, could not exceed 1.46 of the sum of the GNI of all Member States. Moreover, an additional increase of these limits by 0.6 percentage points is foreseen to cover the Union's liabilities derived from the loans subscribed until their extinction, no later than 31 December 2058.

Although the traditional own resources, customs and tariff duties, remain unchanged, the amount of withholding of collection expenses by the States is increased to 25 %. With this, the percentage of 20% provided for in the above Decision is increased, against the recommendation made by the Monti Report and the proposal for a Decision of own resources published in 2018, which included its reduction by 10% to reflect the actual costs and as an incentive to the development of more effective administrative procedures, putting an end to the veiled correction involving this percentage[20].

The calculation of the VAT-based resource is also simplified, in accordance with the subsequent provisions of Council Regulation (EU, Euratom) 2021/769 of 30 April 2021, amending Regulation (EEC, Euratom) No. 1553/89 on the definitive uniform arrangements for the collection of own resources accruing from value added tax[21]. A uniform rate of 0.3% is applied in all Member States to the amount of the VAT collected in relation to the whole of the supply of goods or services taxed, divided by the weighted average rate of VAT calculated for the calendar year, set in 2016, and established as definitive for all the multiannual framework, unlike the former regulation where it was to be calculated every year. The criterion whereby the taxable amount of VAT to be taken into account for these purposes in respect of each Member State should not exceed 50 % of GNI is maintained.

The resource based on gross national income (GNI) remains substantially unchanged as a balancing and residual resource to ensure budgetary sufficiency. Corrections are further established for some Member States such as Denmark, the Netherlands, Austria, Sweden and Germany, against the recommendations of the Monti report and previous proposals from the Commission, which considered that these corrections, linked in some cases to that applied in the United Kingdom, lost their point after UK's departure from the Union, in addition to complicating the system and generating opacity in terms of the distribution criteria*[22].

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crisis.

19. In connection with MFF, under art. 311 TFEU, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the system of own resources of the Union. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements, but with retroactive effect from 1 January 2021, linked to the budget for that year. Together with this decision, Council Regulation (EU, Euratom) 2021/768 of 30 April 2021 establishing implementing measures for the own resources system of the European Union and repealing the previous Regulation 608/2014 is also adopted.

20. Considered as a veiled correction of the own resources system, among others by PÉREZ VEGA, L. "La necesaria reforma del sistema de recursos propios de la Unión Europea" [The necessary reform of the European Union's own resources system], ob. cit.,p. 896 and OLESTI RAYO, A. "La financiación del presupuesto de la Unión Europea y la necesidad de revisar el sistema de recursos propios" [Financing the European Union budget and the need to review the own resources system], *European Law Journal,* No. 37/2015, p. 5.

21. Vide on the form of calculation of the resource in the framework of its reform, Opinion 11/2020 on the draft Council Regulation (EU, Euratom) amending Council Regulation (EEC, Euratom) 1553/89 of 29 May 1989.

22. These corrections originate from the Fontainebleau European Summit, June 1984, which concluded that any Member State bearing an excessive budgetary burden in relation to its relative prosperity could benefit from a correction. The

The most relevant novelty refers, ultimately, to the creation of a new resource consisting of a national contribution calculated according to the weight of non-recycled plastic packaging waste, which aims to fight against related contamination, promoting recycling and the circular economy[23].

3. The resource based on non-recycled plastic packaging waste.

3.1. Characteristics and non-revenue purposes in the framework of the European strategy for plastics.

The possibility of creating a financial resource on plastics to replenish the Community budget arose in the Communication from the Commission COM (2018) 28 final, of 16 January 2018, *A European strategy for plastics in a circular economy*, which referred to the introduction of fiscal measures at EU level to reduce the generation of plastic waste, especially packaging or disposable items, and encourage their reuse. The Communication focuses on the effects of this waste on the environment, marine pollution and climate change, taking as strategic axes the promotion of a new plastic economy in which its design, production and use respect the needs of reuse and recycling, as well as the development and promotion of more sustainable materials. This document points out that global plastic production has increased 20-fold since the 1960s, reaching 322 million tonnes in 2015, figures that will double over the next 20 years. About 25.8 million tonnes of plastic waste are generated annually in Europe and less than 30% is collected for recycling. Of this amount, a significant part leaves the Union to be treated in non-member states, where different environmental standards apply. At the same time, the amounts of plastic waste deposited in landfills or incinerated remain high (31% and 39%, respectively) and although dumping has decreased in the last decade, incineration has increased. It is estimated that 95% of the value of plastic packaging, between EUR 70,000 and 105,000 million per year, is lost to the economy after a very short cycle of first use. Among the economic measures to be adopted to achieve these goals, reference was made to the possible establishment of an EC harmonised tax in the Multiannual Financial Framework after 2020.

The plastic resource was finally incorporated into the Proposal for a Decision of 2 May 2018, on the own resources system, and the Decision of 14 December 2020, but not as a Community tax but as a state contribution that, not falling directly on the European taxpayer, can hardly be considered a "genuine" own resource[24]. On the other hand, it is up to each Member State to adopt the internal measures deemed appropriate to achieve the "non-tax" purpose pursued with this resource.

State contribution is calculated based on the weight of the non-recycled plastic generated in each territory, on which a rate of EUR 0.80 per kilogramme is applied. This weight is calculated based

Parliament expressed its opposition to maintaining the corrections in its Resolution of 23 July 2020 on the Conclusions of the extraordinary meeting of the European Council of 17 to 21 July 2020 (2020/2732(RSP)). However, the final Decision established the following gross reductions of its annual contribution based on GNI for the following States: Denmark: EUR 377 million; Germany: EUR 3,671 million; Netherlands: EUR 1,921 million; Austria: EUR 565 million; Sweden: EUR 1,069 million.

23. Together with the own resources Decision, Council Regulation (EU, EURATOM) 2021/768 of 30 April 2021 laying down the implementing measures for the own resources system of the European Union and repealing Regulation (EU, Euratom) 608/2014, was also approved.

24. In the opinion of MORENO GONZÁLEZ, S., "own resources have three characteristics: they are tax-based; they are supported directly by natural or legal persons of the Community, so there is a link or direct relationship between the Community and the source of income; and they are independent of the decisions of the Member States. Cfr."El sistema de recursos propios de la Unión en el Tratado por el que se establece una constitución para Europa" [The system of the UE's own resources in the Treaty establishing a constitution for Europe], ob.cit., p. 1615. STRASSER, D. defines an own resource as a tax borne directly by the European taxpayer, which is included among the revenues in the general budget of the European Communities and does not appear in the budget of the Member States that constitute these Communities, *La Hacienda de Europa. El derecho presupuestario y financiero de las Comunidades Europeas*[The Finances of Europe. The budgetary and financial law of the European Communities], IEF, Madrid, 1993, p. 105.

on the difference between the total waste generated and that recycled in each Member State in the calendar year in question. Regulation (EU, Euratom) 2021/770 of the Council of 30 April 2021, on the calculation of the own resource, refers, for the determination of these quantities, to Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste and to the Commission's Decision 2005/270/EC, establishing the formats relating to the database system in accordance with the above Directive. These rules set the target of achieving by 31 December 2025 a minimum of 50 % recycling by weight of all plastic packaging waste and 55%, by 2030, to which this resource will also contribute. The formula for determining compliance with these objectives is set out in Articles 6a of the Directive and 6q of the Decision, to which Regulation 2021/77 refers to likewise calculate the weight of non-recycled plastic generated in each Member State, in order to determine the State's contribution.

According to these regulations, for the purposes of calculating whether the targets have been achieved and to now also determine each State's contribution, Member States shall calculate the weight of packaging waste generated and recycled in a given calendar year. Packaging waste generated in a Member State may be deemed to be equal to the amount of packaging placed on the market in the same year within that Member State; for its part, the weight of packaging waste recycled shall be calculated as the weight of packaging that has become waste which, having undergone all necessary preliminary operations to remove waste materials that are not targeted by the subsequent reprocessing, enters the recycling operation. This is defined technically in the Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste, as any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes[25]. Directive 94/62 also contemplates the concepts of packaging, as a product used "for the containment, protection, handling, delivery and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer", in addition to all "non-returnable items used for the same purposes"[26]. By adopting this pre-established formula and previously applied by the Member States, the implementation of the own resource, with already technically defined quantities, is accelerated and facilitated, and links the state contribution to the fulfilment of the recycling target, whereby the greater its achievement, the lower the tax.

Making the resource available to the Union by the Member States is regulated in Council Regulation (EU/Euratom) 2021/770 of 30 April 2021, which as in the case of the own resources Decision, enters into force with retroactive effects from 1 January[27] . Under this Regulation, the amount entered in the budget of each State shall be made available to the Union, in the form of monthly twelfths, on the first working day of each month, subsequently adjusting the amounts based on the final data. In addition, Member States shall periodically send reports to the Commission on the application of their own recourse, and the supporting documentation must be kept until 31 July of the fifth year following the financial year in question. Depending on the cash position the Commission may, in any case, request the Member States to bring forward the entry of the corresponding

25. The quantification of this resource establishes, in any case, various gross annual reductions for several Member States based on their GNI, set out in the third paragraph of Article 2 of the own resources Decision of 14 December 2020.

26. Article 3 of the Directive defines packaging waste as "any substance or object which the holder discards or intends or is required to discard". It also distinguishes between sales packaging or primary packaging, that is to say packaging conceived so as to constitute a sales unit to the final user or consumer at the point of purchase; grouped packaging or secondary packaging, that is to say packaging conceived so as to constitute at the point of purchase a grouping of a certain number of sales units; and transport packaging or tertiary packaging, that is to say packaging conceived so as to facilitate handling and transport of a number of sales units or grouped packagings. On the other hand, the technical definition of plastic can be found in Regulation (EC) 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

27. Its full title is Regulation on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income. This Regulation replaces Council Regulation (EU, Euratom) No 609/2014 on the methods and procedure for making available the traditional, VAT and GNI-based own resources and on the measures to meet cash requirements

amounts during the first quarter of the year. On the other hand, the accrual of late payment interest is foreseen in the event that the corresponding amounts are not entered in a timely manner.

3.2. The tax on non-reusable plastic packaging under the Law 7/2022, of 8 April, on Waste and Contaminated Soils for a Circular Economy.

Consistent with the introduction of this resource at the Community level, the Law 7/2022, of 8 April, on Waste and Contaminated Soils for a Circular Economy, creates two new environmental taxes, the special tax on non-reusable plastic packaging (Articles 67 to 83) and the tax on the deposit of waste in landfills, the incineration and co-incineration of waste (Articles 84 to 97), which will come into force on January 1, 2023. Its creation takes place at the time of transposing two EU directives into the Spanish legislation: Directive (EU) 2018/851 of 30 may 2018 amending the above-mentioned framework Directive on waste 2008/98/EC, which enhances the mandatory use of economic instruments to advance the circular economy, and the so-called Directive on single-use plastics, Directive (EU) 2019/904, June 5, 2019 , on the reduction of the impact of certain plastic products on the environment, which, among other measures, sets restrictions on placing in the market single-use plastic products. Both taxes tend to prevent the generation of new waste and, on the other hand, promote its reuse, reducing its disposal in landfill.

Taxation on the deposit of waste had already been implemented, in any case, in various Spanish Autonomous Communities as an own tax, now being devised as a state tax entrusted to the Autonomous Communities[28]. The introduction of this tax at the national level follows the EC recommendations whereby, faced with the risk of non-compliance with the recycling objectives established in Directive 94/62/EC, Spain should implement a harmonised tax scheme at national level on the deposit of waste in landfills, which improves recycling rates and puts an end to the so called "waste tourism" towards the tax-free o low-tax Autonomous Communities[29]. Although the new tax will also affect plastics, its scope is broader and affects waste in general, taxing its disposal in landfill and incineration. The amount to be paid is determined based on the weight of the waste delivered at a variable rate depending on the type of waste and the type of receiving facility, the facility owner being declared a substitute of the taxpayer, collecting the tax from the natural person, legal entity or entity without legal status who delivers the waste[30].

Although taxation on the deposit of waste was already known in our legal system as an own regional tax, the introduction of the tax on plastic packaging is linked to the EC own resources requirement, and revenue will be recovered at least partially. In this way, the disincentive to the use of non-recycled plastics is implemented internally and puts the environmental cost on manufacturers, importers and purchasers of non-reusable packaging. The new duty will tax the intra-Community

28. Indeed, it is provided for under different names and to a varying degree in Catalonia, Andalusia, Cantabria, Murcia, La Rioja, the Valencian Community, Castilla y León, Extremadura and Balearic Islands. For an overview of these taxes, vide Chapter III on Own taxes of the e-book published by the Ministry of Finance Autonomous Taxation 2021: https://www.hacienda.gob.es/Documentacion/Publico/PortalVarios/FinanciacionTerritorial/Autonomica/Capitulo-III-Tributacion-Autonomica-2021.pdf

29. The risk of Spain failing to meet recycling targets was highlighted in the early warning report issued by the Commission dated 24 September 2018 (SWD (2018) 425 final) that recommends the "introduction of a harmonised tax system for the disposal of waste (i.e. dumping and incineration) that is operational in all Autonomous Communities. This recommendation is reiterated in *The EU Environmental Implementation Review 2019*, relative to Spain, and published on 4 April 2019 https://ec.europa.eu/environment/waste/framework/early/warning.htm 3 https://eur-lex.europa.eu/legalcontent/ES/TXT/PDF/?uri=SWD:2018:425:FIN&qid=1537874175431&from=EN

30. The tax base is given by the weight, measured in metric tonnes of waste deposited in landfills or incinerated, applying a tax rate expressed in euro, which ranges from 40 euro/tonne for municipal waste deposited in landfills for non-hazardous waste (mixed waste or separately collected household waste, including plastics and waste collected separately from other sources, when they are similar in nature and composition to the former); 30 eur/metric tonne for the disposal of municipal waste; between 5 and 8 euros for waste deposited in hazardous waste landfills, and between 1.5 and 3 euros for waste deposited in inert waste landfills. These tax rates may be increased by the Autonomous Communities, once the required agreements and regulatory modifications are adopted within the framework of the regional financing system for its full implementation as a State-assigned tax.

manufacture, import and acquisition, in addition to the non-regulatory entry into Spanish territory, of packaging that, containing plastic, are not reusable. This means that it was "not conceived, designed or placed on the market to accomplish, within its life span, multiple trips or rotations by being returned to a producer for refill or re-used for the same purpose for which it was conceived"[31]. The tax affects such products, whether empty, or containing goods. Taxpayers are the natural or legal persons and entities of Article 35.4 of Act 58/2003, of 17 December, who manufacture, import or carry out the intra-Community acquisition of the products that are part of the objective scope of the tax, without this law providing for how this tax is applied.

Definition of the taxable event is further supported by the establishment of various assumptions of exemption, among others, for those products that, after manufacture and prior to tax accrual, are no longer suitable for use, have been destroyed or are sent directly by the manufacturer to a territory other than the one applying the tax. Numerous exemptions are also contemplated regarding packaging used in the health area, for medicines, health products and food for medical uses or in agricultural or livestock activities; as well as intra-Community acquisitions that are intended for a territory other than the one where the tax is applied. Small imports or intra-Community acquisitions of packaging are also exempt, provided that the total weight of the non-recycled plastic contained in them does not exceed 5 kilogrammes. The taxable base consists of the amount of non-recycled plastic, expressed in kilogrammes, contained in the products subject to the tax and the tax rate is 0.45 euros per kilogramme[32].

As for the accrual, in the case of manufacture, it occurs at the time of the first delivery or making available of the good in the tax-applying territory; for imports, it is at the time of accrual of import duties, and for intra-Community acquisitions, on the 15th day of the month following that in which its dispatch or transport to the acquirer begins, unless the invoice is issued in advance, in which case it shall be on such date[33].

A self-assessment scheme is established on a quarterly or monthly basis depending on the VAT return system. For imports, the tax shall be paid in the manner laid down for customs duties, and the amount of imported non-recycled plastic, expressed in kilogrammes, must be entered in the customs import statement. As the most relevant formal obligations, a specific register is created in which the taxpayers who carry out the taxed activities must register before the start of their activity and the obligation to keep an accounting of the products that are part of the objective scope of the tax and the raw materials needed to produce them. In addition, the invoices issued on the occasion of the sales or deliveries of the taxed products must include the amount of non-recycled plastic, expressed in kilogrammes, contained in said products, as well as the amount of the tax accrued or, where appropriate, the exemption applied, unless they are simplified invoices.

4. Roadmap for the introduction of new resources.

The interinstitutional agreement of 16 December 2020, approving the 2021-2027 Budgetary Framework, also includes a "roadmap" for the introduction of new own resources. Proposals will be sub-

31. The objective scope of the tax also includes semi-finished plastic products used for obtaining the above packaging intended its sealing, marketing or presentation.

32. As GARCÍA NOVOA points out, the control of recycled plastic present in packaging will pose application problems, and waste managers who act as a certifying entity will take on a major role. Cfr. "El impuesto sobre envases de plástico no retornables" [Tax on non-returnable plastic packaging], GARCÍA NOVOA, C. (Dir.) *Digitalización, inteligencia artificial y economía circular"*[Digitalisation, artificial intelligence and circular economy], 2021, p. 41. Vide also, on the configuration of this tax, COBOS GÓMEZ, J.M. "El impuesto sobre envases de plástico no reutilizables y otras medidas fiscales en el Anteproyecto de Ley de Residuos" [Tax on non-reusable plastic packaging and other fiscal measures in the Preliminary Draft Law on Waste", *Crónica Tributaria*, No. 178/2021, p. 11-60.

33. In cases of non-regulatory introduction of the products in the tax-applying territory, accrual shall take place at this time and if it is not known, it shall be deemed the earliest tax period that has not expired, unless there is evidence to the contrary.

mitted by the end of June 2021 for three new resources, to be established by 1 January 2023[34]: A carbon border adjustment mechanism, proposal finally published on 14 July 2021, which is discussed in the following section[35]; a digital tax, on which the Commission opened a consultation period between the months of January and February 2021, but later postponed pending an agreement on minimum corporate taxation at a global level, within the framework of the OECD; and, finally, an own resource based on the EU emissions trading scheme, including its possible extension to aviation and maritime transport[36]. This own resource was already covered in the 2018 proposal for a Decision on own resources, which provided for an allocation of 20 % of certain revenues from the total permits available for auction. As we know, this system is harmonised in the European Union, under Directive 2003/87/EC, of 13 October, and its revenues support the national budgets, a part of which would have to be contributed to the EC budget once the own resource becomes established.

A stage is also contemplated in the longer term, for 2024 to 2026, in which the Commission will have to propose new additional resources, such as a tax on financial transactions, the implementation of which has been attempted since 2011, and a financial contribution linked to the corporate sector or a common corporate income tax base[37]. On the latter, the Communication from the Commission of 18 May 2021, COM (2021) 251 final *Business taxation for the 21st century* announces the proposal of a single regulatory code for the taxation of corporate income in Europe, based on the key features of a common and consolidated tax base, which shall integrate the profits of EU members involved in a multinational group, then allocating profits between Member States based on a distribution formula. This new proposal will replace the pending proposals for a common consolidated corporate tax base (CCCTB) COM (2016) 685 final and COM (2016) 683 final, which will be withdrawn[38]. Proposals for new own resources must be submitted by June 2024, in order to be implemented by 1 January 2026 at the latest.

5. Proposal for the carbon border adjustment mechanism (CBAM).

5.1. CBAM as an instrument to fight against climate change.

In compliance with the roadmap for the implementation of new resources, the Commission put forward on 14 July 2021 a proposal for a regulation establishing a carbon border adjustment mech-

34. Its full name is *Agreement on budgetary discipline, cooperation in budgetary matters and sound financial management, as well as on new own resources, in particular a roadmap towards introducing new own resources*. Based on Article 312 TFEU and aims to achieve budgetary discipline and ensure that EU spending is predictable, establishing the maximum amounts available for each area of expenditure.

PE655.408

35. COM (2021) 564 final 2021/0214 (COD) Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism.

36. In this regard, on 14 July 2021, the Proposal for a Directive was published amending Directive 2003/87/EC as regards the contribution of aviation to the Union's objective of reducing emissions in the whole economy and the appropriate application of a global market measure COM(2021) 552 final 2021/0207(COD).

37. There have been numerous attempts to introduce this tax in the European Union. Thus, in 2011 a proposal for Directive COM (2011) 594 final of 28 September was published, but was never passed, and an enhanced cooperation procedure was later initiated for its implementation. In any case, the tax has been implemented individually and with different characteristics in the various Member States, as is the case of Spain, through Act 5/2020, of 15 October, on financial transactions tax.

38. According to the Communication, although the principles of a common tax base and the distribution formula were already contained in the previous proposal for a common consolidated corporate tax base (CCCTB), the new proposal will reflect the significant changes in the economy and in the international framework since March 2011, when the CCCTB was originally proposed. In particular, its proposals on the definition of the tax base will be based on the approach adopted in the future comprehensive agreement. It will also include a different distribution formula that will better reflect the reality of the economy and current global developments, taking digitalisation into account to a greater extent.

anism (hereinafter, CBAM), COM(2021) 564 final 2021/0214 (COD). In addition to a new source of revenue, the CBAM is key in the European strategy to combat climate change and global warming. The CBAM contributes to the fulfilment of the international obligations derived from the Paris Agreement, signed on 2 December 2015 under the United Nations Framework Convention on Climate Change and adopted by the European Union through Council Decision (EU) 2016/590 of 11 April. The aforementioned agreement establishes, in its Article 2.1 (a), the aim of holding the increase in the global average temperature "well below 2°C with respect to pre-industrial levels", and pursuing efforts to limit the temperature increase to 1.5°C, to reduce the risks and impacts of climate change. This represents a direct threat to human livelihoods and terrestrial and marine ecosystems, with unequal effects that affect the poorest countries to a greater extent, with the WHO estimating that it may cause an additional 250,000 deaths a year from 2030[39] . Also, economic growth and emissions are no longer considered to be directly associated, as the latter decreased by 24% between 1990 and 2019 in the European Union, despite the fact that the economic growth during the same period reached 60 %[40].

The CBAM also intends to contribute to achieving the climate neutrality objective provided for in the European Green Deal, so that by 2050 there will be no net greenhouse gas emissions. As an intermediate objective, in order to achieve the 2050 target, Regulation (EU) 2021/1119 of 30 June 2021 also established the necessary reduction of net greenhouse gas emissions by 2030 of at least 55 % compared to 1990 levels, entrusting the Commission and the Member States to take the necessary measures to achieve this[41]. Among these, the "Fit for 55" package, promoted by the Commission, contemplates the implementation of the CBAM, together with the reinforcement of the emissions trading scheme and the update of the Directive on energy taxation.

The proposal to establish carbon border adjustment measures within the Union is not new, and since 2007 there have been several efforts in connection with the reform of the regulation of the emissions trading system, which never came to fruition[42]. The current proposal is undoubtedly the most comprehensive in terms of its regulation and feasibility, being preceded by the agreement adopted in the MFF, given the need to finance the Community budget.

The proposal is based on Articles 191 and 192 of the TFEU, which, in addition to the "Polluter Pays" principle, include among the aims of the Union, preserving, protecting and improving the quality of

39. Thus reflected in

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PE648.519

European Parliament Resolution of 10 March 2021 on "Towards a WTO-compatible EU carbon border adjustment mechanism" (2020/2043(INI)).

40. This is collected in Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ("European climate legislation").

41. The regulation is in addition to earlier Regulations (EU) 2018/842, of 30 May, which introduced national greenhouse gas emission reduction targets for 2030, and 2018/841, of 30 May, which requires Member States to achieve a balance between greenhouse gas emissions and removals.

42. On the previous proposals for the introduction of carbon adjustment mechanisms, PÉREZ BERNABEU refers to the Draft Proposal for Directive 2003/87/EC presented on 10 December 2007, which sought to amend its Article 29 to introduce a *Future Allowance Import Requirement* (FAIR) in order to tax imports and exports from non-member states not having an equivalent climate action plan to that of the EU for products likely to cause carbon leakage. This author also refers to Article 10b(1)(b) of the Proposal for Directive 2009/29/EC, which enabled the future adoption of a border adjustment mechanism for products from States not cooperating within the framework of international environmental protection agreements or not having a carbon pricing system. This was never implemented, although there was an iniative to introduce a specific adjustment mechanism for the cement sector, known as *Carbon Inclusion Mechanism* (CIM), which was likewise unsuccessful. Cfr. "El mecanismo de ajuste de carbono en frontera como impuesto medioambiental en el marco de la transición ecológica" [The carbon border adjustment mechanism as an environmental tax in the framework of the ecological transition], GARCÍA-HERRERA BLANCO, C (Dir.) *VIII Encuentro de Derecho Financiero y Tributario. La fiscalidad en el marco de la transición ecológica [VIII Meeting of Financial and Tax Law.Taxation in the framework of the ecological transition],* p. 142 et seq.

the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to combat climate change The regulation creates, on the other hand, a uniform legal framework for imports, which prevents diverting goods through States with a more favourable CBAM.

CBAM implementation aims to avoid the risk of the so-called "carbon leakage", a phenomenon whereby, due to the differences in the climate policies across the Member States, companies move their production outside the European Union, to other less restrictive countries in terms of emissions regulation, or when imports from these countries replace equivalent products produced within the Union. The CBAM extends the carbon pricing policy established in the internal market to imported products, preventing that the reduction of emissions within the Union is offset by an increase in emissions in other territories. In this regard, the proposal for a regulation highlights the increase in embedded emissions in imports, which represent more than 20% of domestic CO_2 emissions of the Union, as opposed to the reduction of national emissions[43].

Until now, the risk of carbon leakage has been addressed within the framework of the emissions trading scheme (hereinafter, ETS) regulated in Directive 2003/87/EC, of 13 October, through the free allocation of emission allowances to the sectors most exposed to this phenomenon, in accordance with Article 10a of this standard. However, this system weakens the carbon "price" perception precisely for the facilities with the highest emissions. As we will see later, the CBAM will progressively remove this allocation, to equate domestic and imported products, also generating new resources for national budgets[44].

5.2. Operation and characteristics.

The CBAM is similarly designed to the emissions trading scheme (hereinafter, ETS) applied to domestic production in accordance with the Directive 2003/87/EC, of 13 October. This system, first implemented in 2005, has so far been the Union's main tool to combat climate change, reducing greenhouse gas emissions from industry, electricity generation and air transport[45]. It is based on the so-called emission allowances, authorisations granted in a limited number to emit tonnes of CO2. These permits are negotiable and can be acquired by auctioning, thus fixing the price of carbon. The entities subject to the scheme must annually hand over a number of allowances equal to the emissions produced[46]. Therefore, individualised emission reduction obligations are not estab-

43. In addition, according to 2015 data, the ratio between imported and exported emissions was three to one, given that 1,317 million tonnes of CO_2 were imported and 424 million tonnes were exported. Cfr. European Parliament Resolution of 10 March 2021 on "Towards a WTO-compatible EU carbon border adjustment mechanism" (2020/2043(INI)). On the international reactions and political implications in connection with the establishment of the CBAM in the European Union, in particular in its relations with countries such as China, Russia, Turkey or Ukraine. Vide GLÄSER, A and OLDAG, C. "Less confrontation, more cooperation Increasing the acceptability of the EU Carbon Border Adjustment in key trading partner countries", https://germanwatch.org/sites/default/files/Less%20confrontation%2C%20more%20cooperation%20%28EN%29.pdf

44. On the purpose and configuration of free emission allowances in the Spanish legal system, vide SÁNCHEZ GARCÍA, I.A., "La asignación gratuita de derechos de emisión y las subastas de derechos de emisión en España" [The free allocation of emission allowances and the auctioning of emission allowances in Spain], *Presupuesto y Gasto Público*, No. 97/2019, p. 139-153.

45. The European emissions trading scheme was the first and largest in the world. According to data from Foretica, in 2016 it covered 45% of the greenhouse gas emissions of the European Union and 11% of the world. Cfr. report *Carbon Pricing as a business management tool,* 2016, p. 8 https://foretica.org/wp-content/uploads/publicaciones/investigaciones-tematicas/carbon_pricing_foretica1.pdf. In 2019, as many as 27 jurisdictions, with a GDP equivalent to 37% of the world's, had an emissions trading system, regulating 8% of global emissions. Cfr. report *Keys to the business transformation towards a low carbon economy*, Foretica, 2019, p. 18. https://foretica.org/wp-content/uploads/2019/12/claves/transformacion/empresas/economia/baja/carbono.pdf.

46. As noted by AURA, A., DE MEDRANO, L., BILBAO ESTRADA, I. and MARCO MARCO, J., the emissions trading system sets a maximum level of pollution or "cap" for each Member State with the corresponding allocation of a certain number of emission allowances per country and industry that cannot be exceeded, unless new allowances are acquired or generated, so it is known as a "cap and trade" system. Cfr. "La obligación de entrega de derechos de emisión de CO2: problemática constitucional derivada de su origen comunitario" [The obligation to hand over CO2 emission allowances:

lished, but a carbon pricing system allows the entity to decide whether to invest in improvements that reduce its emissions or to buy the required emission allowances[47].

Based on this model, in the new carbon border adjustment system, importers will have to acquire and deliver CBAM certificates in each Member State where they import, taking into account the embedded emissions of their products and at a price comparable to those paid by domestic operators for the purchase of emission allowances. The affected sectors will be the same as those subject to the ETS and listed in Annex I to the Proposal for a Regulation (cement, electricity, fertilisers, iron and steel and aluminium) to equate the treatment of imported and domestic products.

By levying imports, the CBAM differs from the ETS in that it does not establish a cap for allowances and emissions for trading and purchase through auctioning, in order to avoid establishing trade restrictions that are incompatible with WTO rules. These rules establish the principles of national treatment and most-favoured-nation treatment (Articles I and III of the General Agreement on Tariffs and Trade- GATT), although there are exceptions in the case of measures aimed at health protection and environmental preservation. Article XX points out, in particular, that no provision of the agreement shall be interpreted in the sense of preventing contracting parties from adopting or enforcing measures to "protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources" with the condition, however, that "such measures are made effective in conjunction with restrictions on domestic production or consumption" and "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"[48].

In order to ensure that CBAM was consistent with WTO rules, international and domestic operators are to be treated on an equal footing, so that the price of certificates is comparable to that paid by domestic operators for the purchase of allowances. To this end, the Proposal for a Regulation provides that the price of certificates is determined by the weekly average of the closing prices of the ETS allowances on the common auction platform, in accordance with the procedures established in Regulation (EU) 1031/2010. The price of CBAM certificates is to be published by the Commission and is applicable during the following calendar week[49].

The submission of CBAM certificates shall be carried out annually together with a declaration regarding the verified embedded emissions of the products imported during the previous year. The declaration shall also include: (a) The *goods imported* in the previous calendar year, expressed in tonnes or in megawatt/hour in the case of electricity; (b) The *carbon content of products*, i.e., the

constitutional problems arising from their Community origin], *Crónica Tributaria*, No. 128/2008, p. 26 and 27. Vide also on the configuration of this system, SEDEÑO LÓPEZ, J.F. "Pasado, presente y futuro de la imposición sobre el carbono en España" [Past, present and future of carbon taxation in Spain], *Nueva Fiscalidad*, No. 2/2021, p. 167-200.

47. Cfr. SÁNCHEZ GARCÍA, I.A., "La asignación gratuita de derechos de emisión y las subastas de derechos de emisión en España" [The free allocation of emission allowances and the auctioning of emission allowances in Spain], ob.cit., p. 141.

48. On the interpretation of these articles to determine the compatibility of carbon border adjustment mechanisms with WTO rules, vide, inter alia, FERNÁNDEZ PONS, X., La propuesta de la Unión Europea relativa a un impuesto sobre el carbono en frontera y su compatibilidad con las normas de la Organización Mundial del Comercio" [The EU's proposal for a carbon border tax and its compatibility with WTO rules], *Education and Law Review*, No. 21/2020, (Fiscalidad y objetivos de desarrollo sostenible (ODS)[Taxation and sustainable development goals (SDGs)]), 2020, p. 1 to 24; PÉREZ BERNABEU, B. "El mecanismo de ajuste de carbono en frontera como impuesto medioambiental en el marco de la transición ecológica" [The carbon border adjustment mechanism as an environmental tax in the framework of the ecological transition], ob.cit., p. 143 et seq.; and VAN ASSELT, H. and MEHLING, M. A., "*Border Carbon Adjustments in a Post-Paris World: Same Old, Same Old, but Different?*", ESTY, D. and BINIAZ, S. (Eds.), *Cool Heads in a Warming World: How Trade Policy Can Help Fight Climate Change,* Yale Center for Environmental Law & Policy, 2020, <https://envirocenter.yale.edu/sites/default/files/files/CoolHeads_vanAsselt (1).pdf>

49. Although the European Parliament's report of 15 February 2021 *Towards a WTO-compatible EU border adjustment mechanism* (2020/2043(INI) raised the possibility of total price equation, so that the CBAM would consider those set on a daily basis, this proposal was excessively burdensome and confusing, taking into account that daily prices would become quickly outdated. On the other hand, a weekly publication of CBAM prices would make it possible to adequately reflect the price trend of EU ETS, achieving similar results in terms of compliance with environmental objectives.

total embedded emissions, expressed in tonnes of CO2e per tonne released during its production abroad or CO2e per megawatt/hour in the case of electricity, product subject to a differentiated scheme. The calculation of the embedded emissions shall be carried out through different methods, starting as a general rule from the actual emissions, unless these cannot be determined, in which case default values shall be applied, a criterion that is primarily applicable in relation to electricity[50]; and (c) The total number of CBAM certificates to be delivered, corresponding to the total embedded emissions. To carry out this calculation, the carbon price paid in the country of origin shall be deducted, provided that no deductions or offsets have been applied to the export. In addition, another adjustment shall be made based on the EU ETS allowances allocated free of charge. In order not to favour domestic producers over imports, in accordance with WTO rules, the implementation of the CBAM, over a 10-year period starting in 2026, shall determine a progressive abolition of free emission allowances, at the rate of 10 percentage points each year. During that period, the CBAM certificates to be delivered by importers shall be reduced in proportion to the amount of free allowances distributed in the sector concerned[51].

The similarity between the CBAM and the ETS is also related to penalties, since in the event of failure to surrender certificates, the penalties are identical to those provided for in Directive 2003/87/EC for excess emissions under the ETS.

On the other hand, although submitting the declaration and surrendering the certificates is done annually, acquisition should be done gradually throughout the calendar year, so that at the end of each quarter the declarant has deposited in a national registration account certificates equivalent to 80% of the embedded emissions of all of the goods that have been imported since the beginning of the year. In order for importers to optimise costs, acquiring certificates according to their weekly price, a two-year validity period of the certificates is established. In addition, a repurchase system for surplus certificates by the Member States is envisaged, upon request of the interested party and once the declaration has been submitted.

To prevent the risk of non-compliance, since the declaration is submitted after the end of the calendar year in relation to the emissions of the previous year, the import of the goods is subject to prior authorisation. This request shall contain proprietary and financial information of the entity, and shall include the following data: the main economic activities in the Community territory; certification of the tax administration of the member State where the declarant is established of not being subject to an "outstanding recovery order" for domestic tax debts; affidavit of not having been involved in serious or repeated violations of the customs legislation, tax regulations and rules on insider dealing and market manipulation during the five years preceding the request, in particular, not having been sentenced for a serious offence in connection with their economic activity; information necessary to demonstrate the financial and operational capacity of the applicant to comply with their obligations under the CBAM, subject to the possibility requesting the profit and loss account and the balance sheet of the last three financial years ended, after due risk assessment; and the estimated monetary value and turnover of imports in the customs territory of the Union, by type of goods, for the calendar year in which the request is submitted and the following year.

Although CBAM implementation is scheduled for 2023, a transitional period is established until 2025, in which a CBAM shall be applied without financial adjustment, to facilitate its implementation. During this period, the declarants shall report quarterly the embedded emissions of the imported goods and the price of the carbon paid abroad. The transitional period shall also allow the Commission to assess the possible extension of the scope to indirect emissions and other goods and services. In any case, the similarity between the CBAM and ETS will facilitate its implemen-

50. According to the Proposal for a Regulation, the authorised declarant shall keep records of the information required to calculate the embedded emissions, and shall keep those records until the end of the fourth year after the year in which the CBAM declaration has been or should have been submitted.

51. In Spain, Articles 16 and following of Act 1/2005 of 9 March, which regulates the greenhouse gas emissions trading scheme, regulate the free allocation of emission allowances.

tation, as is the case of the plastic resource, which is based on the already existing rules regarding the fulfilment of recycling objectives.

5.3. CBAM as a non-tax property contribution for public purposes.

The features of the CBAM-based resource allow for its consideration as a new and genuine Community own resource, comparable to those derived from customs duties. Certainly, it is not a tax resource, but a public revenue imposed by the Union on importers, although its collection is carried out through the Member States[52].

The Commission initially assessed designing the CBAM as an import carbon tax, to be calculated based on the default carbon intensity of the products and based on the carbon price in the Union[53]. Importers could request a reduction based on their actual carbon footprint and the carbon price paid in the country of production, to avoid double taxation[54]. The tax would have to be adopted in accordance with Article 192.2 TFEU, which empowers the Union to establish fiscal measures, adopted unanimously, for the protection of the environment.

The report issued by the European Parliament on 15 February 2021 considered, however, that this tax would not fully solve the risk of carbon leakage and would pose technical difficulties given the complexity of carbon traceability in global value chains, offering less flexibility when reflecting the evolution of the ETS price. Therefore, an ETS-based system was reached, although with the particular features noted regarding the acquisition and repurchase of allowances, no limitation on the number of certificates issued and price determination regime. As it is not a tax, the Regulation will undergo ordinary legislative procedure for its approval, with the joint adoption by the European Parliament and the Council having a qualified majority, in accordance with Articles 289 and 294 TFEU, without the requirement of unanimity.

In connection the ETS, on which the CBAM is based, the Judgment of the CJEU of 21 December 2011 (case C-366/10) concluded, moreover, that it was not a tax but a 'market-based measure'. The CJEU concluded that the ETS did not provide for an "a priori defined" tax base and rate that would allow determining the amount to be accrued per tonne of fuel consumed for flights during the calendar year, the specific sector addressed by the judgment. The Court notes that it is not "a type of tax in favour of the public authorities that can be considered a customs duty, levy or tax on the fuel owned or consumed by aircraft operators", a conclusion that is not affected by the fact that emission allowances can be acquired not only from other operators but also from the public authorities by auction.

The CBAM is not a proper emissions trading scheme, since CBAM certificates are acquired from the importing State for the average carbon price in the ETS, without a cap or auctioning. However, its link with the ETS and the variable nature of the price paid, given the possibility of handing over certificates acquired in the last two years depending on their price, with the possible repurchase of surplus allowances by the State, do not allow its classification as a tax. According to the types

52. On the notion of Community own resource, vide note No. 24.

53. The studies conducted for the preparation of the Proposal of a Regulation considered up to five possible options, some with different modalities, for the design of the CBAM. These studies were published by the Commission at the same time as the Proposal for a Regulation. Vide Ramboll DIW Umweltbundesamt FAU Erlangen-Nuremberg Ecologic Institute *Study on the possibility to set up a carbon border adjustment mechanism on selected sectors* Final report: TAXUD/2020/AO-14, of 14 July 2021. https://ec.europa.eu/taxation/customs/system/files/2021-07/Final%20report%20CBAM%20study/0.pdf

54. PÉREZ BERNABEU analyses the common notes of the Carbon Tax systems, dealing with environmental taxes on the emission of carbon dioxide, a greenhouse gas, in order to reduce its release into the atmosphere and pass on the corresponding environmental cost to its causers. The result derived from the application of this tax is the increase in prices in proportion to the emissions that production has caused. In this way, the consumption of products that have fewer carbon dioxide emissions in their manufacture is promoted. Many Community states have established such taxation for those sectors not subject to the ETS. Cfr. "El mecanismo de ajuste de carbono en frontera como impuesto medioambiental en el marco de la transición ecológica" [The carbon border adjustment mechanism as an environmental tax in the framework of the ecological transition], ob. cit., p. 134 and 135.

established in Spanish legislation, the acquisition and hand-over of CBAM certificates could be considered, on the other hand, a non-tax property contribution for public purposes (art. 31.3 Spanish Constitution), given its economic content and coercive nature[55].

In accordance with the Judgments of the Spanish Constitutional Court, TC 83/2014 of 29 May, and 44/2015, of 5 March, revenues of this nature are imposed coercively, understanding as such, those arising from a payment obligation set unilaterally by the public authorities regardless of the payer's free will, provided that such revenue, regardless of the public or private nature of the recipient, is unmistakably for the public interest. The concept of property contribution for public purposes (Art. 31.3 Spanish Constitution) is included in the first additional provision of Act 58/2003, General Tax Act, as worded by Act 9/2017, of 8 November, whereby it refers to those contributions "referred to in Article 31.3 of the Constitution that are required coercively", distinguishing between tax and non-tax. Taxes shall be those that have the consideration of duties, special contributions and levies, while non-tax contributions are those required coercively, that respond to general interest purposes.

Having established this definition, we must recall the Spanish Constitutional Court's Judgment 63/2019, of 9 May, which highlighted how the identification of this type of contribution is "by exclusion", without it being "a homogeneous category (…) in itself". They serve different purposes and have in common only, in addition to not being taxes, coerciveness and the fact that their purpose is not to finance "all" public expenses[56].

The acquisition and surrender of emission allowances under the ETS has been considered a public contribution, a classification that is also extensible, from our point of view, to the CBAM regarding the obligation to acquire and surrender its certificates[57]. This obligation has the required characteristics of being financial in content, coercive and of public interest. Coercion is evident, given that carrying out the activity of importing goods covered by the CBAM is inevitably linked to the acquisition and submission of the certificates, otherwise the business activity is not possible. And the same can be said about the economic content of the obligation and its objective of public interest, linked to the fight against climate change.

Such revenue shall be regulated by non-delegable legislation according to rule of law, as laid down in Article 31.3, which would be fulfilled by the Community Regulation, given the general and direct applicability of this standard, as interpreted by Judgments of the Spanish High Court of 3 June 2002 (appeal 273/1999), and 1 July 2005 (appeal 397/2003) in relation to the duty derived from the excess in the production and sale of the dairy quota, as it is the highest ranking regulation in the Community legal system and is of direct and preferential enforcement within Community jurisdiction[58].

55. As noted by AURA, A., DE MEDRANO, L., BILBAO ESTRADA, I. and MARCO MARCO, J., although not regulating this figure, since the Union lacks "general" financial power, Community legislation sometimes imposes contributions that lead to this concept. "La obligación de entrega de derechos de emisión de CO2: problemática constitucional derivada de su origen comunitario" [The obligation to hand over CO2 emission allowances: constitutional problems arising from their Community origin], ob.cit., p. 23.

56. Vide, inter alia, addressed by recent constitutional case-law, the deduction on pharmacy monthly billings for prescriptions of pharmaceutical forms dispensed and charged to public funds (SSTC 83/2014 of 29 May; 44/2015, 5 March; and 62/2015 of 13 April); the contribution of users in the case of certain benefits of the National Health System (STC 139/2016, 21 July) or the obligations arising from the energy saving and energy efficiency financing plan for 2011, 2012 and 2013 imposed on electricity companies (STC 167/2016, 6 October, inter alia).

57. This is the opinion of AURA, A., DE MEDRANO, L., BILBAO ESTRADA, I. and MARCO MARCO, J., "La obligación de entrega de derechos de emisión de CO2: problemática constitucional derivada de su origen comunitario" [The obligation to hand over CO2 emission allowances: constitutional problems arising from their Community origin], ob.cit., p. 27 et seq.

58. Also for AURA, A., DE MEDRANO, L., BILBAO ESTRADA, I. and MARCO MARCO, the Regulation is comparable to domestic laws in this regard. "La obligación de entrega de derechos de emisión de CO2: problemática constitucional derivada de su origen comunitario" [The obligation to hand over CO2 emission allowances: constitutional problems arising from their Community origin], ob.cit., p. 37.