



An EU CIT: Lessons, Challenges & Alternatives

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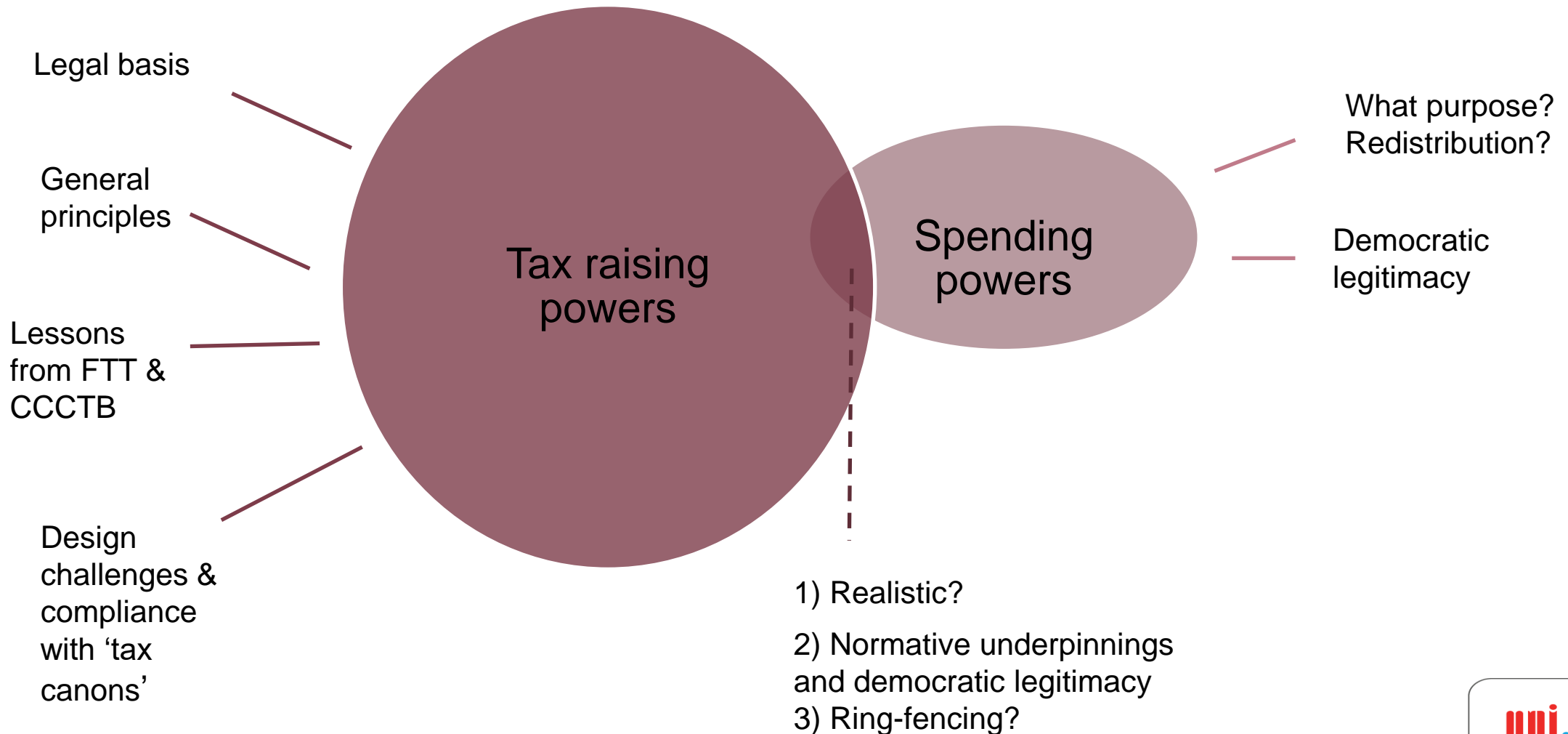
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Structure



Legal Basis Possibilities

- Approximation of tax laws provisions (Articles 113, **115 TFEU**) vs. ‘own resources’ provision (Article 311 TFEU)
- Under both provisions, restraint of **unanimity**
 - ‘Without prejudice to other revenue, the budget shall be financed wholly **from own resources**’
 - Article 311 (3): the Council may establish new categories of own resources, upon unanimous approval by the MS. = EU Tax raising power?
 - 2 different interpretations:
 - Broad reading: allows the EU to raise taxes for the benefit of the EU budget.
 - Restricted reading: MS are prohibited from refusing to contribute to the budget of the Union. (Traversa, Vanistendael: ‘With the exception of the common custom tariff, the EU has no power *whatsoever* to raise revenue by way of taxes’)

Legal Basis Possibilities

- Possibility of a **Treaty amendment** to explicitly attribute tax raising powers to the EU: unanimity required under the ordinary legislative procedure in order to proceed to such a conferral **of a new (?) competence**.
- A 'fiscal 'Union' would require Treaty amendments, providing, inter alia, the legal basis for 'a new taxation power at the EU level, or a power to raise revenue by indebteding itself on the markets (presently barred by Articles 310 and 311 TFEU)'. (Eur. Commission 2012)
- '[...] in a full fiscal and economic union which would itself *dispose of a substantial central budget, the resources for which would be derived, in due part, from a targeted, autonomous power of taxation* and from the possibility to issue the EU's own sovereign debt, concomitant with a large-scale pooling of sovereignty over the conduct of economic policy at EU level. The EP would then have **reinforced powers to co-legislate on such autonomous taxation** and provide the necessary **democratic scrutiny** for all decisions taken by the EU's executive. Member States would not be jointly and severally liable for each other's sovereign debt but at most for that of the EU' (European Commission 2012).

FTT: Legal basis

- Suggested legal basis: **Article 113 TFEU** and not Art. 311 TFEU. Grounds: harmonising legislation concerning indirect taxation on financial transactions,
 - ‘Shared spending’: **‘part of receipts** generated by the FTT shall constitute an own resource for the EU budget [...] and the portion of the FTT revenue that remains in the national budgets could be used to help consolidate public finances, invest in growth [...]. Ultimately, it will be for participating Member States to decide how the revenues of the FTT should be used.’ [Commission, 2013]
 - This type of tax already exists in the most national orders’ of the Member States, which would call for ‘harmonization’ of the existing taxes & approximation of laws.
 - The choice of Art. 113 TFEU allows for **enhanced cooperation** to apply (if there is no unanimity) while art 311 TFEU cannot be circumvented by enhanced cooperation.
 - Practical problem in case of enhanced cooperation under Art. 311 TFEU: a number of Member States would be forced to pay their contributions –in the form of the newly established taxes, while another one would contribute to the EU budget via the traditional own resources means.
 - "The use of FTT revenue as Union own resources is possible under the enhanced cooperation procedure only if national contributions of participating Member States to the Union budget could be **reduced by** the same amount and would avoid the disproportionate contribution by participating Member States compared to nonparticipating Member States.“ [EP]
- 2 COM proposal [2011] adoption of FTT under 311 TFEU, and/or under 113 TFEU but that the revenues of the tax would **be appropriated by the EU towards the EU budget.**

Legal Basis limitations?

- Art. 4 TEU: In accordance with Article 5, **competences not conferred upon the Union** in the Treaties remain with the Member States.
- Art. 5 TEU: The limits of Union competences are governed by **the principle of conferral**. The use of Union competences is governed by the **principles of subsidiarity** [except in cases of exclusive competence] **and proportionality**.

* Note Union's exclusive competence in monetary policy/Ring-fencing/ No subsidiarity argument

- Doctrine of **implied powers** [could we extract from Art. 311 TFEU an implied power?]
 - Need to define the 'exact competence' of Article 311 TFEU.
 - 2 traditional bases for implied powers: first, the existence of **legislation**, whether or not adopted within the framework of a common policy; and second, the existence of a **Union objective** for the attainment of which powers could be implied.

‘Ring – fencing’ : Giving the EMU fiscal capacity

- The Van Rompuy report recommended that the central level of the **euro area** should be equipped with powers for common decision-making on national budgets or else be given a fiscal capacity of its own
 - via the establishment of a mechanism ‘where contributions and disbursements would be based on **fluctuations in cyclical revenue** and expenditure items, or on measures of economic activity’ which would ‘be more directly linked to a specific public function sensitive to the economic cycle.’
 - Could the EMU be given tax raising powers on the legitimacy-shaky grounds of **enhanced cooperation**?
 - presupposes the (problematic) choice of **Art. 113 or 115 TFEU** as a legal basis.
 - Recourse to the *passerelle clause*, to enhance the **democratic legitimacy** of such a decision but would certainly add to the unfeasibility of such an undertaking. (Art. 333 (2) TFEU)
 - Creation of a euro area fund [redistribution purposes?]
 - ‘Introducing an EU tax will not only provide [the EU] with the funds necessary to support [a] budget increase but will contribute to a clearer justification of the project of European integration ... It is essential that the Union is seen as redistributing the Union wealth and not the wealth of some states". [Maduro]

CCCTB & Digital Services Tax: Any lessons?

- CCCTB & DST: **Not ‘EU own resources’ taxes**: no implication on the EU budget – but a single set of corporate tax rules and an EU-wide tax respectively.
- Legal basis: Article 115 TFEU & 113 TFEU respectively.
- Different reasons for adoption/normative underpinnings.
- A failure and a prediction: See the number of states raising formal objections to the CCCTB proposals and to the DST proposal.
 - Fears CC(C)TB: **National perspectives**: Impact on national tax revenue; autonomy of MS;
EU perspective: impact on business decisions; ‘vulnerability’ to all typical tax competition and tax planning strategies.
 - Fears/ Criticisms DST: Turnover tax [unfairness?]; similar to a tariff – relationship with partners and business climate in Europe? Ring-fencing at a global level; value creation = uncertain and undefinable; 3% tax on revenues for certain digital activities could hurt companies that operate on thin margins; undermining national sovereignty.
- Political & design challenges.

Yardsticks & 'canons of taxation'

- fairness,
- equity,
- neutrality,
- certainty,
- convenience,
- administration & simplicity
- Efficiency [efficient allocation of resources]
- Redistribution / Solidarity?
- Sufficiency of funds (for the EU budget) [towards what purpose?]
- Feasibility?

Design issues

- COM Action Plan 2015; CCCTB context, fairness would be ensured by linking taxation to the place where profits are generated & transparency.
- *Surcharges* vs. autonomous tax?
 - Surcharges on existing taxes and redirecting revenue from taxes remaining at the discretion of the MS => No need for a legal basis/ the EU would have to decide about the use of tax revenue only.
- Defining economic allegiance:
 - When & How does the EU contribute to the generation of CI?
 - Through freedoms & secondary legislation? What if, for example, only use = 'foreign employees'?
 - Could the DTCs function – in certain aspects as 'equalizers'?
 - 'Opportunity to access EU policies' – too vague/uncertain?
 - Quantification?
 - Exceptions? (eg. SMEs, activity within one MS only?) < **In principle**, no problem with state aid provision as long as EU tax and no involvement of MS neither in assessment, nor in imposition & collection.

Normative underpinnings – The justification for a CIT

- Why? Choice of tax instrument and allocation of tax burden.
- On the **tax raising powers** part: Against what **yardstick**?
 - Eg. Consumption tax **fairer** than an income tax? (Rawls) OR why not Energy tax vs. CIT?
 - ‘In short, either levy can be justified as fair tax policy in the abstract, with the choice depending on whether **the social-product** or **standards of living version of distributive justice** can be said to be superior as a matter of **political or moral philosophy**. In the absence of a clear showing as to that superiority, no choice can sensibly be made between the two taxes-at least as long as wealth is excluded from the comparison.’ (A. Warren, YLJ, 1980).
- On the **spending powers** part: What for/Whose interests would it serve?
 - Benefit principle: Taxes are a repayment by citizens of the costs incurred by the government to provide them various services.
 - Redistribution / Solidarity [Altruism or quid pro quo?]
 - If solidarity as a legal basis then necessity for the generated revenue to be used for redistributive purposes?
 - Would then, simply, be a supplement to the EU cohesion policy? [redistribution through regulation and taxation?]

Democratic legitimacy

- ‘No taxation without representation’ ≈ a tax cannot be levied without the consent of the persons subject to that tax.
 - Public expenditure is financed through taxation (‘no expenditure without taxation’)
 - One level of government (EU) cannot impose a tax that is specifically intended to be spent by another level of government. [so, EU cohesion policy and other policies that require ‘implementation’ by MS are excluded?]
 - The one who imposes the tax decides how the tax will be spent.
- Democratic legitimacy at the national level vs. democratic legitimacy at EU level.
 - **EP** is not involved in the case of special legislative procedure (only consultation).

‘Reinforcers’

- The EU has little fiscal capacity **but** regulates to a large extent the fiscal conduct of its Member States.
- It would democratize also spending: redistribution would depend largely on the revenues arising from taxation.
- An EU tax to finance the Union’s budget could **indirectly increase participation** in European level of politics.

Tax spending

- Unwillingness of 'net contributors' to contribute further [Redistribution & solidarity?]
 - redistribution via the EU budget is currently effectuated through *regulation* [EU Cohesion policy].
 - Additional implied costs: If redistribution through taxation does EU administration have to change? 'EU Treasury'?
 - Who would administer revenue from EU taxes? – Is further political integration a prerequisite?
- Increased spending/ Larger EU budget

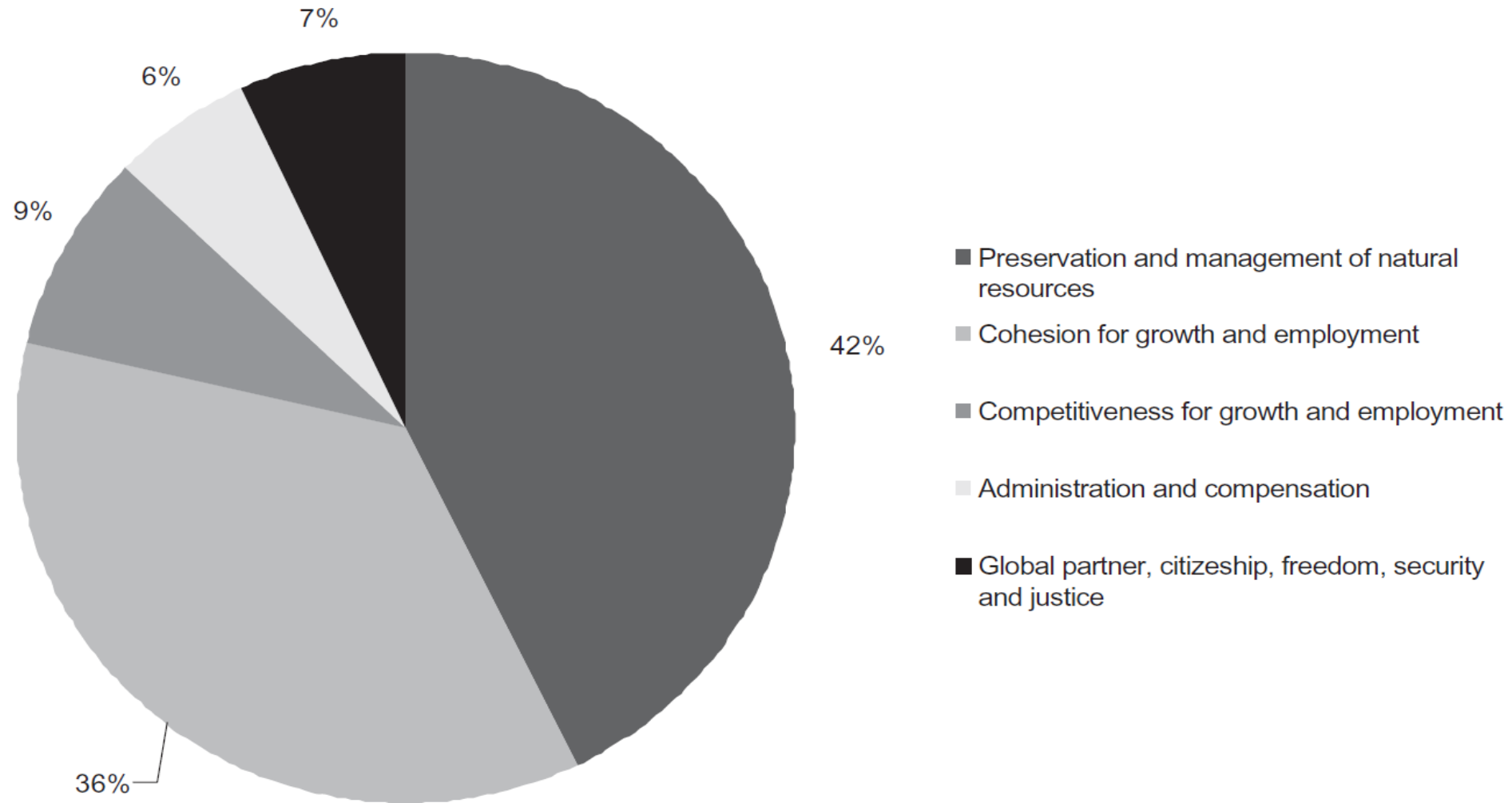
The relevance of solidarity

- *Meaning?*
- Article 2 TFEU, Article 122 TFEU and the ‘solidarity clause’ in Art. 222 TFEU, Article 3 TEU.
- *Solidarity as redistribution?* ‘Solidarity can most fruitfully be defined as the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organized by the state’. [Stjerno’s definition]
 - Solidarity as a means to achieve redistribution and having as a normative assumption social justice.
 - Solidarity connected to the notion of EU citizenship: Being an EU citizen means contributing to **EU** public expenses, regardless of the actual benefits received.
 - Is *altruism* implied in both cases? [Does it matter?]
 - Efficiency considerations?
 - No problem from a democratic legitimacy perspective (?) = EP plays an important role in the adoption of the budget, **however**, requirement only of consent when it comes to the MFF (Article 312 (2) TFEU).
- **Not** a general principle.

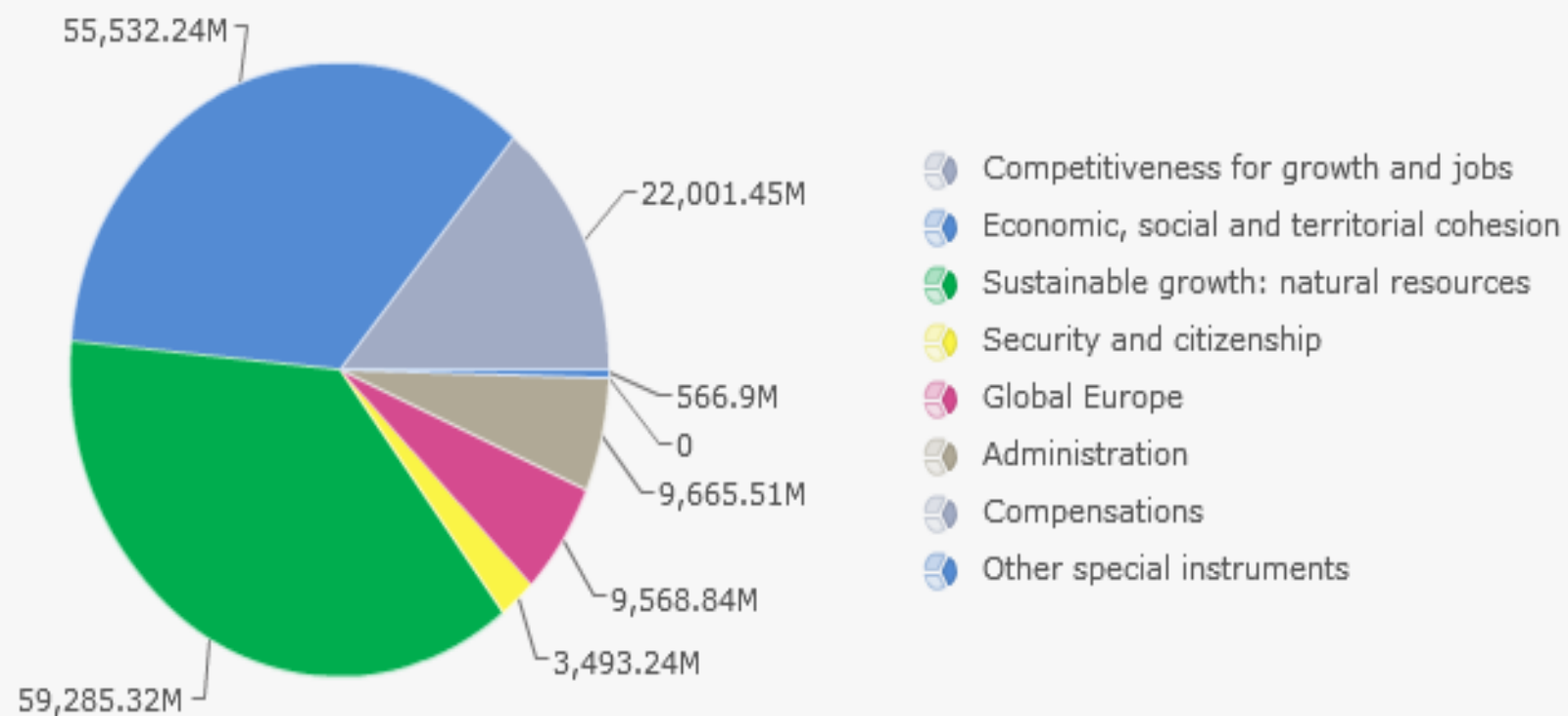
Solidarity and its connection to EU citizenship

- No direct effect < need to resort to more precise provisions?
 - Not sufficiently precise, clear and unconditional without calling for additional measures.
- Relationship to EU citizens: Extracting solidarity from EU citizenship?
 - Underlying reasoning for EU citizenship = non – discrimination
 - Are corporations EU citizens?
 - Can this combination be used as a potential legal basis?

Figure 2: EU Budget Composition, 2007–2013



2018 - Total
EUR 160,113.52 M



Conclusions

- Legal basis: deadlock
 - 311 TFEU?
 - 115 TFEU not appropriate but more chances for enhanced cooperation.
 - If so, however, more involvement for MS – more problems with regard to double taxation, collection, administration, state aid. &
 - Enhanced cooperation would not fulfil the EU CIT's purpose.
- Can an EU CIT satisfy all 'yardsticks'?
 - How to define the EU CIT tax base and determine & quantify the benefit from the EU allegiance.
 - Surcharge vs. autonomous tax.
- How can democratic legitimacy be satisfied in both tax raising and tax spending powers?