

Can the principle of solidarity be a legal basis for an EU initiative on own resources or on corporate taxation?

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Disclaimer: this is not the official position of the EC, but these are my own personal views

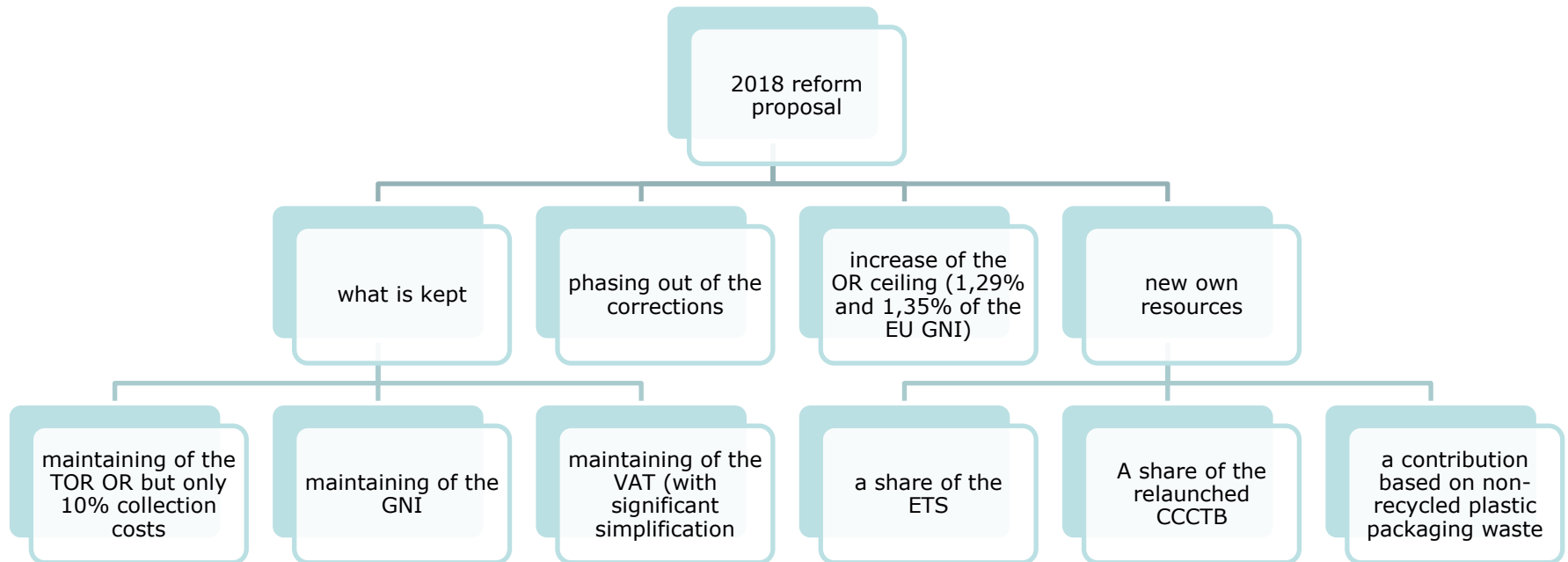
1. Legal Framework of COM(2018)325

Proposal for a Council Decision on the system of own resources in the European Union

Why a new basket of new own resources?

- better link of own resources with EU policies, such as policies on climate change
- new money to compensate for the lack of UK income in case of Brexit
- smaller proportion of the GNI contributions

Significance? 12% of the total EU budget would be covered by this new basket

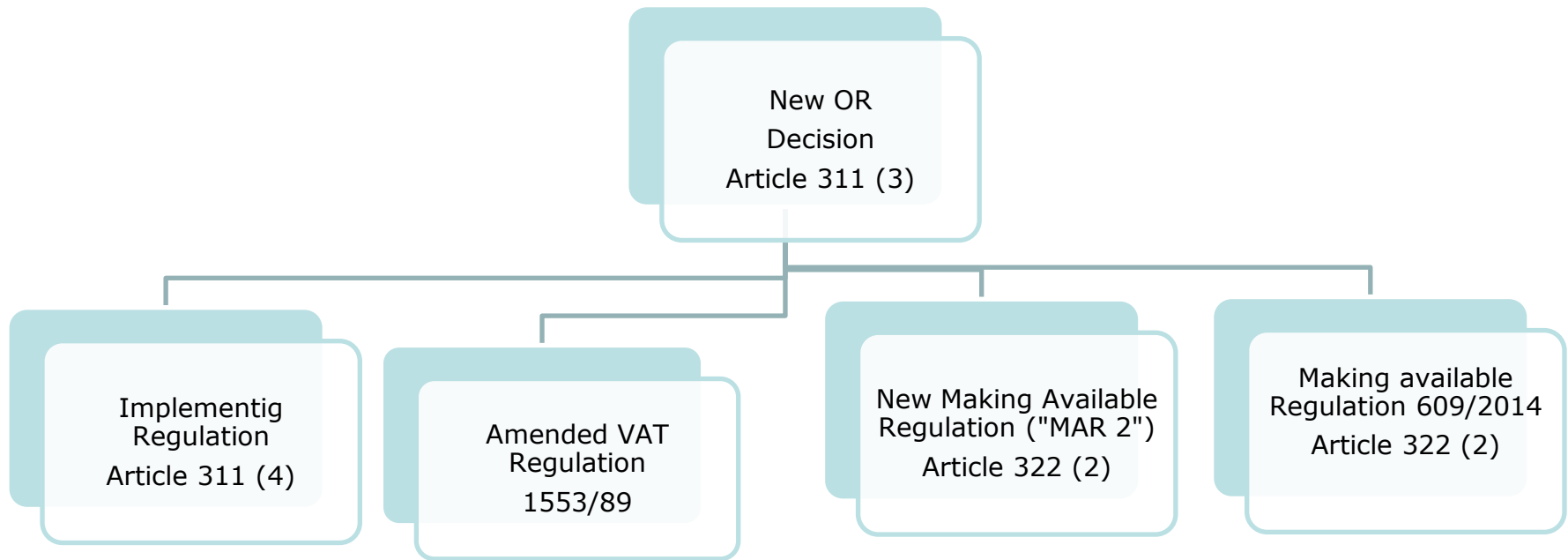


CCCTB as a new own resource

= based on 2016 proposal COM (2016)685 still to be adopted and thus conditional on the adoption of the proposal and the entry into force of the Common Corporate Tax Base

What is the CCTB own resource? a national contribution based on profits of undertakings subject to the CCTB attributed to each Member States under the harmonised rules

The legal structure of OR Decision



Legal basis in TFEU: Article 311(3) and Article 311(4) TFEU

The TFEU introduced innovations allowing for significant changes: for EU budgetary procedure + for the way the EU budget is financed.

Article 311(3) TFEU provides that the Council "may establish new categories of Own Resources or abolish an existing category" in the context of an Own Resources Decision.

Legal basis in TFEU: Article 311(3) and Article 311(4) TFEU

Article 311(4) TFEU newly provides that the "Council, acting by means of regulations in accordance with a special legislative procedure, shall lay down implementing measures for the Union's Own Resources system in so far as this is provided for in the [Own Resources] decision".

This provision introduces the possibility of setting specific implementing measures related to the Own Resources system in an implementing regulation within the limits set out by the Own Resources Decision.

No power to levy taxes for EU

The proposal does not create any new tax for EU citizens, as the EU does not have the power to levy taxes.

See also Monti report:

[...] taking into account that fiscal competences remain at the national level, and within the overall constraint of budget neutrality so that the reform of own resources envisaged do not create additional tax burden on EU citizens (page 7).

The treaties do not give the EU the competence to levy taxes but provide the Union with 'own resources' to achieve its objectives (Article 311 TFEU) while respecting the fiscal prerogatives of the Member States (page 7).

The EU does not have the power to levy taxes. This competence is the exclusive realm of Member States and the Treaty clearly recalls that fact (page 20).

2. Legal Framework of COM(2016)685: what about CCCTB as a new own resource?

*See proposal COM (2016)685: Proposal for a
Council Directive on A Common Corporate Tax
Base*

*Why? Need for fair and efficient taxation of
corporate profits; attributing income to where the
value is created; avoiding aggressive tax
planning practices = anti-tax avoidance ->
facilitates cross border trade and investment in
the internal market*

Significance of CCCTB as a new own resource?

Call rate of 3% for the EU, which corresponds to a possible annual average of approx. 12 billion Euro in the 'new basket' for the EU

Justification of CCCTB: economic benefits for firms: eg cost of setting up a subsidiary would decrease up to 67%, making it easier for companies to go abroad

Legal basis in TFEU: Article 115

The measures of approximation shall directly affect the functioning of the internal market ->

1) it will facilitate business within the EU by subjecting taxpayers to a single rulebook of corporate tax legislation to apply across the internal market

2) it will also fight aggressive tax planning

No mention of idea of solidarity...

3. References to 'solidarity' in the Treaties

Title IV of the CFR refers to 'solidarity':

Distinguish between the notion of "principle" for the purpose of CFR Article 51 and 52, and the notion of "general principle of EU law", which are applied by the European Court of Justice and the national courts of the member states when determining the lawfulness of legislative and administrative measures within the European Union to fill 'gaps' in the Treaties

3. References to 'solidarity' in the Treaties

Article 51 says that rights must be 'respected' whereas principles must merely be 'observed'.

Art. 52(5) 'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality'.

3. References to 'solidarity' in the Treaties

CJEU has not accepted "solidarity" as a general principle of EU law yet in its case law.

General principles of EU law are among others: the Principle of Equality; the Principle of Proportionality; Legal Certainty and Protection of Legitimate Expectations; the Right to Judicial Protection; the Rights of Defence; Principles Governing Liability in Damages, Subsidiarity ...

4. Conclusion

"Solidarity" does not have the 'status' yet of a general principle of EU law

Solidarity cannot be a legal basis for own resources initiatives, as Article 311 TFEU constitutes the appropriate legal basis for this purpose.

Even if "solidarity" would be elevated up to being a "general principle of EU law", given the principle of conferral (Article 5 TEU) it would not constitute a relevant legal basis to impose a EU tax.