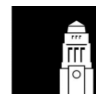
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de la Feria, R (2023) Editorial: Pillar 2, Fiat, and the EU Unanimity Rule on Tax Matters. EC Tax Review, 32 (1). pp. 2-8. ISSN 0928-2750

https://doi.org/10.54648/ecta2023001

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(2023) EC Tax Review 1, forthcoming

Pillar 2, *Fiat*, and the EU Unanimity Rule on Tax Matters

RITA DE LA FERIA*

On September 9, 2022, five Member States announced that should agreement on the legislative proposal concerning the EU implementation of global minimum corporate tax rate be impossible to achieve, they would proceed with implementation of the measure, either unilaterally or through the enhanced cooperation procedure.[1] The announcement came after one Member State, Hungary, blocked agreement at the Council meeting in June. Whilst agreement has now been reached,[2] for a while, the possibility of triggering the enhanced cooperation procedure loomed ever larger. Two months after that announcement, on November 8, 2022 the CJEU delivered its eagerly awaited decision on the *Fiat* case, concerning the use of state aid law to strike down tax deals. In what has been widely seen as a major defeat for the European Commission,[3] the CJEU allowed Fiat's appeal against the previous decision of the EU General Court, and annulled the Commission's state aid decision against Luxembourg, effectively closing – or least significantly limiting – the use of state aid law on tax matters. What do these two taxation developments have in common? On the surface, nothing other than the fact that they both concern EU initiatives on corporate tax matters; in reality, however, there is a close link between them: the EU unanimity rule in tax matters. Both the enhanced cooperation procedure and state aid law have come to be regarded as 'alternative paths' to harmonisation in taxation, where unanimous agreement under Articles 113 and 115 TFEU cannot, or would be unlikely to, be reached. These latest developments on how, and to what extent, they can be used highlight the significant – and growing – costs of keeping the unanimity rule in taxation. The question is then, is it worth keeping?

Taxation is one of only a handful of policy areas within the EU where approval of new legislation is still dependent upon unanimous voting. Over the years, there have been several attempts to move away from the unanimity rule, but these have been met with strong resistance from (some) Member States. The difficulties in approving EU tax legislation, resulting from the endurance of the unanimity rule, have led to the development of various alternative circuitous paths to harmonisation, including most

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[1] L. Thomas, "Five big EU States to Implement Minimum Corporate Tax if no EU Deal", *Reuters*, September 9, 2022.

[2] European Commission, *Statement by Commissioner Gentiloni on the adoption of the Directive on Minimum Effective Taxation for Multinationals*, STATEMENT/22/7786, 15 December 2022.

[3] F.Y. Chee, "Blow for EU Crackdown on tax deals as Fiat wins Appeal", *Reuters*, November 8, 2022; and O. Hoor, "Fiat Wins Appeal Before CJEU – A Beacon of Hope for Legal Certainty", *Bloomberg Tax*, November 25, 2022.

recently state aid law and enhanced cooperation. This Editorial considers the current approach of keeping the unanimity rule, whilst at the same time consistently exploring alternative pathways to circumvent it. Its central argument is that this approach is a reflection of the trade-off between (perceived) national tax sovereignty on one hand, and tax efficiency and fairness on the other hand. Whilst keeping this rule arguably ensures higher (although far from absolute) levels of tax sovereignty for Member States, it also results in less efficient, and probably less equitable, tax systems within the Union. Conversely, abolishing it would improve tax efficiency, and probably equity, even if it would also result in lower levels of tax sovereignty. As the recent Court decision in *Fiat* demonstrates, however, the current approach of keeping the unanimity rule whilst consistently exploring new alternatives to circumventing it, has led to high levels of legal uncertainty, with limited gains for either tax sovereignty, or tax efficiency and fairness.

Tax Sovereignty: Keeping the Unanimity Rule

It is often staid that EU Member States have retained full sovereignty on tax matters, but this is not fully accurate. First, from a global perspective, national tax sovereignty is *de facto* limited by many factors. These limitations can be voluntary, for example, sovereignty can be constrained by entering bilateral or multilateral treaties, or involuntary, for example, sovereignty is constrained by global dynamics of corporate tax competition.[4] Far from nominal, these constraints are not only significant, but they have been increasing over time. Tax sovereignty is not a monolithic, immutable concept, but one that is in constant process of reconfiguration. In particular, growing capital mobility and more generally the globalisation and digitalisation of the economy in the last decades, mean that countries capacity to levy taxes freely – corporate especially, but also personal – has been progressively decreased. To the point that, despite the, at times, idealised perceptions of tax sovereignty, tax cooperation is arguably a higher guarantor of tax sovereignty, than non-cooperation.[5]

Second, from an EU constitutional perspective, national tax sovereignty is limited by the need to respect primary EU law, for example the fundamental freedoms and general principles of EU law,[6] and by the constitutional mandate to approve EU legislation when harmonisation is necessary to ensure the establishing and the functioning of the internal market. This mandate is particularly strong as regards consumption taxes, under Article 113 TFEU, which not only confers competence upon the Union to

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[4] Although authors used different classifications, there is a general agreement that in a globalised world national tax sovereignty is *de facto* limited, even in countries outside the EU or any other form of economic integration. See amongst others, C.E. McLure, “Globalization, Tax Rules and National Sovereignty” (2001) *Bulletin for International Fiscal Documentation* 55(8), 328-341; and R. Avi-Yonah “Tax Competition, Tax Arbitrage, and the International Tax Regime” (2007) *Bulletin for International Fiscal Documentation* 61(4), 130-138.

[5] The argument is further developed in R. de la Feria, “The Perceived (Un)fairness of the Global Minimum Corporate Tax Rate” in W. Haslehner et al (eds), *The Pillar 2 Global Minimum Tax* (Edward Elgar, 2023).

[6] On this regard, the standard of judicial review as regards income taxes is arguably higher than as regards consumption taxes, see R. de la Feria, “VAT and the EC Internal Market: The Shortcomings of Harmonisation” in D. Weber (ed.), *Traditional and Alternative Routes to European Tax Integration* (Amsterdam: IBFD, 2010), 267-308.

harmonise tax laws, but sets up an obligation to do so insofar as "[it] is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition",[7] but it is also subjacent to Article 115 TFEU.

Nonetheless, it is undeniably true that the level of national sovereignty on tax matters is higher than in almost all other areas of public policy falling within the scope of EU legal competence. This is because, as opposed to those other areas, unanimity voting ensures that Member States still retain a veto power on approval of all new EU tax legislation. Although this veto power constituted the most frequent form of approving legislation within the original version of the EEC Treaty, consecutive Treaty amendments, starting with the Single European Act in 1986, have progressively moved away from unanimity and towards qualified majority voting (QMV). This process culminated with the Lisbon Treaty in 2007, which established the ordinary legislative procedure,[8] under which new EU legislation is approved jointly by the European Parliament and the Council, voting by simple or qualified majority,[9] as the default legislative procedure for all areas of EU policy. Tax matters have, however, been left out of these amendments.

Indeed, although even other potentially sensitive areas of public policy, such as immigration and asylum, are now decided under the ordinary procedure, tax matters continue to fall under what is now classified as an exception to that procedure, namely a special legislative procedure.[10] This special legislative procedure, set out in Articles 113 and 115 TFEU, determines that EU tax legislation will be approved solely by the Council, voting by unanimity, after consultation of the European Parliament and the Economic and Social Committee.[11] Keeping this special procedure and leaving tax matters effectively out of the scope of QMV has been far from uncontroversial.

There have been calls for removal of the unanimity rule on tax matters from as early as the 1980s. It is said that even during the negotiations that preceded the approval of the Single European Act, the Commission fought hard for the switch to QMV on taxation, and in particular as regards consumption taxes.[12] In a last attempt, the Commission attempted to limit the use of QMV to specific areas of consumption taxation, however, even this water-down version faced opposition from Member States,

[7] What has been designated as 'mitigated centralised model of regulation' see R. de la Feria, *The EU VAT System and the Internal Market* (IBFD, 2009), Chapter 1.
[8] Article 289(1) TFEU.
[9] Article 294 TFEU.
[10] Article 289(2) TFEU. For an analysis of the evolution of law-making rules post-Lisbon treaty, see P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP, 2010).
[11] Although the results from the consultation are not mandatory, consultation itself is, see Case 138/79, *Roquette Freres*, ECLI:EU:C:1980:249.
[12] See C.D. Ehlermann, "The Internal Market following the Single European Act" (1987) *Common Market Law Review* 24, 380.

and in particular from the UK, which regarded all tax matters as a red-line.[13] The matter resurfaced again during the European Convention negotiations, which eventually led to the Lisbon Treaty.

A majority of the members of the Working Group on Economic Governance, whose competence included taxation, agreed that "*amendments should be made to the decision-making procedures in order to facilitate progress in the area of fiscal policy*". In this context, it recommended a move from unanimity to QMV on specific measures, namely those *"linked to the proper functioning of the internal market, areas affecting directly the fundamental freedoms or where such measures might be essential for sustainable development*".[14] These recommendations, however, encountered significant resistance, and the Treaty's final draft included a much less radical approach, namely:[15] unanimity would continue to apply as regards harmonisation of indirect taxes as a general rule; as an exception, QMV would apply where the measures relate to administrative cooperation or to the combating of fraud. Ultimately, however, Member States could not agree on these proposals either and in the final version of the Treaty on the Constitution of Europe – later, the Lisbon Treaty – unanimity was kept for all tax measures.

The most recent attempt to move away from unanimity and implement a progressive and targeted transition to QMV came in early 2019. In January that year, the Commission unveiled a roadmap, which proposed using the general *passarelle* clause in the TEU for this purpose.[16] The clause sets out a mechanism for introducing Treaty change of a very specific nature, namely authorising the Council to act by QMV in areas where unanimity usually applies. Alas, a decision adopted under that clause requires itself unanimous voting by the European Council, and it soon became clear that '*a considerable number*' of Member States was opposed to the change.[17]

Member States' resistance to QMV in tax matters is not unfounded; there are indeed (arguably) good reasons to keep the unanimity rule. Defenders will argue that not only that tax sovereignty is a fundamental aspect of state sovereignty, but fiscal policy – and thus tax policy – is the only instrument of macro economy policy still available to Member States, namely after the introduction of the Euro

[13] D. Allen, "European union, the Single European Act and the 1992 programme", in D. Swann (ed.), *The Single European market and beyond – A study of the wider implications of the Single European Act*, Routledge, London, 1992, at 42.
[14] Interestingly, although this was the view of the majority Working Group members, this consensus hides some divergent approaches, namely some of its members wished to see a wider extension of the QMV to tax matters, whilst others would prefer to maintain unanimity in all tax matters. See *Final Report of Working Group VI on Economic Governance*, CONV 357/02, 21 October 2002, 6-7.
[15] For a strong defence of the 'competition model' on tax matters, see *Proposals by the CDU and the CSU for a European Constitutional Treaty*, CONV 616/03, 1 April 2003. According to the Presidium, the objective was to "respond to calls from the Working Group for a move to QMV on tax issues, whilst recognising the sensitivity of this issue as expressed by a number of members of the Convention both in the Working Group and the plenary", see *Draft sections of Part Three with comments*, CONV 727/03, 27 May 2003, 4.
[16] Article 48(7). European Commission, *Towards a More Efficient and Democratic Decision-Making in EU Tax Policy*, COM(2019) 8 final, 15 January 2019.
[17] J. Englisch, "Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonisation" (2020) *EC Tax Review* 2, 58-61.

and the centralisation of monetary policy.[18] This was particularly evident during the 2008/2009 financial crisis, when tax policy took central stage in national crisis responses.[19] QMV on tax matters would not be equivalent, or even close, to centralisation of fiscal policy – or even of tax policy – akin to what has happened with monetary policy, but it would eliminate a veto power, which would likely impact upon the tax sovereignty of smaller EU Member States, with a smaller number of votes, to the greatest degree. Nevertheless, it is also true that the unanimity rule in tax matters creates very significant difficulties, and it comes at a high cost, namely that of more efficient and more equitable tax systems across the Union.

First, as the Commission has consistently pointed out, in the context of a globalised and digitalised economy a purely national approach is no longer fit for purpose. Thus, the unanimity rule has hampered progress on important tax initiatives designed to address common, and pressing, challenges.[20] Second, as the discussions on the global minimum corporate tax rate demonstrate, unanimity creates the opportunity for Member States to use their tax veto as a bargaining tool to obtain political leverage, or concessions, in another policy area. Hungary was said to be blocking approval of the EU proposal on the topic, not due to its opposition to the measure, but to prevent the imposition of EU sanctions for violation of the rule of law, and the approval of a new assistance package to Ukraine.[21] Third, the unanimity rule distorts EU tax policy priorities. Legislative proposals will be necessarily conditioned by the unanimity rule, i.e. they will reflect the areas where – and the extent to which – the Commission thinks it can get unanimous agreement on; not necessarily the most pressing issues, or addressed in as much detail as required. Finally, even when legislation is approved, the price for unanimous agreement is lower standard legislation: legislative lacunas where agreement was not possible; ambiguous language where agreement was conditional to wording that allowed for different legal interpretations; legal implementation left to Member States, with only limited guidelines.

A switch to QMV would likely result, therefore, not only in more EU tax legislation, but arguably more meaningful and higher quality legislation, increasing the efficiency and fairness of the tax system. In the absence of QMV, however, EU institutions – and Member States – have tried to achieve those same objectives by attempting to circumvent the unanimity rule, and exploring alternative paths to harmonisation.

Tax Efficiency and Fairness: Circumventing the Unanimity Rule

[18] Even before the introduction of the Euro, authors raised concerns over the impact of the establishment of an EMU on fiscal sovereignty, see A.J. Easson, *Taxation in the European Community* (Athlone Press, London, 1993), 18-19.
[19] R. de la Feria, "Blueprint for Reform of VAT Rates in Europe" (2015) *Intertax* 43(2), 154-171.
[20] European Commission, n. 17 above.
[21] European Parliament, *As Hungary blocks global tax deal, MEPs denounce national vetoes*, Press Release, 06-07-2022.

Over the years, various alternative paths to harmonisation have been used or proposed to overcome the difficulties in achieving unanimous agreement on tax proposals. As summarised in the table below, some of these alternative paths are tried and tested, having been in use for many years (traditional alternatives); others are more recent, of which some are tried but until recently, untested (new alternatives), others are as yet untried (untested alternatives).

Table: Alternative Paths to Harmonisation

	Risks	Availability
Traditional Alternatives		
Judicial Harmonisation	Lack of uniform application Limited enforceability and potential for non-compliance Limited scope for extrapolation and content limitations Legitimacy concerns	Yes
Soft Law	Non-binding value Legitimacy concerns	Yes
New Alternatives		
State Aid	Legal uncertainty Legitimacy concerns	(Probably) No
Untested Alternatives		
Enhanced cooperation	Partial, multi-speed harmonisation Legitimacy concerns (tax spillovers)	Untested (probably yes)
Article 116 TFEU	Limited scope of application Legal uncertainty Potential for non-compliance	Untested (probably no)

Judicial Harmonisation and Soft Law

The role of the CJEU on tax matters can hardly be overstated. The difficulties approving EU legislation has transformed the Court's jurisprudence into a fundamental source of EU tax law – and arguably the main source on income taxes.[22] The adoption of this role by the Court cannotbe characterised as unproblematic, however. As that role increased and became more evident, so did criticisms to the Court's approach to tax cases. These range from the very specific – concentrating on particular decisions and on specific cases – to a general disproval of the Court's fundamental decision of applying its traditional free movement jurisprudence to income tax matters.[23] The main criticisms tend to be the

[22] At present tax cases reportedly constitute approximately 10% of all cases decided by the CJEU, see R. Mason, "Made in America for European Tax: The Internal Consistency Test" (2008) *Boston College Law Review* 49, 1277, at 1281. However, the majority of these – close to 7% – concerns VAT, see R. de la Feria, n. 6 above, at 259-261.

[23] S. Kingston, "The Boundaries of Sovereignty: The ECJ's Controversial Role Applying Internal Market Law to Direct Tax Matters" (2006-2007) *Cambridge Yearbook of European Legal Studies* 9, 287-311.

Court's lack of sovereignty or the Court's threat to national tax sovereignty;[24] its lack of awareness of the particularities of tax law when making its decisions;[25] its lack of concern for the potential budgetary implications of its decisions;[26] or controvertibly its under-zealousness when applying the fundamental freedoms to tax matters.[27] Almost all point to the inconsistency and unpredictability of the Court's decisions, with serious consequences for legal certainty. The controversy caused by the tax jurisprudence of the Court is such, and its budgetary consequences so considerable, that at the negotiations that preceded the Treaty of Lisbon representatives of some Member States reportedly considered stripping the Court of its jurisdiction over tax cases –[28] and not for the first time.[29]

More fundamentally, however, beyond the political implications and legitimacy concerns over the Court's intervention on taxation matters, there are also significant limitations to judicial harmonisation. First, judicial harmonisation does not always ensure uniform application. Not only because, despite the *de facto* rule of precedent,[30] the legal value of the Court's judgments is, in theory at least, *inter partes* rather than *erga omnes*, but crucially, because enforceability is problematic.[31] Second, and perhaps more importantly, the content of these judgments is often unsatisfactory. Decisions are by nature concrete, based on factual *minutiae*, and thus hard to extrapolate from, so that each decision often gives rise to more questions. Moreover- and partly as a consequence of the nature of the EU judicial procedure (no dissenting vote, need for legal translations) - judgments are often vague and the terminology imprecise. Finally, decisions often crease a legal vacuum, they have the "power to destroy" existing rules, rather than approve new ones; one of the key consequences of this power to destroy is also that decisions do not necessarily improve tax efficiency or neutrality.[32]

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[24] D. Weber, "In Search of a (New) Equilibrium Between Tax Sovereignty and the Freedom of Movement Within the EC" (2006) *Intertax* 34, 585; and G. Bizioli, "Balancing the fundamental freedoms and tax sovereignty: some thoughts on recent ECJ case law on direct taxation" (2008) *European Taxation* 3, 133.

[25] J. Avery Jones, "Carry on Discriminating" (1995) *British Tax Review* 6, 525; D. Williams, "*Asscher*: The European Court and the Power to Destroy" (1997) *EC Tax Review* 6, 4; and P.J. Wattel, "Red Herrings in Direct Tax Cases Before the ECJ" (2004) *Legal Issues of Economic Integration* 31(2), 81-95.

[26] O. Thömmes, "Effect of ECJ Decisions on Budgets of EU Member States: EC Law Without Mercy?" (2005) *Intertax* 33(12), 560-561.

[27] G. Kofler and R. Mason, "Double Taxation: A European 'Switch in Time?'" (2007) *Columbia Journal of European Law* 14, 63.

[28] F. Vanistendael, "The ECJ at the crossroads: balancing tax sovereignty against the imperatives of the Single Market" (2006) *European Taxation* 9, 413-420.

[29] G. Kofler, "Austria", in C. Brokelind (ed.), *Towards a Homogeneous EC Direct Tax Law* (Amsterdam: IBFD, 2007), 59-100, at 59.

[30] Whilst formally there is no EU rule of precedent, such a rule can be arguably traced back to the Court's decision in *Costa*, and cemented by the *acte claire* doctrine in *CILFIT*, see P. Craig, "The Classics of EU Law Revisited: CILFIT and Foto-Frost" in M. Maduro and L. Azoulai (eds), *The Past and the Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010), 185-191.

[31] On the high levels of non-compliance and the limitations on enforceability of EU law, see P. Wennerås, "Sanctions Against Member States Under Article 260 TFEU: Alive, But Not Kicking?" (2012) *Common Market Law Review* 49, 145–176; and G. Falkner, "A causal loop? The Commission's new enforcement approach in the context of non-compliance with EU law even after CJEU judgments" (2018) *Journal of European Integration* 40(6), 769-784.

[32] This argument is developed further in R. de la Feria and C. Fuest, "The Economic Effects of EU Tax Jurisprudence" (2016) *European Law Review* 41(1), 44-71.

Soft law was also increasingly used from the late 1990s onwards. As expressly acknowledged by the Commission, the motivation for this development was to clear: "*in view of the difficulty of reaching unanimous agreement on legislative proposals, the use of non-legislative approaches or 'soft legislation' could be seen as an additional means of making progress in the tax field*".[33] One of the first – and still one of the most important instruments of soft law in taxation – was the Code of Conduct of Business Taxation,[34] but various others followed, most notably the VAT Guidelines and Explanatory Notes. The Code of Conduct is regarded as a particularly effective political instrument, relying as most soft law does on peer pressure for its effectiveness;[35] and the role of soft law on the VAT area has been complimented from a governance perspective.[36] The strengths of soft law, however, are also its limitations. Whilst the lack of binding value facilitates approval, it also makes it unreliable. From a Member States perspective, peer-pressure is not sufficient when the stakes are high; and from a taxpayers' perspective, reliance on peer-pressure is insufficient in a commercial context.

These limitations ultimately led to the search for new alternative paths to harmonisation. Indeed, whilst always evident, they became particularly problematic in the context of a globalised and digitalised economy. From the late 2000s onwards, the priority was no longer the mere removal of obstacles to EU trade, but to address the massive challenges that the new economy posed to the efficiency and equitability of our tax systems – and neither case law nor soft law had the potential to do so.

State Aid Law

The use of state aid rules within taxation, and particularly corporate incomes taxes, goes back several decades,[37] with the CJEU confirming as early as 1974 that the Commission's competence in the field of State aid control also covered direct taxation.[38] This use has, however, significantly evolved over time, and the latest stage of this evolution, arguably, started just over a decade ago, with the CJEU judgment in *Gibraltar*,[39] and the subsequent decision of the European Commission initiated investigations of tax rulings of several Member States suspect of being in breach of State aid law.[40] These eventually led to the court proceedings in *Apple* (Ireland), *Starbucks* (Netherlands), *Amazon* (Luxembourg), and *Fiat* (Luxembourg), which challenged the Commission's decisions to regard

[33] European Commission, *Tax Policy in the European Union – Priorities for the Years Ahead*, COM(2001) 260 final, OJ C284, 10.10.2001, 6-19.
[34] OJ C2, 06.01.1998.
[35] H. Gribnau, "Improving the Legitimacy of Soft Law in the EU Tax Law" (2007) *Intertax* 35(1), 30-44.
[36] M. Lamensch, "Soft law and EU VAT: From informal to inclusive governance?" (2016) *World Journal of VAT/GST Law* 5(1), 9-31.
[37] W. Schön, "Taxation and State Aid Law in the European Union" (1999) *Common Market Law Review* 36(4), 911-936.
[38] Case C-173/73, *Italy v Commission*, ECLI:EU:C:1974:71.
[39] Joined cases C-106/09P and C-107/09P, *Commission and Spain v. Gibraltar and United Kingdom*, ECLI:EU:C:2011:732.
[40] E. Forrester, "Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?" (2018) *EC Tax Review* 27(1), 19-35.

transfer pricing deals between Member States and those companies as illegal state aid. Subjacent to all these cases was a key two-part premise, namely that: *(i)* in the absence of harmonisation, the benchmark for what are acceptable levels of corporate taxation within the Union are the ones set out under the OECD standards; and *(ii)* when compared to that benchmark, the rulings by those tax administrations had allowed companies to pay too little corporate income tax.

The link between the lack of harmonisation of allocation of corporate taxing rights and these state aid cases was clear from the outset, and expressly acknowledged by Advocate General Pikamäe in *Fiat*, who characterised the Commission's use of an unwritten benchmark, based on the OECD standards, as 'undue interference in the Member States' tax autonomy'.[41] The CJEU emphatically endorsed this approach, stating that

> *'[the Commission] did not did not... have the power autonomously to define the 'normal' taxation of an integrated company, disregarding national tax rules…[as] the autonomy of a Member State in the field of direct taxation, as recognised by the settled case-law … cannot be fully ensured if, in the absence of any such approximation measure, the examination carried out under Article 107(1) TFEU is not based exclusively on the normal tax rules laid down by the legislature of the Member State concerned*'[42]

Court thus seems to effectively close-down the path of using state aid law to overcome the lack of tax harmonisation, expressly invoking tax sovereignty. It has been argued that, *Fiat* does not completely kill off the use of state aid rules in taxation, as the Court still explicitly endorses *Gibraltar*.[43] This endorsement is therefore being interpreted as essentially confirming that state aid can still be used on tax – perhaps even to challenge national allocation of taxing rights rules (rather than their application). Given the strength of the Court's language against the creation of a new benchmark of "normal taxation", this is doubtful. Instead, the endorsement can be simply read as symptomatic of the Court's usual approach to the EU rule of precedent: formal reinstating previous case law, whilst *de facto* departing from it, by distinguishing on a factual basis.

It remains to be seen what the correct interpretation of the Court's position in *Fiat* is as regards the use as state aid law as an alternative path to harmonisation. What can be surmised already, however, is that the cases highlight the tension at the heart of EU tax policy resulting from the unanimity rule. On one hand, they demonstrate the costs of maintaining the unanimity rule. The difficulties in harmonising corporate taxation has allowed competition to deepen, with significant impact on: *(i)* efficiency, as corporate tax competition under a Nash equilibrium will not be welfare enhancing, and leads to Pareto

[41] Case C-885/19 P, *Fiat v Commission*, ECLI:EU:C:2021:1028, at para. 111.
[42] Joined Cases C-885/19 P and C-898/19 P, *Fiat v Commission*, ECLI:EU:C:2022:859, at para 94.
[43] R. Mason, "Ding-Dong! The EU Arm's-Length Standard is Dead" (2022) *Tax Notes International* 108, 1249-1256.

inefficient low rates;[44] and (ii) equity, as not only companies in the same situation are unlikely to be treated similarly (horizontal equity), but bigger companies are more likely to benefit from a more favourable regime, not least due to their higher mobility (vertical equity). On the other hand, they demonstrate the costs of maintaining the unanimity rule, by using alternative paths to harmonisation. As most scholars consistently pointed out, and the Court implicitly acknowledges, these cases, and in particular the creation of an (imaginary) benchmark of ideal corporate taxation levels, significantly undermined legal certainty.[45]

Enhanced Cooperation Procedure and Article 116 TFEU

Over the years, a few additional paths to harmonisation have been considered as viable alternatives to Articles 113 and 115 TFEU, albeit never actually tested. Most of these have received only a fleeting mention, but enhanced cooperation and Article 116 TFEU are ubiquitous.

The enhanced cooperation procedure was originally established by the Treaty of Amsterdam in 1997, but remained unused until 2010 due to the 'forbiddingly difficult' and restrictive conditions.[46] In 2001, the Nice Treaty substituted unanimity voting for QMV, substantively facilitating the potential use of the procedure. The procedure could henceforth be seen as a method of circumventing the unanimity requirement in the few areas, included taxation, where it still applied. Yet, the procedure was not popular amongst Member States, and in 2013, the Financial Transactions Tax (FTT) proposal became only the third occasion in which the procedure was used, and the first as regards tax issues.[47] Given the limited experience, uncertainty persists on the application of the procedural and substantive conditions for its use.[48] As regards tax matters, one substantive condition is particularly problematic, namely the requirement that enhanced cooperation cannot '*undermine the internal market, or social and territorial cohesion, and cannot constitute a barrier to or discrimination in trade between Member States, nor can it distort competition*'.[49] Indeed, any tax measures is susceptible of having significant spillovers for non-participating Member States – this was arguably the case with the FTT despite the Court's argument

[44] M. Keen and K. Konrad, "The Theory of International Tax Competition and Coordination" in A. Auerbach et al (eds), *Handbook of Public Economics*, Vol 5 (Amsterdam: Elsevier, 2013).
[45] L. Parada, "Between Apples and Oranges: The EU General Court's Decision in the Apple Case" (2021) *EC Tax Review* 2, 55-63; and L. Parada, "Amazon and the State Aid Saga" (2022) *Cahiers de Fiscalite* 1, 95-109.
[46] S. Weatherill, 'Finding space for closer cooperation in the field of culture' in G de Burca and J. Scott (eds.), *Constitutional Changes in the EU: From Uniformity to Flexibility?* (Oxford: Hart, 2000), 241.
[47] For a detailed analysis of the FTT proposal, see R. de la Feria and R. Ness, "The EU Financial Transaction Tax as an Unsuitable and Unnecessary Proxy Tax" (2016) *Canadian Tax Journal* 64(2), 373.
[48] R. Ness, "An Analysis of the Financial Transaction Tax and the EU Enhanced Cooperation Procedure" (2015) *EC Tax Review* 24(6), 294-308. See also CM Cantore, "We're One, But We're Not the Same: Enhanced Cooperation and the Tension Between Unity and Asymmetry in the EU" (2011) *Perspectives on Federalism* 3(3), 1.
[49] It has been suggested that the criterion essentially means that enhanced cooperation 'does not worsen the (current) fragmentation of the internal market', see F. Fabbrini, 'Taxing and Spending in the Eurozone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax' (2014) *European Law Review* 39(2), 155, at 168.

dismissal,[50] but even more so as regards a minimum corporate tax rate. Also problematic, albeit not so far debated, is the fact that the risks of internal market fragmentation increase with the number of times of procedure is used on tax matters: if used once, the procedure will result in "only" two levels of tax harmonisation; if used more often, the procedure will result in multiple levels of tax harmonisation, with potentially various combinations of Member States.

The FTT proposal notoriously failed to get approval. In 2016, Estonia's decision to leave the enhanced cooperation procedure triggered a legal and political debate, which eventually sealed the proposal's fate.[51] Since then, various legislative proposals that failed to get Member States' unanimous support, were rumoured to be proceeding through enhanced cooperation, including more formally the Common Corporate Tax Base.[52] The announcement on September 9th, regarding the minimum corporate tax rate is therefore part of a wide pattern, and thus unsurprising. A move in that direction, however, would have encountered the same challenges faced by previous tax proposals – not just ensuring that nine Member States remained on board, but crucially that the proposed two-speed tax harmonisation did not lead to the fragmentation of the internal market. Given the level of legal uncertainty surrounding the procedure and the difficulty of fulfilling the substantive criteria on tax matters, it is also likely that, even if the proposal was approved, the new legislation would have been subject to legal challenge.

Would the use of Article 116 TFEU hold any more promise then? Probably, no. In 2020, the Commission pledged to make '*full use of the clauses in the Treaties that allow proposals on taxation to be adopted by co-decision and qualified majority voting*'. Few provisions in the Treaty lend themselves to this approach, however, so attention turned almost exclusively to Article 116 TFEU,[53] which provides a legal basis for the approval of legislation to address a distortion of competition in the internal market derived from differences in Member States' legislations that 'needs to be eliminated'. The substantive scope of the provision is not limited to specific policy areas, and can thus be applied to taxation, as confirmed by the Court.[54] Despite confirming its commitment to use Article 116 TFEU to move its tax policy agenda,[55] the Commission has so far abstained from doing so, presumably due to the significant risks that taking that such an approach would carry. First, the criteria for legislating

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[50] Case C-209/13, *United Kingdom v Council*, ECLI:EU:C:2014:283. See, however, J. Vella, J. Englisch, and A. Yevgenyeva, 'The Financial Transaction Tax Proposal Under the Enhanced Cooperation Procedure: Legal and Practical Considerations' (2013) *British Tax Review* 2, 223; and A. Soone, 'Some Legal Issues with Implementing Commission Proposed Financial Transactions Tax in Estonia' (2014) *Intertax* 42(1), 44-50.

[51] R. de la Feria and R. Ness, n. 48 above. On the political aspects of the negotiation, see P Wahl, 'More Than Just Another Tax: The Thrilling Battled over the Financial Transactions Tax: Background, Progress, and Challenges' in T Pagge and K Mehta (eds), *Global Tax Fairness* (Oxford: OUP, 2015), 204.

[52] European Commission, *Proposal for a Council Directive on a Common Corporate Tax Base*, COM(2016) 685 final, 25 October 2016.

[53] J. Englisch, n. 18 above.

[54] Case C-174/02, *Streekgewest*, ECLI:EU:C:2005:10, para. 24.

[55] European Parliament, *The Commission's proposal to fight aggressive tax planning using Article 116 of the Treaty on the Functioning of the European Union (TFEU) – ensuring greater tax fairness and social justice*, Parliamentary question - E-005215/2020, 24.9.2020.

under that provision are, in many ways, stricter than those applied under Articles 113-115 TFEU, not least because it requires that the distortion created by the difference in tax regimes is sufficiently serious and significant to require immediate and prompt intervention.[56] Second, considering that at present little is known generally about the criteria in Article 116 TFEU, and nothing about its potential application to taxation, using that provision as an alternative to Articles 113 and 115 is likely to create, not only significant legal uncertainty, but a risk of Member States' non-compliance.

Tax Sovereignty vs Tax Efficiency and Fairness

There is no good alternative to the unanimity rule in tax matters. The traditional alternative paths to integration (*judicial intervention, soft law*) have significant limitations, and the new alternative paths have either been deemed largely unacceptable by the Court (*state aid*), and/or carry significant risks (*enhanced cooperation, Article 116 TFEU*). This therefore raises the question of whether the unanimity rule should be kept, or whether it is time to move to QMV on tax matters. The answer to that question is that – as it is often the case – it depends.

There is very little in tax policy that is all good, or all bad. Choosing the best policy option is in essence a judgement call on trade-offs: on balance *x* is better than *y*. A switch to QMV – even if only partial, for either specific taxes, or for specific areas of the tax system – would (arguably) limit Member States' tax sovereignty, but would also open the opportunity for more efficient and equitable tax systems, both across the Union, and domestically. Maintaining the EU unanimity rule, on the contrary, means accepting that less efficient and equitable tax systems are, on balance, a price worth paying for keeping veto power on tax matters. The current approach of keeping the unanimity rule, whilst finding new ways to circumvent it, has not fundamentally changed this balance of trade-offs. Although it has arguably placed political pressure on Member States, pursuing alternative new paths to harmonisation has improved neither the efficiency, nor the equity, of our tax systems. The benefits are, therefore, dubious at best, and yet the costs are high – not just from a resources perspective, but critically, in terms of legal certainty, and the stability and reliability of our tax systems. The time may have come in the integration process to re-think the unanimity rule on tax matters; until then, however, we should keep our cool. Tax policy matters, but the rule of law matters more. If we undermine it, we undermine it for everything, not just for the things we do not like.

[56] For a detailed analysis of what he designates as the 'nuclear option', see J. Englisch, n. 18 above. See also M. Nouwen, "The Market Distortion Provisions of Article 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?" (2021) *Intertax* 49(1), 14-28.