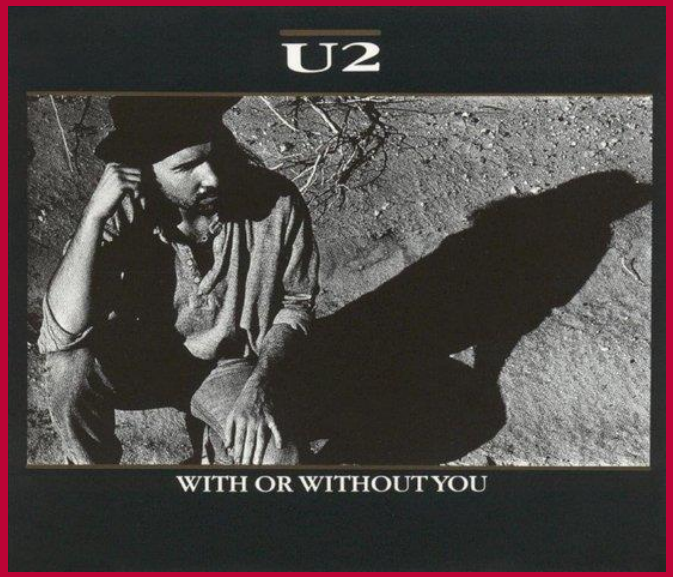
Erasmus School of Law

Future of European Business Taxation:

With or Without You



ACTL conference Pressing Issues in EU Tax law
4 November 2022
Prof. dr. Sigrid Hemels
hemels@law.eur.nl

Erasmus University Rotterdam

LUND UNIVERSITY
School of Economics and Management

Erasmus

Unanimity voting in the policy area of direct taxation

THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

CHAPTER 3

APPROXIMATION OF LAWS

Article 114

(ex Article 95 TEC)

1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

Article 115

(ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Article 192

(ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt:

(a) provisions primarily of a fiscal nature;

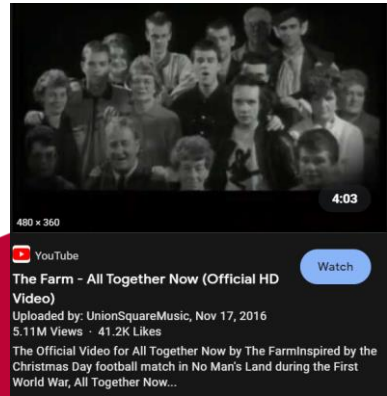
TITLE XXI

ENERGY

Article 194

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

- Wording of article 115 goes back to the 1957 Treaty of Rome (art. 100).
- Wattel in Introduction to Terra/Wattel 2022: harmonisation of direct taxes politically highly sensitive.
- Fundamental part of national sovereignty, basic right of national parliaments: the budget right, right to vote on taxes.
- Taxation is the most important economic and social policy instrument for national governments



Unanimity voting and strategic use of veto's makes direct business tax harmonisation difficult

Poland blocks EU directive to implement global corporate tax deal

By János Allenbach-Ammann | EURACTIV 6 apr. 2022



French minister of finance was visibly by the Polish government's refusal to go along with a compromise on an EU directive implementing the global minimum tax on 5 April in Luxemburg. [European Union]

Languages: Français | Deutsch

Print

Poland vetoed on Tuesday (5 April) a compromise proposal for an EU directive that would implement the internationally agreed 15% minimum effective taxation rate for large multinationals.

With its veto, the Polish government frustrated the French EU Presidency's goal to achieve an agreement before the presidential elections in France.

Poland was the only country to stand by its opposition to the compromise deal, despite assurances by French finance minister Bruno Le Maire who said before the meeting that all technical issues to implement the global agreement had been ironed out.

At a meeting in March, Estonia, Malta and Sweden were among the last governments to resist the directive but they later joined the majority thanks to further compromises.

my.europe EUROPE NEWS

Hungary blocks EU deal on 15% minimum corporate tax

COMMENTS

By Jorge Liboreiro • Updated: 17/06/2022



French Minister Bruno Le Maire had hoped Friday's meeting could lead to a final deal on the EU tax directive. - Copyright Olivier Matthys/Copyright 2022 The Associated Press. All rights reserved

SHARE THIS ARTICLE

Hungary has blocked an EU directive that would impose a 15% minimum tax on multinational corporations, arguing the levy would deal a "low blow" to European competitiveness and endanger jobs.

EU lawmakers move to end unanimous voting on tax

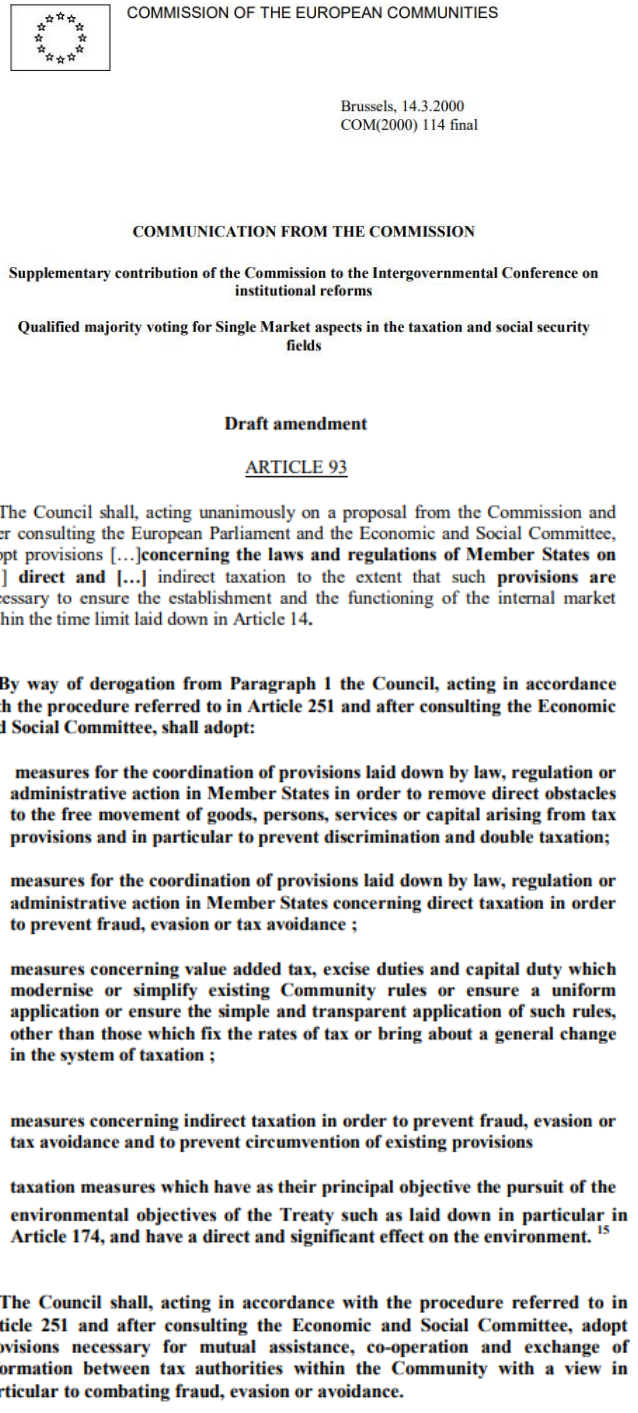
By Danish Mekhoob September 26, 2022



Political support for qualified majority voting is at a peak as unanimity rules continue to block the European Council from passing a directive on pillar two.

Formal endeavours to curb unanimity voting: Commission Communication Com(2000) 114

- Commission proposed to introduce qualified majority voting for, amongst others, certain tax measures (including direct obstacles to exercise the four freedoms, tax measures of a primarily environmental nature, rules for combating fraud & tax avoidance, measures on mutual assistance and co-operation)
- Did not make it into the Treaty of Nice.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.3.2000
COM(2000) 114 final

COMMUNICATION FROM THE COMMISSION

Supplementary contribution of the Commission to the Intergovernmental Conference on institutional reforms

Qualified majority voting for Single Market aspects in the taxation and social security fields

Draft amendment

ARTICLE 93

1. The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, adopt provisions […]**concerning the laws and regulations of Member States on** […] **direct and […]** indirect taxation to the extent that such **provisions are** necessary to ensure the establishment and the functioning of the internal market within the time limit laid down in Article 14.

2. **By way of derogation from Paragraph 1 the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt:**

- **measures for the coordination of provisions laid down by law, regulation or administrative action in Member States in order to remove direct obstacles to the free movement of goods, persons, services or capital arising from tax provisions and in particular to prevent discrimination and double taxation;**
- **measures for the coordination of provisions laid down by law, regulation or administrative action in Member States concerning direct taxation in order to prevent fraud, evasion or tax avoidance ;**
- **measures concerning value added tax, excise duties and capital duty which modernise or simplify existing Community rules or ensure a uniform application or ensure the simple and transparent application of such rules, other than those which fix the rates of tax or bring about a general change in the system of taxation ;**
- **measures concerning indirect taxation in order to prevent fraud, evasion or tax avoidance and to prevent circumvention of existing provisions**
- **taxation measures which have as their principal objective the pursuit of the environmental objectives of the Treaty such as laid down in particular in Article 174, and have a direct and significant effect on the environment.** [15]

3. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt provisions necessary for mutual assistance, co-operation and exchange of information between tax authorities within the Community with a view in particular to combating fraud, evasion or avoidance.

Formal endeavours to curb unanimity voting: scope of ‘fiscal provisions’

- Commission 2003 proposal to change mutual assistance Directive 77/799/EEC based on qualified majority voting: fiscal provisions not main purpose, confined to building bridges between tax administrations
- Council did not agree, legal basis art (now) 115: unanimity voting.
- Commission: Recovery Assistance Directive (RAD) should be adopted based on majority voting as being necessary for the establishment of the internal market (now art. 114(1) TFEU): recovering claims thereby removing barriers to cross-border economic activities. Does not relate to fiscal provisions which should be narrowly construed.
- However, CJEU (Commission v. Council C-338/01, EU:C:2004:253, para 63): ‘fiscal provisions’ covers all areas of taxation, without any distinction between types of duties or taxes concerned, and all aspects of taxation, whether material rules or procedural rule.
- Since then EC proposals for (changes of) RAD and Directive on Administrative Cooperation (DAC) based on article 115, unanimity voting.

However: Public country-by-country reporting (cbcr) Directive (EU 2021/2101)



Council of the EU Press release 1 June 2021 21:10

Public country-by-country reporting by big multinationals: EU co-legislators reach political agreement

Representatives of the Portuguese presidency of the Council today reached a provisional political agreement with the European Parliament's negotiating team on the proposed directive on the disclosure of income tax information by certain undertakings and branches, commonly referred to as the public country-by-country reporting (CBCR) directive.

Corporate tax avoidance and aggressive tax-planning by big multinational companies are believed to deprive EU countries of more than 50 billion euros of revenue per year. Such practices are facilitated by the absence of any obligation for big multinational companies to report on where they make their profits and where they pay their tax in the EU on a country-by-country basis. At a time when our citizens are struggling to overcome the effects of the pandemic crisis, it is more crucial than ever to require meaningful financial transparency regarding such practices. It is our duty to ensure that all economic actors contribute their fair share to the economic recovery.

— Pedro Siza Vieira, Portuguese Minister of State for the Economy and Digital Transition

- DAC4 2017 cbcr obligation for MNEs based on BEPS action 13. Legal base art. 115 TFEU.
- OECD/G20 safeguarded confidential treatment of cbcr: no public cbcr, also not in DAC4
- EP in favour of public cbcr for MNE's
- 2016: EC proposal for public cbcr (COM 2016 (198))
- Not a DAC amendment, but of the Accounting Directive (AD)
- Based on art. 50(1) TFEU, right of establishment, more specifically the protection of the interests of members of companies and others: qualified majority voting.
- 2016 Council Legal Service opinion: objective of the measure to deter tax avoidance: art. 50(1) TFEU not appropriate basis, aim & content related to 'fiscal provisions': art. 115.
- Changes to the preamble (but not to provisions): focus on corporate transparency. Preamble 22: only concerns obligations to publish reports on income tax information, and not harmonization of taxes: art. 50(1) TFEU appropriate legal basis. Critical analysis: Schön 2021.
- 2021: Sweden, Cyprus voted against, Czech Republic, Ireland, Luxembourg, Malta abstained.
- Cyprus, Czech Republic, Ireland, Luxembourg, Malta, Sweden statement: general support for tax transparency, but concerns regarding legal basis, should be art. 115. Croatia: should not become precedent for qualified majority voting in future decision-making process in regard to tax matters.



Public Country-by-Country Reporting: Corporate Law, Fiscal Law and the Principle of Unanimity

Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2021-14

21 Pages • Posted: 2 Sep 2021

Wolfgang Schoen

Alternatives: Article 116 TFEU

Article 116
(ex Article 96 TEC)

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

- Qualified majority voting to eliminate distortions of competition.
- Commission has suggested several times it may use article 116 to address such distortions due to different tax rules if it cannot be removed in concertation with member states.
- Has not been used so far. 2019 Communication: “the Commission is ready to employ it should the specific necessity arise.”
- Strict conditions.
- EP TAXE 3 Committee 2019: use art. 116 for CCCTB. Moscovici: not an appropriate legal basis for wider harmonisation, requirements for activation art. 116 not met.
- Commission (2020): exploring how to make full use of art 116 to fully deliver on fair tax agenda
- Nouwen (2021): because of the strict conditions art. 116 does not seem to provide for an adequate legal basis for far reaching tax integration

taxnotes DOCUMENT SERVICE

EU Commission Wants to Circumvent Tax Unanimity

Posted on Jul. 16, 2020

By Elodie Lamer

The European Commission is looking for “strong cases” that would trigger an EU tax treaty provision that allows an exception to the EU Council’s unanimity voting rule for tax issues.

During a press conference July 15, EU Tax Commissioner Paolo Gentiloni acknowledged that article 116 of the Treaty on the Functioning of the European Union has never been used. “That is the reason to use it in the right or proper way,” he said. Article 116 TFEU says that for it to be triggered, there needs to be a distortion of competition in the single market caused by a “difference between the provisions laid down by law, regulation or administrative action in Member States.”

The Market Distortion Provisions of Articles 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?

Martijn F. Nouwen

Intertax
Volume 49, Issue 1 (2021) pp. 14 – 28

https://doi.org/10.54648/taxi2021003

Copy citation to clipboard | Export citation to RIS

Abstract

The European Commission is currently exploring how to make full use of the market distortion provisions of Article 116-117 TFEU to end prolonged veto deadlocks in tax matters and to fully deliver on the EU's fair tax agenda. This article sets out why the market distortion rules do not seem appropriate for any far-reaching EU tax integration initiatives. However, they could complement the diplomatic EU Code of Conduct Group's work, and the Commission's use of the State aid rules, in addressing national market distorting tax measures and tax ruling practices of Member States.

General passerelle clause (art. 48(7) TEU)

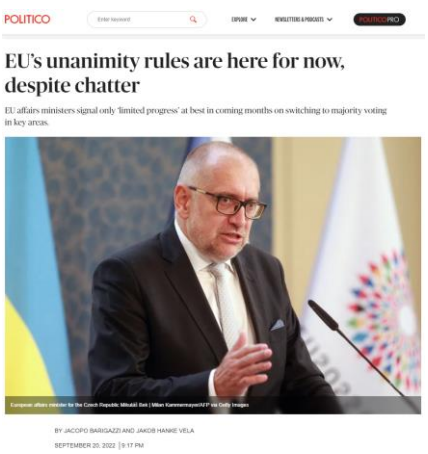
7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

- Possibility to switch from unanimous voting to qualified majority voting.
- Requires initiative and unanimous consent of the European Council (heads of State) and consent of the European Parliament.
- Each national parliament has the right to object and prevent the general passerelle clause from being activated.
- Suggested by a 2019 European Commission communication as the most practical and structured way to move from unanimity to qualified majority voting in taxation.
-


POLITICO

EU's unanimity rules are here for now, despite chatter

EU affairs ministers signal only 'limited progress' at best in coming months on switching to majority voting in key areas.

BY JACOPO BARIGAZZI AND JAKOB HANKE VELA

SEPTEMBER 20, 2022 | 9:17 PM

Don't expect the EU to strip countries' veto power any time soon.

After a meeting of EU affairs ministers in Brussels on Tuesday, Mikuláš Bek, the European affairs minister for the Czech Republic, which currently holds the EU's rotating presidency, said he only foresaw "limited progress" by year's end on the issue.

"I'm not too optimistic," he said, "but I don't think the debate is lost."

But actual movement through the EU's grinding institutional gears has so far been minimal. And support for actually reforming the EU's underlying treaties remains nascent. Also during the meeting it was clear that the majority were against treaty changes, said one diplomat.

Given that, EU affairs ministers have been discussing proposals to tweak the rules without opening up the treaties.

One option on the table: Making reforms via the EU's passerelle clauses— a mechanism that allows countries to switch from unanimity to majority voting in the Council of the EU without needing to change the EU treaties.

Lührmann said Germany supported the passerelle clause route to making that change. The move would lower the threshold for certain foreign policy decisions to a "qualified majority" — a standard requiring at least 55 percent of countries representing at least 65 percent of the EU population.

Others are less enthused. According to one diplomat, some member states on Tuesday stressed that the EU has successfully adopted its most severe sanctions of all time against Russia, despite the need for unanimity.

Still, a Council document obtained by POLITICO revealed burgeoning support for change, noting "several delegations are open or willing to consider using the passerelle clauses." The areas for potential reform include sanctions, human rights, and the non-military side of security and defense, according to the document.

"To a lesser extent, support is also expressed by some delegations for taxation, energy policy and non-discrimination matters," the document adds.

Council Regulation on an emergency intervention to address high energy prices (EU) 2022/1854

- Mandatory temporary solidarity contribution from Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors to contribute to the affordability of energy for households and companies.
- The term ‘tax’ or ‘taxation’ is avoided in the Regulation
- Art. 2(19): ‘solidarity contribution’ means a temporary measure intended to address (Dutch version: ‘*aan te pakken*’) surplus profits of Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors to mitigate exceptional price developments in the energy markets for Member States, consumers and companies;
- Legal basis: article 122(1) TFEU. Gentilioni (18 Oct. 2022): for that reason connected to energy.



Article 122
(ex Article 100 TEC)

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.



Enhanced Cooperation: Financial Transaction Tax (FTT), also for Minimum Tax Directive?

- Article 20 TEU and Articles 326-334 TFEU
- At least 9 Member States, measures only applicable in those Member States.
- Commission should submit proposal to the Council to authorise enhanced cooperation, after consent of the European Parliament, the Council may approve enhanced cooperation by qualified majority voting
- FTT first enhanced cooperation in tax matters, authorised in January 2013, still no agreement
- Way out for the Global Minimum Tax Directive?

Belgium Is Open to Enhanced Cooperation on Pillar 2

POSTED ON OCT. 6, 2022

By ELODIE LAMER Contact Author

Belgian Finance Minister Vincent Van Peteghem told members of the Chamber of Representatives that Belgium would be ready to participate in enhanced cooperation on pillar 2 of the OECD's global tax deal if Hungary doesn't lift its veto before the end of the year.

European Markets

2 minute read · September 9, 2022 4:45 PM GMT+2 · Last Updated 2 months ago

Five big EU states to implement minimum corporate tax if no EU deal

Reuters



A vendor receives a five Euro bank note from a customer at the central market in Athens, Greece, July 8, 2015. REUTERS/Christian Hartmann

PARIS, Sept 9 (Reuters) - The governments of the European Union's five biggest economies said on Friday they would implement a global minimum corporate tax next year by "any possible legal means", if Hungary does not lift its opposition at the EU level.

Hungary blocked the European Union's adoption of a 15% minimum corporate tax at the last minute in June, preventing a deal that would have turned a global reform into law across the bloc.

"Should unanimity not be reached in the next weeks, our governments are fully determined to follow through on our commitment," finance ministers from France, Germany, Italy, Spain and the Netherlands said in a joint statement.

"We stand ready to implement the global minimum effective taxation in 2023 and by any possible legal means," they added in the statement, issued on the sidelines of a meeting with EU counterparts in Prague.

They did not elaborate what form that could take, but French officials have raised the possibility of resorting to an EU legal procedure know as enhanced cooperation that requires at least 9 member states. They can also adopt the legislation individually at the national level.

To conclude

- The future of business taxation: more harmonisation
- Possibilities for an alternative legal basis are already being explored and, in some cases, used.
- Coalition of the willing: with or without all member states

