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A Common Consolidated Corporate Tax Base through Enhanced Cooperation?

- EU Tax Harmonization and Flexible Integration

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Table of contents

Summary

In 2000, the European Union set out the strategic goal to become a more competitive, stronger economic region with sustainable growth in terms of economy and jobs. An important part in achieving this goal is the complete establishment of the internal market to fully promote freedom of movement of goods, capital, services and people within the European Union. The Commission has identified diversity among Member States' tax system as a big obstacle in the internal market, creating trade barriers, distorting competition and hampering growth. To efficiently deal with these distortions, the Commission has proposed the adoption of a Common Consolidated Corporate Tax Base; a new optional tax system that will allow multinational company groups in the European Union to comply only with one tax regime instead of a different set of rules for every country the company group is conducting business in.

The proposal is intended to stimulate business and remove fiscal impediments in the internal market, but it has given rise to the question if it is possible to implement at all due to the inability of the members of the European Union to agree on common tax measures. A number of Member States have shown that they are unwilling to proceed with the matter and since approximation of direct taxation requires unanimity, many have feared that the proposal was dead on arrival.

This has sparked the discussion of using enhanced cooperation to move forward with the proposal. It is a mechanism that allows for a smaller group of Member States to pursue deeper integration when it is found that it cannot be done throughout the Union as a whole. Having only been used twice before, enhanced cooperation is an interesting instrument of flexible integration that may very well be the only way to implement the Common Consolidated Corporate Tax base.

This thesis examines the Commission's proposal and the provisions of the enhanced cooperation mechanism. It also examines the previous usage of enhanced cooperation and the legal assessments of the provision requirements to see if it is applicable to the Common Consolidated Corporate Tax Base proposal. It will be shown that enhanced cooperation, although being somewhat untested and therefore making it hard to draw any definitive conclusion regarding the outcomes of such a process, is a realistic option for establishing a Common Consolidated Corporate Tax Base and thus furthering the functioning of the internal market.

Sammanfattning

År 2000 satte den Europeiska Unionen ett strategiskt mål att bli en större, mer konkurrenskraftig ekonomisk region med stark tillväxt för ekonomi och arbetskraft. En viktig komponent i att nå detta mål är att utveckla den inre marknaden och stödja den fria rörligheten för varor, kapital, tjänster och personer inom den Europeiska Unionen. Kommissionen har identifierat skillnader i Medlemsstaternas skattesystem som ett stort hinder för den inre marknaden vilket skapar handelshinder, stör fri konkurrensen och hindrar tillväxt. För att effektivt stävja detta har Kommissionen föreslagit skapandet av en gemensam konsoliderad bolagsskattebas (Common Consolidated Corporate Tax Base); ett nytt frivilligt skattesystem som kommer att tillåta multinationella företagsgrupper inom den Europeiska Unionen att enbart hantera ett enda skattesystem istället för ett för varje land där man bedriver verksamhet.

Förslaget är menat att stimulera näringsverksamhet och ta bort fiskala hinder på den inre marknaden, men frågan har ställts om det över huvud taget är möjligt att implementera med hänsyn till medlemsstaternas oförmåga att enas i gemensamma skattefrågor. Ett flertal medlemsstater har uttryckt sin ovilja att delta i ett sådant samarbete och då harmonisering av direkta skatter kräver enhällighet är många bekymrade över att förslaget var dömt att misslyckas från början.

Detta har startat en diskussion om att driva förslaget vidare genom fördjupat samarbete (enhanced cooperation). Det är en mekanism som låter en mindre grupp medlemsstater driva ett fördjupat samarbete inom områden där det har visat sig omöjligt att göra gemensamt över hela unionen. Fördjupat samarbete har hittills enbart används vid två tillfällen, men det har visat sig vara ett intressant instrument för att utveckla flexibel integration och det kan mycket väl vara det enda sättet att driva förslaget vidare.

Denna uppsats behandlar Kommissionens förslag och regelverket för fördjupat samarbete. Den undersöker de tidigare användningarna av fördjupat samarbete för att se om de rättsliga utredningarna av de krav som reglerna ställer kan tillämpas på förslaget om en konsoliderad bolagsskattebas. Det kommer visas att fördjupat samarbete, som är ett relativt obeprövat rättsligt instrument, gör det svårt att dra några definitiva slutsatser om utgången av en sådan process, men att det är ett högst realistiskt alternativ för skapandet en gemensam konsoliderad bolagsskattebas och därmed fortsätta utvecklingen av den inre marknaden.

Preface

This thesis marks the end of my years as a student at the Faculty of Law at Lund University. It has been the best of times and the worst of times.

I would like to extend my gratitude to Professor Christina Moëll who has been most helpful during the course of this semester.

I would also like to thank my family and my friends who have been supporting me throughout these past years.

Abbreviations

CCCTB	Common Consolidated Corporate Tax Base
ECJ	European Court of Justice
EMU	European Monetary Union
EU	European Union
QMV	Qualified Majority Voting
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Aim and purpose

The purpose of this thesis is to examine the Commission's proposal for a Directive on a *Common Consolidated Corporate Tax Base* (CCCTB) and more specifically, the possibilities to adopt the proposal, either as a Directive or through the *enhanced cooperation* mechanism. I will examine the traditional legislative procedure according to the treaties of the European Union (EU) and the applicable legal norms of Union law, as well as the provisions on enhanced cooperation and the concept of *flexible integration*.

Enhanced cooperation was introduced in 1997, but was never taken into use until recently. At this point, it has only been used at two separate occasions in the field of divorce law and patent law. The treaties set out several conditions that must be fulfilled in order to proceed with enhanced cooperation. Therefore, I will examine the proposals in relation to the requirements in treaties. In addition to examining the CCCTB proposal, I will present the substantive and procedural requirements for enhanced cooperation and how these have been applied in practice. I will also discuss modes of flexible integration to show how enhanced cooperation may progress. To fully understand the idea behind the CCCTB proposal, some issues on EU direct taxation and previous harmonization attempts will also be discussed.

By comparing with previous attempts on enhanced cooperation and examining the concept of flexible integration I will attempt to conclude whether enhanced cooperation is a potential option for introducing the CCCTB and what it may entail in terms of flexible integration.

1.2 Method and materials

The work on this thesis has been conducted using legal methodology. The legal sources that have been used include EU legal sources such as the treaties of the EU, ECJ case law and Directives. The research has also involved several other types of EU documents such as Commission proposals, reports and other government documentation. In addition, journal articles and books have been used to provide different perspectives on the legal issues of the subject. Several sources have been found online on the official EU website and on government websites. For this reason, these documents have been evaluated as trustworthy. Most importantly, the Commission proposal for a Common Consolidated Corporate Tax Base has been used, including the explanatory memorandum and the proposed Directive.

1.3 Delimitation

Although this thesis examines the CCCTB proposal, it does not provide an extensive technical analysis of the proposed legislation. Neither does it include any detailed economic aspects of implementation. The CCCTB proposal is viewed from a political and legislative point of view in the context of the EU institutional framework.

1.4 Disposition

This introduction is followed by a section that provides an overview of some of the central functions and concepts of the European Union and features the legislative procedure and relevant provisions for the Commission proposal.

The third section examines the concept of flexible integration in the EU and views different types of flexible integration that are discussed by commentators. This is followed by an overview of the substantive and procedural provisions for enhanced cooperation and an analysis of the two previous attempts on enhanced cooperation.

In the fourth section, direct taxation in the European Union and past harmonization attempts will be presented. This will be followed by an analysis of the key features of the CCCTB proposal and how it has been received among Member States and commentators. This section will also include some views on the CCCTB and the enhanced cooperation mechanism among commentators.

The last section includes an analysis of the CCCTB, flexible integration and the prospects of adopting the proposal as a directive or through enhanced cooperation, and lastly my conclusions.
ing to use.

2 The European Union

This section starts by introducing the reader to some of the fundamental concepts of the European Union that are relevant to the thesis. This will be followed by an overview of the EU legislative procedure, focusing on the special legislative procedure that applies to tax measures.

2.1 Introductory remarks

The Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are central to the EU legal order and may even be referred to as the constitutional basis of the Union.[1] The treaties set out the EU's legal framework, its goals, objectives, and more importantly, the limits and the scope of its competences. The EU strives to achieve further integration, economic strength, sustainable development and greater social progress for the member states and its people.[2]

A central goal of the EU is to establish an *Internal Market*[3] within the Union without internal frontiers for the movement of goods, persons, services and capital – commonly known as the "four freedoms". In the TEU it is stated that the Internal Market

> *shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.*[4]

To achieve the Internal Market, the Union "shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties".[5]

The freedom of movement within the Internal Market is manifested through anti-discriminatory provisions in the TFEU. For example, Article 49 provides the right to free establishment and states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.[6] The TFEU contains many more

[1] A. Dashwood, D. Wyatt, et al, *Wyatt and Dashwood's European Union Law* (Hart Publishing, 6th ed, 2011), 23.
[2] Preamble, TEU.
[3] In the early years of the EU, the term 'Common Market' was used without being defined in any way. Later, the term 'Internal Market' was introduced. In several recent EU documents, the term 'Single Market' is used. According to Mortelmans, the terms 'Single Market' and 'Internal Market' are synonymous. See K. Mortelmans, 'The Common Market, the Intermal Market and the Single Market, what's in a market?' (1998) 35, *Common Market Law Review*, 101, 107.
[4] Article 3(3) TEU.
[5] Article 26 TFEU.
[6] Article 49 TFEU.

similar provisions that prohibits, for example, tax discrimination[7] and restrictions for workers on the basis of nationality.[8]

The scope and limits of the Union's competences are governed by the principles of *conferral*, *subsidiarity* and *proportionality*. The competences of the EU are established by the principle of conferral, which means that competences that has not been conferred upon the Union within the Treaties remains with the Member States.[9] In other words, the powers of the EU have been granted by the Member States and the EU cannot generate any additional powers itself. Related to the principle of conferral is the concept of *legal basis*. Since it can only act in accordance with the powers that has been conferred upon it, any action taken by the EU must be on the basis of a specific provision in the treaties.[10] In the legislative process, the concept of legal basis is central as it not only sets out the right for the Union to act, but it also often stipulates the specific conditions for a Union measure within that area.[11]

The TFEU sets out three main types of competences: exclusive Union competence; competence shared with the Member States; and competence to support, coordinate or supplement the actions of a Member State. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts.[12] In areas of shared competence, both the EU and Member States may legislate and adopts legally binding acts. However, the Member States may only exercise their competence to the extent that the Union has not exercised its competence.[13] In areas of supporting competence, the Union can only intervene to support, coordinate or complement measures taken by member states.[14]

The principles of subsidiarity and proportionality play a central role when the EU institutions are to exercise their power, especially in the legislative process where the principles are to be complied with in every step.[15] The principle of subsidiarity stipulates that any measure taken within the EU shall be exercised at the lowest level of authority where it can be exercised effectively. The principle is defined in Article 5(3) TEU, which states that in areas that do not fall within the Unions' exclusive powers, it shall "act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".[16] The principle of

[7] Article 110 TFEU.
[8] Article 45 TFEU.
[9] Articles 4(1) and 5(2) TEU.
[10] Article 3(6) TEU.
[11] A. Dashwood, D. Wyatt, *supra* note *1*, 99.
[12] Article 2(1) TFEU.
[13] Article 2(2) TFEU.
[14] Article 6 TFEU.
[15] This is further explained under section 1.2.3.
[16] Article 5(3) TEU.

proportionality holds that the EU shall act only to the extent that is needed to achieve the objectives of that action. Article 5(4) TEU states that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".[17]

Of further importance are the principles of *sincere cooperation* and *supremacy*. The principle of sincere cooperation obliges the Member States to, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States also have a duty to take any appropriate measures to ensure fulfilment of the obligations arising out of the Treaties or other legal acts.[18] According to the principle of supremacy, EU law takes precedence over domestic legislation. The principle was established in the early years of the EU in the case of *Costa v Enel.*[19] The European Court of Justice (ECJ) ruled that the Member States, by signing the EC Treaty, limited their sovereign rights as nation states and thereby creating a new legal order – EU Law – that has precedence over national law. It was later made clear that the principle of supremacy does not nullify national legislation, but rather requires national courts to not apply national provisions when they are in conflict with EU law.[20]

2.2 EU legislative procedure

This section will provide an overview of the EU legislative procedure and how legal acts are adopted within the Union. It will focus mainly on the special legislative procedure under which the CCCTB proposal may be adopted. Additionally, this section will discuss other relevant parts of the legislative process such as the principles of subsidiarity and proportionality and the "Yellow card" mechanism. It should be noted that the ordinary legislative procedure has been left out because it not applicable to the CCCTB proposal. This will be further explained below.

Firstly, the TFEU distinguishes "legislative" acts from "non-legislative" acts. What constitutes a legislative act is defined as a legal act that is adopted by legal procedure.[21] By default, non-legislative acts are other legal instruments that are adopted by other means.[22] The legal basis for direct taxation is Article 115 TFEU, which stipulates that approximation of such laws, regulations or administrative provisions are subject to a special legislative procedure.[23] This constitutes that any measure taken within the field of direct taxation must be in the form of a legislative act.

[17] Article 5(4) TEU.
[18] Article 4(3) TEU.
[19] Case 6/64 Costa v Enel [1964] ECR 585.
[20] See for example Case 106/77 Simmenthal [1978] ECR 629 or Case C-10/97 IN.CO.GE. [1998] ECR I-6307.
[21] Article 289(3) TFEU.
[22] A. Dashwood, D. Wyatt, *supra* note 1, 71.
[23] Article 115 TFEU.

The various law-making procedures of the European Union are complex and involve several Union bodies. The adoption of legislative acts mainly involves the Commission, the Council and the European Parliament. These are the three main institutions of the legislative procedure and they each play a different role in the process. Certain procedures may also involve other Union bodies, such as the Economic and Social Committee[24] or the Committee of the Regions[25].

2.2.1 Initiation of the legislative procedure

Article 17(2) TEU states that "Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise".[26] Accordingly, the Commission is the only EU Institution that can initiate the legislative process. According to Wyatt and Dashwood, this approach "is designed to ensure that the Council and/or the European Parliament exercise their legislative powers only in relation to a text which has been formulated by the Union institution with a duty to act independently and without regard to any specific national interests".[27] However, in the field of judicial and police cooperation in criminal matters, the legislative process may be initiated by the Commission or by other means. For example, Article 76 TFEU allows for a quarter of the Member States to take initiative.[28]

The Council and the European Parliament are not entitled to initiate a legislative procedure, but indirectly they can influence it by requesting the Commission to conduct any studies the Council or the Parliament considers desirable, and to submit to them any appropriate proposals.[29] In reality, Commission proposals are a result of on-going discussions between the three institutions, which is described by Wyatt and Dashwood:

> *In practice, of course, many of the Commission's proposals originate from cross-institutional deliberations: there would be little point in the Commission bringing forward legislative ideas which it did not already know would secure significant support among the Member States and within the European Parliament.*[30]

Depending on the topic of the proposal, the process will commence through either an "ordinary" legislative procedure or a "special" legislative procedure. The ordinary legislative procedure is the more common of the two and involves the Council and the European Parliament as equal parts.[31] Under the special legislative procedure legal act is adopted by either the

[24] See e.g. Article 115 TFEU
[25] See e.g. Article 194 TFEU
[26] Article 17(2) TEU
[27] A. Dashwood, D. Wyatt, *supra* note 1, 72.
[28] Article 76(2) TFEU
[29] Articles 225, 241 TFEU.
[30] A. Dashwood, D. Wyatt, *supra* note 1, 72.
[31] Article 289(1) TFEU

Council with the participation of the European Parliament, or by the European Parliament with the participation of the Council.[32]

2.2.2 The Ordinary and Special Legislative Procedures

In accordance with Article 115 TFEU, approximation of laws, regulations or administrative provisions that directly affect the establishment or the functioning of the internal market shall be subject to a special legislative procedure. Direct tax legislation falls within the scope of this provision and therefore the Council shall act unanimously after consulting the European Parliament and the Economic and Social Committee.[33] Unlike the ordinary legislative procedure, the special legislative procedure puts the Council in a stronger position than the European Parliament when making the final decision. However, consultation is a strict requirement. The Council may start to work on the Commission proposal before the European Parliament has given its opinion, but must not determine its final position until it has received the opinion.[34] It is also important to consider the duty of loyal co-operation that requires the Union's institutions to practice mutual sincere cooperation.[35]

The European Parliament and the Economic and Social Committee must provide their opinions within reasonable time. If the proposal is amended by the Commission or the Council, a second consultation is required if the text is substantially altered. The Commission has a right to amend its proposal at any time during the procedures if the Council has not yet acted[36]. If the change goes in the direction of the wishes of the European Parliament, a second consultation is not required.[37] Wyatt and Dashwood states that although the European Parliament in the special legislative procedure has a less powerful position than the Council, tactically delaying the consultation process to give more time for informal negotiation can give the European Parliament a greater influence over the legislative procedure.[38]

A special legislative procedure may sometime allow the Council to act after obtaining the consent of the Parliament.[39] This can be seen as a form of co-decision procedure that is similar to the ordinary legislative procedure, but the difference is that a consent procedure involves no formal interactions between the Council and the European Parliament. The Council takes a position, which leaves the European Parliament to accept it or not. Wyatt

[32] Article 289(2) TFEU.
[33] Article 115 TFEU.
[34] Case C-417/93 European Parliament v Council [1995] ECR I-1185.
[35] Article 13(2) TEU.
[36] Article 293(2) TFEU.
[37] Case 1253/79 Battaglia v Commission [1982] ECR 297
[38] A. Dashwood, D. Wyatt, *supra* note 1, 79 f.
[39] See i.e. Article 19(1) TFEU.

and Dashwood argue that this procedure may be best suited for issues that simply require a "yes" or "no".[40]

The Economic and Social Committee is a consultative body within the Union with the purpose of providing advice for the Commission, the Council and the European Parliament when required by the treaties[41]. The Economic and Social Committee consists of representatives of various economic and social interest groups within the Member States.[42]

2.2.3 The Principles of Subsidiarity and Proportionality

The use of Union competences is governed by the principles of Subsidiarity and Proportionality.[43] This means that legal acts must be in accordance with the requirements of these principles. The principle of subsidiarity states that, in areas that do not fall within the its exclusive competence, the Union shall act only if the objectives of a proposed action cannot be sufficiently achieved at a lower level of public power.[44] The principle of proportionality states that the form and content of Union actions shall not exceed what is necessary to achieve the objectives of the treaties.[45] For the legislator, this means that a legal act must achieve its aims, but at the same time intrude the least with the power of the Member States.[46]

The second protocol – the Lisbon protocol – of the treaties regulates the application of the principles of subsidiarity and proportionality. Draft legislative acts shall be justified with regard to these principles and contain a detailed statement explaining the legislative proposals compliance with the principles. The statement should contain assessments of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States. It shall also state the reasons to why the objectives of the legislative act will be best achieved at Union level.[47]

2.2.4 The Role of National Parliaments

The Lisbon Protocol provides the Member States an opportunity to oppose a Commission proposal on the basis that it infringes the principle of subsidiarity. It is sometimes referred to as the "Yellow card" system and is designed to strengthen the principle of subsidiarity and more actively involve national parliaments in the legislative process. According to Wyatt

[40] A. Dashwood, D. Wyatt, *supra* note 1, 80.
[41] Article 304 TFEU.
[42] A. Dashwood, D. Wyatt, *supra* note 1, 42.
[43] Article 5(1) TEU.
[44] Article 5(3) TEU.
[45] Article 5(4) TEU.
[46] A. Dashwood, D. Wyatt, *supra* note 1, 123.
[47] Article 5, Protocol no 2 TEU/TFEU.

& Dashwood, it "reflects the widespread view that compliance with the principle of subsidiarity will be more effectively achieved through a system of ex ante political input into the legislative procedure as it unfolds, rather than ex post judicial review of legislation after it has already been adopted".[48]

Article 6 of the Lisbon protocol states that "[a]ny national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity".[49]

According to Article 7(1), each national Parliament has two votes and in the case of a bicameral system, each of the two chambers has one vote. Furthermore, the same article states that "[w]here reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of paragraph 1, the draft must be reviewed".[50]

[48] A. Dashwood, D. Wyatt, *supra* note 1, 121.
[49] Article 6, Protocol no 2 TEU/TFEU.
[50] Article 7(2), Protocol no 2 TEU/TFEU.

3 Flexible Integration

This section will discuss the concept of flexible integration in the European Union; in other words, non-uniform integration. Focus will be on enhanced cooperation, which is the main instrument for flexible integration in the Treaties. First, three strategic modes of integration will be presented, followed by the provisions for enhanced cooperation in the TEU and the TFEU. Lastly, two Commission proposals will be examined in regard to the legal requirements for enhanced cooperation.

The traditional mode of integration in the European Union has been of uniformity – integration where all Member States are moving forward at the same pace. It was for a long time the only method of progress in the EU, as it, according to Junge "symbolized the principles on which the organization was founded".[51] However, as the European Union has grown larger, integration the "classical way" has become harder to manage. As a result, alternative ways of flexible integration has gradually gained ground.[52]

To a large extent, flexible integration has taken place outside the institutional framework of the Union, such as the Schengen agreement – which has been incorporated as a part of the acquis[53] – or in the form of opt-out provisions regarding the EMU regulated in treaty protocols.[54] Prior to the Amsterdam Treaty, flexible integration was never clearly established as a part of the EU legal framework, but rather had the character of "ad hoc" solutions to deal with specific issues.[55] The Amsterdam Treaty introduced the concept of *enhanced cooperation*[56], thus clearly demonstrating that the EU is open for differentiated integration.[57] Enhanced cooperation is best categorized as a method or instrument for flexible integration and must therefore be distinguished from modes of integration, which describe how flexible integration may play out.

[51] K. Junge, 'Differented European Integration' in M. Cini (ed), *European Union Politics* (Oxford University Press, 2003), 391, 392.
[52] Ibid, 392.
[53] The Schengen agreement started outside the framework of the EU, but was adopted as a part of the acquis through the Amsterdam Treaty.
[54] See e.g. Protocol no. 21 TEU/TFEU On the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol no. 22 TEU/TFEU on the position of Denmark.
[55] N. N. G. de Andrade, 'Enhanced Cooperation: the Ultimate Challenge fo Managing Diversity in Europé' (2005) 40(2), Intereconomics, 201, 202.
[56] Enhanced Cooperation was introduced under the name of Closer Cooperation. See section 3.2 below.
[57] N. N. G. de Andrade, *supra* note 55, 202.

3.1 Modes of integration

Stubb defines three modes of integration that are commonly referred to and seem to have been generally accepted by commentators.[58] These are *Multi-speed* integration, *Variable geometry* integration and *A la Carte* integration.[59]

Multi-speed integration is defined as a mode of integration where the "pursuit of common objectives is driven by a core group of Member States which are both able and willing to pursue some policy areas further, the underlying assumption being that the others will follow later". Multi-speed integration sets out common goals for all Member States to reach, but also recognizes that diversity means that these objectives will not be pursued at the same pace by everyone.[60] Perhaps the most notable example of multi-speed integration is the EMU which has set out different stages of development through which the Member States have moved through when they have fulfilled the necessary requirements.[61]

As opposed to multi-speed integration, the concept of variable geometry does not set out common objectives for all Member States. Rather, it "admits to unattainable differences within the main integrative structure by allowing permanent or irreversible separation between a core of countries and lesser developed integrative units". This approach, even more that multi-speed integration, recognizes economic, political and cultural differences among Member States and views common objectives as unrealistic and impractical. Instead, integration should proceed among groups of Member States where it is practically attainable.[62] The Schengen agreement is an example of Variable geometry, as some states – e.g. Denmark and the United Kingdom – have chosen to stay outside the agreement.[63]

A la Carte integration is defined by Stubb as a mode of integration that "allows each Member State to pick and choose, as from a menu, in which policy area it would like to participate, whilst at the same time maintaining a minimum number of common objectives".[64] An example of A la Carte integration is the use of *snus* (snuff) being permitted in Sweden while being illegal in the rest of the EU.[65] For the purpose of this paper, multi-speed and

[58] See e.g. D. Thym, 'The Political Character of Supranational Differentiation' (2007) 31(6), *European Law Review*, 781 and G. Gaja. 'How Flexible is Flexibility under the Amsterdam Treaty?' (1998) 35, *Common Market Law Review*, 855.
[59] A. Stubb, 'A Categorization of Differentiated Integration', (1996), 34(2), *Journal of Common Market Studies*, 283.
[60] Ibid, 287
[61] Ibid, 291
[62] Ibid, 287
[63] Ibid, 292.
[64] Ibid, 287.
[65] Ibid, 292.

variable geometry are more relevant than a la carte integration, why the latter will not be further examined.

According to Stubb, the main difference between Multi-speed and Variable geometry is "the degree of common objectives involved". Where Multi-speed integration strives to achieve common acquis for all Member States, Variable geometry "has a tendency to push for various forms of deeper integration outside the regular decision-making structure of the Union".[66] However, both modes share one common trait: the idea of a "hard core" or stronger group of Member States as the driving force for integration.[67]

3.2 Enhanced Cooperation

Enhanced Cooperation is a mechanism for flexible integration that allows for a group of Member States to pursue deeper integration within a specific policy area when integration cannot be achieved within the Union as a whole. It was first introduced in 1997 through the Treaty of Amsterdam under the name of Closer Cooperation and later revised and renamed to Enhanced Cooperation through the Treaty of Nice. The provisions were amended a second time through the Treaty of Lisbon.[68]

Although Enhanced Cooperation was introduced as a method for avoiding stagnation as a result of diversity in a growing EU, it has received mixed reviews by commentators. Weatherhill has called it a "blatant assault on at least one cherished though perhaps exaggerated orthodoxy of EC law, its uniformity of application".[69] Philippart and Edwards have argued that enhanced cooperation "could become a positive 'policy-making' device to further integration, even if it has only the status of a back-up device".[70] Others have called it "a truly revolutionary instrument".[71] Holding the middle ground, Thym argues that the potential impact by Enhanced Cooperation has been overestimated and that it should instead be viewed simply as a pragmatic tool for integration:

> *A closer look however reveals that enhanced co-operation is neither the magic potion for the future success of European integration nor a lethal poison leading to a constitutional heart attack. Instead, it appears as a pragmatic new mechanism which allows for limited asymmetrical*

[66] Ibid, 288 f.
[67] Ibid, 290.
[68] A. Dashwood, D. Wyatt, *supra* note, 127.
[69] S. Weatherhill, 'If I'd Wanted You to Understand I Would Have Explained it Better: What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?' in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, 1999), 21, 22.
[70] E. Philipart, G. Edwards, 'The Provisions on Closer Co-operation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union' (1999) 37(1), *Journal of Common Market Studies*, 87, 104.
[71] N. N. G. de Andrade, *supra* note 55, 209.

progress in specific situations when the Member States cannot agree on the appropriateness of European action.[72]

Since it was introduced, Enhanced Cooperation has only been put to use on two occasions; the first time was in 2010, regarding divorce law and the second in 2011, regarding patent law. Although, never being applied during the first twelve years, the provisions on Enhanced Cooperation were revised multiple times and gradually "have become less and less rigid".[73] In the next two sections, the current provisions on Enhanced Cooperation of the Lisbon Treaty will be presented.

3.2.1 Substantive Provisions

Article 20 TEU provides that "Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties". Enhanced Cooperation must "aim to further the objectives of the Union, protect its interests and reinforce its integration process". It must also be open to all Member States when they comply with the conditions of participation set out by the decision to start enhanced cooperation. Additionally, participation must also be open at any time to all member states after establishment if they comply with the decisions made within the Enhanced Cooperation framework. The Commission and the participating Member States must also promote participation by as many Member States as possible.[74]

Furthermore, Enhanced Cooperation must respect the Treaties and Union Law and not "undermine the internal market or economic, social and territorial cohesion". It may not cause discrimination, distort competition or constitute a barrier to trade between Member States.[75] Enhanced Cooperation must also "respect the competences, rights and obligations of those Member States which do not participate in it".[76] Any acts adopted within the enhanced cooperation framework shall bind only participating Member States and is not to be regarded as part of the acquis communautaire.[77]

The substantive requirements of the Enhanced Cooperation mechanism has been debated among commentators. Some have said that the requirements are too steep to actually provide any form of flexibility. Amtenbrink and Kochenov stated, regarding the provisions under the Nice Treaty, that "[i]f

[72] D. Thym, *supra* note 58, 788.
[73] N. N. G. de Andrade, *supra* note 55, 207.
[74] See Article 20(1) TEU and Article 328(1) TFEU.
[75] Article 326 TFEU.
[76] Article 327 TFEU.
[77] Article 20(4) TEU.

these conditions are strictly and cumulatively applied, one can only wonder what the scope of any enhanced cooperation could actually be".[78]

According to Thym, the obligation not to undermine the internal market can be seen as a "legal bottle-neck for any enhanced cooperation" considering that most EU policy areas have an economic dimension and therefore may potentially have an impact on the internal market.[79] Schrauwen argues that the economic nature of tax harmonization most likely will have an impact on free movement and competition within the internal market. However, she notes that the substantive provisions"'could also be read as obliging the closer cooperating states to treat all Union citizens and economic actors on their territory equally, including those who have the nationality of non-participating states".[80]

3.2.2 Procedural provisions

The Treaties provide that Enhanced Cooperation is to be used only as a last resort "when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".[81] According to Schrauwen, the "last resort" criterion indicates that a decision to authorize Enhanced Cooperation must follow a decision procedure in the Council. If that were true, it would mean that a Member State opposing Enhanced Cooperation "can always argue that not enough has been tried in order to take the measures within the Treaty framework and, of course, that the 'reasonable period' has not been taken into consideration, as no definition of it is given in the treaty".[82] Furthermore, enhanced cooperation must involve at least nine member states.[83]

Areas of exclusive Union competence falls outside of the framework. Regarding Enhanced Cooperation outside the area of Common Foreign and Security Policy[84], Member States wishing to engage in cooperation must address their request to the Commission. The Commission has the formal right to initiate the procedure by submitting a proposal to the Council. If, however, the Commission chooses not to do so, it must inform the concerned Member States of the reasons therefor.[85] Authorisation to proceed with Enhanced Cooperation is granted by the Council with the consent of the European Parliament.[86]

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[78] F. Amtenbrink, D. Kochenov, 'Towards a More Flexible Approach to Enhanced Cooperation' in A. Ott and E. Vos (eds), *Fifty Years of European Integration* (T.M.C. Asser Press, 2009), 181, 185 f.
[79] D. Thym, *supra* note 58, 791.
[80] A. Schrauwen, 'Sources of EU Law for Integration in Taxation' in D. Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (Ibfd, 2010), 15, 25.
[81] Article 20(2) TEU.
[82] A. Schrauwen, *supra* note 80, 26.
[83] Art 20(2) TEU.
[84] The Treaties stipulate special provisions for Enhanced Cooperation within this field. See Article 329(2) TFEU.
[85] Article 329(1) TFEU.
[86] Article 329(1) Para 2 TFEU.

During deliberations, all members of the Council may partake, but only only those Member States participating in Enhanced Cooperation may vote.[87] Unanimity shall be constituted by the votes of the representatives of the participating Member States only.[88] According to Wyatt and Dashwood, the effect of authorisation is that "the participating Member States may make use of the Treaties for the purposes of pursuing the initiative(s) specified in the Council's initial decision".[89]

Member States wishing to join enhanced cooperation in progress must notify the Council and the Commission. The Commission shall make sure that the conditions for participation are met and if so, it shall confirm participation. If not, the concerned Member States will be given a chance to fulfil the conditions and the request will be re-examined. If the request is denied a second time, the Member States may address their request to the Council.[90]

The Council may choose to act by qualified majority when unanimity is required, if the Council by unanimity adopts a decision stipulating that it will act by qualified majority.[91] Where a provision of the Treaties which may be applied in the context of enhanced cooperation stipulates that the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously, may adopt a decision stipulating that it will act under the ordinary legislative procedure. The Council shall act after consulting the European Parliament.[92] These provisions can be viewed as a way of expanding the use of qualified majority vote and the ordinary legislative procedure. According to Wyatt and Dashwood, a situation can occur when "a group of Member States are willing to move away from unanimity and/or a special legislative procedure, but cannot persuade the remaining countries to agree to mending the relevant legal bases for the Union as a whole".[93] Lastly, the Council and the Commission shall ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the Union, and shall cooperate to that end.[94]

3.2.3 Summary

To sum up, the key requirements for enhanced cooperation are the following:

1) It must only be used as a last resort.

[87] Article 20(3) TEU and Article 330 TFEU.
[88] Article 330 TFEU
[89] A. Dashwood, D. Wyatt, *supra* note 1, 128.
[90] Article 331(1) TFEU.
[91] Ibid.
[92] Article 333(2) TFEU.
[93] A. Dashwood, D. Wyatt, *supra* note 1, 129.
[94] Article 334 TFEU.

2) It must involve a minimum of nine member states.
3) It must further the objectives of the Union and reinforce the integration process.
4) It must be open to all member states at any time and participation must be promoted actively.
5) It must respect the treaties of the Union, not undermine the internal market, cause discrimination or distort competition.
6) It must respect non-participating member states.
7) It must remain within the framework of the Union's non-exclusive competences.

3.3 Enhanced cooperation in use

As has been noted above, enhanced cooperation was never put to use until after the Lisbon Treaty. In 2010, history was made when the Council for the first time authorised a request to proceed with enhanced cooperation in the area of divorce law.[95] In 2011, a request to proceed with enhanced cooperation in the field of patent law was presented. The second request is currently subject to proceedings in the ECJ due to claims from member states opposing enhanced cooperation.

In this section, the two proposals will be examined, in regard to the substantive and procedural requirements for enhanced cooperation. The following four prerequisites will mainly be examined: (1) The 'last resort' criteria; (2) Furthering the objectives of the Union and respecting the internal market; (3) Respecting the Treaties and Union law; (4) Respecting non-participating Member States.

At this point, it must be stressed that EU divorce and patent law are broad topics and it is not within the scope of this essay to discuss constitutional aspects of these proposals in greater detail. Therefore, the following sections will only discuss issues directly relating to the legal grounds for enhanced cooperation.

3.3.1 Divorce Law

The proposed regulation, known as the "Rome III" regulation, regards rules on conflict of law in divorce proceedings.[96] A proposal[97] to harmonize the rules of applicable law in legal separation was first put forward by the Commission in 2006, but it failed to reach unanimity. Although a majority of member states were in favour of the proposal, differences in the view on divorce among some member states proved to be far too great to

[95] Council Decision 2010/405/EU
[96] S. Peers, 'Divorce, European Style: The First Authorization of Enhanced Cooperation' (2010) 6, *European Constitutional Law Review*, 339, 339.
[97] Commission Proposal COM(2006) 399.

overcome.[98] The discussion came to a standstill in 2008 with no agreement in sight after it was made clear that a few states did not want to opt in to the proposed legislation. Although the majority of member states agreed upon the text as such, a few member states did not approve of the drafting, which made it impossible for them to accept the regulation.[99] There were attempts to modify the regulation so it would gain wider acceptance among the member states, but they were never fruitful.[100]

With no compromise to be found, there were still a large number of member states who supported the regulation, which led to further discussions on alternative ways of proceeding. An opt-out mechanism, allowing Member States to exempt their courts from applying certain parts of the regulation, was proposed, but this solution was found to be inappropriate for "a Community instrument aimed at harmonizing national rules on applicable law".[101] Instead, enhanced cooperation was considered an option when several Member States felt that the discussion had reached a deadlock.[102] In 2010, the Commission forwarded a proposal for the Council to authorize enhanced cooperation among ten member states.[103] The same year, the Council gave its authorization, stating that "[t]he requirement of last resort in Article 20(2) of the Treaty on European Union is fulfilled in that the Council established in June 2008 that the objectives of the proposed Regulation cannot be attained within a reasonable period by the Union as a whole".[104]

3.3.1.1 Legal assesment

At the time of the proposal, only ten member states had requested enhanced cooperation, which fulfilled the threshold requirement of nine participators. The number was later increased to 14 after the official proposal was made. With the possibility for non-participating member states to later join in, Peers argues that it is feasible that the cooperation will grow once the definite regulation is adopted.[105]

Used as a last resort

Regarding the "last resort" criteria, the Commission referred to the Council meeting of 2008 when it was concluded that there was no possibility to reach unanimity at that point or in the foreseeable future due to "insurmountable difficulties". It was therefore established that the only

[98] A. Fiorini, 'Harmonizing the Law Applicable to Divorce and Legal Separation – Enhanced Cooperation as the Way Forward?' (2010) 59(4), *International & Comparative Law Quarterly*, 1144, 1144.
[99] Council doc. 9985/08, at 6.
[100] Ibid, at 8.
[101] Ibid, at 11.
[102] Ibid, at 13 and 14.
[103] Commission Proposal COM(2010) 104 and COM (2010) 105.
[104] Council Decision 2010/405/EU, at 9.
[105] S. Peers, *supra* note 96, 349.

solution available was the use of enhanced cooperation as a last resort.[106] Peers states that the Councils assessment of the "last resort" principle is correct considering that the discussions on the 2006 proposal had led nowhere. Since the Treaties do not expressly require a preceding legislative proposal for the "last proposal" criteria to be fulfilled, he argues that enhanced cooperation could proceed even in situations where one or several member states have declared that they will not approve a proposed measure. However, if there have been discussions on a previous proposal and they have reached a standstill, it would make a stronger argument for enhanced cooperation.[107]

Furthering the objectives of the Union

The Commission referred to the impact assessment for the 2006 proposal and argued that enhanced cooperation would strengthen legal certainty and predictability, increase flexibility, provide greater freedom for citizens within the area of enhanced cooperation and further the Union's objective of "ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws, in that it would increase the level of compatibility as compared to the current situation".[108] Peers argues that although the Commission's assessment generally is true, it only applies to participating states and that some difficulties may still exist in divorce situations that involve a person from a participating state and a non-participating states. Peers concludes that the Commission makes the assumption that it is better that measures are taken by a number of member states within the EU than having no progress at all, or than having cooperation outside the EU framework.[109]

Respecting the Treaties and Union law

The Commission stated that the proposed regulation "would not affect the existing acquis" since, at that time, there was no common regulation in that specific area[110]. Furthermore, it was stated that the proposed measure would not undermine the internal market or economic, social and territorial cohesion. Nor would it constitute a barrier to or discrimination in trade between Member States or distort competition between them.[111] Rather, it would "serve to facilitate the proper functioning of the internal market since it will eliminate any obstacles to the free movement of persons who are currently faced with problems due to existing differences between the national laws with regard to applicable law in matrimonial matters".[112] Moreover, the Commission stated that although citizens in non-participating states would not benefit directly from the regulation, enhanced cooperation

[106] Commission Proposal COM (2010) 104, at 11.
[107] S. Peers, *supra* note 96, 348.
[108] Commission Proposal COM (2010) 104 at 26, 27, 32, 34.
[109] S. Peers, *supra* note 96, 350.
[110] Commission Proposal COM (2010) 104, at 36.
[111] Ibid, at 38.
[112] Ibid, at 39.

would at least not leave them worse off than before.[113] Peers discusses whether the connection between simplifying divorce proceedings and the free movement of persons within the internal market is strong enough, especially considering that the enhanced cooperation would result in citizens affected by the regulation being in a better position than citizens of non-participating member states.[114]

The proposed Regulation is limited to procedural rules in divorce matters and not in all aspects of cross-border family law. Referring to Article 81(2) and 81(3) TFEU, the Commission stated that "conflict-of-law rules in family law constitute an area, admittedly a limited but well-defined area, within the meaning of the Treaties, in which enhanced cooperation may be established".[115] The narrow scope of the regulation is commented on by Fiorini, who argues that as enhanced cooperation should be used only as a last resort "it should not extend to an area where EU-wide measures are possible".[116] Peers states that since the Treaties do not provide rules for the "width or narrowness of the specific subject-matter of EU law to be governed by enhanced cooperation" it is for the Council to decide whether to authorize enhanced cooperation for a broad or a more narrow area.[117]

Respecting non-participating Member States

Here, the Commission simply stated that enhanced cooperation would not affect non-participants, as they would continue to apply their own legislation. Nor are there any international agreements that would be affected.[118] Peers generally agrees with this point of view. Although non-participants indirectly would be affected by having to recognize judgements based on the Rome III proposal, this would not have any negative impact since they otherwise have to relate to various national legislations.[119]

3.3.2 Patent Law

The second authorization of enhanced cooperation after Rome III regards EU patent law. In March 2011, the Council authorized enhanced cooperation in the area of the creation of unitary patent protection.[120] In some respects, this area of law is more complex and controversial than the Rome III regulation. The unitary patent protection is closely related to the matter of an international patent litigation treaty, which has proven to be a problematic issue for the EU.[121] In addition, the decision to authorize enhanced cooperation has been challenged by Spain and Italy on the

[113] Commission Proposal COM (2010) 104, at 42.
[114] S. Peers, *supra* note 96, 351.
[115] Commission Proposal COM (2010) 104, at 14.
[116] A. Fiorini, *supra* note 98, 1148.
[117] S. Peers, *supra* note 96, 349.
[118] Commission Proposal COM (2010) 104, at 44, 46.
[119] S. Peers, *supra* note 96, 352.
[120] Council Decision 2011/167/EU
[121] See S. Peers, 'The Constitutional Implications of the EU Patent' (2011) 7, *European Constitutional Law Review*, 229 for a comprehensive discussion on the matter.

grounds that it will adversely affect the internal market and distort competition between member states.[122] Both cases are currently in progress at the ECJ.

Like direct taxation, patent law has been the subject of harmonization attempts since the 1970's, which has resulted in some moderate progress.[123] The current system of EU patents that allows patent protection to be sought through the European Patent Office (EPO) which grants patent protection throughout all EU member states. However, it requires the patent to be validated in each member state where protection is sought, which is a costly and time-consuming procedure.[124] Therefore a proposed legislation for a new EU patent was submitted by the Commission in 2010 for the purpose of reducing costs related to patent protection and to increase the competitiveness of the Union in relation to other strong economic regions.[125] The process was complicated by the Lisbon Treaty which requires the establishment of "measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union" and the establishment of "language arrangements for the European intellectual property rights" to be adopted through different legislative procedures.[126] The matter of translation agreements proved to be a difficult matter and no agreement was reached.[127] As a result, the Commission requested authorization for enhanced cooperation after a request from twelve member states.

3.3.2.1 Legal assesment

Used as a last resort

The grounds for the resorting to enhanced cooperation as a last resort were expressed practically in the same way as in the Rome III proposal. Referring to the Council meeting in 2010 where it was held that "insurmountable difficulties existed, making a decision requiring unanimity impossible at the time and in the foreseeable future", the Commission concluded that enhanced cooperation was the only way of progressing any further.[128]

Compared to Rome III, the situation here is more complicated due to the fact that there are two proposals involved – the general EU patent proposal

[122] Cases C-274/11 Kingdom of Spain v Council of Europe and C-295/11 Italian Republic v Council of Europe
[123] M. Lamping, 'Enhanced Cooperation – A Proper Approach to Market Integration in the Field of Unitary Patent Protection?' (2011) 42(8), *International Review of Intellectual Property and Competition Law*, 879, 895.
[124] Commission Proposal COM (2010) 350, 2.
[125] Ibid.
[126] See Article 118 TFEU. The first issue is subject to the ordinary legislative procedure and the second issue is subject to a special legislative procedure.
[127] Commission Proposal COM (2010) 350, 3.
[128] Ibid, 7.

and the translation proposal. According to Peers, it can be argued that the "last resort" condition was never met because the general proposal is subject to QMV and was generally agreed upon. However, the translation proposal that is subject to a special legislative procedure and failed to reach unanimity is linked to the first proposal making it impossible to adopt.[129] In the actions that have been brought before the ECJ by Spain and Italy, both parties have submitted that the "last resort" criteria were not properly fulfilled.[130]

Furthering the objectives of the Union

The Commission argued that even if the creation of unitary patent through enhanced cooperation would apply only for a group of members states, it would "imply improving the level of patent protection through the creation of a title which confers uniform protection throughout the territories of the participating Member States" and thus ensuring the functioning of the internal market.[131] Essentially, the reasoning is the same as for Rome III: some progress is better than none. According to Peers, the notion that some "progress is better that no progress", is a basic principle that must be accepted in order to make use of enhanced cooperation at all. If not, it would be difficult to justify any authorization as it may always be seen as affecting the internal market from some perspective.[132]

Respecting the Treaties and Union law

The Commission stated that the proposal would not be in breach with the existing legal acts within the field of patent protections since it has been drafted to include exceptions to such matters that are covered by existing legislation. Also, there will be no discrimination as the patent system will be open to applicants across the Union.[133]

The Commission argued that unitary patent protection would work in favor of the functioning of the inner market by reducing problems originating in having to comply with many different patent systems and the validation requirement. Regarding non-participants, it was argued that "Unitary patent protection covering the territories of the participating Member States would be an additional instrument available to all patent holders in the Union and can only improve the current state of the functioning of the internal market".[134] A unitary patent protection will not cause discrimination or impose any barriers to trade as it would be open to citizens and companies residing in non-participating member states.[135]

[129] S. Peers, *supra* note 121, 250.
[130] See section 3.3.2.2. below.
[131] Commission Proposal COM (2010) 790, 9.
[132] S. Peers, *supra* note 121, 255.
[133] Commission Proposal COM (2010) 790, 11 f.
[134] Ibid, 12.
[135] Ibid, 13.

Respecting non-participants and the fundamental rights

In line with what was argued regarding the internal market, the Commission stated that the patent system would be open to residents across the Union and at the same time not affect the national patent legislation of non-participant member states. By default, this would also mean that there would be no discrimination of non-participant residents.[136]

3.3.2.2 The Claims from Spain and Italy

Italy and Spain, the two states opposing an enhanced cooperation procedure have brought matters before the ECJ. The Cases are currently in progress and have therefore not been settled by the Court.

The following pleas have been made by Italy:

> *First, it submits that the enhanced cooperation procedure was authorised by the Council outside the limits provided for in the first subparagraph of Article 20(1) TEU, according to which such a procedure is to be allowed only within the framework of the European Union's non-exclusive competences. The European Union has an exclusive competence to create*
> *'European rules' which have Article 118 TFEU as their legal basis.*
>
> *Second, it submits that the authorisation of enhanced cooperation in the present case is contrary to — or, in any event, not compatible with — the objectives in view of which such cooperation is provided for by the Treaties. In so far as that authorisation is contrary to, if not the letter, at least the spirit of Article 118 TFEU, it infringes Article 326(1) TFEU, in that the latter requires enhanced cooperation to comply with the*
> *Treaties and with EU law.*
>
> *Third, the Italian Republic submits that the authorisation decision was adopted without an appropriate inquiry with regard to the last resort requirement and without an adequate statement of reasons on that point.*
>
> *Lastly, according to the Italian Republic, the authorisation decision infringes Article 326 TFEU in that it adversely affects the internal market, introducing a barrier to trade between Member States and discrimination between undertakings, causing distortion of competition. Furthermore, it does not help to reinforce the EU's integration process, and is thus contrary to the second subparagraph of Article 20(1) TEU.*

The following pleas have been made by Spain:

> *Misuse of powers since recourse was had to enhanced cooperation although the purpose is not to achieve integration of all the Member States — the mechanism having been used instead to avoid negotiating with a*

[136] Commission Proposal COM (2010) 790, 14.

Member State, imposing upon it an opt-out solution — and although the objectives pursued in this instance could have been achieved by means of a special agreement as provided for in Article 142 of the European Patent
Convention

Failure to respect the judicial system of the EU in that no dispute resolution system is provided for in relation to certain legal rights subject to EU law.

In the alternative, should the Court find that it is appropriate in this instance to have recourse to enhanced cooperation and that it is possible to establish substantive rules for legal rights subject to EU law without making provision for a dispute resolution system in relation to those rights, the Kingdom of Spain submits that the necessary conditions for enhanced cooperation are not met for the following reasons:

infringement of Article 20(1) TEU, since in this instance enhanced cooperation is not a last resort and does not fulfil the objectives provided for in the TEU and since areas are referred to which are not within the scope of enhanced cooperation as they are exclusive competence of the EU.

infringement of Article 326 TFEU, since enhanced cooperation in this instance infringes the principle of non-discrimination and undermines the internal market and economic, social and territorial cohesion, consti-
tuting discrimination in trade between Member States and distorting competition between them. infringement of Article 327 TFEU, since the enhanced cooperation does not respect the rights of the Kingdom
of Spain, which is not participating in it.

4 Direct Tax Harmonization in the European Union

This section will provide an overview of how direct tax issues are handled in the EU and a short summary of past harmonization attempts. This will be followed by a subsection on the CCCTB, focusing on the aim of the current proposal and its key features. Furthermore, opinions of Member States and commentators' views regarding the proposal as such, as well as enhanced cooperation, will be examined.

4.1 The EU and direct taxation

The European Union's relation to direct taxation has long been – and still is – a complex issue. Very few legal acts have been adopted so far, which has often been attributed to the difficulties of all the member States agreeing upon common measures. As fiscal policy is central for the economy of a nation state, many EU members fear that extensive Union interference in direct tax matter would be problematic and lead to complications such as welfare losses.[137]

Approximation of direct taxation falls within the shared competence and is subject to unanimous vote in accordance with article 115 TFEU, which states that

> *[w]ithout 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.*[138]

That taxes are linked with the functioning of the internal market is more clearly seen in Article 113, which regards approximation of indirect taxes and states that

> *[t]he Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.*[139]

[137] A. Schrauwen, *supra* note 80, 17.
[138] Article 115 TFEU.
[139] Article 113 TFEU.

With the EU currently comprised of 27 Member States, each with a different national tax system, the unanimity requirement is in practice very hard to reach.[140] In addition, measures can only be taken when needed for the functioning of the Internal Market and furthermore, such measures must comply with the principles of subsidiarity and proportionality.[141]

However, the various attempts to harmonize European direct taxation have so far resulted in a number of Directives in the corporate taxation field. Notable legal acts are the Parent Subsidiary Directive[142] that aims to eliminate double taxation on profits distributed between parent companies and subsidiaries located in different member states, the Merger Directive[143] that aims to eliminate tax problems relating to mergers and company restructuring involving companies located in different states, and the Interest and Royalties Directive[144] that deals with tax problems related to cross-border paments of interest and royalties between related companies. Also worth mentioning, is the Arbitration Convention[145], which provides procedural provisions to resolve transfer pricing disputes.

4.1.1 EU Case Law

The Court of Justice of the European Union is the Union's judicial institution. It includes the Court of Justice (ECJ), the General Court and specialised courts.[146] From here on, referring will be made to the ECJ as it is the highest court of the EU. According to the TEU, the courts "shall ensure that in the interpretation and application of the Treaties the law is observed".[147] The role of the ECJ in the development of EU law cannot be understated. A large part of the fundamental legal concepts has been developed by the court.[148]

In the area of direct taxation, much progress has come through the rulings of the ECJ due to the difficulties in reaching unanimity among the Member States.[149] The ECJ has concluded that although direct taxation is a matter for the Member States to decide upon, national legislation must comply with the freedom of movement within EU. In other words, the Member States are free to adopt national legislation within the field of direct taxation as long as it is not in breach with EU law. The relation between the fundamental

[140] E. Kemmeren, 'Sources of EU Law for European Tax Integration: Well-Known and Alternative Legal Instruments' in D. Weber (ed), *Traditional and Alternative Routes to European Tax Integration* (Ibfd, 2010), 29, 33.
[141] Ibid, 33.
[142] Council Directive 90/435/EEC
[143] Council Directive 90/434/EEC
[144] Council Directive 03/49/EC
[145] Convention 90/436/EEC
[146] Article 19(1) TEU.
[147] Ibid.
[148] A. Dashwood, D. Wyatt, *supra* note 1, 61.
[149] See B. Terra and P. Wattel, *European Tax Law* (Kluwer Law International, 5th ed, 2008), 163 f; N. Munin, 'Tax in Troubled Time: Is It the Time for A Common Corporate Tax Base in the EU?' (2011) 3, *EC Tax Review*, 121, 122.

freedoms and direct taxation was first established in the *Avoir Fiscal* case, which regarded a French imputation system and double taxation of foreign companies.[150] This principle has later been confirmed in number of cases.[151]

In relation to the CCCTB and cross-border loss relief, *Marks & Spencer*[152] is arguably the most prominent and discussed case of the ECJ. The case regarded the company Marks & Spencer, located in the United Kingdom, and its foreign subsidiaries, which had made considerable losses during the previous years. Marks & Spencer claimed for group relief in the United Kingdom, but was denied on the basis that the subsidiaries where not resident in the United Kingdom. The ECJ concluded that the different treatment of domestic and foreign subsidiaries constitutes a restriction on freedom of establishment, but that such a restriction can be justified if it is necessary in regards of public interest and the measures taken do not go beyond what is necessary to obtain its objective.[153] The ECJ further held that where foreign subsidiaries losses are terminal, it would be to "go beyond what is necessary" if applying different rules than for domestic losses.[154]

4.2 European tax harmonization – from past to present

As noted above, tax harmonization has long been a heavily debated issue within the European community. Since the establishment of the European Economic Community through the Rome Treaty in 1957, taxation has been regarded a key element in achieving the internal market.[155] This has resulted in several studies on harmonization of corporate taxation over the years. In 1960, the Commission issued a committee led by Fritz Neumark to conduct a study on corporate tax harmonization in relation to the European internal market. The Neumark report recommended the introduction of a split-rate tax system in the six founding members of the EEC as well as harmonizing tax rates and tax bases.[156] Harmonization was also the recommendation of a later study led by Dutch financier A.J. Van den Tempel. However, unlike the Neumark report, the 1970 Van den Tempel report proposed the introduction of a classical dividend tax system.[157] In 1975, the Commission made a proposal for a directive on tax harmonization through a partial

[150] Case 270/83 Avoir Fiscal [1986] ECR 273
[151] See i.e. Case C-311/97 Royal Bank of Scotland [1999] ECR I-2651, at 19 and Joined Cases C-397/98 and C-410/98 Metallgesellschaft and Others [2001] ECR I-1727, at 37.
[152] Case C-446/04 Marks & Spencer.
[153] Case C-446/04 Marks & Spencer, at 34-35
[154] Ibid, at 55.
[155] N. Munin, *supra* note 149, 122.
[156] M. Vascega, S. van Thiel, 'The CCCTB Proposal: The Next Step towards Corporate Tax Harmonization in the European Union?' (2011) 51(9/10), *European Taxation*, 374, 374.
[157] J. Blue, 'The Celtic Tiger roars Defiantly: Corporation Tax in Ireland and competition within the European Union' (2000) 10, *Duke Journal of Comparative & International Law*, 443, 448.

imputation system, but the proposal was never agreed upon and it was later withdrawn in 1990. After this, the Commission shifted its focus from full harmonization to working with specific obstacles to the common market such as double taxation and cross-border loss relief, which has resulted in the directives mentioned above under section 3.1.

A third study on tax harmonization was conducted in 1992 by former Dutch finance minister Otto Ruding. The Ruding committee was requested to address a number of tax issues in order to "determine whether existing differences in corporate taxation and the burden of business taxes among member countries lead to major distortions affecting the functioning of the internal market".[158] The findings of the Ruding report were that although there was no need total harmonization at time, a common system for corporation tax should be a long-term goal. Furthermore, the report concluded that there indeed were "discriminatory and distortionary features of countries' tax arrangements that impede cross-border business investment and shareholding" and that the European Union should focus on removing such obstacles.[159] However, the recommendations of the Ruding report did not receive much support and the harmonization work was put aside until 1998 when Council requested the Commission to conduct a study on the effects of taxe base differentials on the effective tax burdens of the Member States.[160] This study was released in 2001, advocating further work on measures to remove specific tax obstacles to the common market as well as the commencement of a common consolidated corporate tax base (CCCTB).[161]

4.3 The CCCTB Proposal

4.3.1 Introductory remarks

The general idea of the CCCTB is to simplify issues of tax administration for multinational companies within the EU by creating a new, optional tax system. Under this system, taxes for a group of companies will be consolidated and calculated once, instead of having each individual company within the group doing it in the country it operates in. The consolidated tax base is then apportioned to each state based on formulary apportionment.

The Commission's proposal sets out that the CCCTB "aims to tackle some major fiscal impediments to growth in the Single Market".[162] Divergence among the tax systems in the EU is regarded as big obstacles for cross-border trade as they often lead to over-taxation, double taxation, high

[158] The Commission of the European Union, 'Conclusions and Recommendations of the Committee of Independent Experts on Company Taxation' (Ruding report), 7f.
[159] Ibid, 11.
[160] M. Vascega, S van Thiel, *supra* note 156, 375.
[161] See section 4.3.2 below.
[162] Commission Proposal COM(2011) 121, 4.

administrative burdens and compliance costs.[163] The CCCTB is intended to remove these obstacles, further the advance towards achieving the internal market and thus attracting investments and stimulating economic growth in the EU zone.[164]

4.3.2 Background

At the European Council in Lisbon 2000, a strategic goal was set for the coming decade. The European Union was to "become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion". This is commonly known as the "Lisbon strategy" and includes developing an efficient economic framework for the internal market through economic reforms and integrated financial markets.[165]

After establishing the Lisbon Strategy, the Commission saw the need for a new EU policy on taxation; a shift from viewing taxation as single isolated issues to view it in the light of wider EU policies and objectives.[166] To fully achieve the internal market, tax policy must be aimed at creating effective and transparent tax systems and removing tax barriers between Member states.[167] Regarding company taxation, it was stressed that "tax systems cater for the increased cross-border activity and modern organisational structures of companies".[168]

In 2001, the Commission conducted a comprehensive study of company taxation in the European community. The study highlighted differences in company taxation and policies throughout the community and identified various tax obstacles to cross-border activity in the internal market.[169] Based on this study, the Commission advocated a two-track strategy for removing tax obstacles and realizing the internal market; targeted measures to address urgent problems in short-term and as a long term solution, creating a consolidated corporate tax base for companies operating across nation borders.[170] The study stressed that company taxation must "contribute to the international competitiveness of EU business", allow for general tax competition while not allowing harmful or undesirable effects, avoid tax obstacles and excessive costs to cross-border economic activity and "ensure that tax considerations distort as little as possible economic decisions by operators".[171]

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[163] Commission Proposal COM(2011) 121, 4.
[164] Ibid.
[165] The Lisbon Strategy was first established at the European Council Meeting in March 2000 in Lisbon. See also Commission Communication COM(2001) 582, 3.
[166] Commission Communication COM(2001) 260, 4.
[167] Ibid, 6.
[168] Ibid, 15.
[169] Commission staff working paper, SEC (2001) 1681, 2.
[170] Commission Communication COM(2001) 582.
[171] Ibid, 5.

Specific obstacles that lead to potential double taxation, high compliance cost or otherwise burdensome procedures for companies operating within the European Union were, among others, intra-group transfer pricing, cross-border flows of income, cross-border loss relief, cross-border restructuring operations and tax systems biased towards domestic investment.[172] According to the Commission, most of the problems are due to companies having to deal with a specific tax regime for every state in which they conduct business.[173] The Commission stated that a consolidated corporate tax base for companies operating across the European Union "would contribute to greater efficiency, effectiveness, simplicity and transparency", reduce compliance costs and enable a better use of the internal market.[174]

The objectives set out in the 2001 communication were followed up in 2003 when the Commission stated that a common consolidated corporate tax base would be the only way of overcoming tax obstacles and reaching the full potential of the internal market in the field of taxation.[175] In 2004, the Commission set up the CCCTB Working group, consisting of legal experts from each member state, to "examine from a technical perspective the definition of a common consolidated tax base for companies operating in the EU". The group held 13 meetings between 2004 and 2008 and provided the Commission with advice on constructing the common consolidated corporate tax base proposal.[176]

4.3.3 The CCCTB Outline – the proposal and remarks

The proposed Directive is comprehensive and include extensive provisions that cover everything from depreciation of assets to administrative procedures and anti-abuse rules. It is divided into 17 chapters and includes three annexes. This paper will not include a detailed report of every provision but rather the central elements of the directive.

4.3.3.1 Consolidation & cross-border loss offset

Consolidation of taxes is arguably the most prominent feature of the CCCTB. Cross-border loss relief has been a "hot potato" since Marks & Spencer and according to the Commission, is a "step towards reducing over-taxation in cross-border situations and thereby towards improving the tax

[172] Commission Communication COM(2001) 582, 10.
[173] Ibid, 11.
[174] Ibid, 16.
[175] Commission Communication COM(2003) 726, 4.
[176] The reports of the CCCTB Working Group can be found on the EU's website for CCCTB:
<http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm>

neutrality conditions between domestic and cross-border activities to better exploit the potential of the Internal Market".[177]

Chapter IX contains provisions for consolidation. The tax bases of a group shall be consolidated.[178] Negative results are carried forwards and positive results are to be shared in accordance with the apportionment formula.[179] "Group" is defined as a resident taxpayer with its permanent establishments located in other member states and in some situations qualified subsidiaries where the parent company either holds a right to exercise more than 50 % of the voting rights or an ownership right amounting to more than 75 % of the company's capital or more than 75 % of the rights giving entitlement to profit.[180][181]

As a result of consolidation, intra-group transactions are ignored when calculating the tax base of a group. Group members are however, required to adequately apply documented methods for recording intra-group transactions.[182] Eliminating intra-group transactions is also a measure to reduce compliance costs as transfer pricing under the arm's length approach is seen as an obstacle in the Internal Market.[183] Barenfeld argues that if the elimination of intra-group transactions is achieved it would be a "huge success in the quest for simplicity" and help remove costly transfer pricing requirements for cross-border transactions.[184]

4.3.3.2 Optionality

The CCCTB will be optional, meaning that companies may choose to opt in to the system or remain subject to national tax legislation.[185] A company that opts for the CCCTB will cease to be subject to national tax legislation regarding all matters covered in the Directive.[186] If a company or group or company chooses to opt in, the system will apply for a period of five tax years.[187]

When designing the CCCTB, the options of having a compulsory or optional system where discussed. The Commission's Impact assessment shows that both options would improve economic efficiency, but an optional

[177] Commission Proposal COM(2011) 121, 5.
[178] Article 57(1), Council Directive, Commission Proposal COM(2011) 121.
[179] Article 57(2), Council Directive, Commission Proposal COM(2011) 121.
[180] Articles 54(1) and 55(1), Council Directive, Commission Proposal COM(2011) 121.
[181] For a discussion about the definitions of taxpayer and permanent establishment, see L. Cerioni, 'The Commission's Proposal for a CCCTB Directive: Analysis and Comment' (2011), *Bulletin for International Taxation*, 515.
[182] Article 59, Council Directive, Commission Proposal COM(2011) 121.
[183] Commission Proposal COM(2011) 121, 4.
[184] J. Barenfeld, 'A Common Consolidated Corporate Tax Base in the European Union – A Beauty or Beast in the Quest for Tax Simplicity?' (2007) 61(7), *Bulletin for International Taxation*, 258, 262.
[185] Article 6, Council Directive, Commission Proposal COM(2011) 121.
[186] Article 7, Council Directive, Commission Proposal COM(2011) 121.
[187] Article 105, Council Directive, Commission Proposal COM(2011) 121.

system was ultimately chosen due to the estimated impact on employment and the avoidance of enforcing new tax rules across the Union.[188]

This seems to be in line with the demands of the business sector. For example, the Tax Executive Institute[189] commented on the progress of the CCCTB saying that it 'must remain optional' to fulfil its purposes.[190] Their opinion is shared by the European Business Initiative on Tax.[191] Also the Confederation of Swedish Enterprises have stated that optionality is required for the CCCTB to be accepted and stressed the importance for companies to able to choose between the CCCTB or domestic legislation depending on which option is more economically efficient.[192]

4.3.3.3 One-stop-shop

As a result of consolidation, a company group only has to deal with one tax administration instead of all the tax administrations of the member states where companies within the group are located (one-stop-shop).[193] This is intended to reduce compliance costs and administrative burdens for large company groups.[194] According to Barenfeld, one-stop-shop is one of the most important features of the CCCTB from companies' point of view. He argues that a system of single compliance would greatly reduce compliance costs, but also points out that it would force Member States to improve collaboration between tax authorities which could prove to be very politically difficult to achieve.[195]

4.3.3.4 Formulary apportionment

The consolidated tax base is apportioned by a formula that comprises three factors: labour, assets and sale.[196] Labour is computed on the basis of payroll and the number of employees equally. Assets include only fixed tangible assets. Intangible and financial assets are excluded "due to their mobile nature and the risks of circumventing the system". The sale factor is included in order to ensure "fair participation of the Member State of

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[188] Commission Proposal COM(2011) 121, 8.
[189] The Tax Executives Institute is a international association for in-house tax professionals. See their website: <http://www.tei.org/organization/Pages/about_tei.aspx>
[190] Tax Executives Institute, Inc., 'Comments of Tax Executives on the Common Consolidated Corporate Tax Base', 2, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/tei_commentsccctb.pdf>
[191] European Business Initiative on Tax, 'Comments on CCCTB WP 57, 59, 60, 61 and 62', 1, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/ebit_contrib_dec2007.pdf>
[192] Svenskt Näringsliv, Remissyttrande (Confederation of Swedish Enterprises), <http://www.svensktnaringsliv.se/multimedia/archive/00027/Remissvar_2011-097_27726a.pdf>
[193] Article 109, Council Directive, Commission Proposal COM(2011) 121.
[194] Commission Proposal COM(2011) 121, 5.
[195] J. Barenfeld, *supra* note 184, 261.
[196] Article 86, Council Directive, Commission Proposal COM(2011) 121.

destination".[197] However, the Directive includes a safeguard clause to be used in situations where the apportionment formula renders imbalanced outcomes. The safeguard clause states that the principle taxpayer or a competent authority may request the use of an alternative method of calculation if the outcome of the apportionment of a group is considered to give an unfair representation of business activity.[198]

The allocation method is undoubtedly a controversial issue. Barenfeld argues that large differences in allocation factors between different sectors makes it hard to establish a formula that would produce an acceptable result in all sectors.[199] Additionally, studies have shown that formulary apportionment may not be an accurate indicator of a company's profits.[200] However, the Commission seem to have chosen formulary apportionment based on multiple factors in order to have a non-volatile mechanism of allocation.[201] Also, the fact that it has been used for many years in Canada and the United States with satisfying results seem to have had an impact on the decision.[202]

4.3.4 Responces to the CCCTB

4.3.4.1 Member States

Following the proposal, nine Member States made use of their "Yellow card" privileges and sent their opinions to the Commission, opposing the proposal. These were Bulgaria, Ireland, Malta The Netherlands, Poland, Romania, The Slovak Republic, Sweden and The United Kingdom. The main concern among the Member States was that the proposal did not comply with the principle of subsidiarity.[203]

The UK government stated that it "does not accept the assumption that a CCCTB is necessary to address the broader objectives of the proposal or that 27 different national corporate tax systems inherently impede the proper functioning of the internal market". It further argued that tax obstacles within the internal market could be addressed through measures on a lower governmental level.[204] The same was held by the Irish government, stating that "it is hard to conclude, with insufficient evidence that EU legislative

[197] Commission Proposal COM(2011) 121, 14.
[198] Article 87, Council Directive, Commission Proposal COM(2011) 121.
[199] J. Barenfeld, *supra* note 184, 270.
[200] For a detailed economic report, see J. R. Hines, 'Income misattribution under formula apportionment' (2010) 54(1), *European Economic Review*, 108.
[201] CCCTB Working Group, 'Working Document WP060', at 10, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/ccctbwp060_en.pdf>
[202] CCCTB Working Group, 'Working Document WP047', at 11-12, <http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/common_tax_base/ccctbwp47_sharing_mechanism_en.pdf>
[203] M. Vascega, S. van Thiel, *supra* note 156, 377.
[204] UK Parliament, Reasoned Opinion of the House of Commons, 5, <http://www.parliament.uk/pagefiles/54364/Reasoned%20Opinion%20Taxation%202011-05-11.pdf>

action is both necessary and of greater benefit than individual action".[205] The Swedish government stated that "an individual member state is better suited than the EU to assess and gain an overview of how corporate taxation should be designed in order to achieve political and economic objectives both nationally and within the EU".[206] There has also been concerns regarding some practical implications of the proposal. These include issues of tax sovereignty, indirect effects on tax rates, the effectiveness of the proposal and the benefits of the one-stop-shop system.[207]

This may not necessarily entail that these Member States further along in the process will vote against a CCCTB system, but it should probably be seen as a clear indicator for that such a scenario may occur. In order to gain wider approval, it might be required that the proposal undergoes big changes which undoubtedly will slow down progress.

4.3.4.2 Commentators

CCCTB has been widely discussed since the work commenced in 2001. The general opinion over the years has been that harmonization might be positive from a business point of view, but that it will prove hard to realize from an institutional standpoint. Barenfeld argues that an optional CCCTB "shows considerable potential for simpler tax rules and administrative procedures" but that its success ultimately depends on politics[208]. According to Devereux and Feust, a CCCTB holds advantages in that it would probably reduce compliance costs and profit shifting through transfer pricing. However, they stress that the many disadvantages, such as the risk of tax competition being distorted and potential spin-off effects on tax rates, may make it hard for the CCCTB to gain approval.[209] However, some have voiced the opinion that a successful CCCTB would require a larger degree of harmonization than what is currently proposed. Spengler argues that a CCCTB "can only reach its objectives in total if it is accompanied by a minimum corporate tax rate".[210] Munin has stated that a compulsory system would be more efficient in removing tax distortions and strengthening the

[205] Irish Parliament, 'Report under Standing Order 105 on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM(2011)121)', 2, <http://www.oireachtas.ie/documents/committees31stdail/standingorder103/Report12052011.pdf>

[206] Sveriges Riksdag, 'Utlåtande 2010/11:SkU37 Subsidiaritetsprövning av direktivförslag om en gemensam konsoliderad bolagsskattebas (CCCTB)' (Statement by the Swedish Committee on taxation) <http://data.riksdagen.se/fil/f2b7e521-6612-4aef-aacf-bf374fb6e393>

[207] See M. Vascega, S. van Thiel, *supra* note 156, for a more detailed summary of these issues.

[208] J. Barenfeld, *supra* note 184, 270 f.

[209] M. Devereux, C. Fuest, 'Corporate income tax coordination in the European Union' (2010) 16(1), *Transfer: European Review of Labour and Research*, 23, 28.

[210] C. Spengel, 'Concept and Necessity of a Common Tax Base – an academic introduction' in W. Schön (ed), *A Common Consolidated Corporate Tax Base for Europe* (Springer, 2008), 1, 47.

internal market, but that it would not gain any approval by the Member States.[211]

Andersson argues that a large-scale project such as the CCCTB is required to resolve internal market issues related to cross-border loss compensation and that correctly implemented, such a system could be a big leap forward in European taxation.[212] Vascega and van Thiel recognize deliberations on the proposal will take time and "require a lot of political will from the Member States", but that the idea of a CCCTB will gain approval in the long run.[213] They also point out concerns over loss of national tax sovereignty should not be exaggerated, stating that "no major industrial country can afford not to follow a certain trend in corporate income taxation, as this would seriously affect its comparative competitive position". Although tax sovereignty may be a concern, national tax policies are greatly affected by international developments.[214] Munin has discussed potential drawbacks of the CCCTB, stating that it might result in reduced tax rates and reallocations of multinational company groups, which in turn can create new distortions in the Internal Market.[215]

4.3.5 Some views on CCCTB and Enhanced Cooperation

Already in 2000, when setting out the new tax policy goals, the Commission reflected upon the legislative process. Noting that the traditional way had been to adopt tax measures through Directives or Regulations, the Commission admitted that the pace of adopting new legislation had been "disappointingly slow" and would seek to make use of alternative mechanisms.[216] Enhanced cooperation was suggested as a potential instrument for tax harmonisation as it "could be targeted so as to produce such benefits for the participating countries that non-participants would be motivated to become involved". The CCCTB was not mentioned in relation to enhanced cooperation at this point, but the Commission argued that it could be used in the field of environmental and energy taxation as "[a] majority of Member States have indicated their strong desire to make progress in this area".[217]

Several commentators have also discussed the potential use of enhanced cooperation on the CCCTB. Thym has stated that since the "unanimous consent of all Member States required for the adoption of the harmonisation measures [..] is unlikely", enhanced cooperation would allow for a

[211] N. Munin, *supra* note 149, 124.
[212] K. Andersson, 'An optional and competitive common consolidated corporate tax base – a comprehensive measure towards a better functioning internal market' (2008) 17(3), *EC Tax Review*, 98, 99.
[213] M. Vascega, S. van Thiel, *supra* note 156, 381.
[214] Ibid.
[215] N. Munin, *supra* note 149, 123 f.
[216] Commission Communication COM(2001) 260, 20.
[217] Ibid, 23.

"coalition of the willing" to adopt the CCCTB.[218] De Andrade has argued that enhanced cooperation could be a way for the EU to easier achieve the goals of the Lisbon Strategy since it allows for Member States to pursue deeper integration without being held back by others, specifically referring to corporate tax and the CCCTB.[219] Vascega and van Thiel have also suggested the possibility of using enhanced cooperation in the light of the strong reactions against the CCCTB by several Member States.[220] Munin has argued that "the strong resistance of some EU Members to corporate tax harmonization might lead to an enhanced cooperation initiative", the success of which "depends on the achievement of a due balance of interests between governments and the business community".[221] Furthermore, Munin has discussed some possible implications of enhanced cooperation on the CCCTB. If it proves to be successful, it may attract more participants as long as opting in remains fairly easy. However, if it results in economically weaker states not wanting in due to high costs and administrative burdens, enhanced cooperation "may imply for an unfair advantage to stronger EU members, raising the question whether Members staying out for this reason may claim de facto discrimination".[222]

De Andrade has argued that using enhanced cooperation to progress with the CCCTB can result in a "positive undermining of the common market". On the one hand, the CCCTB proposal will not – initially – reach the entire EU as is intended, and in a sense not achieve its goals to remove tax distortions or fully utilize the concepts of consolidation and one-stop-shop. One the other hand, tax barriers will be removed between the Member States entering enhanced cooperation, which will work in favour of the internal market.[223] Furthermore, de Andrade has discussed what modes of integration, enhanced cooperation might result in. He argues that it can be interpreted in two different ways; either as a form of multi-speed integration or as variable geometry integration. According to the first view, the common goals of the EU must be maintained and allow for "some countries to temporarily advance more than others in order to achieve new areas and simultaneously prepare the path for the slower ones to reach them at a later stage".[224] However, de Andrade views variable geometry integration as more realistic as its easier to pursue integration among wealthier, more prepared Member States without having to adapt to "less enthusiastic" Member States.[225]

In general, commentators seem to be positive, or at worst neutral, to the idea of using enhanced cooperation to proceed with the CCCTB. It seems that

[218] D. Thym, *supra* note 58, 789.
[219] N. N. G. de Andrade, *supra* note 55, 213 ff.
[220] M. Vascega, S. van Thiel, *supra* note 156, 380.
[221] N. Munin, *supra* note 149, 131 f.
[222] Ibid, 128.
[223] N. N. G. de Andrade, *supra* note 55, 213 f.
[224] Ibid, 203.
[225] Ibid.

the opposition against the CCCTB and the readiness by the Commission to use enhanced cooperation has made the idea appear very real.[226]

[226] D. Thym, *supra* note 58, 788.

5 The CCCTB and Flexible Integration – Analysis

5.1 General thoughts on tax harmonization and flexible integration

Throughout the history of the European Union, tax harmonization has been seen as a key part in fully reaching the internal market, which in turn is perhaps the most fundamental aim of the European Union. From this point of view, tax harmonization therefore plays an important role in the development of the European Union. This raises the question why so little progress has been made so far in the field of direct tax harmonization. As some have argued, it is because of a general reluctance among Member States to give up power over fiscal policies, which effectively makes it very hard to reach unanimity in legislative procedures.[227]

The European Union legal order has traditionally been characterized by a "unity dogma"[228], which entails progress through unity or no progress at all. However, taking in consideration such practices as the Schengen agreement or the European Monetary Union, one can argue that non-uniform integration has been an option as well. While that statement may hold some merit, it is important to remember that the examples of flexible integration prior to 2010 have taken place outside the institutional framework or have had the character of an "ad hoc" solution.[229]

This was changed by the introduction of enhanced cooperation, which incorporated flexible integration in the treaties. Enhanced cooperation should be seen as a method of maintaining progress in a growing EU where diversity among Member States makes uniform progress seem nearly impossible at times. Looking at the history of direct tax harmonization, it is perhaps not hard to imagine why some regard enhanced cooperation to be the only way forward.

5.2 General thoughts on the CCCTB proposal

Past measures taken in the field of direct taxation have dealt with specific isolated issues, mainly in the form of Directives and ECJ rulings. The CCCTB is intended to be a comprehensive, long-term solution to tax problems in the internal market. To reach its goals, the CCCTB system must

[227] See section 4.1 above.
[228] D. Thym, *supra* note 58, 781.
[229] See section 3 above.

therefore be able to remove tax barriers between Member States, facilitate the four freedoms and stimulate cross-border activity. As shown above, the proposed Directive is extensive and includes the necessary elements, to achieve its aims. The drafting seems to be in line with the views of most commentators.[230] Some have argued that in order for a CCCTB to be successful, it requires a very high degree of harmonization.[231] However, the Commission has shown no intention of making the CCCTB compulsory or impacting on tax rates.[232] In fact, optionality is a vital requirement for the business sector and the potential spin-off effects on tax rates are important issues to the Member States.[233]

5.3 Enacting the CCCTB as a Directive through unanimous decision

Breaking down the key provision, Article 115 TFEU, a decision on the CCCTB is a three-step process. First, it requires consulting the European Parliament; secondly, it requires consulting the Economic and Social Committee; lastly, it requires a unanimous decision in the Council.

There is no certain way of knowing what the outcome would be in a Council vote, but much point to the proposal not passing. By definition, unanimity means that any one Member State can veto the proposal. Judging by the outcome of the 'Yellow Card procedure' it seems likely that at least one state would veto the proposal. Although the required votes fell short of the 18 needed to initiate a Yellow card procedure, there is obviously a resistance among several Member States. Looking at the opinions that were sent in to the Commission regarding the proposal, the main concern among Member States seems to be that it does not comply with the principle of subsidiarity. Since the drafting of the proposal is not a great concern, it seems unlikely that any deliberations on the substantive issues of the directive would lead to the opposing Member States changing their minds. With everything taken into account, it seems highly unlikely that the proposed Directive will reach unanimity; a view that is shared by several commentators and seemingly even the Commission. (Supra note under s. 3.3.5)

5.4 CCCTB and Enhanced Cooperation

Introducing the CCCTB through enhanced cooperation is a realistic option according to commentators and it has also been considered by the Commission. An enhanced cooperation procedure will obviously require that substantive and procedural provisions are met. Assuming that at least

[230] See section 4.3.3 above.
[231] C. Spengel, *supra* note 210; N. Munin, supra note 211.
[232] Commission Proposal COM(2011) 121, 5 ff.
[233] See Section 4.3.4.1 above.

nine Member States are willing to partake in the process, certain requirements require a closer look.

Last Resort

There is no definition of what constitutes as a measure of last resort. The provision does not say which measures, if any, are to be taken before the requirement is fulfilled. In the cases of the Rome III Regulation and the EU patent proposal, the Commission has made the assessment that the last resort criteria is fulfilled when it was concluded that there was no possibility to reach unanimity due to "insurmountable difficulties". Regarding the EU patent, the Commission has made a similar assessment. It can be said that since there is no formal requirement for enhanced cooperation to be preceded by a down-voted decision, there is no need to exhaust all possibilities to reach agreement under a legislative procedure. However, in the case of the Rome III Regulation, there were considerable efforts made to reach an agreement. Additionally, in the case of the EU Patent, the opposing Member States have turned to the ECJ with claims that enhanced cooperation does not constitute a last resort. It seems likely that due to the strong opposition against the CCCTB proposal, similar claims can be made if it progresses to an enhanced cooperation procedure.

Furthering the objectives of the Union

Since the CCCTB proposal aims to tackle tax obstacles and distortions in the internal market, there should be little doubt that the proposal as such fulfills the conditions of furthering the objectives of the union and ensuring the functioning of the internal market. More interesting is whether an enhanced cooperation procedure in this particular case will be beneficial for the internal market. A good starting point is the argument that some integration is better than none, as has been the case with Rome III and the EU patent. This can be compared to de Andrade's view on enhanced cooperation as a "positive undermining of the common market".[234]

It is important to consider the risks of discrimination claim from economically weaker Member States, as has been argued by Munin.[235] This might be particularly true in a scenario where enhanced cooperation leads to variable geometry integration, creating a strong separation between the "ins" and the "outs". Ultimately, if such scenarios occur, it will be an issue for the ECJ to decide upon.

Respecting the Treaties, Union Law and non-participating Member States

A CCCTB in either form it may take, must be drafted not to breach any existing Union law, which include tax Directives as well as ECJ case law. This also means that it shall not undermine the internal market or create trade barriers or distort competition. In the case of Rome III, the

[234] N. N. G. de Andrade, *supra* note 223.
[235] N. Munin, *supra* note 228.

Commission argued that although citizens of non-participating Member States would not directly benefit from enhanced cooperation, it would leave no worse off than before. The same reasoning can be applied to the CCCTB. Consider, for example, a scenario where a group of five companies, located in different Member States, ends up being divided into three companies in the CCCTB zone and two companies outside. If the “ins” choose to opt into the CCCTB, the company group will have to deal with three different tax systems. Without enhanced cooperation and CCCTB, the same company group will have to deal with five different tax systems. The same argument that some integration is better than none can be used to show that enhanced cooperation will not be in breach with Union law. On the other hand, it can be argued that enhanced cooperation will create a “zone within the zone”, which undoubtedly will impact on cross-border trade within the internal market.

5.5 Conclusions

The CCCTB Directive is a comprehensive proposal, and if it is to be realized, it will be a big leap forward given the past accomplishments, or perhaps lack thereof, in the field of direct taxation. The extensive work behind the proposal shows that the Commission is determined to make things happen this time around. Undoubtedly, several issues regarding drafting and the technical outline of the CCCTB remains to be discussed, but the general idea of a CCCTB and the current proposal seems to be well accepted by commentators.

Given the circumstances, it seems unlikely that the proposal will gain the unanimous support required to adopt a Directive. The strong opposition from a few Member States might instead lead to an enhanced cooperation procedure. That would obviously require that substantive and procedural provisions are met, which can result in a cumbersome process. Those who resist it, will have several options to oppose enhanced cooperation on the grounds that it does not meet one or several of the requirements. The provisions on enhanced cooperation are somewhat ambiguous as they state which conditions are to be fulfilled, but does not specify how these conditions are to be met. The ECJ has yet not tested dealt with these issues, which makes it hard to predict the outcome of an enhanced cooperation procedure.

If enhanced cooperation is to be used, it will lead to either a form of multi-speed integration or variable geometry integration. Multi-speed integration might be more preferable in the long run as it will grow to a EU-wide practice, but variable geometry may result in a stronger economic impact on trade and be more beneficial for the business community. Ultimately, the outcome will depend on policy issues. For the CCCTB to function properly under enhanced cooperation, it is important that progress is monitored so that it does not create new distortions or undermine the internal market. Furthermore, it is equally important to remember that enhanced cooperation must be aimed to reach the goals of the Lisbon Strategy. Whichever path the

EU will take it will certainly be a burdensome process that will require much strategic work. The CCCTB will most likely work to further develop the internal market, but in the light of what has been said, enhanced cooperation might be the only realistic way forward at the current moment.

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