

## Evaluating the Tax Veto in a Digital Age: Legislative Efficiency and National Sovereignty in the European Union

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*The total market capitalization of the six largest U.S.-headquartered tech companies now tops \$4.5 trillion; yet much of their revenues legally escape taxation every year. Recognizing the challenges of taxing the digital economy, the international community joined forces to reform the outdated global tax framework. In 2018, however, the United States hesitated to commit to reform and international negotiations stalled. The European Commission (Commission) subsequently proposed an interim Digital Service Tax for the European Union (EU), in part, to incentivize stronger U.S. involvement in negotiations. Because the European Council requires unanimity when voting on tax proposals, however, the proposal failed when three Member States exercised their tax veto. Defeated by veto, EU leaders could have pursued Enhanced Cooperation to revive the legislation. Instead, the Commission proposed permanent elimination of tax unanimity through the obscure and never-used Passerelle Clauses that allow legislators to utilize majority voting without amending any treaties. In doing so, the Commission signaled its desire for the European Union to emerge as a global tax leader, unencumbered by the need to obtain unanimity. However, the Commission's proposal also raises serious EU state sovereignty concerns. This Note explores the costs and benefits of abandoning the EU tax veto by explaining the EU distribution of taxation power, voting procedures, and methods of circumventing the tax veto. Ultimately, adopting majority voting for tax promises increased legislative efficiency for the Commission and large EU states. Simultaneously, though, abandoning tax unanimity poses a serious threat to the national sovereignty of small EU states and raises important questions about the proper balance of power between the European Union and its Member States in the digital age.*

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## INTRODUCTION

When the United States notified global leaders of its intent to withdraw from international tax talks during the summer of 2020, Bruno Le Maire, French Minister of Finance, condemned the action as a “provocation.”<sup>1</sup> Le Maire threatened that Europe would renew its effort to tax big tech, an action that would disproportionately impact the United States, home to Google, Amazon, Facebook, and Apple (GAFA). Though by mid-2021 and with a new presidential administration, the United States shifted gears on its willingness to negotiate on global tax reform and updating rules for taxing the digital economy, whether the United States effectively implements those reforms remains unclear as of late 2021.<sup>2</sup> A few years earlier, in 2018, the European Union’s (EU) attempt to unilaterally adopt a Digital Services Tax (DST) failed when three EU Member States vetoed the proposal.<sup>3</sup> Assuming the European Commission (Commission) relaunches its efforts for a GAFA-specific tax if the global agreement fails to accomplish its intended purposes, can the EU do so without U.S. support?

Only if *every* EU Member State says “yes.” But given the staunch resistance to and multiple vetoes of the first DST, this scenario seems highly unlikely. Alternatively, U.S. leaders may have reason for continued interest in EU action on taxation of GAFA if the EU Commission succeeds in its proposal to eliminate the EU tax veto *and* a majority of Member States agree on a specific tax on big tech. The mere possibility that this second outcome could occur, however remote in time or likelihood, raises important questions about national sovereignty in the European Union. While any move by EU leaders to eliminate the EU tax veto would certainly have implications on internal EU politics, it would also affect the global negotiating stage. As world leaders clash over how to effectively regulate big tech, determining who wields ultimate control over EU tax policy becomes crucial for understanding the future of EU tax governance and the role the

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1 Alan Rappeport et al., *U.S. Withdraws from Global Digital Tax Talks*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/06/17/us/politics/us-digital-tax-talks.html>.

2 *International Community Strikes a Ground-Breaking Tax Deal for the Digital Age*, OECD, <https://www.oecd.org/tax/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm>; *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, ORG. ECON. COOP. & DEV. (Jan. 2020), <https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf>; David Lawder, *U.S. Tax Experts Say Biden Spending Bill Likely to Be Resuscitated*, REUTERS (Dec. 22, 2021), <https://www.reuters.com/world/us/us-tax-experts-say-biden-spending-bill-likely-be-resuscitated-2021-12-22/> (“A Treasury spokesperson said on Wednesday that the department was confident it could meet the commitment to implement the 15% global corporate minimum tax next year, with the rules coming into force in 2023.”).

3 Leigh Thomas, *EU Ministers Fail to Break Digital Tax Deadline*, REUTERS (Dec. 3, 2018), <https://www.reuters.com/article/us-eu-tax-digital/eu-ministers-fail-to-break-digital-tax-deadlock-idUSKBN1O22MR>.

European Union will play going forward. What is also certain is that eliminating the EU tax veto will have clear impacts on U.S. tech dominance and bargaining power in global negotiations in the years to come.

Globally, the world's six largest tech companies, Facebook, Apple, Amazon, Netflix, Google, and Microsoft, all U.S.-headquartered, share a \$4.5 trillion market capitalization.<sup>4</sup> Between 2010 and 2018, though, the global tax gap for these market leaders topped \$100 billion.<sup>5</sup> This means that over those eight years, governments have legally lost \$100 billion in tax revenue. The discrepancy between big tech's market dominance and lost tax revenue prompted the international community to seek reform of the world's outdated tax framework. And the European Union emerged, anxious to lead the way.<sup>6</sup>

In early February 2018, the largest EU Member States lobbied the Commission to take decisive action. Germany, France, Italy, and Spain united to persuade the Commission that the European Union must tax GAFAs. Approximately one month later, on March 21, 2018, the Commission launched its Digital Services Tax.<sup>7</sup> Commission leaders, responding in part to the demands of its most powerful states, believed an interim plan, set to retire once the global community found consensus on taxing the digital economy, would signal its commitment to global tax

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4 *The Silicon Six and Their \$100 Billion Global Tax Gap*, FAIR TAX MARK (Dec. 2019), <https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf>; See Vijay Govindarajan et al., *Tech Giants, Taxes, and a Looming Global Trade War*, HARV. BUS. REV. (Aug. 24, 2020), <https://hbr.org/2020/08/tech-giants-taxes-and-a-looming-global-trade-war> (“The irony is that during Covid-19, while countries are hurting, digital giants have further captured the market and revenue shares from local companies... Governments thus face [a] one-two punch: fund local recovery and welfare, while not getting enough taxes from digital giants who have usurped their tax base. They have no choice but to look towards digital giants to meet at least a part of their budgetary deficits.”); See Edison Jakurti, *Taxing the Digital Economy—It’s Complicated*, THE BROOKINGS INST. (Dec. 13, 2017), <https://www.brookings.edu/blog/future-development/2017/12/13/taxing-the-digital-economy-its-complicated/>. These issues have only been exacerbated by the Covid-19 pandemic.

5 Chloe Taylor, *Silicon Valley Giants Accused of Avoiding over \$100 Billion in Taxes over the Last Decade*, CNBC (Dec. 3, 2019), <https://www.cnn.com/2019/12/02/silicon-valley-giants-accused-of-avoiding-100-billion-in-taxes.html>; See *The Silicon Six and Their \$100 Billion Global Tax Gap*, *supra* note 4.

6 Currently, international leaders seek a solution to address the challenges of taxing the intangible value creation of digital multi-national entities. See *Statement by the OECD/G20*, *supra* note 3. See also Chris Giles, *OECD Drafts Principles for \$100bn Global Corporate Tax Revolution*, FIN. TIMES (Oct. 12, 2020), <https://www.ft.com/content/c269d8ad-11d6-490a-b290-4d3dbf80bd03>; Anjana Haines, *This Week in Tax: OECD and UN Digital Tax Proposals Released*, INT’L TAX REV. (Oct. 16, 2020), <https://www.internationaltaxreview.com/article/b1ntym05qyfq5n/this-week-in-tax-oecd-and-un-digital-tax-proposals-released> (“A political agreement on the OECD’s digital tax proposals will not happen before mid-2021.”).

7 See *Fair Taxation of the Digital Economy*, EUR. COMM’N, [https://ec.europa.eu/taxation\\_customs/business/company-tax/fair-taxation-digital-economy\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/fair-taxation-digital-economy_en); Ingrid Melander, *France, Germany Want Progress on Taxing Tech Giants*, REUTERS (Feb. 7, 2018), <https://www.reuters.com/article/us-eu-tax-digital-france/france-germany-want-progress-on-taxing-tech-giants-idUSKBN1FR29K?il=0> (“Italy, Germany and Spain, together with France, are spearheading the push for tax reform. They face resistance from smaller nations like Ireland who are a hub for those firms’ investments and fear changes could hurt their economies.”).

reform. They also hoped the move might incentivize the hesitant United States, home to GAF A and reluctant to reform rules that may undermine U.S. tech dominance, to commit to global tax reform.<sup>8</sup> Many large states, having lobbied for EU action, supported the proposal. However, the proposed DST met strong resistance from some of Europe's smallest states, namely, Ireland, Denmark, Malta, and the Netherlands.<sup>9</sup> And, given the requirement of tax unanimity in the EU Council, the proposal failed when Ireland, Denmark, and Sweden exercised their veto.<sup>10</sup>

After just three Member States exercised their veto right and blocked the 2018 DST, Commission leaders felt justified in moving to permanently reform EU voting procedure.<sup>11</sup> Valdis Dombrovskis, Executive Vice President of the Commission, urged his fellow lawmakers that “the blocking of the Digital Services Tax by a few Member States in the Council, and previous similar experiences, should be seen as a wake-up call concerning the need for the Union to gradually move towards qualified majority voting on tax matters.”<sup>12</sup> Because economists expected the tax to raise just €5 billion, it may seem odd that this particular failure triggered such a strong response.<sup>13</sup> Even if the DST offered the best policy response to the global challenge of taxing multi-national tech giants, why did this policy rejection of an interim tax compel the Commission leader to label it a “wake-up call” that warranted permanent change in EU tax voting procedure?<sup>14</sup> The answer has something to do with the Commission's desire to tax the digital economy and a lot to do with the current EU balance of power on taxation. Ultimately, the controversy boils down to two important treaty provisions: the Council's tax unanimity voting requirement and the obscure never-used

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8 See Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 3, 396-97 (2020) (“U.S. dominance in technology enabled the Commission to formulate a tax that would almost perfectly target U.S. companies, while exempting nearly all EU companies, even when those companies engaged in the same commercial activities as the targeted U.S. companies...it elicited the condemnation of U.S. lawmakers who argued that it was designed to discriminate against U.S. companies, would undermine the tax-treaty system, create trade barriers, lead to double taxation, and possibly violate trade law.”); See also Foo Yun Chee, *EU's Vestager Appeals Court Veto of \$15 Billion Apple Tax Order*, REUTERS (Sept. 25, 2020), <https://www.reuters.com/article/us-eu-apple-taxation/eus-vestager-appeals-court-veto-of-15-billion-apple-tax-order-idUSKCN26G1DB>.

9 See *infra* notes 60-63.

10 Jorge Valero, *The EU's Digital Tax is Dead, Long Live the OECD's Plans*, EURACTIV (Mar. 11, 2019), <https://www.euractiv.com/section/economy-jobs/news/the-eus-digital-tax-is-dead-long-live-the-oecd-plans/>; See European Parliament Press Release, *Parliament Keeps up Pressure to Tax Digital Economy More Fairly* (Dec. 18, 2019).

11 EUR. PARL. DEB. (2695) 21 (Apr. 15, 2019) (remarks of Mr. Dombrovskis).

12 *Id.*

13 Daniel Bunn, *Revenue Estimates for Digital Services Taxes*, TAX FOUND. (Apr. 26, 2019), <https://taxfoundation.org/digital-services-tax-revenue-estimates/>.

14 EUR. PARL. DEB. (2695), *supra* note 11.

clauses that allow legislators to transition from unanimous to qualified majority voting (QMV) without amending any underlying treaties.<sup>15</sup>

To understand Dombrovskis' comment, we must first recognize that a tension exists between the taxation goals of some Member States and the Commission responsible for advocating the interests of the entire Union. Seeking to strengthen the single market and better position the European Union globally, the Commission benefits from consolidated legislative control to efficiently enact policies. Simultaneously, many small Member States rely on strategic tax programs to attract investment, especially from highly profitable tech companies, in the increasingly competitive digital economy. By offering regulatory advantages for tech investors, U.S. tech companies benefit from the policies of these tech-friendly EU states and these small EU states in return attract much-needed capital and jobs. Sometimes, though, these Member State regulatory regimes conflict with the Commission's broader objectives. However, since the current framework requires unanimity for EU action, states may unilaterally block any proposals deemed harmful to national interests. Relying on this procedural guarantee, any move by the Commission to eliminate unanimity risks infringing on the expectation by some states that Brussels fiercely guard what they see as an essential protector of national sovereignty.

In the European Union, Member State representatives in the European Council vote unanimously on tax matters. Codified in Articles 113 and 115 of the Treaty on the Functioning of the European Union (TFEU), the tax veto is an integral feature of EU legislative procedure.<sup>16</sup> Periodically, however, veto exercise generates opposition. Critics consider tax unanimity inefficient and ill-suited to a Union of 446 million people.<sup>17</sup> So, after the DST's failure, the Commission felt justified that the European Union must finally bid adieu to the tax veto. Valdis Dombrovskis argued that the proposal's failure by veto represents just "another example of many tax initiatives where the unanimity requirement has hampered the progress needed to strengthen the single market and avoid its fragmentation."<sup>18</sup> Not

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<sup>15</sup> The tax unanimity requirement is found in Articles 113 and 115 of the Treaty on the Functioning of the European Union. *See infra* note 83. The Passerelle Clauses are found in Article 48 of the Treaty on European Union. *See supra* note 13.

<sup>16</sup> Suzanne Kingston, *The Boundaries of Sovereignty: The ECJ's Controversial Role Applying Internal Market Law to Direct Tax Measures*, CAMBRIDGE Y.B. OF EUR. LEGAL STUD., 289 (2007).

<sup>17</sup> *Living in the EU, About the EU*, EUR. UNION, [https://europa.eu/european-union/about-eu/figures/living\\_en](https://europa.eu/european-union/about-eu/figures/living_en).

<sup>18</sup> EUR. PARL. DEB. (2695), *supra* note 11. Here, Dombrovskis likely references the three recent failures under the veto: the Common Corporate Consolidated Tax Base, Value Added Tax reform, and the Financial Transaction Tax. *See also* Stephanie Soong Johnston, *German and French Governments Agree on Common Corporate Tax Base*, TAX NOTES INT'L (Jun. 21, 2018), <https://www.taxnotes.com/tax-notes-today-international/corporate-taxation/german-and-french-governments-agree-common-corporate-tax-base/2018/06/21/285dw> (Ireland, Sweden, Denmark, Malta, and Luxembourg all raised formal objections to the tax).

only does the veto inhibit EU progress, Dombrovskis stressed, it also limits Europe's ability to act as a united force in global negotiations.<sup>19</sup> "Speaking with one voice," he maintained, "will allow the EU to put more pressure on the [international] discussions [for tax reform] and better defend our interests."<sup>20</sup> His considerable dissatisfaction that just three Member States blocked the proposal explains why the Commission, backed by the largest and most influential EU Member States, felt vindicated in seeking to eliminate tax unanimity.

Fueled by the politically salient DST failure, in 2019, the Commission formally proposed eliminating the tax veto. It advocated applying the never-before-used provisions in the Treaty on European Union (TEU) dubbed the "Passerelle Clauses" to effectuate the transition.<sup>21</sup> Through the Clauses, the Commission would extend QMV, the standard EU voting procedure, to include taxation.<sup>22</sup> In doing so, the Commission's tax proposals would enjoy a higher likelihood of success since legislators would no longer need to obtain unanimous consent to enact time-sensitive legislation. This could lead to more opportunities, in the words of Dombrovskis, to "strengthen the single market" and allow the Union a higher chance of "speaking with one voice" in global tax negotiations, both now and in the future.<sup>23</sup>

The transition would also expand the role of large Member States, such as Germany, France, and Italy, since QMV positively biases more populous countries. Yet, the proposal threatens small countries, who see the veto as an essential protector of their national sovereignty.<sup>24</sup> While supporting most of the EU agenda, Denmark, for example, which vetoed the DST, reacted skeptically at the prospect of relinquishing additional authority to Brussels.<sup>25</sup> Thus, the proposal raises important questions about the appropriate balance of power between large and small states and the extent of EU influence over tax policy. To examine the political implications of the proposed change, this Note presents the dual challenge facing EU lawmakers – an inefficient

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19 EUR. PARL. DEB. (2695), *supra* note 11.

20 *Id.*

21 European Commission Press Release IP/19/225, Commission Launches Debate on a Gradual Transition to More Efficient and Democratic Decision-Making in EU Tax Policy (Jan. 15, 2019); *See infra* pages 451-54 for a discussion about the Passerelle clauses, their structure, and method of use.

22 Consolidated Version of the Treaty on European Union, art. 48, Sept. 5, 2008, 2008 O.J. (C 115) 7 [hereinafter TEU].

23 EUR. PARL. DEB. (2695), *supra* note 11.

24 Friedrich Heinemann, *Majority Voting on Taxation Could Prove Explosive for European Integration*, EUR. NETWORK FOR ECON. & FISCAL POL'Y RSCH. (May 18, 2019); *See* Marc Morris, *United in Diversity, Divided by Sovereignty: Hybrid Financing, Thin Capitalization, and Tax Coordination in The European Union*, 31 ARIZ. J. INT'L & COMP. L. 761, 775 (2014) (These smaller states express "Eurosceptic" sentiment in that they remain more "vocally opposed to further integration" and fear loss of "legitimacy and democratic control.").

25 *See* Maja Kluger Rasmussen & Catharina Sørensen, *Denmark: A Pragmatic Euroscepticism*, 2 (Institute Français des Relations Internationales, Building Bridges Paper Series Mar. 2016), [https://www.ifri.org/sites/default/files/atoms/files/denmark\\_-\\_pragmatic\\_euroscepticism\\_0.pdf](https://www.ifri.org/sites/default/files/atoms/files/denmark_-_pragmatic_euroscepticism_0.pdf).

framework that allows a single country to block an important measure *and* a delicate balance of power that is vulnerable to upset should the European Union eliminate one of the last remaining unanimous voting provisions.

This Note considers the costs and benefits of the Commission's proposal to transition to QMV for taxation and ultimately concludes that, under the current political landscape, the costs likely outweigh the benefits. Given the population thresholds in QMV, loss of tax unanimity would allow large state coalitions to enact legislation swiftly to meet current market and political demands. While this would certainly improve EU legislative efficiency and allow the Union to act as a stronger counterweight to the United States in international negotiations, small states stand only to lose their ability to block harmful, yet popular, EU proposals. Without an ability to protect national interests in the Council, loss of veto power could lead to resentment of EU economic policies and undermine EU cohesion. By contrast, in maintaining the status quo, recurring veto exercise would continue to lead to failed proposals and fragmentation of the single market; yet, the European Union would signal its commitment to protecting the national sovereignty of *all* Member States.

The following Note is divided into three parts. Part I provides an overview of EU taxation power and voting procedures and highlights the numerous Member State sovereignty protections embedded within the EU governing framework. Part II discusses the two methods of circumventing unanimity: Enhanced Cooperation and the Passerelle Clauses. This section also analyzes the Commission's proposal to shift to QMV and considers why the European Union opted to pursue the untested Passerelle Clauses to change voting procedure. Finally, Part III discusses Member State responses to the proposal, examines the effects of adopting QMV for taxation, and considers what this proposal signifies about the future of taxation in the European Union.

## I. TAXATION POWER AND VOTING PROCEDURE IN THE EUROPEAN UNION

As a background, three governmental bodies exercise authority within the EU framework: the Council, the Parliament, and the Commission.<sup>26</sup> EU Citizens directly elect representatives to Parliament and its members serve as representatives. The Council “represents the *governments* of the individual member countries while the Commission represents “the interests of the *Union* as a whole.”<sup>27</sup> With a president elected by Parliament, the

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<sup>26</sup> *About the EU Institutions and Bodies*, EUR. UNION, [https://europa.eu/european-union/about-eu/institutions-bodies\\_en#eu-institutions-and-bodies-in-brief](https://europa.eu/european-union/about-eu/institutions-bodies_en#eu-institutions-and-bodies-in-brief).

<sup>27</sup> *Id.*; See *How are the Commission President and Commissioners Appointed?*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/news/en/faq/8/how-are-the-commission-president-and->



Commission, the entity responsible for advocating EU interests, submits proposals to the Council on behalf of the entire Union. For any proposal, the Council's role is in "providing [the] mandate for negotiations to the Commission," "signing the agreement on behalf of the EU," "adopting the final decision," and executing the law.<sup>28</sup> For the vast majority of legislating, Parliament and the Council are co-legislators. As co-legislators, the two entities must mutually agree for legislation to proceed. By contrast, for tax policy, or any matter subject to unanimity, the Council merely "consults" Parliament. Where the Council "consults" Parliament, the Council need not abide by any Parliamentary decision, although the Council must wait to consider Parliament's formal opinion before proceeding.<sup>29</sup>

#### *A. The Distribution of Taxation Power in the European Union*

The EU taxation framework demonstrates how the treaties protect the sovereign role of Member States in setting tax policy. In 1993, the European Union formalized its internal market when it eliminated border tax controls and formulated EU trade rules.<sup>30</sup> In doing so, the European Union hoped to better compete in the global economy.<sup>31</sup> In keeping with its responsibility to advocate the Union's interest, the Commission supports policies that promote a unified single market. In practice, this means cooperating with states on tax matters to complement national taxation regimes.<sup>32</sup> Cooperation can include, for instance, directives to ensure Member States do not enact conflicting policies. Yet the Union is limited in its tax governing authority since Member States set the majority of their national tax rules.<sup>33</sup>

On the State level, Member States retain substantial tax governing power.<sup>34</sup> States decide the "tax unit, the tax base, the tax rate, and how they

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commissioners-appointed (details the process of appointing and electing Commissioners of the European Commission) (emphasis added).

28 *The Role of the Council in International Agreement*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/council-eu/international-agreements/>.

29 *What Are the European Parliament's Powers and Legislative Procedures?*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/news/en/faq/17/what-are-the-european-parliament-s-powers-and-legislative-procedures>.

30 *Taxation: Promoting the Internal Market and Economic Growth, Towards Simple, Fair and Efficient Taxation in the European Union*, EUR. COMM'N, 8 (2015) ("When the internal market was established in 1993, tax controls at the borders between EU countries were abolished.").

31 Christian Keuschnigg et al., *Tax Competition and Tax Coordination in the European Union: A Survey* 4 (Leibniz Info. Ctr. for Econ., Working Paper No. 04, 2014).

32 *Id.*

33 *General Tax Policy, Fact Sheets on The European Union*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/92/general-tax-policy>; See *Taxation: Promoting the Internal Market and Economic Growth*, *supra* note 30, at 9.

34 See Kingston, *supra* note 16, at 291 ("Member States make what are intrinsically policy decisions in choosing how to design and structure their tax systems, depending on, e.g., how much they wish to spend on public services; how much they need to finance public pensions, etc.").

wish to administer, assess, collect, and recover tax.”<sup>35</sup> Some Member States, like Ireland, Denmark, Malta, and Sweden, strategically offer low corporate tax rates to stimulate domestic investment.<sup>36</sup> By contrast, large states do not experience the same necessity to compete for investment via national tax policy.<sup>37</sup> Rather, states like France and Germany, with robust national economies, overwhelmingly prefer taxes that broaden their bases to meet strong public expenditure demands.<sup>38</sup> Thus, larger states tend to view the low corporate tax policies of Denmark and Ireland, among others, as triggering a race to the bottom. This race to the bottom, they argue, minimizes state revenue collections, especially when the world’s most highly profitable tech companies establish or move corporate facilities to Europe’s low-tax jurisdictions.<sup>39</sup> While this scenario depicts tax competition in its simplest form, it also reflects the long-established EU understanding protecting Member State tax sovereignty.<sup>40</sup> Despite their broad tax authority, however, Member States must still conform to certain EU guidelines.<sup>41</sup>

The European Union, by contrast, enjoys significantly less taxation power when compared with other economic areas.<sup>42</sup> While its primary role centers around indirect taxation, the European Union does retain some

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35 Morris, *supra* note 24 at 780; See Matt Thompson, *Dutch, Swedish Officials Back EU Unanimity for Green Taxes*, LAW 360 (Jun. 20, 2019), <https://www.law360.com/tax/articles/1171142/dutch-swedish-officials-back-eu-unanimity-for-green-taxes>.

36 See Elke Asen, *Insights into the Tax Systems of Scandinavian Countries*, TAX FOUND. (Feb. 24, 2020), <https://taxfoundation.org/bernie-sanders-scandinavian-countries-taxes/> (“While Scandinavian countries raise a lot of revenue from individuals through the income tax, social security contributions, and the VAT, corporate income taxes ... play a less significant role in terms of revenue. All Scandinavian countries’ corporate income tax rates are lower than the United States’ rate.”).

37 See *Your Move in the Right Direction Investing in Ireland*, DELOITTE, 20 (2016), [https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/IE\\_T\\_invest\\_in\\_ireland\\_0517.pdf](https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/Tax/IE_T_invest_in_ireland_0517.pdf) (“Ireland is an ideal place for companies to centralize their activities from both a business and tax perspective. In particular, companies based in Ireland can own and exploit intangible assets with a low effective tax rate.”).

38 *Commission European Economy Economic Papers on Tax Revenues in the European Union: Recent Trends and Challenges Ahead*, at 2, 9, 21 (May 2007); See María Teresa Álvarez-Martínez et al., *The Economic Consequences of Corporate Tax Rates Reductions in the EU: Evidence Using a Computable General Equilibrium Model*, WILEY-BLACKWELL (2019), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/twec.12703>.

39 See *Apple is Ireland’s Largest Company*, IRISH EXAM’R (May 9, 2019), <https://www.irishexaminer.com/business/arid-30922934.html> (Along with Apple, Facebook and Microsoft have also moved their international headquarters to Ireland.); See also Ruth Mason & Stephen Daly, *State Aid: The General Court Decision in Apple*, 99 TAX NOTES INT’L 1317, 1329 (2020).

40 See Kingston, *supra* note 16 (“As taxation policy is very often key in national election campaigns, ceding control over it interferes with an important part of national government’s democratic mandate.”).

41 Morris, *supra* note 24, at 781. See *infra* note 50 (detailing areas of EU oversight and the types actions Member States may not make without violating EU law, given their status as EU states.).

42 See Shafi U. Khan Niazi & Richard Krever, *Romance and Divorce Between International Law and E.U. Law: Implications for European Competence on Direct Taxes*, 53 STAN. J. INT’L L. 129, 167 (2017).

flexibility in setting direct tax policy.<sup>43</sup> In overseeing indirect taxation, the Union “harmonizes,”<sup>44</sup> Member State policies to simplify and equalize EU tax compliance.<sup>45</sup> These policies aim to increase EU economic competitiveness and minimize compliance costs.<sup>46</sup> Increased uniform policies attract foreign investment to the European Union since companies need not incur substantial costs complying with a myriad of policies. In reviewing Member State laws, the Union looks to whether laws promote free exchange, are fair to competition, do not discriminate against other Member States, support development, and expand employment.<sup>47</sup> On direct taxation, the European Union takes a secondary role. EU direct taxation primarily involves directives to eliminate double taxation, minimize corporate tax avoidance, and mechanisms by which states can resolve tax disputes.<sup>48</sup> Because the balance of power favors Member States, the European Union acts only when it has a specific justification for legislating.<sup>49</sup> And, it must comply with principles that provide a check on EU authority.

For any EU action, conferral provides that “the Union shall act only within the limits of the competences<sup>50</sup> conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”<sup>51</sup> Simply put,

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43 *Taxation Trends in the European Union*, EUR. COMM’N, at 18 (2019), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_trends\\_report\\_2019.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2019.pdf) (“A direct tax is a tax levied on income and wealth that is durable by nature and directly upon a specific person via a notice of assessment. An indirect tax is a tax levied on a material or legal event of accidental or temporary nature and upon a person that can often be an intermediate and not the person responsible for this event.”).

44 Keuschnigg et al., *supra* note 31 (harmonization means “almost identical” or “at least similar tax systems, tax bases and tax rates within a Union”).

45 *General Tax Policy, Fact Sheets on The European Union*, *supra* note 33; *What Are the European Parliament’s Powers and Legislative Procedures?*, *supra* note 29 (Parliament “has the right to be consulted on tax matters – except on budgetary related issues” where it acts as a “co-legislator.” Where the EU parliament is consulted, it “may approve or reject a legislative proposal, or propose amendments to it, but the Council is not legally obligated to follow Parliament’s opinion.”).

46 *Taxation Trends in the European Union*, EUR. COMM’N, 18 (2020), [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/taxation\\_trends\\_report\\_2019.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_trends_report_2019.pdf).

47 *Taxation*, EUR. UNION, [https://europa.eu/european-union/topics/taxation\\_en](https://europa.eu/european-union/topics/taxation_en).

48 *See* Directive 2017/1852, of the Council of 10 October 2017 on tax dispute resolution mechanisms in the European Union, O.J. (L 265); Council Decision of 9 December 2014 Concerning the Accession of Croatia to the Convention of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustments of Profits of Associated Enterprises 2014/899/EU, 2014 O.J. L358) 19; Directive 2016/1164 of the Council of 12 July 2016 on Preventing Tax Avoidance by Companies 2016 O.J. (L 193) 1.

49 *The Principle of Subsidiarity, Fact Sheets on the European Union*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity> [hereinafter *Subsidiarity*].

50 There are four types of EU competences. Put simply, this means the policy areas where the EU may propose legislation and the degree of authority with which they may legislate. Tax policy falls under “shared competency” with Member States. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 4, Oct. 10, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU]; *See Division of Competences within the European Union*, EUR-LEX, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0020&from=EN>.

51 TEU, art. 5, Oct. 26, 2012, 2012 O.J. (C 326).

states retain authority not granted to the Union.<sup>52</sup> This power structure stresses Member State autonomy within the Union and constrains EU governing authority.<sup>53</sup> Two other principles specifically regulate administration of EU competencies: proportionality and subsidiarity.<sup>54</sup> First articulated in the Maastricht Treaty, these principles appear in Article 5 of the Treaty on European Union (TEU).<sup>55</sup> These principles apply to the Union when setting tax policy and highlight important checks on EU action.

First, subsidiarity ensures that the European Union only acts when it can better accomplish set-out goals than can individual Member States.<sup>56</sup> This principle eliminates Union involvement if Member States acting alone can resolve issues sufficiently.<sup>57</sup> In so doing, subsidiarity preferences localized decision making and limits EU power.<sup>58</sup> Member States can raise subsidiarity challenges by submitting reasoned opinions to the Commission.<sup>59</sup> For instance, when the Commission proposed the DST,

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52 *Taxation*, EUR. UNION, *supra* note 47 (EU states granted to the Union certain powers including: the power to ensure states do not enact taxes that discriminate against other states; prevent states from providing advantages to businesses of their own state, to the detriment of other businesses out of state; and unlawfully blocking access to the free flow of capital across EU state lines.).

53 *Id.* (The European Union can only act within certain limits as it pertains to taxation as it, for instance cannot “set tax rates” or directly “collect taxes” from EU citizens.); *See* Kingston, *supra* note 16, at 294.

54 *Subsidiarity*, *supra* note 49.

55 TEU, art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 3; *See also Subsidiarity*, *supra* note 49.

56 *Subsidiarity Control Mechanism*, EUR. COMM’N, [https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism\\_en](https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/relations-national-parliaments/subsidiarity-control-mechanism_en) (EU action must only be taken when doing so is “more effective than EU countries acting alone at national, regional, or local level.).

57 *Subsidiarity*, *supra* note 49.

58 *Subsidiarity Control Mechanism*, *supra* note 56; *See also Subsidiarity*, *supra* note 49.

59 *Voting System*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/council-eu/voting-system/> (“National Parliaments have to decide whether legislation complies with the principle of subsidiarity.” If enough Member States believe the proposed course of action does not comply, subsidiarity control mechanism protects proposals from progressing. National parliaments can issue reasoned opinions to challenge subsidiarity within eight weeks of the date the EU initiates the proposal. The EU commission must “take account of each of the reasoned opinions it receives.”).

Ireland,<sup>60</sup> Denmark,<sup>61</sup> the Netherlands,<sup>62</sup> and Malta<sup>63</sup> issued reasoned opinions. In tax matters, when one-third of Member States submit reasoned opinions the Commission must review its proposal and make necessary amendments to ensure subsidiarity compliance.<sup>64</sup> However, for the DST, Member States did not reach this threshold.<sup>65</sup> Not only does subsidiarity prospectively limit EU action, but challengers may also bring actions retrospectively to the Court of Justice of the European Union (Court of Justice).<sup>66</sup> The appeals process further demonstrates the ways Member States can challenge EU overreach and highlights the important sovereignty protections within the governing framework.

Second, proportionality provides that the European Union must craft policies as narrow as possible to limit overreach.<sup>67</sup> Actions must not exceed

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<sup>60</sup> *Houses of Oireachtas Reasoned Opinion on COM(2018) 147 Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence and COM(2018) 148 Proposal for a COUNCIL DIRECTIVE on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services* (May 2018) (Ireland worried the tax would “favour and advantage large member states with large populations and customers bases” and that it would “disproportionally and negatively [impact] the finances of smaller ... states.” Ireland also urged the European Union to wait to act until global consensus is first achieved.); *See also* Catherine O’Meara & Trevor Glavey, *Ireland’s Position on the EU’s Digital Tax Proposal*, INT’L TAX REV. (July 12, 2018), <https://www.internationaltaxreview.com/article/b1f7n05ftfrhcj/irelands-position-on-the-eus-digital-tax-proposal>.

<sup>61</sup> *Denmark Reasoned Opinion Regarding the Commission’s Proposed Measures Regarding Taxation of the Digital Economy* (May 9, 2018) (Denmark argued that the proposal could “better be done on the local Member State level” and challenged it as beyond the scope of permissible EU legislation.).

<sup>62</sup> *Netherlands Reasoned Opinion Regarding the EU Proposals for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence (COM(2018) 147), and a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting From the Provision of Certain Digital Services (COM(2018) 148)* (Apr. 4, 2018) (The Netherlands stressed the importance of taxing the digital economy; however, it felt that “Member States can also achieve this reform without European Harmonization or interference.”).

<sup>63</sup> *Reasoned Opinion of the House of Representatives of Malta Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence COM (2018) 147 and Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting From the Provision of Certain Digital Services COM (2018) 148* (May 2018) (Malta argued that the DST could risk undermining global negotiation efforts and that an interim proposal would “impinge on established fundamental tax concepts.”).

<sup>64</sup> *Subsidiarity Control Mechanism*, EUROFOUND, <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/yellow-card-procedure> (Where a third of Member States issue reasoned opinions, the Commission must re-examine the proposal under the “yellow card” procedure. It must “decide whether to maintain, change, or withdraw the proposal and must provide the rationale for its decision....the proposal will be removed from consideration and thus fails provided that a simple majority of the EU parliament or members comprising 55% of the EU council find that the proposal breaches subsidiarity.”).

<sup>65</sup> *See* Ani Matei & Adrian Stelian Dumitru, *The Subsidiarity Principle and National Parliaments Role: From Formal Need to Real Use of Powers*, 10 ADM. SCI. 20, 10, 11 (2020) (Discussing the subsidiarity challenges raised by Member States in response to the 2018 EU DST proposal and how there were just four reasoned opinions submitted).

<sup>66</sup> *Subsidiarity*, *supra* note 49 (The Commission must provide an explanation in an “explanatory memoranda” the ways in which the proposed legislation is justified in the light of the “principle and “must take this into account in its impact assessments.”).

<sup>67</sup> *Taxation: Promoting the Internal Market and Economic Growth*, *supra* note 30, at 5.

that which “is necessary to achieve the objectives of the treaties.”<sup>68</sup> This principle, too, minimizes EU authority. And, like subsidiarity, States may challenge the measure before the Court of Justice. Accordingly, the governing principles demonstrate the limits on EU power and protections of Member State autonomy in tax governance. In addition to the general framework, EU voting procedure also limits EU action and demonstrates the delicate EU balance of power between the Union and its Member States.

### B. *Voting Procedure in the European Union*

Three methods of voting exist in the EU Council: simple majority,<sup>69</sup> qualified majority, and unanimous.<sup>70</sup> Most important for purposes of this discussion are qualified majority and unanimous voting.

#### 1. *Qualified Majority Voting*

Qualified majority voting (“QMV”) is the voting method for Ordinary Legislative Procedure and covers the vast majority of substantive law-making in the European Union.<sup>71</sup> The Treaty of Nice, in 2002, marked the beginning of QMV’s expansion. At Nice, Member States delegated significant legislative authority to the European Union and broadened QMV to cover “90% of EU Law.”<sup>72</sup> In 2009, The Treaty of Lisbon further widened QMV’s coverage by transitioning twenty-one policy areas from

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<sup>68</sup> TEU, art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 4.

<sup>69</sup> *Voting System*, *supra* note 59. (Simple Majority is used primarily for procedural matters and requires fourteen Member States for a motion to pass); EUROPEAN COUNCIL, SIMPLE MAJORITY, <https://www.consilium.europa.eu/en/council-eu/voting-system/simple-majority/> (Matters covered by simple majority include procedural issues like “organisation of its secretariat general, the adoption of the rules governing the committees foreseen in the treaties” and “request[s] [for] the Commission to undertake studies or submit proposals.” It is not used for substantive law-making.).

<sup>70</sup> *Voting System*, *supra* note 59.

<sup>71</sup> *The Role of the Council in International Agreement*, *supra* note 28 (QMV is the most widely used voting method in the council.); *See The Ordinary Legislative Procedure*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/ordinary-legislative-procedure/en/ordinary-legislative-procedure.html>.

<sup>72</sup> Morris, *supra* note 24, at 772 (In extending QMV to include 90% of EU law, the Treaty of Nice “ended national vetoes in twenty-three separate E.U. articles.”); *See* George Tsebelis & Xenophon Yataganas, *Veto Players and Decision-making in the EU after Nice: Political Stability and Bureaucratic/Judicial Discretion*, 40 J. COMMON MKT. STUD. 2, 283-307 (2002).

unanimity to QMV.<sup>73</sup> Now, over three-fourths, around 80%, of total legislation passes through QMV.<sup>74</sup>

The Treaty of Lisbon also amended QMV procedure by adding demographic criteria to the requirements for obtaining majority.<sup>75</sup> Whereas QMV traditionally centered on voting percentages alone, after Lisbon, it requires a Member State approval of 55%, or 15 of 27 states, and that those in favor represent 65% of total EU population.<sup>76</sup> Legislation may be struck down, however, by a “blocking minority.”<sup>77</sup> A blocking minority, too, demands a certain population threshold.<sup>78</sup> It requires four countries whose populations together total, at a minimum, 35% of EU population.<sup>79</sup> If any Council member does not vote,<sup>80</sup> legislation may pass so long as the majority meets the 55% Member State and 65% population requirements.<sup>81</sup> By including population weights, qualified majority after the Treaty of Lisbon tilted the scales of power toward countries with larger populations, to the detriment of smaller countries. Naturally, then, QMV favors the European Union’s largest economies, such as Germany, France, Spain, and Italy.<sup>82</sup>

## 2. *Unanimity*

Unanimity covers the remaining roughly 10% of substantive legislation. Found in Articles 113 and 115 of the TFEU, the governing treaties stipulate that the Council must vote unanimously on tax proposals.<sup>83</sup> Only if every single Member State, who participates in the vote, votes in the affirmative will legislation pass. When legislators shifted voting areas from unanimity to QMV at the Treaty of Lisbon, policy-makers agreed that the tax veto would remain intact.<sup>84</sup> In fact, when Ireland ratified the Lisbon Treaty it

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73 Youri Devuyt, *The European Union’s Institutional Balance after the Treaty of Lisbon: “Community Method” and “Democratic Deficit” Reassessed*, 39 GEO. J. INT’L L. 247, 286, 288 (2008); See Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon*, 50 VA. J. INT’L L. 919, 940-954 (2010) (discussing how and in what ways the treaty of Lisbon expanded and modified QMV to streamline the decision-making processes within the EU Council).

74 *Qualified Majority, The Standard Voting Method in the Council*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/> [hereinafter *Qualified Majority*].

75 TEU, art. 16, Oct. 26, 2012, 2012 O.J. (C 326) 4.

76 *Id.*

77 *Qualified Majority supra* note 74 (explaining what a blocking minority is).

78 TEU art. 16. *supra* note 75.

79 *Qualified Majority supra* note 74.

80 *Id.* (Under QMV, the EU counts an “abstention” as a vote no).

81 See *Voting Calculator*, EUR. COUNCIL, <https://www.consilium.europa.eu/en/council-eu/voting-system/voting-calculator/>.

82 Devuyt, *supra* note 73, at 302.

83 TFEU, art. 113, 115 Jun. 7, 2016, 2016 C.J. (C 202); Kingston, *supra* note 17, at 289.

84 Jamie Smyth, *Coven Confirms New Lisbon Referendum After EU Deal*, THE IRISH TIMES (Dec. 12, 2008), <https://www.irishtimes.com/news/coven-confirms-new-lisbon-referendum-after-eu-deal-1.832993> (“The conclusions...also outline that that EU leaders have agreed to offer the “necessary legal guarantees on the following three points: as regards all Member States, nothing in the Lisbon

conditioned its approval on protection of the tax veto.<sup>85</sup> Ultimately the Lisbon Treaty retained unanimity in seventy-two areas, including tax.<sup>86</sup>

The tax veto guarantees that every Member State in the Council shares an equal voice. By forcing equality between States, unanimity allows each Member State to fully represent its interests in the Council without majority rule.<sup>87</sup> It ensures that “only ideas that actually benefit *all* EU states get signed into law.”<sup>88</sup> When, for instance, subsidiarity challenges do not rise to the level warranting further review, as was true for the DST, dissenting countries retain the ability to block proposals that could harm national interests.<sup>89</sup> Yet, given recent tax proposal failures, the Commission feels confident that global tax conditions justify departing from this tax sovereignty guarantee.

## II. CIRCUMVENTING VETO AND THE PROPOSAL TO ADOPT QUALIFIED MAJORITY VOTING FOR TAX MATTERS

Even though EU law protects the tax veto, two avenues exist that allow legislators to bypass unanimity: Enhanced Cooperation and the Passerelle Clauses. Legislators included these provisions with anticipation that certain scenarios may justify overcoming unanimity. Both processes ultimately permit Council representatives to vote via QMV. While legislators have successfully adopted measures under Enhanced Cooperation, although never for a tax matter, the Passerelle Clauses remain unused. Given that two options exist and only one has produced successful results, it may seem peculiar that the Commission has not considered Enhanced Cooperation for reviving the DST. Yet, past successful projects offer insights suggesting why legislators have not pursued Enhanced Cooperation for the DST and

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treaty makes any change of any kind to the extent or operation of the Union’s competence in relation to taxation.”).

85 Joe Brennan, *Ireland Rejects Brussels Plan to Kill National Vetoes on Tax*, THE IRISH TIMES (Jan. 15, 2019), <https://www.irishtimes.com/business/economy/ireland-rejects-brussels-plan-to-kill-national-vetoes-on-tax-1.3759027> (“Many citizens in Ireland voted to support the Lisbon Treaty on the understanding that tax sovereignty is protected by the system of unanimous vote on tax matters and the basis on which the Irish ratified the treaty cannot be disregarded by the EU.”); Ken Foxe, *European Commission Plan on Tax Was a ‘Red Line’ for Ireland*, IRISH EXAM’R (Mar. 11, 2019), <https://www.irishexaminer.com/news/arid-30910062.html>.

86 Devuyt, *supra* note 73, at 286, 288; *See* Sieberson, *supra* note 73, at 940-54; *Unanimity*, EUROPEAN COUNCIL, <https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/> (Other matters subject to unanimous voting include: “common foreign and security policy...citizenship, EU membership, harmonisation of national legislation on indirect taxation, EU finances, certain provisions in the field of justice and home affairs, harmonisation of national legislation in the field of social security and social protection.” When the Council utilizes unanimous voting, a proposal can still be enacted despite an absentee member state.).

87 Heinemann, *supra* note 24.

88 *Id.* (emphasis added).

89 *Unanimity*, *supra* note 86.



why some EU leaders may prefer a permanent departure from tax unanimity, even if that means placing plans for the DST on temporary hold.

### A. *Enhanced Cooperation*

Enhanced Cooperation first appeared in the 1999 Amsterdam Treaty.<sup>90</sup> Only in 2009, however, did the procedure receive formal codification in the Lisbon Treaty when countries agreed on the terms and processes for utilizing Enhanced Cooperation.<sup>91</sup> A so-called “method of last resort,” the procedure allows legislators to proceed despite veto exercise.<sup>92</sup> It provides a method of advancing a proposal when a single nation vetoes or a small coalition of countries veto a popular policy.<sup>93</sup> Measures only succeed when significant support for the proposed policy already exists.<sup>94</sup> Despite creating a backdoor to enact vetoed proposals, Enhanced Cooperation does not permit the Union to act beyond its stated legislative authority.<sup>95</sup>

If adopted, the act in question becomes law solely for Member States who participated in the process, which, naturally, undermines its utility in reigning in EU tax competition.<sup>96</sup> Member States who do not initially join may later decide to participate.<sup>97</sup> Since a measure applies solely to participating Member States, Enhanced Cooperation does not offer a quick solution to rescuing vetoed legislation when the Commission aims to enact uniform and time-sensitive policies.

#### 1. *Enhanced Cooperation Procedure*

As a primary matter, at least nine Member States must unanimously agree to use Enhanced Cooperation.<sup>98</sup> Member States first propose their

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<sup>90</sup> EUROPEAN UNION PUBLICATIONS OFFICE, ENHANCED COOPERATION, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0015>.

<sup>91</sup> *Legal Framework*, EU MONITOR, <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dow6rirz4#p4>; Therese Blanchet, *The Treaty of Lisbon: A Story in History or the Making of a Treaty*, 34 FORDHAM INT'L L.J. 1217 (2011) (discussing the Treaty of Lisbon and changes made to simplify and delineate Enhanced Cooperation procedures); Morris, *supra* note 24, at 772.

<sup>92</sup> See TEU, art. 20; TFEU art. 326-334; Carsten Gerards & Wolfgang Wessels, *Enhancing 'Enhanced Cooperation': Constraints and Opportunities of an Inflexible Flexibility Clause*, COLL. OF EUR. POLY BRIEF (Mar. 2019); Matthew Parker, *Giving Teeth to European Patent Reform: Overcoming Recent Legal Challenges*, 26 EMORY INT'L L. REV. 1079, 1088 (2012).

<sup>93</sup> *Commission White Paper on the Future of Europe*, 87, COM(2017) (Mar. 19, 2019) [hereinafter *Future of Europe*].

<sup>94</sup> Matej Avbelj, *Differentiated Integration – Farewell to the EU-27?*, 14 GERMAN L.J. 191, 201 (2013).

<sup>95</sup> *Future of Europe*, *supra* note 93.

<sup>96</sup> Gerards & Wessels, *supra* note 92.

<sup>97</sup> *Future of Europe*, *supra* note 93.

<sup>98</sup> *Id.*; See Gerards & Wessels, *supra* note 92.

intent to use Enhanced Cooperation to the Commission.<sup>99</sup> The Commission may then submit a plan to the European Parliament to secure its approval. Alternatively, the Commission may decline to submit a request to Parliament. However, it must notify Member States of its reason.<sup>100</sup> If the Commission proceeds, the Council “authorizes” Enhanced Cooperation by approving it unanimously.<sup>101</sup> Then, the European Parliament must approve the request by simple majority.<sup>102</sup> If it passes, participating Member States in the Council may debate and vote on the matter by QMV.<sup>103</sup>

## 2. *Legislative Successes under Enhanced Cooperation*

As of 2020, only a handful of measures have successfully navigated Enhanced Cooperation, the first of which occurred in 2010.<sup>104</sup> The procedure led lawmakers to adopt five measures: a divorce reform law applying to international EU couples;<sup>105</sup> the creation of the European Unitary Patent;<sup>106</sup> the establishment of a European Public Prosecutor Office;<sup>107</sup> the Property Regime Rules providing a framework of distribution of property for international EU couples;<sup>108</sup> and, finally, cooperation on defense and security measures that allow states to collaborate on certain security initiatives.<sup>109</sup>

So far, since Enhanced Cooperation boasts just five successful projects, a definitive determination of policy characteristics necessary for success under Enhanced Cooperation remains unclear. However, despite differences in the successful measures, a baseline assumption about types of policies likely to succeed under Enhanced Cooperation emerges. Three general parallels appear in the policies that succeeded through Enhanced Cooperation: a primarily internal EU focus; a purpose where realization remains independent of universal application; and average participation of twenty-two Member States.

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99 *Enhanced Cooperation*, EU MONITOR, <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dow6rirz4>; See Gerards & Wessels, *supra* note 92.

100 *Enhanced Cooperation*, EU MONITOR, *supra* note 99.

101 *Id.*

102 *Id.*

103 *Id.*

104 See Avbelj, *supra* note 94, at 200; *Future of Europe*, *supra* note 93.

105 Council Regulation 1259/2010 of Dec. 20, 2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343).

106 *Unitary Patent Guide*, EUROPEAN PATENT OFFICE (Dec. 2012).

107 See *European Public Prosecutor's Office*, EUROPEAN COMMISSION, [https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office\\_en](https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/networks-and-bodies-supporting-judicial-cooperation/european-public-prosecutors-office_en); *Future of Europe*, *supra* note 93.

108 *The Implementation of Enhanced Cooperation in the European Union*, EUROPEAN PARLIAMENT (Oct. 2018).

109 *Future of Europe*, *supra* note 93, at 2.

First, each successful policy under Enhanced Cooperation contains an internal EU focus and application. Internal in nature, the policies do not directly impact non-EU actors. For example, the patent measure affects EU patent holders, the divorce and separation measure affects EU citizens of multiple Member States, the European Public Prosecutor's Office targets EU crimes, and the defense procedures involve collaboration between EU states. These internal focuses suggest that Enhanced Cooperation may prove most successful for policies directly targeting EU citizens and countries.<sup>110</sup>

Second, for each measure, realization of the legislative purpose can occur independent from universal Member State support. For example, the patent measure protects parties from the need to litigate similar disputes in multiple countries by providing a common venue.<sup>111</sup> As a result, even if just the nine minimum states participated, each country would benefit from the provision of a common venue since it lowers the administrative costs of litigation. Advantages would also easily accrue to additional Member States. Similarly, the divorce and separation measure benefits any number of states. The policy provides a standard procedure for determining choice of law for separating or divorcing couples from two Member States. Even assuming just nine participating states, couples originating from those states immediately benefit, even if more states could better accomplish the policy purpose.

Third, with an average Member State participation rate of twenty-two, to succeed under Enhanced Cooperation, it is safe to assume that a measure may enjoy a higher likelihood of success where a near majority of EU states lend support. Twenty-six Member States supported the European Unitary Patent, seventeen supported the divorce and separation policy, twenty-two States supported the European Public Prosecutor's office, eighteen supported the property regime rules, and twenty-five supported the defense and security cooperation measure.<sup>112</sup> Even though Enhanced Cooperation requires a minimum of nine states, the five successes indicate that success under Enhanced Cooperation may demand a higher consensus of participating states, for varying reasons.<sup>113</sup>

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110 While it could be argued that the patent has an international focus, in that it improves EU patent enforcement which strengthens the European Union, the focus is decidedly internal as it applies to holders of EU patents.

111 Parker, *supra* note 92, at 1091-92.

112 *The Implementation of Enhanced Cooperation in the European Union*, *supra* note 108.

113 See Bernd Martenczuk, *Enhanced Cooperation: The Practice of Ad Hoc Differentiation in the EU since the Lisbon Treaty*, 66 *STUDIA DIPLOMATICA* 3, 83-100 (2013).

### 3. *Enhanced Cooperation and the Vetoed Digital Services Tax*

Given its prior use, the question remains why the Commission, and Dombrovskis, overlooked Enhanced Cooperation when the DST failed in 2018. As a starting point, no tax measure has succeeded under Enhanced Cooperation. Currently, the vetoed Financial Transaction Tax (FTT)<sup>114</sup> makes its way through the process. However, the journey has taken since 2011 and remains incomplete.<sup>115</sup> The FTT, like the DST, failed by tax veto. Member States initially began the process in 2013 when eleven states advocated the use of Enhanced Cooperation. By 2015, the proposal stalled in the Council. However, in 2019, Member States requested reconsideration. Now it again proceeds slowly through the process.<sup>116</sup> Given the FTT's five-year incomplete journey, legislators may have decided to observe the FTT's outcome before embarking on a second tax proposal through Enhanced Cooperation.<sup>117</sup>

Even if Enhanced Cooperation eventually leads to the enactment of the FTT, legislators likely have other reasons for their decision not to pursue Enhanced Cooperation for the DST. At this time, lawmakers have decided that they should not pursue the procedure without at least twenty participating states.<sup>118</sup> Given the high number of Member States involved in the five successful policies, where measures averaged twenty-two supporting States, this decision makes sense, since, the likelihood of unilateral U.S. retaliatory tariffs declines with every additional participating Member State.<sup>119</sup>

Thus far, Enhanced Cooperation has also applied to primarily internal EU measures where the intended policy goal does not require universal cooperation. The DST, however, would be unlikely to apply similarly for

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114 See Elke Asen, *Financial Transaction Taxes in Europe*, TAX FOUNDATION (Jan. 23, 2020), <https://taxfoundation.org/financial-transaction-taxes-in-europe/> (“FTTs are levied on the trade in financial instruments such as stocks, bonds, or derivatives. Under an FTT, a percentage of the asset's value is paid in taxes when it is traded.”).

115 *Id.*

116 *Legislative Train, Deeper and Fairer Internal Market with a Strengthened Industrial Base*, EUROPEAN PARLIAMENT (Sept. 20, 2020), <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-financial-transaction-tax>; Francesco Guarascio, *EU Tries to Revive Plan for Financial Transaction Tax*, REUTERS (June 14, 2019), <https://www.reuters.com/article/us-eu-ecofin-tax/eu-tries-to-revive-plan-for-financial-transaction-tax-idUSKCN1TF1OG>.

117 See *European Union: Debate on Circumventing National Vetoes on EU Taxation Policies Gathers Steam*, INT'L TAX REV. (Dec. 14, 2017), <https://www.internationaltaxreview.com/article/b1f7nb6ymx6ywm/european-union-debate-on-circumventing-national-vetoes-on-eu-taxation-policies-gathers-steam>.

118 *US Considers Tariff Response to French Digital Tax*, GRANT THORNTON (Dec. 10, 2019), <https://www.grantthornton.com/library/newsletters/tax/2019/hot-topics/dec-10/US-considers-tariff-response-french-digital-tax.aspx>.

119 *Id.*

two reasons: its nature as an interim tax and its direct disparate impact on non-EU actors.

First, the Commission proposed an interim DST and did not envision the creation of a permanent law. Instead, the Commission, and large supporting Member States, intended the tax both as a temporary solution to taxing the digital economy and as a method by which the European Union could incentivize progress on global tax reform.<sup>120</sup> When the proposal failed, the EU missed its opportunity to create a temporary unified EU response. When discussing the DST's failure and why it necessitated a switch to QMV, Dombrovskis reasoned that QMV would ensure that, going forward, the Union could more easily act as a full united force during global negotiations.<sup>121</sup> Dombrovskis' emphasis on the global implications of the DST failure suggests that its defeat did not solely mean lost tax revenue. Rather, blocking the DST at a critical time in global tax talks minimized the Commission's goal of appearing united in international negotiations.<sup>122</sup> Yet, in simply proposing the tax, the Commission succeeded in bringing the issue of taxing GAFAs to the forefront of international tax talks. The proposal itself, Dombrovskis stated, "has the merit of having accelerated international discussion within the OECD and the G20 on the comprehensive solution [of taxing the digital economy]."<sup>123</sup> So, even if enough states enacted the tax through Enhanced Cooperation, the global community would likely obtain a solution before the proposal navigated through the lengthy Enhanced Cooperation process. So, for now, placing the EU tax on the back burner and pursuing permanent procedure change may seem more appropriate since the proposal succeeded in temporarily expediting global tax negotiations.

Second, while the tax facially applies internally, it would have expressed a global focus in application. The qualifying thresholds would have disproportionately applied to GAFAs, all U.S.-headquartered technology companies.<sup>124</sup> The disparate impact on American multi-national entities suggests that by designing the tax to target GAFAs, the Commission also intended the tax to function as a signal to the United States to incentivize

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120 *Communication from the Commission to the European Parliament and the Council Concerning the Time to Establish a Modern, Fair, and Efficient Taxation Standard for the Digital Economy*, at 8-9, COM (2018) 146 final (Mar. 23, 2018); EUR. PARL. DEB., *supra* note 11 ("[the Commission] strongly believe[s] that the solution to tax and [sic] the digital economy must ultimately be a global one.>").

121 EUR. PARL. DEB., *supra* note 11.

122 *Id.*

123 *Id.*

124 See Gavin Ekins, *European Countries Push Forward on Digital Taxes Despite Pleas to Wait*, TAX FOUNDATION (Feb. 9, 2018), <https://taxfoundation.org/european-countries-push-forward-digital-taxes-despite-pleas-wait/> (discussing the individual regional DSTs, the taxes closely mirror the thresholds proposed in the Commission's DST and notably target US tech companies such as Google, Apple, Amazon, and Facebook).

stronger U.S. involvement in global tax talks.<sup>125</sup> Although after the DST's failure, Margrethe Vestager, Executive Vice President of the Commission, argued that the Union has a strong interest in encouraging U.S. involvement in global tax reform. When the United States withdrew from international tax negotiations during the summer of 2020,<sup>126</sup> Vestager countered that EU countries would enact "regional" DSTs, but that the "EU would 'really, really prefer a global consensus.'" <sup>127</sup> By linking DSTs with the EU desire for U.S. engagement in international tax talks, Vestager suggests that the Commission views DSTs, and their disparate impact on U.S. tech companies, as an incentive for Americans to negotiate.<sup>128</sup> If states could press forward with DSTs unilaterally and trigger an American reaction, the Commission could direct its attention to a larger goal and not need to pursue Enhanced Cooperation since the effect would closely mirror a few consenting states unilaterally imposing the tax. Since achieving full EU agreement failed and U.S. cooperation remains weak, the moment arrived where the Commission felt justified in advancing its prophylactic plan of amending voting procedure. Now, the European Union could seek changes to ensure it would no longer fail to present a unified front because of Member State tax veto use.<sup>129</sup>

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125 See U.S. TRADE REPRESENTATIVE, USTR INITIATES SECTION 301 INVESTIGATIONS OF DIGITAL SERVICES TAXES (June 2, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/june/ustr-initiates-section-301-investigations-digital-services-taxes>; Melissa Heikkila & Elisa Braun, *EU Effort to Tax Tech Giants Falters Under Pressure From U.S.*, POLITICO (July 27, 2020), <https://www.politico.com/news/2020/07/27/europe-digital-tax-382309> ("The proposal under discussion at the OECD consists of two pillars. The first, aimed at ensuring digital companies are taxed in the places where they generate profit, is ferociously opposed by Washington, which argues that it would discriminate against U.S. tech companies....").

126 Alan Rappeport et al., *U.S. Withdraws from Global Digital Tax Talks*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/06/17/us/politics/us-digital-tax-talks.html>.

127 Ryan Heath, *EU Pushing Ahead with Digital Tax Despite US Resistance, Top Official Says*, POLITICO (Jun. 23, 2020), <https://www.politico.com/news/2020/06/23/eu-digital-tax-united-states-336496> ("A frustrated Vestager said that big tech companies are inviting a backlash from both consumers and regulators by repeatedly pushing the limits of EU law. Many of those companies are American, Vestager highlighted, pointing to a long list of antitrust and tax cases against Apple, Amazon and Google as a sign companies are not learning from past EU regulatory tangles."). *Germany Wants to Rescue Talks with U.S. on Digital Services Tax*, REUTERS (June 18, 2020), <https://www.reuters.com/article/us-usa-trade-digital-france-germany/germany-wants-to-rescue-talks-with-u-s-on-digital-services-tax-idUSKBN23P2DQ> (citing France referred to the US withdrawal as a "provocation" and reignited the debate for a DST in order to elicit a US response).

128 Sam Schechner, *After U.S. Declares Impasse on Digital Taxes, Europe Continues Push*, WALL ST. J. (June 18, 2020), <https://www.wsj.com/articles/after-u-s-declares-impasse-on-digital-taxes-europe-continues-push-11592481834> ("European officials are pushing forward with plans to tax tech giants after the U.S. declared international talks on the issue to be at an impasse, raising the specter of trans-Atlantic trade conflict."). See also Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, 40 VA. TAX REV. 1, 176-217, 193-194 (2020).

129 See Heikkila & Braun, *supra* note 126 ("And while November could see the election of a new, more Euro-friendly administration, the OECD's Saint-Amans says he does not thin[k] a Joe Biden presidency would take a very different stance on digital tax. 'Europeans underestimate how bipartisan the U.S. position is,' he said. 'You cannot attack U.S. tech companies.'").

Successful applications of Enhanced Cooperation demonstrate why Member States and the Commission may not have elected to pursue Enhanced Cooperation for the DST. Both Dombrovskis and Vestager's comments as Commission Vice-Presidents, suggest that the Commission viewed the interim DST as a negotiating tool. When it failed, Commission leaders likely realized they could no longer jeopardize the Union's need to appear unified when interacting with the international community by allowing a few small Member States to derail EU plans. So, with States enacting regional DSTs, the Commission turned to the Passerelle Clauses.

### B. *The Passerelle Clauses*

Transitioning away from the veto would occur through the Passerelle Clauses. Found in the Treaty of European Union (TEU), these obscure and never-applied clauses allow legislators to eliminate the veto and vote via QMV.<sup>130</sup> Called Passerelle Clauses, French for “bridging,” these provisions provide a non-treaty altering method of changing EU voting procedure.<sup>131</sup> Like Enhanced Cooperation, the Passerelle Clauses trace their origins to Lisbon.<sup>132</sup> Before the Treaty of Lisbon, no similar clause allowed legislators to switch voting methods without altering underlying treaties.<sup>133</sup> Legislators included these clauses to “facilitate EU integration in ‘sensitive’ areas if EU countries so wish[ed].”<sup>134</sup> Yet, despite their inclusion, they remain subject to strict voting rules. Only with unanimous Member State support can legislators opt to use the Passerelle Clauses and switch from unanimous voting to QMV in a particular “area” or specific “case.”<sup>135</sup> Since the Commission knew they could not obtain unanimity for the DST, they instead sought an alternative path: a gradual change in taxation.

#### 1. *Activating the Passerelle Clauses*

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130 TEU art. 48, *supra* note 22; *Communication from the Commission to the European Parliament, the European Council – Towards a More Efficient and Democratic Decision Making in EU Policy*, COM (2019) 8 final (Jan. 15, 2019) [hereinafter *Towards a More Efficient and Democratic Decision Making*].

131 TEU art. 48, *supra* note 22; See Press Release, *supra* note 21.

132 Although the Lisbon Treaty codified the Passerelle Clauses as they appear today, the concept of pass-through clauses generally had existed in earlier treaties. See Gavin Barrett, *Final Impact: The Treaty of Lisbon and the Final Provision for the Treaty Establishing the European Community and the Treaty of the European Union*, UCD Dublin European Institute, Working Paper No. 08-1, 6-7 (May 2008).

133 Sieberson, *supra* note 73, at 970.

134 *Flexibility in EU Decision-Making: Passerelle Clauses, Brake Clauses, and Accelerator Clauses*, EUR-LEX (2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0019&from=EN>.

135 TEU art. 48, *supra* note 22 (“Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorizing the Council to act by a qualified majority in that area or in that case.”) (emphasis added).

Transitioning to QMV under the Passerelle Clauses requires the support of national parliaments, the European Parliament, and the unanimous approval of Member States.<sup>136</sup> Initially, the Council, at its discretion, may move to adopt legislation through the Clauses. To do so, it must provide notice to each national Parliament. Once notified, the Clauses provide national parliaments six months from the date they receive notification of the Council's intention to object. If a national parliament provides notice of its disapproval within the six-month time frame, the Council cannot move forward. This provision creates an "effective power of veto" for each national Parliament.<sup>137</sup> If no national parliament objects, the proposal proceeds. Then, the European Parliament must consent by majority.<sup>138</sup> Only then can the Council implement the resolution. And, it must do so unanimously. Successive powers of veto throughout the Passerelle Clauses limit their applicability as a general means of bypassing unanimity. The multiple layers of consent also demonstrate the sovereignty protections within the very clauses permitting departure from unanimity.<sup>139</sup> Throughout the process, the underlying proposal remains subject to subsidiarity and proportionality challenges.<sup>140</sup>

## 2. *The Commission's Plan to Phase Out Tax Unanimity*

Following the DST's failure, the moment arrived for the Commission to move forward.<sup>141</sup> For around twenty years, the Commission periodically advocated departing from tax unanimity. This desire led leaders to include the Passerelle Clauses in the Lisbon Treaty. Suggestive of the European Union's eventual proposal, in 2017, then-Commission President, Jean-Claude Juncker, in his State of the Union Address, highlighted his desire for a Europe that can "act more quickly and decisively in a range of policy areas."<sup>142</sup> And, by January 2019, just a few months after the DST failure, the

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<sup>136</sup> TEU art. 48, *supra* note 22.

<sup>137</sup> *Brief of the European Political Strategy Center on A Union that Delivers: Making Use of the Lisbon Treaty's Passerelle Clauses*, European Commission (Jan. 14, 2019) at 4, [https://moien.lu/wp-content/uploads/2019/01/epsc\\_brief\\_passerelles\\_2.pdf](https://moien.lu/wp-content/uploads/2019/01/epsc_brief_passerelles_2.pdf) [hereinafter *A Union that Delivers*].

<sup>138</sup> *Id.* at 4.

<sup>139</sup> *Id.* at 8; Devuyt, *supra* note 73, at 287.

<sup>140</sup> *A Union that Delivers*, *supra* note 137, at 3.

<sup>141</sup> Since 2002, at the Convention on the Future of Europe, the European Commission has stressed its desire to abandon the veto, in the name of legislative efficiency and modernity. *European Commission Communication on Unanimity in Taxation, Euro Tax Flash from KPMG's EU Tax Center*, KPMG (Jan. 2019), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/01/etf-393-eu-commission-roadmap-qmv-tax-matters.pdf>.

<sup>142</sup> *European Union: Debate on Circumventing National Vetoes on EU Taxation Policies Gathers Steam*, *supra* note 117; Press Release, *supra* note 21.



Commission, supported by the European Economic and Social Committee (EESC),<sup>143</sup> advocated abandoning the tax veto.<sup>144</sup>

In the 2019 proposal, the Commission signaled its intention to eliminate tax unanimity. It emphasized recent tax veto use that undermined EU objectives. In the few years preceding the proposal, the veto blocked not only the DST, but also three other tax reform measures, namely: the Common Corporate Consolidated Tax Base (CCCTB),<sup>145</sup> the Financial Transactions Tax (FTT),<sup>146</sup> and the Value Added Tax (VAT) reform.<sup>147</sup> Yet, the Commission's plan to change the voting procedure would not automatically apply to taxation of the digital economy. Instead, it opted for a step-by-step approach. In its proposal, the Commission criticized the veto, referring to it as an antiquated tool to hold legislation hostage instead of an important protector of national sovereignty.<sup>148</sup> It condemned the veto for its ability to prevent the Council from passing legislation.<sup>149</sup> The proposal cited the near "impossible" nature of enacting economic and tax legislation, despite numerous recent tax policy successes.<sup>150</sup> In sum, objections boiled down to a perception of tax unanimity as needlessly inefficient.<sup>151</sup>

In switching to QMV on tax matters, "problems" associated with veto exercise would largely disappear. Previous shifts to QMV in other areas, the Commission advocated, stabilized the single market. Enacted in 1986, The Single European Act had mandated that legislators could vote via QMV instead of unanimity on directives relating to the internal market.<sup>152</sup> Within just six years, the Council adopted 88% of its proposals, which it considered

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143 The EESC is composed of "employers, trade unionists and representatives of social, occupational, economic and cultural organisations." They issue opinions on policy to ensure democratic input from stakeholders to ensure that policy initiatives "tie in better with economic, social and civic circumstances." See *European Economic and Social Committee*, European Union, <https://www.eesc.europa.eu/en/about>.

144 *A Union that Delivers*, *supra* note 137; *Towards a More Efficient and Democratic Decision Making*, *supra* note 130; Opinion of the European Economic and Social Committee on 'A favorable tax system for fair competition and growth,' 2017 O.J. (434).

145 Henk van Arendonk, 2019: *A Landmark Year for European Cooperation, or Maybe Not?!*, EC TAX REV. (Feb. 2019) ("While Germany and France clearly want to proceed with CCCTB and CCTB proposals" other Member States hesitated to support the measures since the CCCTB and the CCTB would "favour countries with a large manufacturing sector over and above those with a larger presence in services and the digital economy."); *Commission Proposal for a Council Directive on a Common Corporate Tax Base*, COM (2016) 685 final (Oct. 25, 2016); Keuschnigg et al., *supra* note 31 (saying that the original CCCTB proposal failed in 2011).

146 *How Do We Gradually Improve Decision-Making in EU Tax Policy?* European Commission (Jan. 15, 2019), [https://ec.europa.eu/taxation\\_customs/system/files/2019-01/15\\_01\\_2019\\_qmv\\_factsheet\\_en.pdf](https://ec.europa.eu/taxation_customs/system/files/2019-01/15_01_2019_qmv_factsheet_en.pdf).

147 *Id.*

148 *A Union that Delivers*, *supra* note 137.

149 Heinemann, *supra* note 24.

150 *A Union that Delivers*, *supra* note 137.

151 Heinemann, *supra* note 24.

152 Devuyt, *supra* note 73, at 286.

both a success and a goal to replicate for taxation legislation.<sup>153</sup> Analogizing taxation to trade, the Commission argued that once legislators voted via QMV on trade policy, legislators could respond quickly to changing economic conditions. This move, they argued, improved EU global standing.<sup>154</sup> While legitimate arguments for unanimity in national security exist, the Commission conceded, the same does not apply for tax.

3. *How the Commission Plans to Utilize the Passerelle Clauses to Gradually Eliminate the Tax Veto*

The shift away from tax unanimity would occur through a step-by-step process in specific tax policy areas until QMV entirely replaces the tax veto.<sup>155</sup> As a first step, Member States would adopt QMV for matters less likely to generate controversy, such as strengthening coordination in enforcement areas. This step would include measures combatting fraud and tax evasion and policies to ensure consistent reporting by Member States.<sup>156</sup> Then, the Commission would use QMV in areas where tax is secondary to the primary policy objective, such as in social, health, or environmental initiatives.<sup>157</sup> Later, legislators would adopt QMV for “harmonis[ing] EU rules” on matters such as VAT and excise duties.<sup>158</sup> Only then would the European Union move to QMV for “major tax projects” like the CCCTB and, ultimately, taxation of the digital economy.<sup>159</sup> In so doing, the Union would gradually phase out the tax veto and replace it with QMV.<sup>160</sup> Yet, given the layers of unanimity required to press forward on shifting to QMV, achieving consensus will mean compromise.

### III. ABANDONING THE TAX VETO: A PROMISE OF EFFICIENCY AND SOLIDARITY IN A DIGITAL AGE OR A THREAT TO NATIONAL TAX SOVEREIGNTY

Because the Passerelle Clauses demand unanimity, the proposal can only succeed if all states agree to move forward. As the proposal exists today, however, it is unlikely that it will generate unanimous support. In the 1980s, when most economic legislation required unanimity, a Union with few

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<sup>153</sup> The Council adopted “265 out of 300 proposed measures” during the period. See *A Union that Delivers*, *supra* note 137, at 2.

<sup>154</sup> *Id.* at 1.

<sup>155</sup> Press Release, *supra* note 21.

<sup>156</sup> *Towards a More Efficient and Democratic Decision Making*, *supra* note 130.

<sup>157</sup> Press Release, *supra* note 21.

<sup>158</sup> *Towards a More Efficient and Democratic Decision*, *supra* note 130.

<sup>159</sup> *Id.*

<sup>160</sup> Press Release, *supra* note 21.

Member States meant legislators could more easily obtain consensus.<sup>161</sup> With twenty-seven Member States today, conflicting tax objectives increase the difficulty of achieving unanimity. Today, the tax policies of smaller, typically Nordic, states often clash with those of larger states and the Commission. This tension creates strong incentives for large states to limit the ability of a minority of small states to derail shared policy objectives of the majority.<sup>162</sup> Since QMV offers large states the opportunity to increase their Council influence, the proposal to switch taxation to QMV leads many larger states to support the move.<sup>163</sup> By contrast, the proposal threatens small states who stand to lose their unilateral veto. The proposal, then, offers a choice between efficient legislating for the European Union or a threat to the current EU distribution of taxation power.

#### *A. The Politics of Voting by Qualified Majority on Tax*

##### *1. Large Member States Tend to Support the Commission's Plan as It Increases Their National Influence in the Council*

Many large Member States, such as Germany, France, and Spain, support the transition to QMV as it would increase their influence on tax policy given the QMV population thresholds that favorably bias states with high populations.<sup>164</sup> Because the tax veto, exercised primarily by smaller countries, often blocks legislation supported by larger economies, as was true for the FITT, DST, and CCCTB, Europe's most populous states stand to gain as they could more easily achieve qualified majority and block any dissenters.<sup>165</sup>

Home to Europe's largest cities and economic centers, highly populous EU Member States benefit already from existing strong centers of international commerce. They reject the tax competition that minimizes

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<sup>161</sup> *A Union that Delivers*, *supra* note 137, at 2; Konrad Schiemann, *Europe and the Loss of Sovereignty*, 56 INT'L & COMPAR. L. Q. 475, 482 (2007).

<sup>162</sup> France, Germany, Italy, and Spain lobbied for a tax targeting GAFA in February and, by late March, the Commission had launched its proposal.

<sup>163</sup> *Changed Rules for Qualified Majority Voting in the Council of the EU* (Dec. 2014), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/545697/EPRS\\_ATA%282014%29\\_545697\\_REV1\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2014/545697/EPRS_ATA%282014%29_545697_REV1_EN.pdf); *See* Morris, *supra* note 24, at 779; *See generally* Alex Barker, *Brussels Pushes to Scrap National Vetoes on Taxation*, FIN. TIMES (Jan. 14, 2019), <https://www.ft.com/content/65327b4e-173d-11e9-9e64-d150b3105d21> (“...some ambassadors from EU Member States argued it was unwise for the commission to even make the proposal, since it would be exploited by nationalists and populists...” in the upcoming election.)

<sup>164</sup> Francesco Guarascio, *EU Smaller States Say No to End of Veto on Tax Reforms*, REUTERS (Feb. 12, 2019), <https://uk.reuters.com/article/us-eu-tax-reform/eu-smaller-states-say-no-to-end-of-veto-on-tax-reforms-idUKKCN1Q11BA>; Alexander Hartley, *Qualified Majority Voting Will Drive Reforms, Says EC's Tax Chief*, INT'L TAX REV. (July 29, 2019), <https://www.internationaltaxreview.com/article/b1fr4qb2w02nj4/qualified-majority-voting-will-drive-reforms-says-ecs-tax-chief>.

<sup>165</sup> Heinemann, *supra* note 24.

state revenue collections as they face ever-increasing public expenditure demands. They see the blocked tax proposals that would have raised additional revenues as prime examples of why small states should not wield unilateral veto power.<sup>166</sup> Bruno Le Maire, French Minister of Finance, touted the move to QMV as an opportunity to increase the “efficiency” of EU law-making.<sup>167</sup> Speaking on behalf of Spain, Spanish Prime Minister Pedro Sanchez, too, backed the proposal.<sup>168</sup> And Germany’s Finance Minister, Olaf Scholz, called the proposal “important and useful” and a “real breakthrough” for moving the Union forward.<sup>169</sup> Whether these leaders specifically responded to Dombrovskis’ “wake-up” call, Europe’s largest economies agree that small states should not hold the unilateral power to prevent the European Union from enacting uniform legislation, especially during intense global tax negotiations.<sup>170</sup>

2. *Small Member States that Tend to Rely on Investment-Orientated Tax Systems Reject the Commission’s Proposal as It Could Undermine Their National Tax Autonomy*

Member States, predictably, did not respond to the Commission’s proposal in the same way. States such as Ireland, Sweden, the Netherlands, and Luxemburg, voiced concern over losing their voice. With smaller economies, these states rely on investment-oriented tax regimes to sustain employment and stimulate their local economies, especially by incentivizing tech investment.<sup>171</sup> The smaller states that vetoed the DST, for example, generally saw the proposal as overstepping EU authority. They expressed concerns that the tax would disadvantage local tax regimes and undermine

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<sup>166</sup> *Id.*

<sup>167</sup> Jorge Valero, *Member States Shield National Vetoes on Tax Matters*, EURACTIV (Feb. 12, 2019), <https://www.euractiv.com/section/economy-jobs/news/member-states-shield-national-vetoes-on-tax-matters/>; *EU Wants to End Member State Veto on Tax*, FRANCE 24 (Jan. 1, 2019), <https://www.france24.com/en/20190115-eu-wants-end-member-state-veto-tax-0>.

<sup>168</sup> Valero, *supra* note 167.

<sup>169</sup> Michael Nienabar, *1-EU Finance Ministers Will Discuss Recovery, Joint Revenues at Berlin Meeting – Scholz*, REUTERS (Sept. 3, 2020), <https://www.reuters.com/article/eu-economy-scholz/update-1-eu-finance-ministers-will-discuss-recovery-joint-revenues-at-berlin-meeting-scholz-idUSL8N2G031Q>; *Germany Wants to Rescue Talks with U.S. on Digital Services Tax*, REUTERS (Jun. 18, 2020), <https://www.reuters.com/article/us-usa-trade-digital-france-germany/germany-wants-to-rescue-talks-with-u-s-on-digital-services-tax-idUSKBN23P2DQ> (citing the German Finance Ministry as stating that “we continue to work hard for a solution that adequately address the tax challenges of digitalization and leads to fair taxation.”); See Matthew Karnitschnig, *Berlin Open to Majority Voting on EU Taxes: Report*, POLITICO (Feb. 2, 2019), <https://www.politico.eu/article/berlin-open-to-majority-voting-on-eu-taxes-report-german-finance-minister-olaf-scholz/>.

<sup>170</sup> Guarascio, *supra* note 164; See also Thomas Adamson, *European Countries Slam US Withdrawal from Tech Tax Talks*, U.S. NEWS (June 18, 2020), <https://www.usnews.com/news/business/articles/2020-06-18/france-calls-us-withdrawal-from-tech-tax-talks-provocation>.

<sup>171</sup> See Guarascio, *supra* note 164.

recent economic gains derived from considerable foreign tech investment in their economies.<sup>172</sup> The prospect of losing the ability to halt proposals triggers an economic Euro-skepticism in these smaller states, comparable to the immigration centered Euro-skepticism in eastern Europe.<sup>173</sup> Losing economic control, they fear reversal of the financial growth generated through their strategic tax initiatives.<sup>174</sup> If they relinquished additional authority to Brussels and their economies suffered when adverse policies subsequently passed, the transition could provide fuel for Euro-skeptic sentiment and increase EU tensions.

Confirming this fear, Swedish Finance Minister Magdalena Anderson reacted to the Commission's proposal stating that "it is not more democratic to have less power" and warned that such a move could increase "skepticism for many countries and many parliaments across Europe."<sup>175</sup> Luxembourg's Finance Minister Pierre Gramegna argued that it would threaten the "core sovereignty of the countries."<sup>176</sup> Gramegna also highlighted EU tax successes and noted the progress already occurring within the current framework.<sup>177</sup> Ireland, along with the Netherlands, expressed contentment with existing rules. Ireland recognized the substantial economic advantages resulting from EU cooperation. However, with its pro-investment tax regime, Ireland fears ceding more control to Brussels.

In 2008, these smaller states already relinquished substantial authority to the Union when the Lisbon Treaty added population weights and shifted twenty policy areas to QMV. Fiercely contested, Ireland ultimately ratified the Treaty on the guarantee that the Union would protect tax unanimity.<sup>178</sup> Now, Ireland again worries that the European Union will enact policies that conflict with their tax regime that has generated substantial gains for its

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172 See *supra* notes 61-64.

173 Economic Euroscepticism differs greatly from the immigration-oriented Euroscepticism expressed in central or eastern European countries. Skepticism from dissenting countries on tax issues centers on economic rather than social concerns. Compare Markus Ketola & Johan Nordensvard, *Nordic Euroscepticism – an Exception that Disproves the Rule?*, THE LONDON SCH. OF ECON. AND POL. SCI. (Sept. 3, 2013), <https://blogs.lse.ac.uk/eurocrisispress/2013/09/03/nordic-euroscepticism-an-exception-that-disproves-the-rule-2/>, with William A. Galston, *The Rise of European Populism and the Collapse of the Center-Left*, THE BROOKINGS INST. (Mar. 8, 2018).

174 See Peter Flanagan, *Why Ireland Is Taking on Most of the World in Tax Fight*, BLOOMBERG (July 24, 2021), <https://www.bloomberg.com/news/articles/2021-07-24/why-ireland-is-taking-on-most-of-the-world-in-tax-fight-q-a>.

175 Valero, *supra* note 167; Mehreen Khan & Sam Fleming, *Brussels Plans Attack on Low-Tax Member States*, FIN. TIMES (July 14, 2020), <https://www.ft.com/content/4068b83a-2c64-43e9-b82a-0b77c454164b>.

176 Valero, *supra* note 167.

177 *Id.* See also Khan & Fleming, *supra* note 175.

178 See Presidency Conclusions, Brussels European Council, at 2, 18 (July 10, 2009) ("Nothing in the Treaty of Lisbon makes any change of any kind, for any Member State, to the extent or operation of the competence of the European Union in relation to taxation."); See also Grainne de Burca, *If at First You Don't Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, 33 FORDHAM INT'L L.J. 5, 1472, 1484 (2001).

workers and economy.<sup>179</sup> With QMV, just five large states could “create a majority voting bloc on the basis of population” and more easily pass legislation.<sup>180</sup> This power shift would minimize Ireland’s voice, leaving them limited options to protect local interests.<sup>181</sup> The Irish Finance Ministry argued that it has “always been clear [for Ireland] that unanimity is the appropriate voting system for any tax proposals at the EU level.”<sup>182</sup> Reflected in the treaties, and upheld over time, these states view the tax veto as integral to national sovereignty.<sup>183</sup> And, as Swedish Finance Minister Anderson warned, ignoring that fact could prove harmful for internal EU cohesion.<sup>184</sup>

*B. A Promise and a Threat: Qualified Majority Voting*

*1. Eliminating Unanimity Will Increase the Legislative Efficiency of the Largest EU States, Allow the Commission to Respond Efficiently to Changing Market Conditions, and Solidify the European Union’s Position as a Global Tax Leader*

Abandoning tax unanimity promises greater opportunities for the European Union to enact uniform policies and avoid conflicting unilateral state actions. In voting by QMV, the resulting legislative efficiency gains would promote a strong single market and help the European Union present a more cohesive global image to act as a greater counterweight to the United States in international tax negotiations.<sup>185</sup> Absent uniform EU tax

<sup>179</sup> Maria Jepsen, *The European Irishman: An Analysis of Euroscepticism in Ireland*, Roskilde Univ., (2012), <https://core.ac.uk/download/pdf/12520371.pdf>.

<sup>180</sup> Ken Foxe, “Majority Voting Could See Five States Decide EU Taxes, IRISH INDEPENDENT (Mar. 11, 2019), <https://www.independent.ie/business/irish/majority-voting-could-see-five-states-decide-eu-taxes-37898614.html>.

<sup>181</sup> *Id.*; See Brennan, *supra* note 85. These smaller states could still challenge proposals under subsidiarity. See *supra* note 49 (discussing principle of subsidiarity); and *supra* note 56 (highlighting process of using the Subsidiarity Control Mechanism to raise subsidiarity challenges).

<sup>182</sup> Khan & Fleming, *supra* note 175; Valero, *supra* note 167 (“Menno Snel, state secretary for finance of the Netherlands, said his government was happy with the situation as it is.”).

<sup>183</sup> See Ken Foxe, *supra* note 86 (“[An] internal brief, prepared for Finance Minister Paschal Donohoe and for officials, said any such move would be ‘highly sensitive’...‘as any move to change the voting method used ... would reduce member states’ sovereignty.’”).

<sup>184</sup> Heinemann, *supra* note 24; See Georgi Pirinski, *The Foundation of a Sovereign Europe*, EUR. COUNCIL ON FOREIGN REL. (Nov. 8, 2019), [https://www.ecfr.eu/article/commentary\\_the\\_foundation\\_of\\_a\\_sovereign\\_europe](https://www.ecfr.eu/article/commentary_the_foundation_of_a_sovereign_europe); Arthur J. Cockfield, *The Rise of the OECD As Informal ‘World Tax Organization’ Through National Responses to E-Commerce Tax Challenges*, 8 YALE J.L. & TECH. 136 (2006); Thomas Rixen, *Tax Competition and Inequality: The Case for Global Tax Governance*, 17 GLOBAL GOVERNANCE 447, 447 (2011) (explaining that achieving international tax cooperation has proven difficult due to the special sovereignty protections associated with taxation); Valero, *supra* note 167.

<sup>185</sup> Council of the European Union, No. 13872/18 of 6 Nov. 2018, *Outcome of the 3646th Council Meeting, Economic and Financial Affairs of the European Council*, at 6, <https://www.consilium.europa.eu/media/37381/st13872-en18-vf.pdf>.

legislation, states may enact their own, potentially conflicting, measures.<sup>186</sup> When companies must adhere to a myriad of policies, the compliance cost increases and can harm businesses and consumers.<sup>187</sup> Even compliance with one unilateral state action, deviating from other state norms, can generate substantial compliance costs.<sup>188</sup> Together, distortions from unilateral actions can harm not only EU businesses and consumers, but also trigger trade tensions abroad, such as with the United States.<sup>189</sup> Even if the Union hopes to trigger an international response through regional policies, as is the case for regional DSTs, unilateral actions still increase compliance costs. These costs can unintentionally incentivize companies to shift tax burdens downstream to the detriment of small businesses and, ultimately, consumers.<sup>190</sup> By switching to QMV, the likelihood of these compliance

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186 See, e.g., *Managing the Uncertainty of Digital Taxation, CTO Insights – Issue Spotlight*, KPMG (Jan. 2020), <https://tax.kpmg.us/content/dam/tax/en/pdfs/2020/cto-insights-january-2020.pdf>; *Tax Reform, Digital Taxation and BEPs Continue to Drive Challenges – and Opportunities – for Companies in 2018*, EY (Apr. 24, 2018), [https://www.ey.com/en\\_gl/news/2018/04/tax-reform--digital-taxation-and-beps-continue-to-drive-challenges-and-opportunities-for-companies-in-2018](https://www.ey.com/en_gl/news/2018/04/tax-reform--digital-taxation-and-beps-continue-to-drive-challenges-and-opportunities-for-companies-in-2018); *Emerging Digital Taxation Issues May Require Action*, PWC (Oct. 2018), <https://www.pwc.com/us/en/services/tax/library/insights/emerging-digital-taxation-issues-may-require-action.html>.

187 Among the unilateral policies across Europe, variation exists on triggering thresholds and coverage between Member State policies. For example, the DSTs in Austria and France have domestic revenue thresholds of \$28 million, Belgium proposed \$5.6 million, Spain proposed \$3 million, and Italy requires \$6 million. These differing thresholds mean companies conducting business in each of these States must separately determine their tax liability across each country and spend substantial resources on accountants and tax advisors. Elke Asen, *What European OECD Countries are Doing about Digital Services Taxes*, TAX FOUND. (June 22, 2020), <https://taxfoundation.org/digital-tax-europe-2020/>.

188 See Isabel Gottlieb, *Big Tech Frets Over French Digital Tax Compliance Headaches*, BLOOMBERG TAX (Aug. 15, 2019), <https://news.bloombergtax.com/daily-tax-report-international/big-tech-frets-over-french-digital-tax-compliance-headaches> (“The compliance burden adds to the cost of the tax itself—which will likely be in the millions of euros.” “Compounding the headache is the fact that the tax could disappear in a few years.”).

189 *European Parliament Committee on Economic and Monetary Affairs Report on the Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting From the Provision of Certain Digital Services*, at 8, COM (2018) 0148 final (May 12, 2018); *Conclusion of USTR’s Investigation Under Section 301 into France’s Digital Services Tax*, U.S. TRADE REPRESENTATIVE (Dec. 2, 2019), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/conclusion-ustr’s-investigation> (Following the French proposal for a unilateral DST, the United States Trade Representative (“USTR”) investigated the proposed tax and found it discriminatory against US businesses); Jim Tankersly & Ana Swanson, *Trump Administration Escalates Global Fight Over Taxing Tech*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/06/02/business/economy/trade-digital-tax-tech.html> (discussing Senators Chuck Grassley, a Republican, and Ron Wyden, a Democrat, issued a joint statement in support of the USTR’s investigation into unilateral EU DSTs. This suggests bipartisan U.S. support exists regarding use of the Section 301 investigation process to examine these discriminatory unilateral measures); Melissa Heikkilä & Elisa Braun, *Digital Tax: A Cautionary Tale*, POLITICO (July 23, 2020), <https://www.politico.eu/article/digital-tax-a-cautionary-tale-france-germany-amazon-google-facebook-platforms/> (“[The] OECD’s Saint-Amans says he does not thin[k] a Joe Biden presidency would take a very different stance on digital tax.”).

190 Silvia Amaro, *Big Tech Finds a Way to Pass on the Cost of Digital Taxes in Europe*, CNBC (Sept. 3, 2020), <https://www.cnbc.com/2020/09/03/big-tech-finds-a-way-to-pass-on-the-cost-of-digital-taxes-in-europe.html>.

costs will decrease since the European Union may more easily enact clear and consistent legislation, thereby strengthening the single market.

2. *Maintaining Unanimity Will Ensure that the European Union Continues to Protect the National Sovereignty of its Member States*

Despite the inefficiencies inherent in tax unanimity, significant cooperation still occurs. In the past five years, the European Union successfully adopted numerous measures to support and stabilize EU taxation and prevent profit shifting. In the Parent Subsidiarity Directive of 2015, the Council harmonized the General Anti-Abuse Rules (GAAR).<sup>191</sup> In 2016, the European Union passed the Anti-Tax Avoidance Directive (ATAD).<sup>192</sup> Member States also adopted measures to improve compliance data sharing across the European Union.<sup>193</sup> In 2019, the Commission accomplished half of its tax “legislative programme,” suggesting substantial cooperation despite unanimity’s challenges.<sup>194</sup> These examples demonstrate that veto exercise does not overwhelmingly result in legislative failure. Rather, when policies offer universal benefits, states willingly provide support when doing so does not undermine important national economic interests. However, when policy-makers fail to consider the impact on *all* Member States, countries may exercise their veto rights. While inefficient, unanimity incentivizes the Commission to consider the policy effects on *all* states if it hopes for a quick success. And if a measure fails by veto, the Commission has likely neglected to consider the Union *as a whole*.

The treaties do not guarantee efficient legislating, but they do ensure that individual Member States may represent national tax interests on the Council equally.<sup>195</sup> As a result, states rely on tax unanimity to protect their domestic economic interests. And for many smaller states, it has become a closely guarded procedural protection.<sup>196</sup> Although QMV nominally provides opportunities for dissent, the four-country threshold and 35% population requirement minimize the ability of small states to block proposals, unless they join forces with at least one populous state.<sup>197</sup>

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191 Van Arendonk, *supra* note 145; *See generally* Directive 2016/1164, of the Council of 12 July 2016 on Tackling Corporate Tax Avoidance, 2016 O.J. (L 193), 1-14.

192 *The Anti Tax Avoidance Directive*, EUROPEAN COMMISSION, [https://ec.europa.eu/taxation\\_customs/anti-tax-avoidance-directive\\_en](https://ec.europa.eu/taxation_customs/anti-tax-avoidance-directive_en).

193 Van Arendonk, *supra* note 145 (discussing how this agreement involved developing and strengthening the required disclosures which mandated “intermediaries, such as tax advisors, to report aggressive tax-planning structures.”).

194 *Id.*

195 Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPs*, 50 SUFFOLK U. L. REV. 517, 574 (2017); Valero, *supra* note 167.

196 Morris, *supra* note 24, at 781; *See Taxation: Promoting the Internal Market and Economic Growth*, *supra* note 31, at 3 (“...tax laws reflect the fundamental choices of different EU countries in important areas of public expenditure, such as education, health and pensions.”).

197 Heinemann, *supra* note 24; *Qualified Majority*, *supra* note 74.



Although QMV arguably involves more “input” from the European Parliament<sup>198</sup> which increases citizen accountability,<sup>199</sup> the practical reality shows that democratic inclusion of *all* states under QMV decreases when solely smaller states oppose a policy.<sup>200</sup> Protected in the treaties and guaranteed by the Treaty of Lisbon, the proposal to abandon unanimity through the novel, yet legal, Passerelle Clauses offers a substantial departure from the European Union’s current balance of power on taxation. With the sovereignty-based Euro-skepticism expressed by states which rely heavily on tech-investment-oriented tax policies to create jobs and increase domestic economic competitiveness, removing this closely guarded procedural guarantee could heighten resistance to EU action on taxation.<sup>201</sup>

Today, little incentive exists for small states who benefit from the current regime to support the Commission’s proposal, since they stand only to lose political influence. Initially, Ireland opposed ratification of the Lisbon Treaty. Contested because of its dramatic expansions of EU authority, Ireland held two referendums. Only when policy-makers promised to retain tax unanimity did Ireland ratify. Now, the Commission again hopes to broaden its legislative powers. Absent specific inducements to smaller states, this proposal may remain an empty promise for some and a threat for others. To gain the support of every Member State, the Commission must offer new promises.

#### CONCLUSION

The rapidly growing digital economy places ever increasing demands on policy-makers to reform and modernize outdated regulatory regimes worldwide. Given the difficulty of obtaining internal EU consensus, the Commission must reconcile its hopes for a more powerful EU single market and its desire to wield more influence over global tax regimes with its responsibility to consider the interests of all Member States. While transitioning to QMV may provide more opportunities for the Commission to realize its economic agenda and act as one, retaining unanimity ensures that the Council continues to protect each member state’s tax sovereignty equally.

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198 *See id.*

199 Press Release, *supra* note 21.

200 *See* Heinemann, *supra* note 24 (Using QMV in refugee legislation led larger Member States to “outvote” states in “central and eastern” Europe. This caused a significant controversy that undermined EU unity.); Schiemann, *supra* note 161, at 476.

201 Richard Wike et al., *Europeans Credit EU with Promoting Peace and Prosperity, but Say Brussels Is Out of Touch with Its Citizens*, PEW RSCH. CTR. (Mar. 19, 2019), <https://www.pewresearch.org/global/2019/03/19/europeans-credit-eu-with-promoting-peace-and-prosperity-but-say-brussels-is-out-of-touch-with-its-citizens/>.

As demonstrated, the power of the tax veto is not absolute. Enhanced Cooperation and Passerelle Clauses provide routes by which legislators may circumvent unanimity. In a European Union where QMV already covers 90% of policy areas, Commission leaders must recognize the adverse implications of attempting to strip away additional power from its Member States. They must contend with rationales EU States have provided for recent veto use and consider what eliminating the tax veto may mean for EU cohesion. Ultimately, for the proposal to proceed under the Passerelle Clauses, the European Union must strike a new deal that both increases its legislative efficiency to meet the demands of the digital economy and protects the national tax sovereignty of *all*.