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Company Tax Integration in the European Union during Economic Crisis – Why and How?

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Abstract

Company tax integration in the EU is yet to be realised. This article first outlines the main benefits of company tax integration for the Economic and Monetary Union, and also discusses the main legal obstacles the EU Treaties pose for harmonisation of company tax. The main problem identified is the unanimity requirement in the legal basis of Article 115 TFEU. As this requirement is currently not feasible in the political climate of the debt crisis, this article assesses possible reasons for and ways to further fiscal integration. It considers Treaty change, enhanced cooperation, soft law approaches and also indirect harmonisation through the new system of economic governance. Eventually, a possible non-EU option is considered. However, this article recommends making use of the current EU law framework, such as soft law approaches and the system of the new economic governance to achieve a more subtle and less intrusive tax harmonisation, or instead a Treaty change that would legitimately enhance and further economic integration in the field of taxation.

Keywords: company tax harmonisation, EU law, Internal Market, taxation policies

1 Introduction

Company tax integration in the European Union (EU) has long been on the agenda. However, several legal and political obstacles have so far prevented any substantial EU legislation in the field. However, a new movement to achieve company tax harmonisation has recently been realised in the Commission Proposal for a Directive on a Common Consolidated Corporate Tax Basis (CCCTB Directive). This might be a step in the right direction, but much still needs to be done. The financial and sovereign debt crisis has already exposed that more economic integration is necessary in the economic and monetary union. With the crisis straining Member States' budgets, it becomes increasingly important for them to keep their tax revenue high, which is why a heated public debate on tax avoidance has put tax integration back on the European Council agenda.

While the crisis might further impede tax integration in the EU, it might also bring opportunities to tackle the legal and political obstacles that have so far hindered integration. The aim of this article is two-fold. First, the main benefits, and also legal obstacles, for company tax integration will be put in the context of Economic and Monetary Union. Second, the article aims to assess the possible solutions to these obstacles from a European public law perspective. This article is divided into four substantive sections. An outline of the benefits of tax integration in today's Economic and Monetary Union (EMU) precedes the mapping of legal obstacles for tax integration, taking the CCCTB Directive[1] as an example, where appropriate. It follows an assessment of possible solutions in the context of the EMU. The last section provides some concluding remarks and general concerns regarding the solutions considered.

2 The Crisis-Stricken EMU and the Benefits of Tax Integration

2.1 Reforms to the Economic and Monetary Union

The financial and sovereign debt crisis has left the EU in turmoil and in need of further reform. The major problem the crises have shown is the division of competences between the EU and its Member States.[2] While the EU has exclusive competence with matters regarding the monetary union,[3] economic policies have been

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1. The CCCTB directive is discussed in detail elsewhere in this journal issue.
2. For a discussion of the history of EMU in the EU, please *see*: J. Mortensen, 'Economic Policy Coordination in the Economic and Monetary Union: From Maastricht via the SGP to the Fiscal Pact', *CEPS Working Document No. 381, August 2013*. Working Paper, August 2013, <http://www.ceps.be/book/economic-policy-coordination-economic-and-monetary-union-maastricht-sgp-fiscal-pact> (last visited 10 November 2013).
3. Art. 3(c) Treaty on the Functioning of the European Union (hereinafter: 'TFEU').

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left to the Member States themselves subject to coordination within the framework of the Union.[4]

The Member States of the eurozone have resorted to an array of measures to tackle the crisis, including the famous six-pack[5] and two-pack[6] sets of legislation aiming to increase oversight of economic policies in the EMU. These eight pieces of secondary law provisions aim to enhance both the multilateral surveillance procedure and the persuasive arm (the Excessive Deficit Procedure, EDP) of the Stability and Growth Pact (SGP); in addition, a macroeconomic imbalances procedure modelled on the basis of the multilateral surveillance procedure is introduced. Next to these EU law measures, the Fiscal Compact is designed to back up the new reversed qualified voting procedure in the Council regarding a decision on the existence of an excessive deficit. This means that a measure will be deemed adopted unless a qualified majority rejects it in the Council.[7] Deviation from any of the 'Maastricht criteria'[8] will now trigger an EDP, in contrast to the pre-reform legislation under which these criteria were cumulative.[9]

In addition, stringent procedures for the correction of macroeconomic imbalances are put in place, similar to the EDP. Correction of macroeconomic imbalances now takes place in accordance with the Commission, which has to approve Member States' budgetary plans if they fall under the EDP. In addition, the requirements for reports and the transmission of Medium Term Objectives and stability programmes have been increased. The national legislator is now required to provide proof of liabilities, expected economic developments as well as economic variables.[10] Most eurozone Member States, furthermore, have signed and ratified the Treaty Establishing a European Stability Mechanism (ESM)[11] as well as the Treaty on Stability, Coordination and Governance, the so-called Fiscal Compact (TSCG), mentioned above.[12]

As these reforms indicate, European leaders do strive to strengthen the Economic and Monetary Union; however, it seems that there is less consensus as to the further measures to be taken to enhance economic cohesion and to strengthen the internal market. In the following, the role of company tax integration in the EU is discussed in the context of the EMU.

2.2 The Benefits of Company Tax Integration for the EMU

It could be argued that company tax integration can be beneficial for the Economic and Monetary Union for three main reasons, namely increased economic cohesion in the Internal Market, improved fiscal oversight and better control of tax fraud and evasion.

Economic and Monetary Union is seen as the last step of economic integration, which has at the outset the aim of improving overall prosperity in a region. For this final step, economic cohesion is desirable for the good functioning of a monetary union, in order for Member States to outweigh the costs with benefits of giving up its own exchange rate.[13] Traditionally, an optimum currency area (OCA)[14] is seen as a basis for a working currency union. Economies are perceived to form an OCA if they are symmetric in certain ways. First, business cycles should run similarly in order for a single monetary policy to be beneficial for all the participating economies, which also prevents asymmetric shocks in the currency union. Second, inflation rates should be similar in order to enhance competition in the union, while production within a participating economy should

4. Arts. 2(3) and 5(1) TFEU.
5. Consisting of:
   - Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Official Journal of the European Union [2011] OJ L306/1.
   - Regulation (EU) No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8.
   - Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12.
   - Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.
   - Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33.
   - Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.
6. Consisting of two legislative proposals:
   - COM(2011)0819 final, Proposal for a regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area.
   - COM(2011)0821 final, Proposal for a regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.
7. *Ibid*.; Art. 5(2) Regulation 1173/2011.
8. A Member State is allowed to have a total amount of debt of 60% of the GDP and an annual debt ratio of 3% of the GDP. These criteria were laid down in the Stability and Growth Pact in Maastricht.
9. For a discussion of the pre-crisis system of economic governance see for example: J. Breuss, 'The Stability and Growth Pact. Experiences and Future Aspects', in *Schriftenreihe der Österreichischen Gesellschaft für Europa* (2007).
10. Art. 1(6) Regulation 1175/2011.
11. Treaty establishing a European Stability Mechanism (hereinafter, ESM Treaty).
12. For a discussion of the Fiscal Compact *see* for example: A. Kocharov, 'Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty', *SSRN Scholarly Paper*, Rochester, NY: Social Science Research Network, 1. April 2012, <http://cadmus.eui.eu/bitstream/handle/1814/21496/LAW_2012_09_Kocharov_ed.pdf> (last visited 10 November 2013).
13. R.A. Mundell, 'A Theory of Optimum Currency Areas', 51 *The American Economic Review* 4 (1961); J. Bogusław Osoba, 'Theory of Optimum Currency Areas and Monetary Integration in the European Union', 10 *Yearbook of the Institute of East-Central Europe* 6, pp. 27-44 at 29ff. (2012).
14. Optimum Currency Area describes an area of high economic cohesion that should form the basis of a monetary union. It reduces the risk of anti-cyclical action that is not beneficial for one or more parts of the monetary union. Economic cohesion here includes sectoral similarities, convergent economic cycles etc. *See* for further explanation above n. 13.

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be diverse in order to avoid a situation where one sectoral problem influences the whole economy (*e.g.* unemployment) or another economy in the currency union. In addition, a currency union should be able to absorb financial and economic (external) shocks by providing wage price flexibility, integration of financial markets, and also mobility of productive factors and fiscal integration.[15]

The Internal Market in the EU could be said to have achieved some degree of wage price flexibility owing to increased intra-sectoral competition in the EU, although the direct effects of the Internal Market on the labour market have also been disputed.[16] In particular, the provisions on the Internal Market aim to facilitate the mobility of productive factors by enabling free movement of goods, persons, services and capital.[17] In addition, in the aftermath of the financial crisis, Member States have made efforts to further integrate the financial markets in the EU; most recently, a European Banking Union has been put on its way.[18]

This leaves one element of OCA to be discussed: fiscal integration. While complete fiscal integration in the EU, such as a single budget, is explicitly excluded in the Treaties,[19] such a harmonisation of tax law that directly affects the functioning of the Internal Market is allowed and desired under the Treaties.[20]

The system of company tax is of direct influence on the Internal Market, as it influences the manner in which, and where, companies establish themselves in the EU.

Company tax integration could contribute to enhancing economic convergence by increasing competition in the Internal Market, as companies could establish themselves and move much more freely between Member States than they currently do. Different taxation in different regions (read Member States) within one market might drive investors to another region even though they would like to establish themselves in the first region,[21] which is why tax obstacles distort the working of the Internal Market.

Current tax obstacles include limited cross-border relief, obtrusive calculation of transfer prices, double taxation and unequal treatment of parent and subsidiary companies.[22] Cross-border relief of tax refers to a situation in which profits and losses of a company fall under different jurisdictions, while the respective company is then able to deduct the loss incurred in one country from its taxable profit in another.[23] This kind of relief is possible only to a limited extent in the EU, by means of a credit system.[24] Transfer pricing describes the process by which a company tries to internally shift its net profits to lower company tax countries in order to increase its profits.[25] For this process, rules are in place, but they differ from country to country.[26] More traditionally, problems of double taxation – profit is taxed in more than one jurisdiction – and unequal treatment arise. By eliminating these tax obstacles, companies would have a much better position in the market – it would attract more companies to establish themselves in the EU.

In fact, the original 'Pact for Competitiveness', integrated in the Euro-Plus Pact, has already argued for a common assessment basis for the corporate income tax.[27] Also, this document stresses the effect of company tax integration as promoting the accessibility and attractiveness of the Internal Market.

Secondly, company tax integration could also help to contribute to fulfilling another important role in the EMU, that of fiscal oversight.[28]

In the Economic and Monetary Union in the EU, competence on monetary policy is given to a European Central Bank (ECB), while fiscal policy remains in Member States' scopes of competence.[29] Without a strict European fiscal surveillance operation system in place, the Stability and Growth Pact[30] was intended to counter Member States who would not conform with set convergence criteria (3% of GDP as new annual debt; 60%

15. *See* further on this: Osoba, above n. 13, at 30ff.
16. H. Siebert 'Labor Market Rigidities: At the Root of Unemployment in Europe', 11 *The Journal of Economic Perspectives* 3, at 37-54 (1 July 1997).
17. C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (2007).
18. Proposal for a Regulation of the European Parliament and of The Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No. 1093/2010 of the European Parliament and of the Council /*COM/2013/0520 final – 2013/0253, available at: http:// eur -lex .europa .eu/ LexUriServ/ LexUriServ .do ?uri= CELEX: 52013PC0520:EN:NOT.
19. Arts. 3(1) (c), 5 Treaty on the functioning of the European Union (TFEU); M. Larch, '101 Proposals to reform the Stability and Growth Pact. Why So Many? A Survey', *Economic Paper Series of the Directorate General for Economic and Financial Affairs*, available at: <http://ec.europa.eu/economy_finance/publications/publication833_en.pdf> (last visited November 10, 2013) at 5.
20. *See* below n. 41
21. S. Desai, 'Taxation without Harmonization in the European Union' (2003), available at: <http://aei.pitt.edu/2857/1/106.pdf> (last visited 10 November 2013), at 4.
22. ECO/302 CCCTB, Opinion of the European Economic and Social Committee on the Common Consolidated Corporate Tax Base (CCCTB), Brussels, 26 October 2011.
23. Europa.eu Website 'Tax Treatment of Losses in Cross-Border Situations', <http:// europa .eu/ legislation_ summaries/ taxation/ l31059_ en .htm> (last visited 18 November 2013).
24. *Ibid.*
25. Ramy Elitzur and Jack Mintz, 'Transfer Pricing Rules and Corporate Tax Competition', 60 *Journal of Public Economics* 3, at 401-422 (June 1996). doi:10.1016/0047-2727(95)01558-2, p. 402ff.
26. *Ibid.*
27. The Pact for Competitiveness, unofficial translation 3 February 2011, available at: <http:// www .euractiv .com/ sites/ all/ euractiv/ files/ BRNEDA224_004512.pdf> (last visited 10 November 2013).
28. Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011, Annex 1, available at: <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/119809.pdf> (last visited 10 November 2013) at 11.
29. Arts. 3(1) (c), 5 Treaty on the functioning of the European Union (TFEU); M. Larch *et al.* (2013), above n. 19.
30. The term Stability and Growth Pact refers to a set of primary and secondary legislation adopted in an attempt to safeguard convergence between Member States in the EMU. The original pact consisted of Art. 121 and 126 TFEU, Regulations 1466/97 and 1467/97 EC, Protocol No. 12 annexed to the treaties and a European Council resolution of 17 June 1997.

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of GDP as total amount of debt) once a Member of the Eurozone.[31]

However, as the debt crisis has shown, control of Member States' budgets and expenditure was lacking under the old SGP, which has been identified as one of the reasons leading to the debt crisis.[32] In fact, two main problems can be identified here. First, while the SGP was and is built around two reference values, the SGP ignores other factors that might influence the fiscal situation of a state. The 3% and 60% margins are only of nominal value and compliance does not reveal how government money is spent or invested.[33] Second, Member States were to provide their own fiscal information to the European Commission; this information was not always double-checked.[34]

The recent reforms to the system have improved the information policy in this respect; however, company tax integration in the EU could offer another way of monitoring fiscal policy of Member States. In an integrated company tax system, oversight on Member States' tax revenue and expenditure could become easier. It can help to increase fiscal transparency and would help a centralised authority (such as the Commission) to keep track of a Member State's income, next to the information that is already provided by Member States in the form of stability and convergence programmes. This control is important for safeguarding the stability of the eurozone by (partly) eliminating creative accounting[35] and by providing another useful tool in detecting macroeconomic imbalances before they lead to problems.

Thirdly, company tax integration for the EU would reduce the likelihood of tax fraud and evasion within the Internal Market, as it creates a European level playing field for companies. Especially in times of economic crisis and diminished tax revenues, this becomes a problem for Member States. While tax evasion is already on the political agenda for non-EU *tax havens*,[36] company tax integration could represent a big step forward in the internal context of the EU.

The heads of state or government of the euro area have summarised these advantages of a corporate tax integration in the Euro-Plus Pact of 2011, when they state that 'developing a common corporate tax base could be a revenue neutral way forward to ensure consistency among national tax systems while respecting national tax strategies, and to contribute to fiscal sustainability and the competitiveness of European businesses'.[37]

3 Obstacles for Company Tax Integration in Times of Crisis

There are two categories of legal obstacles to company tax integration in the EU, when approached from a European public law perspective: first, the lack of a specific legal base of tax integration in the Treaties, and second the subsidiarity principle. The main problem evolving from both is the unanimity requirement in the Council for any taxation matters.

3.1 Lack of (Specific) Legal Base

With regard to taxation of companies, the Treaties do not directly transfer taxing powers.[38] No direct transfer of powers, however, does not mean that there is no competence at all for the EU.[39] The Treaty does confer on the EU a means of more general legislative power under Article 114 TFEU and 115 TFEU, allowing it to legislate when and where needed for the functioning of the Internal Market. However, Article 114(2) TFEU forbids the Union to adopt any fiscal provisions under the ordinary legislative procedure this article provides for. Therefore, any harmonisation attempt has to be based on the legal base in Article 115 TFEU, which reads:

> Without prejudice to Article 114, the Council shall, acting *unanimously* in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue *directives* for the *approximation* of such laws, regulations or administrative provisions of the Member States as *directly affect* the establishment or *functioning of the internal market*.[40]

Using this article as legal basis is paid by the price of cumulative restrictions on adopting legislation. The legal base for *approximation* of laws only allows the Council to adopt such measures as to approximate (not harmonise) laws, by means of *directives*. This means

31. <http:// ec .europa .eu/ economy_ finance/ publications/ publication833_ en.pdf> (last visited 10 November 2013) at 6.
32. M. Larch, P. Van den Noord and L. Jonung, 'The Stability and Growth Pact: Lessons from the Great Recession' (2010), available at: <http:// mpra.ub.uni-muenchen.de/27900/>, (last visited 10 November 2013) at 16.
33. A. Lemmer, 'Revenue Windfalls and Expenditure Slippages: Disappointing Implementation of the Reformed Stability and Growth Pact', 44 *Intereconomics* 3, 159, at 165 (2009).
34. Regulation 3605/93 EC.
35. Term often used with respect to the Greek creative accounting before entering the eurozone, *see for example* A. Cabral, 'Main Aspects of the Working of the SGP', in J. Breuss (ed.), *The Stability and Growth Pact. Experiences and Future Aspects, Schriftenreihe Der Österreichischen Gesellschaft Für Europa* (2007), at 141.
36. *See* for example: 'Combating Tax Fraud and Evasion', Commission contribution to the European Council of 22 May 2013, available at: <http:// ec .europa .eu/ europe2020/ pdf/ tax_ en .pdf> (last visited 10 November 2013).
37. Conclusions of the Heads of State or Government of the Euro Area of 11 March 2011, at 11. Also *see*: Z. Danko, 'Corporate Tax Harmonisation in the European Union', in *Crisis Aftermath: Economic Policy Changes in the EU and its Member States*, Conference Proceedings, Szeged, University of Szeged (2012), 207-218, at 215.
38. W. Hellerstein, G. Kofler and R. Mason, 'Constitutional Restraints on Corporate Tax Integration', *Tax Law Review*, forthcoming. Available at SSRN: <http://ssrn.com/abstract=1101560> (last visited 10 November 2013) at 63.
39. F. Amtenbrink and H. Raulus, 'Contribution to: Fiscal Policy in the European Union Context – The Semi-Fetached Sovereignty of Member States in the European Union', in S. Jansen (ed.), *Fiscal Sovereignty of the Member States in an Internal Market-Past and Future*, Eucotax Series (2010) 1, at 6.
40. Emphasis added by the author.

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that, by definition, a regulation, which would be binding in its entirety,[41] cannot be adopted under Article 115 TFEU. While approximation of corporate tax can easily be justified to directly affect the functioning of the internal market,[42] legislation still has to be adopted *unanimously*.

Unanimity in the Council, however, is a difficult target to achieve in the EU-28. It is, on the one hand, only sensible, from a constitutional point of view, to safeguard the general legal base of Article 115 TFEU with a stringent legislative procedure so as to avoid any competence creep[43] by the EU. On the other hand, it is also obvious that this special legislative procedure stands in stark contrast to the ordinary legislative procedure,[44] which only requires a qualified majority (QMV), albeit with consent from the European Parliament. Taxation systems differ considerably between the Member States, and they are unlikely to agree on anything in this field.

The use of the special legislative procedure in Article 115 illustrates this Member State reluctance to share more powers than transferred already with the EU. With regard to fiscal integration, this becomes very explicit in Article 114(2) TFEU, which excludes the use of Article 114(1) TFEU as a legal basis for fiscal provisions (thereby leaving Article 115 TFEU as the only legal base). Also, other Treaty provisions (or rather the lack thereof) emphasise the fiscal autonomy of Member States. While the Union is equipped with exclusive competence for providing monetary policy,[45] Member States shall coordinate their economic policies within the Union.[46] This does entail a positive obligation in the word 'shall', but still leaves a lot of room for manoeuvre for Member States to organise their tax policy beyond the economic coordination efforts laid down in the Stability and Growth Pact, even after the recent reforms. Taxation, in particular company tax integration, still remains in the Member States' sphere of competence, despite obvious advantages.

Indeed, Member States also have a (protectionist?) interest in keeping this autonomy for themselves. Some countries, for example the Netherlands, have been able to attract important multinationals to establish themselves in their countries, with consequent gains in tax revenue.[47] In fact, countries compete for these kinds of capital flows, as eventually countries finance their public spending by the levying of taxes.[48] In times of economic crisis, this is another sensitive issue where Member States find it hard to agree: how, if taxation were to be harmonised, should the tax revenue be allocated between them? Fundamental disagreement is predestined with regard to corporate taxation. Additionally, the current political climate in the economic crisis does make it even more difficult for the Member States to reach agreement. Pressure from the international community, their electorates and parliaments puts national governments in a position without an elegant solution. Reforms have to be done, but they do not want to be the ones making the unpopular changes. Maybe unjustifiably, other topics are on the agenda of national governments besides company tax integration in a fight for the electorates, who on the other hand are more and more driven to populist Eurosceptic parties such as in the Netherlands and Finland.[49] Euroscepticism is also on the rise in other Member States, in particular in Great Britain, which also opposed the revision of the Treaties in the first round of EMU reform efforts, leading to the conclusion of the ESM Treaty and the Fiscal Compact.[50]

3.2 The Subsidiarity Protocol and Company Tax Integration: The Example of the CCCTB

The unanimity requirement is not the only obstacle that stands in the way of tax integration. The EU has committed itself to the principle of subsidiarity,[51] which is a governance principle in institutional theory, regulating the allocation and the use of public power.[52] Subsidiarity aims to avoid undesired centralisation in a supranational entity.[53] Next to the principles of conferral and proportionality, the principle of subsidiarity is also one of the fundamental principles of European governance, as enshrined in Article 5 of the Treaty on EU (TEU). Under the principle of subsidiarity, in areas that do not fall under the exclusive competence of the Union, the Union shall only act if and only to the extent that 'the objectives of the proposed action cannot be sufficiently be achieved by the Member States, [...] but [...] can better be achieved at Union level'.[54]

The principle imposes three cumulative requirements for Union action: (i) there must be an objective, (ii) the objective to be achieved cannot sufficiently be dealt with by Member States and (iii) the Union must be better equipped to achieve the objective. Subsidiarity is applicable only to legislative fields in which the EU has a shared competence. In exclusive competence areas, subsidiarity, by definition, does not play a role. The establishment and functioning of the Internal Market is a shared competence between Member States and the EU.

41. Art. 288 TFEU.
42. Desai, above n. 21.
43. *See* for example: A. Prechal, 'Competence Creep and General Principles of Law', 3 *Review of European 1 Administrative Law* 5, at 5 (2010).
44. Art. 294 TFEU.
45. Art. 3(1)(c) TFEU.
46. Art. 5 TFEU.
47. A. de Graaf, 'International Tax Policy Needed to Counterbalance the "Excessive" Behaviour of Multinationals', 22 *EC Tax Review* 2, at 106-110 (2013).
48. *Ibid.*
49. G. Wilders' Party for Freedom (PVV) in the Netherlands and the True Finns (Perussuomalaiset) in Finland.
50. 'EU Suffers Worst Split in History as David Cameron Blocks Treaty Change', in *The Telegraph*, 9 December 2011, available at: <http://www.telegraph.co.uk/news/worldnews/europe/eu/8945155/EU-suffers-worst-split-in-history-as-David-Cameron-blocks-treaty-change.html> (last visited 10 November 2013).
51. Art. 5 Treaty on European Union (hereinafter: TEU).
52. A. Follesdal, 'Subsidiarity and Democratic Deliberation', in E. Eriksen *et al.* (eds.), *Democracy in the European Union: Integration through Deliberation?* (2000), at 85-110, electronic copy available at: <http://ssrn.com/abstract=1750981> (last visited 10 November 2013), page numbers of citations refer to this document, at 2.
53. *Ibid.*
54. Art. 5(3) TEU.

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As a result of this, any attempts to harmonise corporate taxes under Article 115 TFEU are subject to the principle of subsidiarity and its corresponding protocol No. 2 on the application of the Principles of Subsidiarity and Proportionality. This protocol grants national parliaments the right to scrutinise the legislative proposals emanating from the Commission. According to Protocol No. 2, the Commission is required to forward all draft legislative acts (Regulations, Directives and Decisions[55]) to national parliaments at the same time as it forwards them to the Union legislator,[56] while the Council and the European Parliament have to keep national parliaments informed of their amendments to the proposals.[57]
As of the moment of the transmission of the draft legislative act, national parliaments are granted 8 weeks to assess whether the act complies with the principle of subsidiarity and communicate a reasoned opinion to the European Parliament, the Council and the Commission.[58] Such a reasoned opinion contains an assessment of the parliamentary chamber why a proposed legislative act is not in conformity with the subsidiarity and is directly forwarded to the Commission.[59] If a third of the parliamentary chambers issue a reasoned opinion pleading for breach of the subsidiarity principle,[60] the draft legislation then *must* be reviewed; on giving reasons, the Commission may maintain, amend or withdraw the proposal.[61]
Parliaments are, generally speaking, not very active in scrutinising legislative proposals under this procedure, even where their own parliamentary prerogatives (fe. the increased budgetary control by the Commission introduced by the six-pack and two-pack) are concerned.[62]
However, with regard to the Commission proposal for a common consolidated corporate tax basis (CCCTB Directive), parliaments have been much more active, which illustrates their strong opposition to more tax harmonisation. Only by one parliamentary reasoned opinion, the threshold of one-third of parliaments was missed, as nine parliamentary chambers, including the Dutch *Tweede Kamer*, issued a reasoned opinion[63] to the Commission. This CCCTB led to one of the highest numbers of reasoned opinions ever issued under the protocol.[64] The canon of these reasoned opinions[65] stresses four points of parliamentary concern. They state that the Commission has failed to produce a detailed statement based on relevant criteria for assessment of the merits of EU, as opposed to national, action. They doubt that an additional tax base system to the already existing 28 systems does in fact simplify matters for companies.[66] In addition, they argue that the prosperity value of the CCCTB would likely be either limited or even negative, which is related to feared budgetary erosion and decrease in taxation revenues. Lastly, parliaments posit that the proposal encroaches upon Member State sovereignty in the area of taxation,[67] as companies would be able to choose which system they want to apply to them, the CCCTB or the national system. The main question raised by parliaments seems to boil down to: ‘What is the use of it?’
Given this response to the CCCTB, it is unlikely that parliaments would support any further tax integration, if proposed by the Commission. The Commission is very much aware of this Member State government and

55. Art. 288 TFEU.
56. Art. 4(1) Protocol No. 2.
57. Art 4(2-4) Protocol No. 2.
58. Art. 6 Protocol No. 2.
59. *See* for examples: Saeima (Latvian Parliament) *Saeima identifies violation of subsidiarity principle in the EU's proposal for regulation*, parliamentary press release of 23 May 2012, available at: <http://saeima.lv/en/ news/ saeima -news/ 19732 -saeima -identifies -violation -of -subsidiarity -principle -in -the -eu -s -proposal -for -regulation>; Reasoned opinions issued by the House of Commons as listed and linked at: <http:// www .parliament .uk/ business/ committees/ committees -a -z/ commons -select/ european -scrutiny -committee/ scrutiny -reserve -overrides/>; German Bundestag Printed Paper 17/8000 of 30 November 2011, *Committee recommendation and report of the Committee on Legal Affairs (6th committee) on the communication Printed Paper 17/7713* no. a.5-*Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law* (unofficial translation communicated to IPEX), available at: www .ipex .eu/ IPEXL -WEB/ dossier/ files/ download/ 082dbcc5358a6ec60135a4f0e762114a .do +reasoned+opinion+eu+subsidiarity+bundestag& hl= de& pid= bl& srcid= ADGEESirKHrVbjDeU3iHt6W4eefi7HczClkYJoRD29rVHw3ADppzLkAX 3SnEKYkY8bKQM78l_ XA7bRrPkTPNYIVn4nxWronlJybmkqjAnbDjwA7Qhap5RbPN7uO02N0j 9IDxxS2TmWXr& sig= AHIEtbTyrUUyjiY -NTUzdDz_ gfRZIHWOmQ> (electronic sources last visited 10 November 2013).
60. Art. 7(2) Protocol No. 2. In case of legislation in the Area of Freedom, Security and Justice only a quarter of parliamentary chambers are needed.
61. *Ibid*.
62. A. Sting, ‘Lack of Forum, Lack of Power: Involvement of National Parliaments in Economic Decision-Making in the EU’, York, United Kingdom, presentation at SLSA Conference-Stream: Europe, Crisis? What Crisis?, 27 March 2013.
63. Kamerstuk 32728-3, Tweede Kamer der Staten-Generaal, Gemotiveerd advies over het voorstel voor een Richtlijn van de Raad betreffende een gemeenschappelijke, geconsolideerde heffingsgrondslag voor de vennootschapsbelasting (CCCTB)-COM (2011) 121.
64. Report from the Commission on Subsidiarity and Proportionality (19th report on Better Lawmaking covering the year 2011), COM(2012) 373 final, Brussels, 10.7.2012, available at: <http:// ec .europa .eu/ governance/ better_ regulation/ documents/ com_ 2012_ 0373_ en .pdf> (last visited 10 November 2013), at 4.
65. Nine reasoned opinions from the Dutch *Tweede Kamer*, the Romanian Chamber of Deputies, the Swedish, Slovakian, Bulgarian and Maltese Parliaments, the UK House of Commons, the Irish *Dáil Éireann* and the Polish Lower House as well as five contributions from the Portuguese, Danish and Luxembourg Parliaments and the Italian and Belgian Chambers of Deputies, *see*: European Parliament, State of Play on reasoned opinions and contributions submitted by national Parliaments under Protocol No. 2 of the Lisbon Treaty, Brussels, 30 May 2011, available at: <http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/ shared/ subsidiarity/ State%20of%20play%20notes/ 2011/ State%20of %20play%2030%20May%20%202011 .pdf> (last visited 10 November 2013).
66. *See* for example the Czech contribution: The Senate of the Parliament of the Czech Republic, 8th term, 241th resolution of the senate delivered on the 9th meeting held on 9th June 2011 on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), available at: <http:// www .senat .cz/ xqw/ xervlet/ pssenat/ htmlhled?action=doc&value=60520> (last visited 10 November 2013).
67. *Ibid*., at 2.

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parliament reluctance to tax integration, which is reflected in the recitals to the CCCTB Directive. It has been very careful in pointing out that the CCCTB was not designed to 'interfere with financial accounts', that harmonisation would 'not extend to the rates' of taxation and that it is 'not intended to influence the tax revenues' of Member States.[68]

Next to the lack of a specific legal base, in essence, the parliamentary reaction to the CCCTB also shows a *political* unwillingness of all 28 Member States to further integrate their tax policies, while others might want to. Some Member States have in fact been very favourable towards the Commission proposal, including the Belgian House of Representatives[69] and the Czech Senate.[70] The latter, very much in Commission line, stated that

> finding a common European approach towards the calculation of corporate tax base, that would arise from expert debate on best practices in the area of corporate taxation in individual Member States, could lead to facilitation of cross-border business activities and contribute to the strengthening of the single market of the EU,[71]

and considered that it is

> therefore, appropriate to focus, besides the CCCTB, also on finding an optimal and effective European framework for calculation of a common corporate tax base without the aspects of consolidation and optionality.[72]

How should these discrepancies between Member States be reconciled? Unanimity, under current circumstances, is unlikely to be reached, and subsidiarity issues will continue to concern some parliaments. This is not only the case of first efforts to integrate tax policies, but would also effect all future changes to any system that is put in place. Especially with regard to taxation, some degree of legislative flexibility is needed.[73] In the following, therefore, possible solutions to the lack of unanimity will be assessed.

4 How to Achieve Further Tax Integration

4.1 Treaty Change

The most obvious solution to targeting the problems of the legal base and subsidiarity is a Treaty change that would create a more specific legal base for tax harmonisation in the EU. With the introduction of a specific legal base that would allow the EU to take action under the ordinary legislative procedure, only a QMV in the Council would be necessary to adopt legislation in the field of taxation. In addition, depending on which kind of competence would be attributed to the EU, exclusive or shared,[74] the subsidiarity issue would be either obsolete (if exclusive) or not such a problem (if shared). Even when competence was to be shared with the Member States, a specific legal base would not only make it easier for the Commission to justify its action, but rather a mandate under the Treaties as tax harmonisation would become one of the objectives in the Treaty.

However, achieving Treaty change[75] in the current political climate is not an easy task, as the negotiations on Treaty change in the early stages of reform efforts have shown.[76] As creating a legal basis for EU action on taxation would confer a new competence for the EU, the Treaties could be amended only by the ordinary revision procedure laid down in Article 48 TEU.[77] The revision procedure involves a convention of national parliaments, heads of states or governments, a majority vote of the European Parliament, unanimity in the Council as well as ratification of every Member State according to their constitutional requirements.[78] As already discussed, these kinds of requirements are unlikely to be fulfilled in all Member States. However, one could argue that to anchor the reforms to the EMU, a considerable revision of the Treaties is necessary at some point, as there has been lots of discussion on the legality of some of the reforms.[79] When this turning point in European integration is reached, it will be time to put taxation on the agenda and provide a basis for harmonisation in the Treaties. At the same time, such a Treaty change is, after the last failure of Treaty amendment rounds, currently not to be envisaged. There are, however, other (interim) solutions for further tax integration in the EU, some of which have already been realised.

68. Explanatory memorandum to: Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2011) 121/4, para. 1, Context of the Proposal.
69. Belgische Kamer van Volksvertegenwoordigers, Voorstel voor een richtlijn van de Raad 26 mei 2011 namens de commissie voor de financiën en de begroting, uitgebracht door mevrouw Christiane, verslag betreffende een gemeenschappelijke geconsolideerde heffingsgrondslag voor de vennootschapsbelasting (CCCTB) Subsidiariteitsadvies, DOC 53 1507/001, available at: <http:// www .ipex .eu/ IPEXL -WEB/ scrutiny/ COM20110121/bechb.do> (last visited 10 November 2013), at 25.
70. The Senate of the Parliament of the Czech Republic, 8th term, 241st resolution of the senate delivered at the 9th meeting held on 9 June 2011 on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), available at: <http:// www .senat .cz/ xqw/ xervlet/ pssenat/ htmlhled?action=doc&value=60520> (last visited 10 November 2013).
71. *Ibid*.
72. *Ibid*.
73. De Graaf, at 106-110.
74. Arts. 3-5 TFEU.
75. Art. 48 TEU.
76. 'EU Summit: All But Two Leaders Sign Fiscal Treaty', *BBC News*, 2 March 2012, available at: <http:// www .bbc .co .uk/ news/ world - europe-17230760> (last visited 10 November 2013).
77. As opposed to the simplified revision procedure, *see* Art. 48(2-5) for the ordinary revision procedure and Art. 48(6-7) TEU for the simplified revision procedure.
78. Art. 48 TEU.
79. Including the German Constitutional Court's judgments on, for example, the European Financial Stability Mechanism, which concerned, inter alia, parliamentary involvement. BVerfG, 2 BvE 8/11 vom 28.2.2012, Absatz-Nr. (1-162), <http:// www .bverfg .de/ entscheidungen/ es20120228_2bve000811.html> (last visited 10 November 2013).

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4.2 Enhanced Cooperation

According to Article 20 TEU, Member states 'which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences' are allowed to do so.[80] They are then allowed to make use of its institutions if the enhanced cooperation aims to achieve one of the objectives of the Union,[81] but only if it can be established that there are no other options to achieve the aim as the Union as a whole.[82] With regard to further corporate tax harmonisation beyond the CCCTB, all three of these requirements are fulfilled. The objective to be achieved of any tax-related enhanced cooperation, as has already been discussed above, would be the proper functioning of the Internal Market, which is a non-exclusive competence of the Union.[83] In addition, it has become clear that a solution for the whole of the EU is unlikely to be achieved in the short-term.

Therefore, enhanced cooperation could be an option for further corporate tax integration. In fact, the Committee for Economic and Monetary Affairs (ECON) of the European Parliament has explicitly stated with regard to the CCCTB that if the unanimous Council adoption of the Directive fails, it would be appropriate to initiate 'without delay' the procedure for a Council decision authorising enhanced cooperation in the area of the CCCTB. It emphasised that such enhanced cooperation should be initiated by the Member States whose currency is the euro.[84] It thereby indicates that it also sees the strong connection between the EMU and stronger coordination of company taxation. The likelihood of approval for enhanced cooperation has also recently been strengthened by the enhanced cooperation with regard to the financial transaction tax between 11 Member States.[85]

4.3 Soft Law

In addition to the hard law approaches of Treaty change or enhanced cooperation, stronger tax coordination could be achieved on the basis of a soft law approach. This has, so far, also been an option of choice; the Council Conclusions of December 1st, 1997 concerning taxation policy, which formulate a Code of Conduct, are an example of such successful coordination.[86] This Code of Conduct is obviously a non-binding instrument that, on the other hand, has strong political force.[87] In this Code of Conduct, Member States committed themselves to, first, abolish any tax measures that constitute harmful tax competition[88] based on the definition in the Code itself,[89] and, second, to refrain from introducing any new measures that qualify as harmful tax competition.[90] The Code has been substantivised by the establishment of the Code of Conduct group of EU Finance Ministers under the leadership of the UK Paymaster.[91] In 1999, this group issued a report that identified 66 tax measures considered harmful.[92]

In addition to this Code of Conduct, the Commission has also issued a communication advocating more transparency in the area of tax policy,[93] and also outlines the success of the Code of Conduct, which has led to the abolishment of more than 100 tax measures that fall under the definition of harmful tax competition.[94] Surely, the cooperation between Member States and the EU institution has some more potential for integrating company tax in the future – the Open Method of Coordination, while setting common guidelines for Member States, still allows for a lot of leeway for Member States to harmonise their taxation policies in a non-intrusive manner towards their own taxation system.

4.4 Indirect Harmonisation through EMU Reform Legislation

While the approaches discussed above directly target the harmonisation of taxation policies as such, there might be other options to harmonise them a bit more indirectly by means of the reformed system of economic governance in the EU. The six-pack and two-pack legislative packages introduce an array of new powers for the European Commission with regard to budgetary oversight.

Regulation 473/2013[95] grants the Commission the right to review national budgetary plans subject to a strict timeline for the parliaments.[96] Requirements for the budgetary plans include the forecast of any government expenditure and revenue,[97] which are then assessed by the Commission itself.[98] The Commission then adopts

80. Art. 20 TEU.
81. Art. 20(1) TEU.
82. Art. 20(2) TEU.
83. Art. 4(2)(a)TFEU.
84. 2011/0058(CNS) – 29/03/2012 Committee report tabled for plenary, 1st reading/single Reading, as well as summary available at: <http:// www .europarl .europa .eu/ sides/ getDoc .do ?type= REPORT& mode= XML&reference=A7-2012-80&language=EN> (last visited 10 November 2013) at 1 of executive summary.
85. Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final, available at: <http:// ec .europa .eu/ taxation_ customs/ resources/ documents/ taxation/com_2013_71_en.pdf> (last visited 10 November 2013).
86. 98/C 2/1Council Conclusions of 1 December 1997 concerning taxation policy.
87. <http:// ec .europa .eu/ taxation_ customs/ taxation/ company_ tax/ harmful_tax_practices/> (last visited on 10 November 2013.
88. Council Conclusions of 1 December 1997 concerning taxation policy, 98/C 2/1, under D.
89. *Ibid.*, under B.
90. *Ibid.*, under C.
91. <http:// ec .europa .eu/ taxation_ customs/ taxation/ company_ tax/ harmful_tax_practices/> (last visited on 10 November 2013).
92. Annex A to the Report from the Code of Conduct Group (Business Taxation) to the ECOFIN Council on 29 November 1999, available at: <http:// ec .europa .eu/ taxation_ customs/ resources/ documents/ primarolo_en.pdf> (last visited on 10 November 10 2013).
93. COM(2009) 201 final, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee 'Promoting Good Governance in Tax Matters', Brussels, 28 April 2009.
94. *Ibid.*, para. 2.1.
95. Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140/11.
96. Art. 6 Reg. 473/2013.
97. Art. 6(3) (b), (c), (d) Reg. 473/2013.
98. Art. 7 Reg. 473/2013.

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an opinion and can, under circumstances, request a revised budgetary plan from the national parliament.[99] Here, the Commission could, through the backdoor, try to harmonise taxation policies of the Member States. In combination with the country-specific recommendations in the European Semester, the Commission is granted a profound insight into the fiscal situation of the Member State concerned. Recommendations could involve an assessment of the tax revenue estimate that a Member State submits. Thereby, it could recommend to what extent the company tax should be raised (or lowered) so as to achieve the budgetary and economic objectives.

The macroeconomic imbalances procedure[100] offers similar ways to influence a Member State's taxation policy, since the Commission is granted the right to 'in-depth' review a Member State's economic and fiscal situation in case that it detects excessive macroeconomic imbalances.[101] However, on the one hand, one has to keep in mind that both the two-pack and the six-pack only apply to the euro area Member States. Therefore, the scope of the Commission is somewhat limited in this respect. On the other hand, as has been outlined above, harmonisation of taxation policies is most beneficial for those Member States that are part of the common currency as it stabilises the economy of the EMU.

The system of the new economic governance in the EU might be a good way for the Commission to subtly harmonise tax policies in the Internal Market/euro area. However, the legitimacy of any such use of the six-pack and two-pack could of course be questioned, not only by scholarly debate, but also in front of the CJEU on the basis of *ultra vires* action of the EU.

4.5 Non-EU Legislation

In light of the recent developments in EU constitutional law, another option for harmonisation of taxation policies and laws needs to be considered here: the recourse to intergovernmental treaties. Apart from traditional bilateral and multilateral efforts and or treaties in the field of taxation,[102] the Member States of the EU have started to draw up semi-EU law treaties that make use of the EU institutions, but are, strictly speaking, not EU law itself. Recourse to these treaties has been taken exactly because unanimity in the ordinary Treaty amendment procedures could not be reached.[103] The legality of this practice has been questioned in *Pringle*,[104] who argued that, first, the amendment of Article 136 TFEU constituted an unlawful amendment of the TFEU and, secondly, that by ratifying, approving or accepting the ESM treaty, Ireland had undertaken obligations incompatible with the Treaties,[105] that is, that the establishment of the ESM did not fall under Member State competence.

However, the Court confirmed the validity of the ESM Treaty, making a clear distinction between economic (coordination) and monetary (exclusive competence of the Union) policies and concluded that Articles 4(3), 13 TEU, and Articles 2(3), 3(1)(c)TFEU 'do not preclude the conclusion between the Member States whose currency is the euro of an agreement *such as* the European Stability Mechanism or ratification of that Treaty'[106] (emphasis added by the author).

It might be the case that the Court very consciously chose to include the words 'such as' in its judgment to create room for future intergovernmental treaties that make de facto EU law, where no competences are directly transferred to the EU. Taxation competences are not transferred to the EU either: Therefore, intergovernmental treaties *such as* the ESM treaty (meaning between a large majority of Member States) in the field of, say, taxation are seemingly 'legalised' by the Court. At least, the Court does not set limits for Member States in that respect.

However, one has to take into account what consequences this intergovernmental approach would have for the EU. Intergovernmental treaties, such as the ESM Treaty or a possible taxation treaty, avoid not only the unanimity trap, but also any deep debate in the EU as a whole. If recourse to intergovernmental treaties becomes a normal *Union method*, Member States might not even try to reach unanimity anymore. All the other options considered above are generally seen as a last resort and have at their outset the striving for unanimity in the Union as a whole.

5 Conclusion and General Concerns

In the foregoing, the question was raised as to how to overcome the current legal obstacles to tax company integration. In times of economic crisis, it has become clear that the main problem and obstacle to be overcome is the unanimity requirement that Article 115 TFEU poses. To overcome this, this article assessed a Treaty change, the possibility of enhanced cooperation, soft law approaches and also indirect harmonisation by means of the new system of economic governance in the EU, as

99. Art. 7(2) Reg. 473/2013.
100. Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306/25 (hereinafter: Reg. 1176/2011).
101. Art. 5 Reg. 1176/2011.
102. *See* for example the Franco-German paper on business taxation: Bundesministerium der Finanzen en Ministère de l'Economie et des Finances et de l'Industrie, 'Grünbuch der Deutsch-Französischen Zusammenarbeit über Konvergenzpunkte bei der Unternehmensbesteuerung', 6 February 2012.
103. 'EU Suffers Worst Split in History as David Cameron Blocks Treaty Change', *see* above, n. 49.
104. *Pringle* judgment of the Court (Full Court) of 27 November 2012, *Thomas Pringle* v. *Government of Ireland, Ireland and The Attorney General*, C-370/12, not yet reported.
105. C-370/12 – *Pringle*, para. 1.
106. C-370/12 – *Pringle* para. 186(2).

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well as a non-EU law solution of an intergovernmental treaty.

It has to be concluded that a Treaty change might be on the future agenda of European leaders; currently, the constitutional requirements under Article 48 TFEU will not be met soon. Recourse to an intergovernmental treaty *such as* the ESM Treaty might be an easy and fast solution; however, 'traditional' EU law approaches have to be favoured. This is because of the fact that at least enhanced cooperation, soft law approaches and indirect harmonisation have as their ambition to reach consensus, if not unanimity, between Member States. Forcing economic integration, in particular fiscal integration, on Member States may do more harm than good for the future of the EMU. Some of the approaches discussed better allow Member States to implement taxation harmonisation at their own pace and in accordance with their political debate over time, rather than creating a premature break-up by means of yet another treaty next to the EU framework. In addition, these mechanisms have the considerable advantage that they are already put in place and are partly used. However, for the purpose of overall economic cohesion in the EU, a solution in which all Member participate remains the most desirable, in order to avoid further fragmentation of the EMU framework. Now it remains a question of not only time, but also effort until Treaty revision is realised.

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