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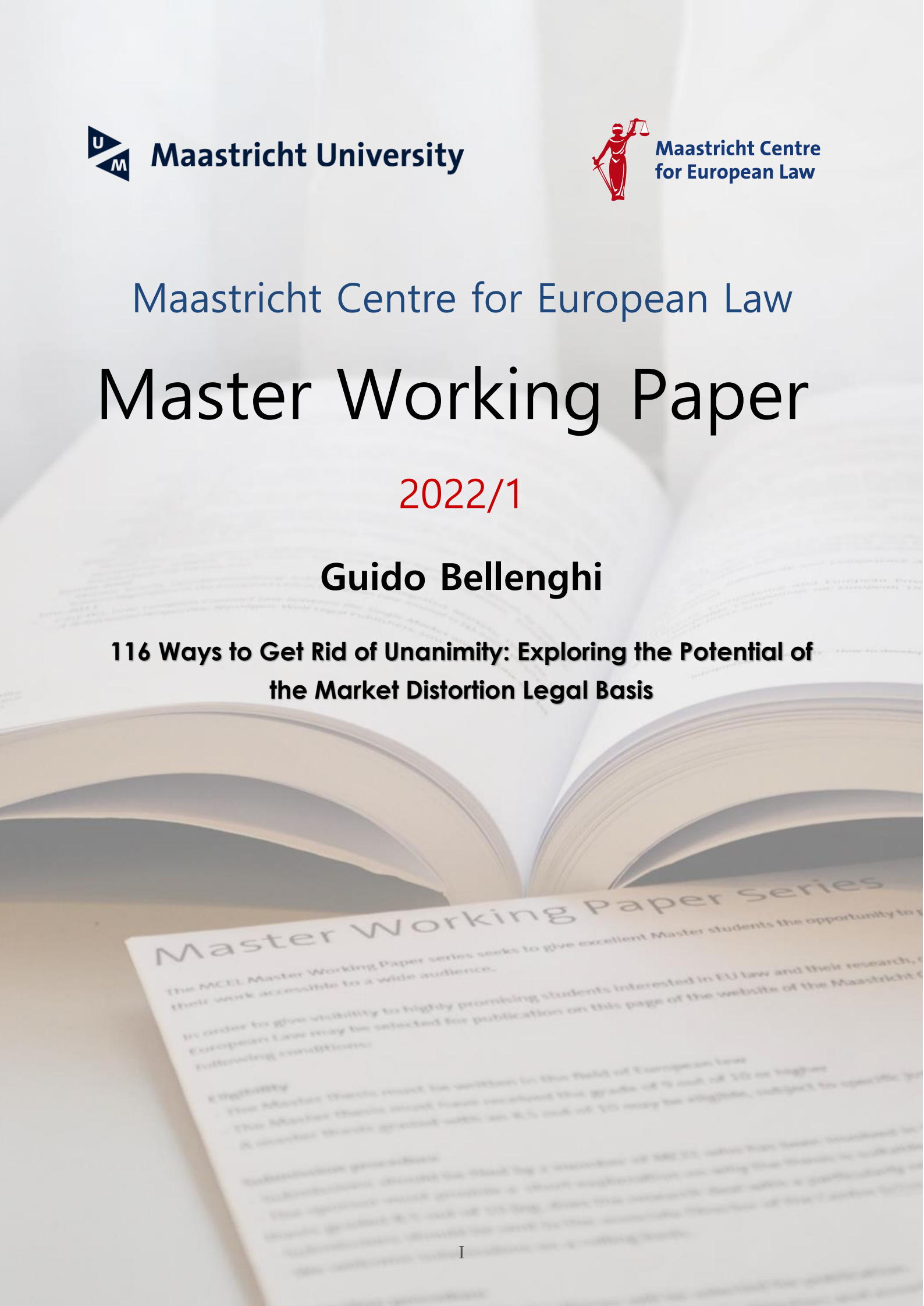
116 Ways to Get Rid of Unanimity: Exploring the Potential of the Market Distortion Legal Basis



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List of Frequently Used Abbreviations

AG — Advocate General

BEPS — Base Erosion and Profit Shifting

CJEU — Court of Justice of the European Union

ECJ — European Court of Justice

EU — European Union

EUR — Euro

GC — General Court

OECD — Organisation for Economic Co-operation and Development

TEU — Treaty on the European Union

TFEU — Treaty on the Functioning of the European Union

Abstract

The aim of this thesis is to assess the potential role of Article 116 TFEU within the context of EU legislation, with particular reference to the fields of direct taxation and minimum wage.

The research revolves around the issue of the effectiveness of EU law, to be seen as inextricably intertwined with the purposes of enhancing democratic legitimacy and distributive justice. It is submitted that such purposes are inherently and necessarily linked with tax and labour policies, and thus unanimity requirements within those fields undermine the effectiveness of EU law and prove to be significantly detrimental for the pursuit of instances of democracy and social justice.

Therefore, it is argued that the absence, in the Treaties, of an explicit recognition of unanimity requirements for tax and labour policies allows the European lawmaker to explore the opportunity provided by the market distortion legal basis included in Article 116 TFEU.

In order to investigate the potential of that legal basis, this work tries to analyse the wording of Article 116 TFEU and understand the reasons which pushed the drafters of the Treaties to include, and then maintain, that provision within the EU constitutional framework. It is argued that Article 116 TFEU, which allows for the adoption of directives through qualified majority voting, contains a flexible legal basis, unlimited in its material scope, and constrained by a *sui generis de minimis* threshold.

The main findings of the research are then tested against the backdrop of both direct taxation and minimum wage legislation. In particular, this thesis assesses the suitability of Article 116 TFEU as legal basis for measures aimed at tackling harmful tax competition—in both its targeted and general dimension—and for a minimum wage directive.

It is finally submitted that there are no insurmountable legal obstacles for Article 116 TFEU to become the 'white knight' of market integration. This notwithstanding, some limitations emerge from the analysis of the market distortion provisions' constitutional design. First, the use of the legal basis contained in Article 116(2) TFEU is conditional upon the fulfilment of certain legal and political requirements. Second, although in principle internal market legislation may well pursue social goals, this will not be without consequences on the type and effectiveness of the measure adopted. Third, legal feasibility does not necessarily entail political willingness. In this respect, however, it is crucial to be aware of what is legally feasible in order to be ready to exploit favourable opportunities and political momentum.

116 Ways to Get Rid of Unanimity: Exploring the Potential of the Market Distortion Legal Basis

Guido Bellenghi*

1. Introduction and methodology

1.1 Framing unanimity in the EU and its internal market

The European Union (EU) is an international organisation whose *raison d'être* is to perform certain functions that Member States themselves cannot perform with equivalent effectiveness.[1] Indeed, the capacity to effectively act has been described as 'the most basic good'[2] for the EU. Such an effectiveness, however, is not a *per se* value. In fact, it is only when effectiveness serves the purposes of democracy and distributive justice that governance issues are successfully addressed. In turn, arguably, the ineffectiveness of decision-making might undermine the democratic legitimacy and distributive justice of governance policies.[3]

EU action, and thus its effectiveness, is limited by several constraints. First and foremost, the competence of the EU is subject to the principle of conferral pursuant to Article 5(1) of the Treaty on the European Union (TEU).[4] A further and significant limit to EU action comes from unanimity requirements. The Treaties recognise unanimity as pre-condition for action in important matters. For instance, and to name but a few, unanimity is required by Article 7(2) TEU to adopt sanctions against a Member State which is breaching the core values enshrined in Article 2 TEU; moreover, unanimity is the rule for decision-making in the Common Foreign Security Policy domain, pursuant to Article 24(1) TEU; in addition, both the Own Resources Decision and the Multiannual Financial Framework shall be adopted by the Council acting unanimously, according to Articles 311 and 312 of the Treaty on the Functioning of the European Union (TFEU)[5] respectively.

Despite unanimity was not problematic in the original Community format, it has proved increasingly burdensome due to the EU enlargement policy. Finding a compromise amongst the six founding States was much easier than simultaneously satisfying twenty-seven different preferences. This evolving difficulty is witnessed by the ever-rarer recourse to the

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[1] See Bruno De Witte, 'Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible Without Constitutional Changes?' (European Parliament 2019) In-Depth Analysis Requested by the AFCO Committee PE 608.872 10.

[2] Bruno De Witte, 'Constitutional Design of the European Union: Getting Rid of the Unanimity Rule' (Conversations for the 'Future of Europe', European University Institute, 3 June 2020).

[3] See Miguel Poiares Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012) RSCAS Policy Paper 2012/11 6–8.

[4] Consolidated version of the Treaty on the European Union [2012] OJ C 326.

[5] Consolidated version of the Treaty on the functioning of the European Union [2012] OJ C 326.

flexibility clause contained in Article 352 TFEU.[6] The problem is even more significant when considering the future perspectives of EU enlargement policy: Ukraine and Moldova have recently joined Albania, the Republic of North Macedonia, Montenegro, Serbia, and Turkey in the group of candidate countries.[7] In such a context, even though differentiated integration is often a fruitful path to restore effectiveness, it cannot be a universal solution without risking harming the essence of the European project.[8]

Within the internal market, the unanimity requirement might seem less cumbersome. In 1986 the Single European Act responded to the need for qualified majority voting through the amendment of what is now Article 114(1) TFEU. The outcome was the creation of an internal market 'purposive'[9] competence which allowed the EU to overcome the unanimity requirement for the sake of harmonisation. The *vis expansiva* of EU law, supported by the interpretation of the Court of Justice of the European Union (CJEU),[10] has gradually extended the reach of Article 114(1) TFEU and allowed, under certain conditions,[11] the pursuit of non-economic objectives through that legal basis.

Nevertheless, Article 114(1) TFEU is limited as for its scope *ratione materiae*. Indeed, Article 114(2) provides that the legal basis in question cannot be used to adopt fiscal provisions, measures relating to free movement of persons, nor measures relating to the

[6] Article 352 TFEU contains a legal basis which allows, through unanimity in the Council, the EU to act in fields where the Treaties provide no competence, when such an action is necessary to attain one of the objectives set out in the Treaties. On the rarity of its use since the Lisbon Treaty, see Sacha Garben, 'Competence Creep Revisited' (2019) 57 Journal of Common Market Studies 205, 208.

[7] See European Council, 'Conclusions on Ukraine, the membership applications of Ukraine, the Republic of Moldova and Georgia, Western Balkans and external relations' (23 June 2022) 611/22, para 11.

[8] On differentiated integration, see Deirdre Curtin, 'From a Europe of Bits and Pieces to a Union of Variegated Differentiation' (European University Institute 2020) RSCAS EUI Working Paper 37/2020; Ellen Vos, 'Differentiation, Harmonisation and Governance' in Bruno De Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001). See also the various contributions in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar Publishing 2017).

[9] Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2. The adjective 'purposive' refers to a competence not defined by a specific sector or policy area but only by the aim of ensuring the smooth functioning of the internal market. See also Bruno De Witte, 'Exclusive Member State Competences—Is There Such a Thing?' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 63; Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827, 831.

[10] One of the main examples is provided by the s.c. 'Tobacco Advertising saga', where the Court has recognised that measures adopted on the basis of Article 114 TFEU are not prevented from impacting on the protection of human health. See case C-376/98 *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544, para 78.

[11] These conditions correspond to the adherence to the 'centre of gravity' doctrine (i.e. the legal basis must be chosen having regard to the content and the aim of the measure), the satisfaction of the 'threshold requirement' (i.e. the non-economic objective must be interconnected with the aim of ensuring the smooth functioning of the market), and the respect of the principle of subsidiarity (Article 5(3) TEU). See Bruno De Witte, 'A Competence to Protect' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 35.

rights and interests of employed persons. These constrains can be overcome via recourse to Article 115 TFEU, which is not limited in its material scope but, unlike Article 114(1) TFEU, requires unanimity.

Such a constitutional arrangement appears to be in contrast with the conception of integration in the internal market as a source of wealth creation and redistributive effect 'by competition in that market and the increased majoritarian character of [EU] decisions'.[12]

In fact, taxation and labour, excluded from the reach of Article 114(1) TFEU, are two policies inextricably linked with the abovementioned democratic legitimacy and distributive justice.[13] The concept of political representation through national parliaments was conceived in the XIII century precisely in response to arbitrary taxation,[14] and the progressive nature of the majority of European tax systems has essentially a redistributive function.[15] Furthermore, in a Europe which is shifting from the 'welfare' to the 'workfare' model,[16] the bases for democracy and distributive justice are to be found in labour regulation. Indeed, the idea is that society's solidarity is not anymore unconditional. It is instead based on the efficiency and productivity of the individual worker.[17] In turn, it is a collective responsibility to ensure fair conditions and reasonable incentives for the individual's access to work.[18] Hence, labour regulation becomes a perfect example of law as a 'social ordering technology'.[19]

Although it collides with the effectiveness of EU decision-making in critical matters, the exclusion of tax and employment issues from the scope of Article 114(1) TFEU is due to the political sensitiveness of those subjects.[20] This 'competence anxiety'[21] is witnessed by the

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[12] Miguel Poiares Maduro, Bruno De Witte and Mattias Kumm, 'The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis' in Miguel Poiares Maduro, Bruno De Witte and Mattias Kumm (eds), *The Democratic Governance of the Euro* (RSCAS Policy Paper 2012/08 2012) 3.

[13] On the limited (but increasing) direct engagement of the EU in redistributive matters, see Mark Dawson and Floris de Witte, 'Constitutional Balance in the EU after the Euro–Crisis' (2013) 76 The Modern Law Review 817, 817 ff.

[14] See Antonio Padoa Schioppa, *Storia del Diritto in Europa: dal Medioevo all'Età Contemporanea* (Second edition, Il Mulino 2016) 236–237.

[15] See Andrew Moravcsik, 'In Defence of the "Democratic Deficit", Reassessing Legitimacy in the European Union' (2002) 40 Journal of Common Market Studies 603, 608; Pasquale Russo and others, *Istituzioni di Diritto Tributario* (Second edition, Giuffrè 2016) 29. In Franco Gallo, 'La Concorrenza Fiscale Tra Stati' in Pietro Boria (ed), *La Concorrenza Fiscale tra Stati* (Wolters Kluwer 2019) 57 the author advocates the overtaking of the unanimity principle in tax matters and concludes that it would bring to new levels of integration and distributive justice.

[16] See Antonio Perrone, *Tax Competition e Giustizia Sociale nell'Unione Europea* (Wolters Kluwer 2019) 102–103.

[17] See *ibid* 104. Early formulations of this theory, rooted in the UK, can be found in Robert Nozick, 'Distributive Justice' (1973) 3 Philosophy & Public Affairs 45, 46; Samuel Brittan, 'The Economic Contradictions of Democracy' (1975) 5 British Journal of Political Science 129, 151–155.

[18] See Paolo Caretti and Ugo De Siervo, *Diritto Costituzionale e Pubblico* (Second edition, Giappichelli 2014) 538–539.

[19] This definition is borrowed from Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 17.

[20] In Moravcsik (n 15) 608, the author analyses the fiscal constraints of the EU's institutional capacity and argues that '[i]t is not coincidental that the policies absent from the EU's policy portfolio - notably

recent debates concerning the introduction of a common corporate tax directive and a minimum wage directive. The developments concerning the adoption of these measures confirm that the EU legislator often has to opt for less ambitious and somehow watered-down reforms in order to reach the consensus required by the Treaties.

It is often maintained that the combination of Articles 114(2) and 115 TFEU creates a unanimity requirement.[22] However, some counterarguments should be taken into consideration. First and foremost, there is no explicit and positively formulated unanimity requirement for those subjects in the TFEU. This would have been the case if, for instance, Article 114(2) read as follows:

> 'Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons. *Such provisions can only be approximated following the procedure laid down in Article 115*'.

Second, as for labour, there is another legal basis in the Treaty, namely Article 153(2) TFEU, allowing for harmonisation through qualified majority voting in certain fields concerning the rights of employees.[23] This suggests that the combination of Articles 114(2) and 115 TFEU does not *per se* create an absolute unanimity requirement for the subjects listed in the former provision.

Third, amongst the common rules on approximation of laws within the internal market there is another legal basis, namely Article 116(2) TFEU, which is not limited in its material scope and allows for the adoption of directives through the ordinary legislative procedure, thus through qualified majority voting.[24]

Already in 1985, the Commission listed recourse to Article 116 TFEU, together with the 'creation of a unified market', amongst the priorities for the stimulus of competition, the promotion of structural adjustment, and the increase of competitiveness of the Community economy.[25] In 2002, von Quitzow went further and argued that 'Article [116] is not a sleeping

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social welfare provision [...] - require high government expenditure'. On the historical unwillingness of Member States to confer to the EU a competence on direct taxation, see Peter Jacob Wattel, 'Taxation in the Internal Market' in Panos Koutrakos and Jukka Snell (eds), *Research handbook on the law of the EU's internal market* (Edward Elgar Publishing 2017) 323; Pieter Van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' (2019) 4 European Papers 225, 232–233.

[21] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1, 13.

[22] See, *ex multis*, Wattel (n 20) 328.

[23] In particular: the improvement of the working environment to protect workers' health and safety; working conditions; the information and consultation of workers; the integration of persons excluded from the labour market; and equality between men and women with regard to labour market opportunities and treatment at work.

[24] The ordinary legislative procedure is laid down in Article 294 TFEU.

[25] Commission, 'Fourteenth Report on Competition Policy' (1985) 16.

beauty but it might be the white knight that saves Community wide market integration'.[26] Twenty years later, the aim of this dissertation is to concretely analyse the option provided by Article 116 TFEU for the sake of the effectiveness of EU decision-making in particularly sensitive matters. Therefore, this thesis aims at addressing the following main research question: to what extent can Article 116 TFEU be a suitable legal basis for internal market legislation?

In turn, the answer to the main question will allow to further develop the research and address two sub-questions. Such sub-questions will concern, in particular, the suitability of the legal basis enshrined in Article 116(2) TFEU for the adoption of measures within fields falling outside the scope of Article 114(1) TFEU, namely taxation and employment.[27]

In order to answer the research questions, the thesis will first investigate the history and the legal features of Article 116 TFEU (Section 2). Second, this work will explore the possibility of using the legal basis contained in Article 116(2) TFEU in the context of the fight against harmful tax competition (Section 3) and for the adoption of a minimum wage directive (Section 4). Finally, some conclusions will be drawn (Section 5).

1.2 Methodology and structure

This dissertation adopts a qualitative approach towards the traditional legal doctrinal methodology.[28] That is to say that not only is the option provided by Article 116 TFEU analysed from the perspective of its literal content, but it is also assessed in light of the political context. Such a methodological choice is suggested by the scarcity of relevant case-law and the absence of legislative acts adopted on the basis of Article 116 TFEU. Therefore, whereas the wording of that provision constitutes the starting point, the analysis of the legal basis contained therein cannot proceed without inquiry into its meaning and origins,[29] aiming at putting the law in context. To that end, a careful investigation of a number of policy documents is conducted. It is indeed necessary to identify and analyse those moments of EU legal and political history when the market distortion provisions have been taken into consideration for intervening on the market, going from the Spaak Report to the most recent pandemic-related communications.

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[26] Carl Michael von Quitzow, *State Measures Distorting Free Competition in the EC: A Study of the Need for a New Community Policy Towards Anti-Competitive State Measures in the EMU Perspective* (Kluwer Law International 2002) 196.

[27] In *ibid* 191, the author observes that 'it cannot be excluded that [Article 116 TFEU] will gain increased importance in the future, e.g. in case of sudden and serious distortions […] caused by national rules excluded by Article [114(2) TFEU], for instance taxation rules or rules relating to social policy'.

[28] See Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Second edition, Edinburgh University Press 2017) 24.

[29] See Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6 Law Text Culture 159, 162.

The structure of this thesis can be divided into two macro-parts. In the first part (Section 2), the wording of Article 116 TFEU, the limited case-law, and the main articles and commentaries are analysed with a descriptive approach in order to build a legal-feasibility test. Such a test includes four fundamental conditions for recourse to Article 116 TFEU. In essence, the test is aimed at assessing whether Article 116 TFEU could be a suitable legal basis for the adoption of a given measure.

The second part (Sections 3 and 4) of this work applies the said test to certain measures that have been recently discussed within the fields of taxation and labour. In doing so, the research combines its descriptive nature with a more evaluative approach. In particular, the latter is aimed at highlighting the contrast between legal soundness and political feasibility of EU action within the concerned subjects.

More specifically, as for taxation, the potential use of Article 116 TFEU is assessed against the backdrop of harmful tax competition. The latter is in turn considered in both its dimensions, namely targeted and general competition. With regard to the former, i.e. targeted tax competition, recourse to Article 116 TFEU is conceived as an alternative strategy vis-à-vis the application of State aid rules to harmful tax practices. Thus, in light of the practice of the Commission and the recent jurisprudence of the General Court (GC), strengths and weaknesses of a potential change of course in the EU's approach are considered. As regards the latter, i.e. general tax competition, the possibility of harmonisation in the field of direct taxation through Article 116 TFEU is assessed against the recent steps taken at both global and EU level to overcome the current political deadlock.

Moreover, with regard to labour, the thesis proposes to introduce Article 116 TFEU in the debate concerning the appropriate legal basis for the adoption of an EU minimum wage directive. In particular, the research tries to highlight the advantages and disadvantages that, should such a measure be based on the internal market provisions, could be ensured vis-à-vis the current proposal based on Article 153 TFEU. To do so, the dissertation takes into account the peculiar relationship between internal market legal bases and social legislation which has been developed in the case-law of the CJEU.

Finally, some assumptions and limitations must be preliminarily disclosed. First, as pointed out in the previous paragraph, this thesis starts from the assumption that overcoming unanimity requirements would be beneficial for the effectiveness of EU action. In turn, an increased effectiveness of fiscal and employment measures would enhance the democratic legitimacy and distributive justice of EU action. Nevertheless, the dissertation is not aimed at advocating the absolute desirability of the centralisation at EU level of all taxation and labour matters. The objective is rather to argue that the current framework of the Treaties offers a concrete possibility to act through qualified majority voting even in those fields which are excluded from the scope of Article 114(1) TFEU. Second, although in this work the argument

is made that the use of Article 116 TFEU might function as leverage to incentivise Treaty amendment and soften unanimity requirements, the analysis carried out throughout the research does not take a reform-based approach and instead remains within the boundaries of the current Treaty framework.[30]

2. The market distortion legal basis: An analysis of Article 116 TFEU

Since Article 116(2) has never been used as the legal basis for the adoption of any legislative act, its interpretation is historically uncertain and controversial.[31] This provision has been described as 'a paper tiger',[32] '*lettre morte*',[33] and 'declined into practical oblivion'.[34] Unfortunately, the contribution of the CJEU on the matter is very limited.[35] However, it is precisely the obscurity of this article that keeps pushing scholars to wonder about its potential.

Article 116 TFEU, which belongs, together with Article 117, to the s.c. 'market distortion rules',[36] provides that:

> '[w]here the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.
>
> If such consultation does not result in an agreement eliminating the distortion in question, the European, Parliament and the Council, acting in accordance with

[30] In Commission, 'Conference on the Future of Europe - Putting Vision into Concrete Action' COM(2022) 404 final 4-5, the Commission observes that 'Treaty change should not be an end in itself' and that 'for the vast majority of measures [proposed within the framework of the Conference on the Future of Europe], there is much that can and will need to be done under the existing treaties', referring to the option provided by the 'passerelle clause' (Article 48(7) TFEU) to 'move to qualified majority voting in certain policy fields', including energy and taxation. However, the use of the 'passerelle clause' within taxation matters has proven unlikely for political reasons, as explained by Joachim Englisch, 'Article 116 TFEU - The Nuclear Option for Qualified Majority Tax Harmonization?' (2020) 29 EC Tax Review 58, 58.

[31] On this obscurity see, *ex multis*, Pierre Pescatore, 'Public and Private Aspects of European Community Competition Law' (1986) 10 Fordham International Law Journal 373, 402; Roberto Adam and Antonio Tizzano, *Manuale di diritto dell'Unione europea* (Third edition, Giappichelli 2020) 681; Manuel Kellerbauer, 'Article 116 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: a commentary* (Oxford University Press 2019) 1258; Amedeo Arena, 'Art. 116' in Antonio Tizzano, Piero De Luca and Massimiliano Puglia (eds), *Trattati dell'Unione Europea* (Giuffrè 2014) 1274.

[32] Peter Jacob Wattel, 'Comparing Criteria: State Aid, Free Movement, Harmful Tax Competition and Market Distorting Disparities' in Isabelle Richelle, Wolfgang Schön and Edoardo Traversa (eds), *State Aid Law and Business Taxation* (Springer 2016) 64.

[33] Commission's Legal Service, doc. no. JUR(86)D/2755 (7 May 1986), para 8, at 4, quoted in Martijn Nouwen, 'The Market Distortion Provisions of Articles 116-117 TFEU: An Alternative Route to Qualified Majority Voting in Tax Matters?' (2021) 49 Intertax 14, 15.

[34] Robert Schütze, *European Union Law* (Second edition, Cambridge University Press 2018) 551.

[35] See, for instance, case C-174/02 *Streekgewest* [2005] ECLI:EU:C:2005:10, para 24; case 94/74 *IGAV v Ente nazionale per la cellulosa* [1975] ECLI:EU:C:1975:81, para 34; case 173/73 *Italy v Commission* [1974] ECLI: ECLI:EU:C:1974:71, para 17.

[36] Wattel (n 32) 63; Nouwen (n 33).

the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted'.

Accordingly, there are four conditions for the use of the legal basis provided for in the second paragraph: a disparity between the laws or the administrative practices of the Member States (§2.1); a distortion of competition resulting from the said disparity (§2.2); the need for the elimination of such a distortion (§2.3); and the unsuccessful outcome of the prior consultation procedure provided for in the first paragraph (§2.4). The aim of this section is to separately analyse each of those conditions in order to define the scope of application of Article 116(2) TFEU.

2.1 The disparity between the laws or administrative practices of the Member States

Article 116 TFEU only applies when the difference between Member States' concerns existing and in force legislation (or administrative practices).[37] Not only can this be understood from the wording of the Treaty, but it can also be inferred from the twin provision included in Article 117(1) TFEU. The latter, complementary to Article 116 TFEU, refers to the 'fear that the *adoption* or *amendment* of a provision […] may cause distortion'.[38] It seems thus reasonable to draw a parallel with the relationship between paragraphs 4 and 5 of Article 114 TFEU: while Article 116 TFEU (similar to Article 114(4) TFEU) deals with existing provisions, Article 117 TFEU (similar to Article 114(5) TFEU) concerns measures that have not been adopted yet.[39]

This notwithstanding, the term 'disparity' does not necessarily imply that two or more Member States have different statutory provisions on the same subject. In fact, even the absence of legislation in one or more Member States on a matter which is positively regulated (as explained above, through existing and in force legislation) in another Member State may distort competition.[40] Furthermore, in the absence of full mutual recognition, disparities might arise even where two sets of rules in two countries are identical.[41]

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[37] See Kellerbauer (n 31) 1259; Arena (n 31) 1272.

[38] Emphasis added. According to Manuel Kellerbauer, 'Article 117 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: a commentary* (Oxford University Press 2019) 1262, Article 117 TFEU is aimed at 'pre-empting' distortions.

[39] Paragraphs 4 and 5 of Article 114 TFEU provide the s.c. 'opt-out clauses', allowing Member States to derogate from harmonising measures adopted on the basis of Article 114(1) TFEU. Paragraph 4 allows derogation for existing national provisions, whereas paragraph 5 allows the introduction of new derogating measures. See Ellen Vos and Maria Weimer, 'Differentiated Integration or Uniform Regime? National Derogations from EU Internal Market Measures' in Bruno De Witte, Andrea Ott and Ellen Vos, *Between Flexibility and Disintegration* (Edward Elgar Publishing 2017) 308–311.

[40] See Vos (n 8) 148; Philip Collins and Michael Hutchings, 'Articles 101 and 102 of the EEC Treaty: Completing the Internal Market' (1986) 11 European Law Review 191, 195.

[41] See René Barents, 'The Competition Policy of the EC' in Paul Joan George Kapteyn and others (eds), *Kapteyn & VerLoren van Themaat - The Law of the European Union and the European Communities* (Fourth edition, Kluwer Law International 2008) n 585.

Finally, since the Treaty does not otherwise specify, it can be assumed that the difference might also involve more than two Member States.

2.2 The distortion of competition: Beyond Spaak

Many scholars maintain that, unlike Article 114,[42] Article 116 TFEU only refers to actual distortions.[43] There are at least two reasons to uphold this view. First, as explained in the previous paragraph, potential distortions fall more likely within the scope of Article 117. Second, should the scope of Article 116 have also included potential distortions, it would have not referred to the actual need for their elimination.

There are two main categories of competition distortions. On the one hand, 'active' distortions are those caused by the direct interference of the State in the market, such as in certain cases of State aid. On the other hand, 'passive' distortions are distortions due to State measures which indirectly affect market conditions, such as those caused by disparities between Member States' legislations.[44]

Within the latter category, it is possible to distinguish two types of competition distortions: specific and generic (or global).[45] According to the Spaak Report,[46] a specific distortion occurs when, due to public intervention in the economy of a certain Member State, one or more economic operators or sectors are subject to different economic conditions than average in that Member State, being thus competitively advantaged or disadvantaged with respect to competing operators or sectors in one or more other Member States.[47] On the contrary, distortions deriving from national rules of general application, which arise between

[42] See, *ex multis*, case C-350/92 *Spain v Council* [1995] ECLI:EU:C:1995:237, para 35 and case C-377/98 *Netherlands v Parliament and Council* [2001] ECLI:EU:C:2001:523, para 15.
[43] See Nouwen (n 33) 16; Englisch (n 30) 59; von Quitzow (n 26) 192.
[44] See von Quitzow (n 26) 44.
[45] For a taxonomic investigation of the concept of 'distortion', see Charles Campet, 'Le "Distorsioni" e La Loro Eliminazione in Vista Di Una Integrazione Economica Di Più Paesi' (1960) 1 Rivista di Politica Economica 1610. In Nouwen (n 33) 17, the author considers global and generic distortions as two different types of distortions. He describes 'global distortions' as those that 'occur at a macro level' and are addressed by Member States 'by recourse to their macroeconomic policy instruments and multilateral EU supervision of financial economic policy and a uniform monetary policy within the EMU'; whereas he refers as 'generic distortions' to those that 'occur at intermediate or sectoral levels and are primarily traceable to disparities in (systems of) legislation'. See also Barents (n 41) 872–873.
[46] Comité Intergouvernemental Créé par la Conférence de Messine, 'Rapport Des Chefs de Délégation Aux Ministres Des Affaires Etrangères' (1956) paras 60–64.
[47] On the basis of Commission's answer of 26 July 1983 to parliamentary question of Mr. H. Muntingh [1983] OJ C 275/1, Nouwen (n 33) 18 identifies three criteria for the creation of a specific distortion: the 'internal derogation criterion', the 'external effect criterion', and the 'net-effect or balancing criterion'. Similarly, see Arena (n 31) 1272. According to Campet (n 45) 1612-1615, distortions of competition can be either internal (i.e. those which do not produce effects beyond national economy) or external (those that can be only valued from the perspective of the relationship between two countries, as they affect international relations). In particular, the author submits that only the latter are capable of affecting European integration and should be considered within the meaning of the Treaty. This interpretation seems to be confirmed by the last sentence of Article 117(2) TFEU, which excludes the applicability of Article 116 TFEU where a Member State 'causes distortion detrimental only to itself'.

Member States and not within one Member State, belong to the category of generic distortions.[48] According to AG Geelhoed, generic distortions 'may in principle result from *all* public interventions which affect the market behaviour of undertakings'.[49]

Within the framework outlined in the Spaak Report, Article 116 TFEU could appear only applicable to specific distortions. At the time of the Spaak Report, such a view was influenced by the assumption that generic distortions could be instead addressed through adjustments in the effective exchange rate.[50] The limitation of the scope of Article 116 TFEU to specific distortions, to which various commentators have adhered,[51] is thus grounded on a premise which is practically impossible in the context of the Economic and Monetary Union (EMU).[52]

One might argue, then, that Article 116 TFEU has lost its purpose, and therefore its applicability, due to the progress of European economic integration. However, such an argument would fail to explain why Article 116 TFEU has endured through the several Treaty reforms begun in the 1990s. In particular, the fact that it has also been modified in its wording by the treaties of Amsterdam and Lisbon suggests that Article 116 TFEU has been taken into consideration by the drafters, who could have deleted this provision but significantly did not.

Furthermore, it has been observed that the interpretation based on the Spaak Report reverses the causality relationship outlined in the wording of Article 116 TFEU.[53] This appears particularly true when considering the French and Italian versions of the Treaty. Accordingly, the distortion is a consequence of national disparities' disruptive impact on competition conditions (in French: '*une disparité […] fausse les conditions de concurrence […] et provoque, de ce fait, une distorsion*'; in Italian: '*una disparità […] falsa le condizioni di concorrenza […] e provoca, per tal motivo, una distorsione*'). That is also the logic order

[48] See Englisch (n 30) 59; Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Hart 2002) 131.

[49] Case C-308/01 *GIL Insurance Ltd and Others* [2003] ECLI:EU:C:2003:481, Opinion of AG Geelhoed, para 63.

[50] Comité Intergouvernemental Créé par la Conférence de Messine (n 46) para 60. See also Campet (n 45) 1613–1614; Ugo Draetta, 'Ravvicinamento Delle Legislazioni: Art. 101' in Rolando Quadri, Riccardo Monaco and Alberto Trabucchi (eds), *Trattato Istitutivo della Comunità Economica Europea: Commentario*, vol 2 (Giuffrè 1965) 799.

[51] See Kellerbauer (n 31) 1259; Arena (n 31) 1272; Miguel Moura e Silva, 'Artigo 116' in Manuel Lopes Porto and Gonçalo Anastácio (eds), *Tratado de Lisboa - Anotado e Comentado* (Almedina 2012) 545; Daniel-Erasmus Khan and Dominik Eisenhut, 'Approximation of Laws' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties: A Commentary* (Beck; Hart 2015) 566.

[52] See von Quitzow (n 26) 194–195; Englisch (n 30) 59. On the singleness of the currency and of the exchange rate policy in the EMU, see Article 119(2) TFEU. See also Rosa M Lastra and Jean-Victor Louis, 'European Economic and Monetary Union: History, Trends, and Prospects' (2013) 32 Yearbook of European Law 57, 57–72.

[53] See Daniel Vignes, 'Le Rapprochement Des Législations' in Daniel Celleja, Daniel Vignes and Rolf Wägenbaur (eds), *Commentaire Mégret. Le Droit de la CEE*, vol 5 (Second edition, Presses Universitaires de Bruxelles 1993) 332.

followed by the CJEU in its interpretation of Article 116 TFEU.[54] In the Spaak Report's construction, instead, the distortion seems to be deemed the cause, and not the effect, of the breach of the level playing field, favouring certain undertakings over others. It goes without saying that the content of the Spaak Report cannot lead to an interpretation *contra legem* of the Treaties.[55]

The decisive confirmation of the outdated character of the Spaak Report comes from the CJEU, which has included Articles 116 and 117 TFEU amongst those articles which 'provide for detailed rules for the abolition of *generic* distortions'.[56] In fact, as observed by AG Darmon, to limit the applicability of Article 116 to specific distortions would entail the creation of an overlap with State aid rules.[57] The specificity of the distortion, indeed, closely recalls the selectivity of the aid.[58] Therefore, it seems that, also with a view of preserving the *effet utile* of Article 116 TFEU,[59] the latter should be seen as *lex generalis* vis-à-vis Article 107 TFEU.[60] In other words, unlike State aid rules, Article 116 TFEU applies also to public intervention devoid of selective nature.[61]

In the 1990s, the Commission eventually abandoned its originalistic approach based on the Spaak Report. In particular, it started focusing on the distortive effects rather than on the generic or specific nature of the measures at stake.[62] Accordingly, it acknowledged that competition can well be distorted, within the meaning of Article 116 TFEU, by general measures, i.e. 'any state interventions that apply uniformly across the economy and which do not favour certain enterprises or sectors'.[63]

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[54] See *IGAV v Ente nazionale per la cellulosa* (n 35), para 34.

[55] See case C-441/14 *DI* [2016] ECLI:EU:C:2015:776, Opinion of AG Bot, para 68, where, in the context of a case concerning the limits of consistent interpretation, AG Bot observed: '[a] *contra legem* interpretation must, to my mind, be understood as being an interpretation that contradicts the very wording of the […] provision at issue'.

[56] *Italy v Commission* (n 35), para 17 (emphasis added).

[57] See joined cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* [1992] ECLI:EU:C:1992:130, Opinion of AG Darmon, para 72.

[58] On the concept of selectivity, see Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union C/2016/2946 [2016] OJ C 262, paras 27-40.

[59] See Englisch (n 30) 59. For a different opinion, see Moura e Silva (n 51) 545, where the author argues that there is no necessary overlap between Articles 107 and 116 TFEU, since the former only applies to measures granted through State resources—to that extent, see joined cases C-72/91 and C-73/91 *Sloman Neptun v Bodo Ziesemer* [1993] ECLI:EU:C:1993:97, para 19—whereas the latter does not require an impact on the public budget.

[60] See Opinion of AG Geelhoed (n 49), para 3.

[61] See joined cases C-182/03 and C-217/03 *Belgium v Commission* [2006] ECLI:EU:C:2006:89, Opinion of AG Léger, para 292.

[62] See Commission, Note of the Commissions' Legal Service doc. no. JUR(91)02385 (16 April 1991), para 3.3 at 3–4, cited by Nouwen (n 33) n 44.

[63] Commission, 'Second Survey on State Aids in the European Community in the Manufacture and certain other factors' SEC(90) 1165/3, 1990, 5-6.

2.3 The need for the elimination of the distortion: A *sui generis de minimis*?

Englisch recently pointed out that 'the potential of Article 116 TFEU to overcome the unanimity requirement […] depends crucially on how narrowly or broadly the notion of "distortions of competition to be eliminated" is construed'.[64] To understand the implications of Article 116(1) TFEU's peculiar wording ('the resultant distortion *needs to be eliminated*'),[65] it is necessary to consider the original context of the EEC Treaty.

Aimed at facilitating the establishment and functioning of the common market, Article 100 EEC (now Article 114 TFEU) allowed for the approximation of national provisions through unanimous action of the Council and after the consultation of the Assembly (now European Parliament). At the same time, the drafters of the Treaty perceived the need for a simplified procedure allowing the Community to address the most serious distortions: in their words, those that 'need[ed] to be eliminated'. Hence, the genesis of Article 101 EEC (now Article 116 TFEU): it allowed the Community to act through qualified majority voting and without the involvement of the Assembly.[66]

This historical reconstruction witnesses the nature of Article 116 TFEU as *lex specialis* vis-à-vis Article 114. Such a relationship seems unanimously accepted by scholars[67] and brings two observations. First, the qualification of Article 116 as *lex specialis* logically excludes that this article could have a merely residual character in the framework of the Treaty.[68] By definition, indeed, only the *lex generalis* can have a residual scope of application. Second, the purposes of Articles 114 and 116 TFEU only partially overlap,[69] being the latter aimed at addressing solely the distortions of competition beyond the peculiar

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[64] Englisch (n 30) 59. This view is shared by Nouwen (n 33) 17.

[65] Emphasis added.

[66] On this interpretation, see Barents (n 41) 872; Draetta (n 50) 798; Vignes (n 53) 332; von Quitzow (n 26) 190; Francesco Bertolini and Giuseppe Colavitti, 'Il Ravvicinamento Delle Legislazioni' in Stelio Mangiameli (ed), *L'Ordinamento Europeo*, vol 2 (Giuffrè 2006) 474. As observed in Khan and Eisenhut (n 51) 567, the current Article 116 TFEU retains a simplified character when compared to Article 114 TFEU, as the former does not require the consultation of the Economic and Social Committee. Nevertheless, in Denys Simon, 'Article 101' in Vlad Constantinesco and others (eds), *Traité Instituant la CEE: Commentaire Article par Article* (Economica 1992) 577, the author submits that the lack of recourse to Article 116 TFEU has been due to its requirements' complexity: '*[s]ans doute faut-il aussi chercher dans la complexité de ses conditions de mise en œuvre l'explication du rôle marginal qui lui a été laissé*'.

[67] See Vignes (n 53) 331; Nouwen (n 33) 15; Arena (n 31) 1273; Moura e Silva (n 51) 544. See also Kieran Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) n 60, where the author refers to Articles 116 as allowing for 'specific action' in favour of the internal market.

[68] Instead, in Fabio Ferraro, 'L'Efficacia Dei Principi Comunitari Sulla Concorrenza' (2005) 1 Il Diritto dell'Unione Europea 669, 686, the author describes Articles 116 and 117 TFEU as 'norme di chiusura', meaning that they can only be used in the absence of other applicable provisions.

[69] The wording of Article 114 TFEU does not actually refer to 'distortions of competition'. However, the CJEU has clarified that measures based on Article 114(1) TFEU must be aimed at the improvement of the conditions for the establishment, i.e. removing obstacles, and functioning, i.e. removing distortions of competition, of the internal market. See *Germany v Parliament and Council* (n 10), para 84. On the scope of application of Article 114 TFEU, see Davies (n 9) 8.

de minimis threshold constituted by the need for their elimination.[70] It follows from the foregoing that, according to the *lex specialis derogat legi generali* principle,[71] there should be cases in which recourse to Article 116 would be more appropriate than the use of Article 114.

Such an interpretation is not contradicted by the ruling of the CJEU in *Costa v E.N.E.L.*,[72] where it is held that Article 117 TFEU refers to cases where national projected legislations 'create a risk, *however slight*, of a possible distortion [within the meaning of Article 116 TFEU]'.[73] Indeed, in the wording of the judgement, 'however slight' refers to the risk and not to the distortion.

The question arises, then, as to where the dividing line between distortions that do and do not need to be eliminated is. The Commission has provided an explanation by reference to antitrust (Articles 101 and 102 TFEU) and State aid (Article 107 TFEU) rules.[74] However, such an explanation is unsatisfactory for three reasons.

First, antitrust and State aid rules set different benchmarks for the assessment of anticompetitive behaviours' effects on the market. Whereas for the purposes of Articles 101 and 102 TFEU the concept of 'appreciable extent'[75] can be precisely quantified in terms of market shares and turnover,[76] the CJEU has endorsed a much more broad, flexible, and case-by-case approach within State aid cases.[77] Therefore, in order to define a clear benchmark, reference cannot be made to both antitrust and State aid rules as if they

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[70] See Georges Dellis, 'Le Rapprochement Des Législation' in Philippe Léger (ed), *Commentaire Article par Article des Traités UE et CE* (Bruylant Bruxelles 2000) 954-955, where the author submits that '*les autorités communautaires [sont autorisées] à faire appel à l'article [116 TFUE] seulement pour faire face à des distorsions de concurrence dépassant un certain degré de gravité*'. See also Delfina Boni, '116' in Fausto Pocar and Maria Caterina Baruffi (eds), *Commentario Breve ai Trattati dell'Unione Europea* (Second edition, CEDAM 2014) 913; Simon (n 66) 579.

[71] See case C-48/14 *Parliament v Council* [2015] ECLI:EU:C:2015:91, para 36, where the Court holds that 'if the Treaties contain a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision'. Nevertheless, in Annegret Engel, *The Choice of Legal Basis for Acts of the European Union: Competence Overlaps, Institutional Preferences, and Legal Basis Litigation* (Springer 2018) 24, the author holds that this principle 'can only apply in addition to other criteria of legal basis litigation' and it is only 'a supplementary criterion of legal basis litigation'.

[72] Case 6/64 *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.

[73] *Ibid*, p. 595 (emphasis added).

[74] See Commission (n 62).

[75] In case 22/71 *Béguelin Import Co. v G.L. Import Export* [1971] ECLI:EU:C:1971:113, para 16, the CJEU held that 'to come within the prohibition imposed by article [101 TFEU] an agreement must affect trade between Member States and the free play competition to an appreciable extent'.

[76] See Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101, para 52. The Notice refers to the appreciable effect on trade between Member States, but this condition is conceptually intertwined with the appreciability of the effects on competition. Further on this point, see Alison Jones, Brenda E Sufrin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (Seventh edition, Oxford University Press 2019) 196–202 and 218; Pieter J Slot and Martin Farley, *An Introduction to Competition Law* (Second edition, Hart Publishing 2017) 58–59; Federico Ghezzi and Gustavo Olivieri, *Diritto Antitrust* (Second edition, Giappichelli 2019) 34–35.

[77] An example worth-mentioning is provided by joined cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECLI:EU:C:2000:570, para 66.

envisaged the same threshold. Moreover, while State aid rules are addressed to Member States' behaviour, antitrust rules deal with the anticompetitive practices of undertakings. Since Article 116 TFEU concerns public intervention in the economy, reference to State aid rules seems more appropriate.

Second, the Court has used the word 'appreciable' to set a *de minimis* rule not only for the application of antitrust rules, but also for the use of Article 114 TFEU.[78] Once it is acknowledged that distortions falling within the scope of Article 116 are more serious than those falling within the scope of Article 114, then the 'appreciable' extent of the distortion cannot be a suitable *de minimis* rule for Article 116. Thus, the Commission's reference to antitrust rules to define the scope of Article 116 might prove misleading. To fall within the meaning of Article 116(1), distortions must, in fact, be more than merely 'appreciable'. As observed by Barents, interestingly, '[i]n some language versions of the Treaty it may seem that [in Article 116 TFEU] the seriousness of the distortion is implied by the use of a different term from that used in general to refer to distortions of competition, e.g., [Article 101 TFEU]'.[79]

Third, both antitrust and State aid rules include potential distortions in their scope. As explained above in this work, this is not the case for Article 116 TFEU.

Having therefore outlined the problematic nature of the Commission's reference to antitrust and State aid rules, the attention turns now to academic doctrine in order to investigate the meaning of distortion that 'needs to be eliminated'. In the literature, potential interpretations of the threshold in question include the need for elimination 'in order to establish the equality of chances presupposed by the Treaty' and the need for elimination of distortions when they 'threaten market integration'.[80] Moreover, reference has been made to the need to eliminate the distortion in the short term and to other functional grounds.[81]

In the absence of a CJEU's definition of this *sui generis de minimis*, and in line with the wording and structure of Article 116(1), it seems reasonable to affirm that the Commission can exercise a wide margin of discretion in assessing which distortions fall within the scope of Article 116 TFEU.[82]

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[78] See case C-300/89 *Commission v Council* [1991] ECLI:EU:C:1991:244, para 23.
[79] Barents (n 41) n 586.
[80] von Quitzow (n 26) 195.
[81] See Paul Joan George Kapteyn and Pieter Verloren van Themaat, *Introduction to the Law of the European Communities: From Maastricht to Amsterdam* (Laurence W Gormley ed, Third edition, Kluwer Law International 1998) 808, where the authors also refer to distortions which occur between only some Member States and distortions the removal of which should occur through unilateral adaptation of its policy be the Member State which causes them. The latter functional grounds, however, seem to point more towards the type of distortions to address rather than to define the threshold triggering the need for their elimination.
[82] Likewise Kellerbauer (n 31) 1259; Vignes (n 53) 332; Draetta (n 50) 801; Ferraro (n 68) 684; Arena (n 31) 1273.

The discretion recognised to the Commission, albeit broad, does not in principle exclude the applicability of Article 265 TFEU in case of failure to act.[83] Nevertheless, it is doubtful whether individuals would have standing, since the Court has clarified that 'the Commission is bound to ensure respect for the provisions of this article, but this obligation does not give individuals the right to allege [a] breach of duty on the part of the Commission'.[84]

Similarly, individuals, and in particular private undertakings, cannot rely on Article 116 TFEU before national courts. In other words, Article 116 is unable to produce direct effect.[85] A confirmation comes by analogy from the CJEU's judgement in *Costa v E.N.E.L.*, where Luxembourg judges excluded that Article 117 could be invoked by an individual to hold a Member State liable for not submitting to the consultation procedure enshrined therein. In the Court's words, 'the States have undertaken an obligation to the [Union] which binds them as States, but which does not create individual rights which national courts must protect'.[86]

2.4 The prior consultation phase and its outcome: A 'political' dimension

According to Article 116(1) TFEU, before acting through the legal basis provided for in Article 116(2), the Commission shall consult the Member State(s) responsible for the distortion. Hence, the 'political'[87] nature of this prior consultation stage.

Should the consultation fail to lead to the spontaneous elimination of the distortion by the concerned Member State(s), the Commission might either rely on the legal basis of Article 116(2) TFEU or act through the other Treaty provisions.

In the latter scenario, one might think of recourse to either infringement proceedings under Article 258 TFEU or different legal bases.[88] Interestingly, the formula '[a]ny other appropriate measures provided for in the Treaties may be adopted'[89] is not used in any other article of the TFEU, thereby confirming the peculiar procedural flexibility of Article 116. The reasoning carried out above in this thesis tends to exclude the residual nature of the provision, i.e. that Article 116 TFEU could be activated solely in the absence of any other available option.[90] Therefore, only measures which constitute *lex specialis* (e.g. free movement legal bases), and not *lex generalis*, vis-à-vis Article 116 TFEU fall within the meaning of 'any other appropriate measures'. It follows that it is unlikely that the Commission would be allowed to

[83] See Nouwen (n 33) 20; Collins and Hutchings (n 40) 198. On the action for failure to act, see Koen Lenaerts and Piet Van Nuffel, *EU Constitutional Law* (Tim Corthaut ed, Oxford University Press 2021) 799–800.
[84] *Costa v E.N.E.L.* (n 72) 595.
[85] See von Quitzow (n 26) 59; Arena (n 31) 1273.
[86] *Costa v E.N.E.L.* (n 72), 595. The CJEU confirmed its interpretation in case C-134/94 *Esso Española v Comunidad Autónoma de Canarias* [1995] ECLI:EU:C:1995:414, para 26; case 5/84 *Direct Cosmetics v Commissioners of Customs and Excise* [1986] ECLI:EU:C:1985:71, para 33.
[87] The adjective is borrowed from Moura e Silva (n 51) 545.
[88] See Arena (n 31) 1274; Khan and Eisenhut (n 51) 566.
[89] Article 116(2) TFEU, last sentence.
[90] See *supra* text to n 68.

use Article 114 TFEU. Indeed, the Commission should open the 'political' phase only once it has ascertained the existence of a distortion that needs to be eliminated. Thus, according to the *lex specialis derogat legi generali* principle, the use of Article 116(2) TFEU would be more appropriate than recourse to Article 114(1) TFEU.

Once the prior consultation procedure provided for in Article 116(1) TFEU has been carried out, should it fail to lead to an agreement with the concerned Member State(s), the act adopted by the EU on the basis of Article 116(2) TFEU 'must automatically be assumed to abide by the principle of subsidiarity as prescribed in Article 5(3) TEU'.[91] It is true that, so far, the CJEU does not seem to have attached much weight in practice to the strict respect of the subsidiarity principle.[92] This notwithstanding, the Court itself has recognised that, in the context of Article 114 TFEU,

> 'the principle of subsidiarity applies where the [Union] legislature makes use of Article [114 TFEU], inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, […] by removing distortions of competition'.[93]

By analogy, the same line of reasoning applies to EU action under Article 116(2) TFEU. However, the failure of consultations would arguably confirm that 'the objectives of the proposed action cannot be sufficiently achieved by the Member States'.[94] Any act of the Commission, then, would reasonably be shielded from challenges under Article 263 TFEU on the grounds of a breach of the principle of subsidiarity.[95]

As for the procedural aspects, the Treaty does not provide a detailed description of the mechanism, leaving to the Commission the determination on the scope and timeframe of the consultation.[96]

The research carried out by Nouwen shows that the Commission initiated around fifty investigations for potential market distortions in the period between 1960 and 1972.[97] Only in five cases the Commission concluded that there was an actual market distortion that needed to be eliminated. Whereas in three of those cases the consultation procedure led to an agreement for the repeal of the distorting measures (in one case, following a

[91] Englisch (n 30) 60. Likewise Peter Jacob Wattel and Ben JM Terra, *European Tax Law* (Second edition, Wolters Kluwer 2012) 29; von Quitzow (n 26) 264.
[92] On the evolution of the Court's case-law on the assessment of subsidiarity, in particular in the context of measures adopted under Article 114 TFEU, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Sixth edition, Oxford University Press 2019) 576–578.
[93] Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECLI:EU:C:2002:741, para 179.
[94] Article 5(3) TEU.
[95] See Protocol (No 2) on the application of the principles of subsidiarity and proportionality [2008] OJ C 115, Article 8.
[96] See Kellerbauer (n 31) 1259.
[97] See Nouwen (n 33) 21–22.

recommendation issued on the basis of Article 117(1) TFEU), in two cases no solution was reached to obtain the elimination of the distortion. Even though the Commission could have activated Article 116(2) TFEU in both circumstances, it decided to do so only in one case,[98] where the proposed measure was eventually not adopted. Nevertheless, two elements are worth noticing.

First, after the failure of the prior consultation and before issuing its proposal, the Commission made an extra attempt to engage in further dialogue with the concerned Member State (Germany). This behaviour confirms the flexible and, to some extent, lenient nature of the political phase, which is mainly aimed at reaching 'non-traumatic and consensual'[99] solutions. Hence, the wide margin of discretion recognised to the Commission.

Second, the proposed measure was a directive addressed to one Member State, namely Germany. The German case might support the conclusion that, as argued by some authors,[100] Article 116(2) TFEU only allows for the adoption of directives addressed exclusively to the Member State(s) responsible for the distortion. However, this is probably not the case. In fact, pursuant to Article 117(2) TFEU, under certain specific conditions provided for in that article,[101] Member States other than that (or those) responsible for the distortion 'shall not be required, pursuant to Article 116, to amend their own provisions in order to eliminate such distortion'. *A contrario*, Article 117(2) indicates that Article 116(2) TFEU can be the legal basis for the adoption of directives also addressed to the Member States that are not responsible for the distortion.[102] In other words, it allows for harmonisation in the traditional sense of the term, namely applying to all Member States.

After 1972, the Commission has not carried out any consultation procedure explicitly based on the grounds of Article 116(1) TFEU, although some initiatives of the Commission have been deemed to be investigations implicitly carried out within the framework of Articles 116-117 TFEU.[103] Such investigations might be considered as a corollary of the doctrine of combined application of Article 4(3) TEU, Protocol No 27,[104] and antitrust rules (Articles 101

[98] Commission, 'Proposal for a special Council Directive on the Seventeenth Law Amending the German Turnover Tax Act' COM(1967) 277 final.

[99] These adjectives are borrowed from the procedure's description (*'una procedura finalizzata a favorire una soluzione consensuale e non traumatica delle questioni controverse'*) provided in Ferraro (n 68) 686.

[100] See Dellis (n 70) 958. The opinion is also reproposed by Arena (n 31) 1274.

[101] Namely when the Member State responsible for the distortion does not comply with a recommendation issued by the Commission on the basis of Article 117(1) TFEU.

[102] See Englisch (n 30) 60.

[103] For instance, see Commission, 'Report on Competition in Professional Services' COM(2004) 83 final, which does not explicitly mention Articles 116-117 TFEU but is deemed to be grounded on those provisions by Ferraro (n 68) 684–685. However, the fact that the Commission refers to 'those groups of regulatory restrictions in the professions which have the biggest *potential* to harm competition' (para 90, emphasis added) might indicate that Article 116 TFEU would not be the appropriate basis, since it only applies to actual distortions (see *supra*).

[104] Protocol (No 27) on the internal market and competition [2008] OJ C 115.

and/or 102 TFEU).[105] Accordingly, pursuant to the principle of loyal cooperation, Member States should refrain from introducing legislation susceptible of distorting competition. For example, one might think of legislation favouring or reinforcing the effects of practices contrary to the prohibition of either collusive behaviour or abuse of dominance.

Interestingly, it has been argued that the rarity of recourse to Article 116 TFEU is due, *inter alia*, to the application of the said doctrine of combined application.[106] It seems, however, that such a view does not take sufficiently into account that the legal construction in question is a judicial instrument of negative integration. On the contrary, Article 116 TFEU is primarily an instrument of positive integration, as witnessed by its collocation in the Treaty amongst the rules for the approximation of laws.[107] Therefore, even though both mechanisms can be seen as corollaries of the principle of loyal cooperation,[108] their functions significantly differ from each other.

An alternative and more plausible explanation for Article 116 TFEU's fall in disuse is the expansion of Article 114 TFEU's scope of application.[109] Indeed, distortions of competition have become, since the 1990s, an accepted and widely used justification for harmonisation based on Article 114 TFEU.[110]

3. Article 116 TFEU and harmful tax competition

3.1 The problem of harmful tax competition

The use of Article 116 TFEU has been invoked in the context of the fight against harmful tax competition since the early 2000s.[111] For the purposes of this Section, it is thus necessary to take a step back and briefly explain what harmful tax competition is.

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[105] This doctrine, mainly developed by the CJEU between the late 1980s and the 1990s (see, *ex multis*, case 267/86 *Van Eycke v ASPA* [1988] ECLI:EU:C:1988:427, para 16), has been traditionally subject to a very narrow interpretation by the Court. It was recently back in the spotlight due to the broader interpretation offered by the CJEU in joined cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API and Others* [2014] ECLI:EU:C:2014:2147, paras 37-45. For a complete overview of the matter, see Jones, Sufrin and Dunne (n 76) 202–203 and 585–588; Slot and Farley (n 76) 254–260.

[106] See Arena (n 31) 1274.

[107] Part one, Title VII, Chapter 3 of the TFEU.

[108] See Roberto Mastroianni, 'Ravvicinamento delle Legislazioni nel Diritto Comunitario' in Vv.Aa. (ed), *Digesto delle Discipline Pubblicistiche*, vol 12 (Fourth edition, UTET 1997) 469.

[109] Likewise Kellerbauer (n 31) 1259.

[110] See *supra* n 69.

[111] See von Quitzow (n 26) 195 and 198; Conor Quigley, 'General Taxation and State Aid' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (Oxford University Press 2004) 214–215. Some years later, a similar view was expressed in Wattel and Terra (n 91) 29. More recently, the option has been analysed by Nouwen (n 33); Englisch (n 30); Giandonato Caggiano, 'L'Armonizzazione Fiscale per Il Funzionamento Del Mercato Unico Digitale Tra Limiti Del Principio Di Unanimità e Ripercussioni Della Sentenza Del Tribunale Nel Caso Apple' in Vv.Aa. (ed), *Annali AISDUE*, vol 2 (Editoriale Scientifica 2021) 11–12; Moritz Scherleitner, 'Should the EU Implement a Minimum Corporate Taxation Directive?' [Forthcoming] European Law Journal; Wattel (n 32); Rita Szudoczky and Dennis M Weber, 'Constitutional Foundations: EU Tax Competences; Treaty Basis for Tax Integration; Sources and Enactment of EU Tax Law' in Peter

Regulatory competition 'describes the activity of private or public lawmakers who intend to produce novel or alter current legislation in response to competitive pressure from other private or public lawmakers'.[112] Theorised for the first time in 1956,[113] in the last part of the XX century the regulatory competition model gave rise to a debate about the desirability of its effects, with reference in particular to the case of Delaware in the U.S.[114] It did not take long before similar controversies arose in the EU,[115] where the CJEU had to deal with regulatory competition in a number of internal market landmark cases, such as *Centros*[116] and *Laval*.[117]

Tax competition can be defined as regulatory competition in the field of tax law. In the words of Van Cleynenbreugel, it is 'a tendency consisting in the lowering of tax rates in an attempt to attract businesses to establish themselves on the territory of that Member State'.[118] Tax competition triggers companies' regulatory arbitrage, meaning that companies exploit freedom of establishment (Article 49 TFEU) and free movement of capital (Article 63 TFEU) in order to shift their profits from high-tax EU jurisdictions to low-tax EU or extra-EU jurisdictions.[119] In the international context, and in particular in the OECD framework, this behaviour is known as base erosion and profit shifting (BEPS) and is realised through the s.c. 'aggressive tax planning'.

Tax competition amongst Member States occurs at two levels across the EU. On the one hand, governments engage in 'targeted' tax competition when they offer preferential tax regimes to some, normally very mobile, parts of the tax base of certain companies. Targeted tax competition is nowadays the most relevant form of tax competition and materialises mainly through advance tax rulings, i.e. agreements negotiated in advance between multinational groups and Member States' tax authorities that accord favourable tax

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Jacob Wattel, Otto CR Marres and Hein Vermeulen (eds), *Terra/Wattel - European Tax Law*, vol 1 (Seventh edition, Wolters Kluwer 2018) 37.

[112] Katrin Gödker and Lars Hornuf, 'Regulatory Competition' in Alain Marciano and Giovanni Battista Ramello (eds), *Encyclopedia of Law and Economics* (Springer 2019) 1787 1787.

[113] The first regulatory competition model was theorised by Charles M Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 Journal of Political Economy 416.

[114] On the one hand, regulatory competition was initially considered a harmful 'race to the bottom', following the critiques expressed by William L Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 The Yale Law Journal 663. In the 1990s, on the other hand, Roberta Romano, *The Genius of American Corporate Law* (AEI Press 1993) shed the light on some positive aspects which, in her opinion, render regulatory competition a 'race to the top'.

[115] See, *ex multis*, Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 197 ff. More recently, see Pistor (n 19) 69–76.

[116] Case C-212/97 *Centros* [1999] ECLI:EU:C:1999:126.

[117] Case C-341/05 *Laval un Partneri* [2007] ECLI:EU:C:2007:809.

[118] Van Cleynenbreugel (n 20) 233.

[119] On the relationship between corporate mobility and regulatory competition see Francesco Costamagna, 'At the Roots of Regulatory Competition in the EU: Cross-Border Movement of Companies as a Way to Exercise a Genuine Economic Activity or Just Law Shopping?' (2019) 4 European Papers 185.

treatments to intra-group cross-border transactions.[120] On the other hand, 'general' tax competition corresponds to the s.c. 'race to the bottom' in fixing corporate income tax rates.[121]

The concept of 'harmful tax competition' stresses the negative effects of tax competition, in particular on a social level. Indeed, the ultimate consequence of tax competition is unavoidably the lowering of tax income and thus the reduction of public expenditure. Therefore, some aggressive forms of tax competition have a harmful impact on welfare policies, hindering redistribution and affecting the legitimacy of tax systems.[122]

Limited by the constrains set by Article 114(2) TFEU, the EU has tried to mitigate the phenomenon in three main ways. Firstly, the Commission has pursued tax harmonisation based on Article 115 TFEU.[123] Unsurprisingly, however, the most incisive proposals of the Commission have sunk before Member States' 'vetocracy'. Secondly, a non-binding instrument, namely the Code of Conduct for business taxation,[124] has introduced political mechanisms aimed at promoting fair tax competition. Thirdly, the Commission has developed a strategy consisting of the assessment of tax rulings under State aid rules (s.c. 'Vestager doctrine').[125]

Confronted with the partial ineffectiveness of the policies adopted so far, the Commission has recognised the need for an EU instrument to address harmful tax competition through qualified majority voting:

> 'new challenges continue to emerge and the EU's instruments to regulate fair tax competition and deter harmful tax practices – inside and outside the EU – need to keep pace. Globalisation, digitalisation and modern business models are

[120] At EU level, 'advance price arrangements' are now defined in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation [2011] OJ L 64, Article 3(15), as amended by Council Directive (EU) 2015/2376 of 8 December 2015 [2015] OJ L 332, Article 1.

[121] See Philipp Genschel, Achim Kemmerling and Eric Seils, 'Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market' (2011) 49 Journal of Common Market Studies 585, 587.

[122] See, *ex multis*, Perrone (n 16); Steffen Ganghof and Philipp Genschel, 'Taxation and Democracy in the EU' (2008) 15 Journal of European Public Policy 58; Michele Carbone and Antonio Mancazzo, *Contrasto alla Fiscalità Internazionale Aggressiva* (IPSOA 2021) 8–10. On the contrary, some positive effects of tax competition are considered in Augusto Fantozzi, 'La Competizione Fiscale' in Pietro Boria (ed), *La Concorrenza Fiscale tra Stati* (Wolters Kluwer 2019) 65–66.

[123] See, for instance, Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States [2011] OJ L 345.

[124] The Code of Conduct was adopted by means of the Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy - Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 December 1997 on a code of conduct for business taxation - Taxation of saving, OJ C, C/2, 06.01.1998.

[125] For an analysis of the application of the Vestager doctrine, see Liza Lovdahl Gormsen, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019).

creating new limits for tax competition and new opportunities for aggressive tax planning'.[126]

Moreover, the problematic impact of harmful tax competition has become even clearer in the context of the pandemic crisis. As observed by the Commission,

'corporate tax avoidance in the EU amounts to more than EUR 35 billion per year [and] these remarkable amounts of revenue lost are even more problematic given that the economic ramifications of COVID-19 will inevitably lead to substantially lower levels of tax revenue'.[127]

Against this backdrop, the Commission announced its intention to 'explore how to make full use of the provisions of the [TFEU] that allow proposals on taxation to be adopted by ordinary legislative procedure, including article 116'.[128]

As pointed out at the beginning of this paragraph, the reference to Article 116 TFEU is nothing new. In fact, pressed by several committees of the European Parliament, the Juncker Commission had already referred to Article 116 in January 2019.[129] Nevertheless, on 27 June 2019 Commissioner Moscovici declared that 'Article 116 TFEU is not a possible legal basis for proposals on tax harmonisation' and that 'Articles 113 and 115 TFEU are the only legal bases allowing the Council to adopt measures of approximation of Member States' laws, regulatory or administrative provisions concerning taxation'.[130]

In December 2020, a new opening towards the use of Article 116 TFEU came from the von der Leyen Commission: Commissioner Gentiloni declared that 'the Commission should make full use of the provisions in the Treaties that allow taxation proposals to be adopted

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[126] Commission, 'Tax Good Governance in the EU and beyond' COM(2020) 313 final, para 1.

[127] Commission, 'An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy' COM(2020) 312 final, para 2.1. See also Commission Staff Working Document, 'Identifying Europe's recovery needs' SWD(2020) 98 final, para 5: 'the strength of Europe's recovery also relies on pursuing social reforms to generate sustainable and fair growth, including through fair tax policies and broad and equitable tax bases'; and Commission Staff Working Document, 'Guidance to Member States. Recovery and Resilience Plans' SWD(2021) 12 final, part 1, para 2: 'the fight against aggressive tax planning [should be reflected in the Member States' priority setting], since, more than ever, the upcoming economic recovery requires Member States to secure tax revenues for public investment and reforms and avoid distortion of competition between firms'. On 25 September 2020, Commission's Executive Vice-president Vestager declared that 'if Member States give certain multinational companies tax advantages not available to their rivals, this harms fair competition in the European Union […]. The public purse and citizens are deprived of funds for much needed investments – the need for which is even more acute now to support Europe's economic recovery' (Statement by Executive Vice-President Margrethe Vestager on the Commission's decision to appeal the General Court's judgment on the Apple tax State aid case in Ireland, available at <https://ec.europa.eu/commission/presscorner/detail/en/statement_20_1746>).

[128] Commission, 'An Action Plan for Fair and Simple Taxation' (n 127), para 1.

[129] See Commission, 'Towards a more efficient and democratic decision making in EU tax policy' COM(2019) 8 final, para 3.

[130] Answer given by Mr Moscovici on behalf of the European Commission to Parliamentary Question E-001797/2019 on 27 June 2019. Commissioner for Economic and Financial Affairs, Taxation and Customs P. Moscovici was addressing questions related to the potential use of Article 116 TFEU for the proposals regarding the Common Consolidated Corporate Tax Base and the Digital Service Tax.

through the ordinary legislative procedure […], including Article 116'.[131] However, in March 2021 the enthusiasm was again dampened by Angel,[132] who held that Article 116 TFEU 'is not allowing to circumvent the unanimity requirement existing on taxation', whereas it 'just allows us to address some problems in some Member States stemming from regimes that would produce distortive effects or practices that would produce distortive effects'.[133]

In July 2021 the negotiations carried out within the OECD Framework[134] led to the agreement for a global minimum corporate tax rate set at 15%. After the initial hesitation of some countries, amongst which the EU Members Ireland, Estonia, and Hungary, the agreement was amended and finalised in October.[135] Without delving into details, it is sufficient here to notice that those amendments brought to an agreement 'somewhat watered down at the international level, precisely to get the EU holdout countries on board'.[136]

The reason behind the compromise was indeed the need for unanimity at EU level. The confirmation came on 22 December 2021 from the Commission's proposal for a directive transposing the international agreement on minimum taxation of multinationals: the proposed directive is based on Article 115 TFEU.[137] Although one could expect that political consensus would have been favoured by the upstream agreement reached at international level, the adoption of the proposed directive is currently blocked by the Hungarian veto.[138] The political stalemate has revived the qualified majority debate, as commentators are once again exploring routes to depart from unanimity within fiscal matters. Such routes include enhanced cooperation[139] and Article 116 TFEU.

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[131] Answer given by Mr Gentiloni on behalf of the European Commission to Parliamentary Question E-005215/2020 on 8 December 2020.

[132] Director of directorate 'Direct taxation, tax coordination, economic analysis and evaluation' at the Commission's Directorate-General for Taxation and Customs Union. For a different opinion, see Szudoczky and Weber (n 111) 37:'[t]he unanimity requirement can be "circumvented" by using the market distortion provisions'.

[133] Sarah Paez, 'The European Commission's Year Ahead In Tax - Interview with Benjamin Angel' (*Forbes*, 26 March 2021) <https://www.forbes.com/sites/taxnotes/2021/03/30/the-european-commissions-year-ahead-in-tax/>.

[134] OECD/G20 Inclusive Framework on BEPS agreement on a Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy

[135] Leigh Thomas, 'Global Minimum Corporate Tax Rate Deal Reached: OECD' (*Reuters*, 8 October 2021) <https://www.reuters.com/business/oecd-says-deal-global-minimum-corporate-tax-rate-has-been-reached-2021-10-08/>.

[136] Joachim Englisch, 'Effective Minimum Tax Implementation by the EU: Which Alternatives?' (*Kluwer International Tax Blog*, 25 October 2021) <http://kluwertaxblog.com/2021/10/25/effective-minimum-tax-implementation-by-the-eu-which-alternatives/>.

[137] Commission, 'Proposal for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union' COM(2021) 823 final.

[138] See Francesco Guarascio, 'EU Fails to Agree Corporate Tax Reform as Hungary Vetoes Overhaul' (*Reuters*, 17 June 2022) <https://www.reuters.com/markets/europe/eu-fails-agree-corporate-tax-reform-hungary-vetoes-overhaul-2022-06-17/>.

[139] See Article 20 TEU. Martin Kreienbaum, Director General of International Taxation for the German Federal Ministry of Finance, recently advocated for the adoption of a minimum corporate tax system through enhanced cooperation: see Jakob Hanke Vela and Suzanne Lynch, 'Brussels Playbook: NATO's Reconquista — G7 Wrap — Interpreters Strike' (*POLITICO*, 29 June 2022)

With regard to the latter, the question arises as to whether the Commission could rely on Article 116 TFEU to address issues of harmful tax competition. The matter is debated. Wattel believes that Article 116 TFEU is the 'perfect legal basis for curbing excessive tax competition'.[140] Other commentators deem it either suitable for the introduction of a limited form of business tax harmonisation[141] or only a complementary instrument to the Code of Conduct and State aid rules.[142]

To answer the question, this Section will try to distinguish between targeted tax competition (3.2) and general tax competition (3.3) and assess for each of them the existence of the conditions for the use of Article 116 TFEU described in Section 2.

3.2 Article 116 TFEU and targeted tax competition

As observed in the previous paragraph, targeted tax competition occurs in the EU mainly through the negotiation of tax rulings between national tax authorities and multinational groups. The phenomenon has been addressed by the Commission through the application of State aid rules. Such an approach was endorsed by the GC in a number of judgments.[143] Nevertheless, in some other cases the GC annulled the Commission's decisions which had found the tax rulings at stake to be incompatible State aid.[144] Even though it is not the aim of this dissertation to discuss the legal validity of the Vestager doctrine—Bradford recently described it as 'an interesting case as it sits between competition law and tax law'[145]—it is nonetheless necessary to point out that that strategy is currently highly debated and criticised amongst scholars.[146] Hence, the interest in exploring the alternative option offered by Article 116 TFEU.

<https://www.politico.eu/newsletter/brussels-playbook/natos-reconquista-g7-wrap-interpreters-strike/>. See also Dennis M Weber and Jorn Steenbergen, 'Enhanced Cooperation: EU Implementation of Pillar 2 without Unanimity' (*Kluwer International Tax Blog*, 7 June 2022) <http://kluwertaxblog.com/2022/06/07/enhanced-cooperation-eu-implementation-of-pillar-2-without-unanimity/>.

[140] Wattel (n 32) 61.

[141] Likewise Englisch (n 30) 61, where the author refers to a Union-wide flight tax, a 'green' tax, a financial transaction tax, and, to a certain extent, an international minimum tax on business profits.

[142] Likewise Nouwen (n 33) 24–27.

[143] In particular, see joined cases T-516/18 and T-525/18 *Luxembourg v Commission* [2021] ECLI:EU:T:2021:251; joined cases T-760/15 and T-636/16 *Netherlands v Commission* [2019] ECLI:EU:T:2019:669; case T-755/15 *Luxembourg v Commission* [2019] ECLI:EU:T:2019:670.

[144] In particular, see joined cases T-816/17 and T-318/18 *Luxembourg v Commission* [2021] ECLI:EU:T:2021:252; joined cases T-778/16 and T-892/16 *Ireland v Commission* [2020] ECLI:EU:T:2020:338; joined cases T-131/16 and T-263/16 *Belgium v Commission* [2019] ECLI:EU:T:2019:91.

[145] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) 107.

[146] For instance, see Phedon Nicolaides, 'State Aid Rules and Tax Rulings' (2016) 15 European State Aid Law Quarterly 416, 416 ff; Liza Lovdahl Gormsen, 'EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga' (2016) 7 Journal of European Competition Law & Practice 14, 14 ff; Adrien Giraud and Sylvain Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter?' (2017) 16 European State Aid Law Quarterly 233, 233 ff; Emily Forrester, 'Is the State Aid Regime a

Following the scheme outlined in Section 2, the first requirement for recourse to Article 116 TFEU, namely the existence of a disparity, would be met. Indeed, Article 116 TFEU, like Article 114, refers not only to laws but also to the administrative action of the Member States. First, the treatments granted through tax rulings vary across the countries and even across the different rulings accorded within the same tax jurisdiction. Second, the formal investigations carried out by the Commission show that only a few Member States are involved in the 'tax ruling saga': so far, Ireland, Luxembourg, Belgium, and the Netherlands. It follows from the considerations carried out above in §2.1 that the existence in some Member States of an administrative practice which is absent in other Member States can constitute a disparity within the meaning of Article 116 TFEU.

As for the distortion of competition, it is undisputed that national tax policies are in principle capable of distorting competition. More specifically, distortions might occur because taxation influences costs and prices of products.[147] Most prominently, differences in direct taxation levels can affect and distort the allocation of the factors of production, thereby contravening the very *ratio* behind the internal market.[148] The distortive nature of tax rulings,[149] moreover, seems to be confirmed by the recent case-law: first and foremost, by those cases in which the GC upheld the Commission's State aid negative decisions; second, by the GC's ill-concealed critiques to those tax practices even in cases where the Commission's decisions were eventually annulled, such as *Apple*[150] and *Amazon*.[151]

Tax rulings subject their beneficiaries to economic conditions more favourable than average in the jurisdiction where the ruling is granted. Those economic operators, then, are competitively advantaged with respect to competing operators in other Member States. Tax rulings, therefore, seem to cause specific distortions of competition. With this in mind, it is interesting to notice that selectivity is the most discussed and problematic element of the Commission's decisions and the GC's judgements in the tax ruling saga.[152] In both *Apple* and *Amazon* cases the GC held that the Commission had failed to meet the particularly high

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Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?' (2018) 27 EC Tax Review 19, 19 ff; Gabriella Perotto, 'How to Cope with Harmful Tax Competition in the EU Legal Order: Going Beyond the Elusive Quest for a Definition and the Misplaced Reliance on State Aid Law' 13 European Journal of Legal Studies 309, 309 ff.

[147] See Campet (n 45) 1618–1619.

[148] Likewise von Quitzow (n 26) 40.

[149] On the distortive effects of tax rulings, see Camilla Buzzacchi, 'Tax Rulings e Concorrenza Fiscale tra Ordinamenti: l'Incerta Qualificazione del Vantaggio Selettivo nel Caso Irlanda/Apple' (2021) 1 Rivista della Regolazione dei mercati 170, 181.

[150] *Ireland v Commission* (n 144), para 479, where the GC expresses regrets about the 'the incomplete and occasionally inconsistent nature of the contested tax rulings'.

[151] *Luxembourg v Commission* [2021] (n 143), para 585, where the GC refers to the 'inappropriate' ceiling mechanism endorsed by the tax ruling at stake.

[152] A recent and complete analysis of the assessment of selectivity in State aid and tax ruling cases in provided by Nieves Bayon Fernández, 'The Selective Advantage Criterion in Tax Rulings: The Path Towards a More Coherent and Thorough Analysis of Selectivity' (2021) 12 Journal of European Competition Law & Practice 200.

burden of proof required to demonstrate the selective advantage enjoyed by the multinational groups involved. As the reasoning carried out above in §2.2 suggests, for the application of Article 116 TFEU (as opposed to State aid law) there would be no need to investigate the allegedly selective nature of the measure at stake.

With regard to the need for the elimination of the distortion, the Commission enjoys broad discretion. The size of the multinational groups concerned, the considerable amounts of the recovery orders issued so far, and the aforementioned disruptive consequences of harmful tax competition suggest that this *de minimis* threshold should be irrelevant in most cases.

Faced with a distortion of competition that needs to be eliminated, the Commission could thus address the Member State whose tax authorities have issued the ruling(s). If no agreement could be found for the elimination of the existing rulings and/or the termination of their issuance, then the EU legislator could adopt a directive addressed to the Member State in question on the basis of Article 116(2) TFEU. The directive could, for instance, inhibit the negotiation of tax rulings which entail the lowering of effective taxation below a certain percentage of the national ordinary corporate tax rate.

One might argue that similar results could be achieved through infringement proceedings under Article 258 TFEU.[153] However, according to the case-law of the CJEU, 'an administrative practice can be the subject-matter of an action for failure to fulfil obligations when it is, to some degree, of a *consistent and general nature*'.[154] It is not easy to foresee how the Commission could demonstrate the 'consistent and general nature' of tax rulings, especially when considering that only some of them (namely advance pricing arrangements granted to big multinational groups) are susceptible of causing distortions that need to be eliminated.

Coming back to Article 116(2) TFEU, it is likely that the Netherlands, Belgium, Luxembourg, and Ireland would not be favourable to such a directive. In addition, Estonia and Hungary, already hesitant within the OECD Framework, would probably vote against the Commission's proposal. The same might apply for Sweden, Malta, and Cyprus, which are also traditionally resistant to change when EU tax matters are at stake.[155] Even imaging that,

[153] The use of infringement proceedings in the fight against harmful tax competition is proposed by Francesco Pepe, 'On the Legal Validity and the Geo-Political Practicability of the "Vestager Doctrine" in the Field of Tax Rulings and State Aid to Multinational Enterprises' (2017) 1 Rivista Trimestrale di Diritto Tributario 703, 746–747.

[154] Case C-387/99 *Commission v Germany* [2004] ECLI:EU:C:2004:235, para 42 (emphasis added).

[155] On the political negotiations for the overcoming of unanimity within EU tax matters, see Bjarke Smith-Meyer, 'Brussels' Bid to Kill Tax Veto Faces Uphill Battle' (*POLITICO*, 13 January 2019) <https://www.politico.eu/article/brussels-bid-to-kill-tax-veto-faces-uphill-battle/>.

for political reasons, Poland and Austria could join the coalition,[156] these eleven countries would not form a blocking minority in the Council within the meaning of Article 16(4) TEU.[157]

This notwithstanding, some of those countries might challenge the validity of the directive (once adopted) under Article 263 TFEU. Notably, two main issues may arise when considering the proportionality, under Article 5(4) TEU, of recourse to Article 116 TFEU.

First, it was noticed above that in some cases the GC has recognised the selective nature of tax rulings. In those cases, it might be argued that State aid rules, as *lex specialis*, would be the appropriate instrument to deal with those measures. Therefore, the Commission would have to show that tax rulings do not constitute State aid for reasons other than their non-selective nature. To do so, building on the Opinion delivered by AG Jääskinen in the *Gibraltar* case,[158] the Commission could argue that State aid law is not a suitable instrument to address an inter-State phenomenon such as regulatory competition without risking breaching the rule of law under Article 2 TEU. Alternatively, the Commission could maintain that tax rulings are not granted through State resources, and therefore do not fall within the scope of Article 107 TFEU. In fact, as observed by Giraud and Petit, 'tax ruling cases use theoretical benchmarks to identify State resources'.[159] In other words, a measure granted through State resources should negatively impact a Member State's budget.[160] However, if one assumes that, in the absence of the ruling, the multinational group would have not moved to that Member State, it could be argued that tax rulings only have a positive impact on State's budget (constituted by the, albeit reduced, taxes paid in that State).[161] Both the arguments are fascinating but show a major weakness: the Commission would have to

[156] This is the hypothesis in Caggiano (n 111) 12.

[157] At the time of writing, they represent less than 25% of the EU population, whereas a blocking minority requires at least 35%.

[158] See joined cases C-106/09 P and C-107/09 P *Commission and Spain v Government of Gibraltar and United Kingdom* [2011] ECLI:EU:C:2011:215, Opinion of AG Jääskinen para 134: 'harmful institutional or tax competition between Member States clearly does not fall within the mechanism for controlling State aid established by the Treaty [and] the legitimate objective of combating harmful tax competition cannot justify distortion of the European Union's legal framework established in the area of competition law applicable to State aid, or even the adoption of ad hoc solutions conflicting with the rule of law as enshrined in Article 2 TEU'.

[159] Giraud and Petit (n 146) 235.

[160] See joined cases C-399 and 401/10 P *Bouygues and Bouygues Télécom v Commission* [2013] ECLI:EU:C:2013:175, para 109.

[161] Interestingly, the Italian Council of State (*Consiglio di Stato*), in its judgment no. 4388 of 20 July 2011, held that pursuant to Article 107 TFEU, a tax measure which is, as a whole, suitable to result in an increase of the overall tax revenue, cannot constitute State aid as it cannot be deemed to be aid granted through State resources. See para 5.2.8.1: *'[a]ppare dirimente osservare, poi, che ai sensi dell'Articolo 107 TFUE, perché si configuri un'ipotesi di aiuto di Stato (anche nella forma dell'incentivo di carattere fiscale) è indefettibile la circostanza per cui si faccia ricorso a "risorse statali" (in particolare, attraverso la rinunzia al maggior gettito che sarebbe possibile conseguire non applicando la misura fiscale di favore), laddove il sistema nel suo complesso è idoneo - al contrario – a determinare un maggiore gettito per l'Erario'*. However, similar arguments have been so far rejected by the CJEU in cases such as C-182 and 217/03 *Belgium and Forum 187 v Commission* [2006] ECLI:EU:C:2006:416, para 129, and T-92/00 *Diputación Foral de Álava v Commission* [2002] ECLI:EU:T:2002:61, para 62.

openly contradict the strategy that it has pursued for over a decade. Should the European Court of Justice (ECJ) deny the legal validity of the Vestager doctrine in the several appeals proposed against the GC's judgements, the Commission's turnaround would be facilitated.

Second, some Member States might argue that a non-binding tool such as the Code of Conduct, introduced precisely to avoid the application of hard law instruments,[162] would be less intrusive with respect to their fiscal sovereignty. A counterargument could be based on the inefficiency of the Code of Conduct, arguably demonstrated by twenty-five years within which it has, at least partially, failed to solve the issues of harmful tax competition.

3.3 Article 116 TFEU and general tax competition

General tax competition is deemed less problematic than preferential tax treatments, for statutory rates, unlike effective rates, are normally quite levelled across the EU. However, a closer look suggests that general tax competition is not limited to the race to the bottom in statutory rates. In fact, similar results can be obtained through adjustments of methods of calculation of the tax base. In a nutshell:

*tax liability = tax base * tax rate.*

Therefore, tax liability can be reduced by decreasing either the tax base or the tax rate.

It does not come as a surprise, then, that the Commission attempted to address harmful tax competition through the introduction of a Common Corporate Tax Base[163] and a Common Consolidated Corporate Tax Base.[164] Both proposals, however, were based on Article 115 TFEU and failed to reach political consensus. Could Article 116 TFEU be the key for the introduction of a common (or minimum) corporate tax rate or a common corporate tax base?

The existence of a disparity between national legislations is due to Member States' sovereignty in direct taxation matters. The most notable case is Ireland and its 12.5% corporate tax rate, whereas in countries like the Netherlands tax competition mainly occurs through exemptions that affect the tax base.

Distortions caused by those differences in national legislation seem more likely to be classified as generic distortions, which can only be addressed through direct tax harmonisation.[165]

The assessment of the *de minimis* threshold might be problematic. Whereas in the case of tax rulings the distortive character of the measure can be more easily quantified by reference

[162] See Wattel (n 32) 70.
[163] Commission, 'Proposal for a Council Directive on a Common Corporate Tax Base' COM(2016) 0685 final.
[164] Commission, 'Proposal for a Council Directive on a Common Consolidated Corporate Tax Base' COM(2016) 0683 final.
[165] Likewise Campet (n 45) 1618.

to a benchmark,[166] the same does not apply here. In fact, in the exercise of its discretion, the Commission would necessarily carry out an evaluation concerning the appropriate level of taxation, arguably exceeding the competences conferred upon it in the Treaties. For instance, if the distortion was caused by the difference between the 12.5% tax rate of Member State A and the 24% tax rate of Member State B, the Commission would have to decide which of the two tax rates is responsible for the distortion. One might instinctively assume that the distorting rate is the lowest one, and that the Commission should address Member State A. In doing so, not only would the Commission encroach in national fiscal policies, but it would also ignore strong arguments according to which general tax competition is not always harmful. As observed by AG Geelhoed:

> 'in itself, the existence of disparities may well have a positive effect on Member States' economies and benefit the internal market. With the exception of certain extreme cases – for example, the cases of "harmful tax competition" – there is a powerful argument that transparent regulatory competition in tax regimes, as in other spheres, gives Member States an incentive to be as efficient as possible in the administration and structure of their tax systems and in the use of their direct tax receipts'.[167]

Therefore, the Commission should enter into consultation with all the Member States and not only those which offer the more 'competitive' tax rates. Should no agreement amongst the Member States be found, the Commission would be empowered to act under Article 116(2) TFEU to pursue harmonisation. It is not clear on which criteria the Commission could base its proposal. Reasonably, the Commission would try to set taxation levels close to those of the majority of the Member States, in order for the directive to gain more political chances of being adopted.

Angel has described taxation as 'a bit of a dinosaur of the [T]reaty'.[168] However, it is here submitted that the complex scenario described so far suggests that in tax matters Article 116 TFEU poses question of political feasibility rather than legal validity. As observed by many commentators, several Member States might perceive it as too dangerous to endorse the Commission's recourse to this 'nuclear option'.[169] Even where they agree with the content,

[166] Which reference system should be the benchmark is highly debated. However, that matter is mainly relevant for the assessment of the selective nature of the advantage granted to the undertaking in the context of the application of State aid rules.
[167] Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECLI:EU:C:2006:139, Opinion of AG Geelhoed, n 43.
[168] Paez (n 133).
[169] Englisch (n 30).

they would fear 'the anti-distortion weapon being turned against themselves at a future time'.[170]

It remains to be seen whether the new stress on solidarity and redistribution and the need for public funding deriving from the pandemic crisis will impact on this political deadlock. In that sense, the much invoked 'return of politics'[171] might coincide with further steps towards qualified majority voting. After all, in democracies politics works through majority voting and not unanimity. Thus, the adoption of a fiscal measure through qualified majority voting might help weakening the perception of an EU 'democratic deficit'.[172] In the words of Poiares Maduro, '[i]f it is well known that there ought to be no taxation without representation, it is equally true that there can be no representation without taxation'.[173]

Finally, even a one-off recourse to Article 116 TFEU or its concrete threaten would have an important leverage function in the negotiations for further tax measures.[174] On the long term, such a leverage effect might play a role in the discussions on the most suitable way to overcome unanimity: 'changing the rules of Treaty change'[175] through Treaty amendments.[176]

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[170] Nouwen (n 33) 28. On the same line of reasoning, see Caggiano (n 111) 12; Wattel (n 32) 64. On a similar note, and in particular on the 'typical reluctance of states within an international organization to sanction one another', see, in the context of the 'rule of law backsliding', Gráinne De Búrca, 'Poland and Hungary's EU Membership: On Not Confronting Authoritarian Governments' (2022) moac008 International Journal of Constitutional Law 1, 17. By analogy, on the concepts of State 'self-preservation' and 'reciprocal deference', see Kim Lane Scheppele and Roger Daniel Kelemen, 'Defending Democracy in EU Member States' in Francesca Bignami (ed), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 429.

[171] Alfredo D'Attorre, *L'Europa e il Ritorno del 'Politico': Diritto e Sovranità nel Processo di Integrazione* (Giappichelli 2020); Luuk van Middelaar, 'The Return of Politics - The European Union after the Crises in the Eurozone and Ukraine: The Return of Politics' (2016) 54 Journal of Common Market Studies 495.

[172] See Moravcsik (n 15) 608; Jan Wouters, Daniele Gallo and Cristina Fasone, 'Re-Conceptualizing Authority and Legitimacy in the EU: Introductory Remarks' in Jan Wouters, Daniele Gallo and Cristina Fasone (eds), *Re-conceptualizing Authority and Legitimacy in the EU*, vol 5 Special Section (European Papers 2020) 176–179.

[173] Poiares Maduro (n 3) 8.

[174] Likewise Englisch (n 30) 61.

[175] De Witte, 'Constitutional Design of the European Union: Getting Rid of the Unanimity Rule' (n 2).

[176] The debate concerning the need for Treaty amendments envisaging new decision-making rules has recently gained new momentum in light of the latest developments of the EU enlargement policy: see *supra* text to n 7 and Maïa De La Baume, 'The EU Is Delaying an Inevitable Debate: Will It Rewrite Its Biggest Rules?' (*POLITICO*, 24 June 2022) <https://www.politico.eu/article/eu-brussels-emmanuel-macron-mario-draghi-olaf-scholz-leaders-put-treaty-change-in-the-back-seat/>.
Interestingly, Alemanno calculated that over 10% of the measures proposed within the framework of the Conference on the Future of Europe require Treaty change: see Eleonora Vasques, 'Over 10% of Citizen Proposals on EU's Future Require Treaty Changes, Expert Says' (*Euractiv*, 15 April 2022) <https://www.euractiv.com/section/future-eu/news/over-10-of-citizen-proposals-on-eus-future-require-treaty-changes-expert-says/>. Furthermore, the Commission has recently declared that it 'will ensure that new reforms and policies are not mutually exclusive to discussions on the need for Treaty change, focusing on making the most of what is currently possible, while being open to Treaty change where that will be necessary': see Press Release 'Commission sets out first analysis of the proposals stemming from the Conference on the Future of Europe' (17 June 2022) https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3750. See also Commission (n 30) 5 and Catherine De Vries, Simon Hix and Miriam Sorace, 'The EU Treaty Reform Challenge: Is There a

4. Article 116 TFEU and minimum wage legislation

4.1 The Commission's proposal for a minimum wage directive and its material constrains

In October 2020, the Commission published its 'Proposal for a directive on adequate minimum wages in the European Union'.[177] The proposed directive aims at strengthening collective bargaining and statutory minimum wages within the EU. Despite its innovative character, the Proposal has faced a rather lukewarm reception.[178] In particular, it has been criticised for failing to provide a clear and uniform definition of 'adequacy' when laying down the indicators based on which Member States should set minimum wages. Moreover, it has been pointed out that the proposed directive is vague and not ambitious in relation to the mechanisms for strengthening collective bargaining that it could have introduced.[179]

In their analysis of the Proposal, Aranguiz and Garben have argued that the scarce incisiveness of the instrument is due to the legal basis chosen by the Commission, i.e. Article 153(1)(b) TFEU.[180] Indeed, Article 153(5) TFEU prevents the EU from using the other paragraphs of that Article to adopt measures directly affecting the level of pay.[181] Aranguiz and Garben have thus observed that 'defending that a more robust provision relating to adequacy of the level of wages would not fall foul of [Article] 153(5) TFEU would arguably over-stretch a reasonable interpretation of the latter'.[182]

On 7 June 2022, the European Parliament and the Council reached a provisional agreement on the draft directive on adequate minimum wages, overcoming the opposition of Hungary and Denmark.[183] However, impaired by the ineffectiveness due to the material constrains enshrined in the Treaties, the redistributive purpose of the Proposal seems

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Winning Package?' (*EUIdeas*, 30 June 2022) <https://euideas.eui.eu/2022/06/30/the-eu-treaty-reform-challenge-is-there-a-winning-package/>.

[177] COM(2020) 682 final.

[178] See, *ex multis*, Luca Ratti, 'La Proposta Di Direttiva Sui Salari Minimi Adeguati Nella Prospettiva Di Contrasto All'*in-Work Poverty*' (2021) 1 Diritto delle Relazioni Industriali 59, 66–69.

[179] See Ane Aranguiz and Sacha Garben, 'Combating Income Inequality in the EU: A Legal Assessment of a Potential EU Minimum Wage Directive' (2021) 46 European Law Review 156, 166–167; Torsten Schulten and Thorsten Müller, 'Minimum-Wage Directive: Yes, But…' (*Social Europe*, 10 November 2020) <https://socialeurope.eu/minimum-wage-directive-yes-but>; Ane Aranguiz, 'The Proposal on Adequate Minimum Wages in the European Union: Striving for Fairness, Less So Adequacy' (*EU Law Analysis*, 5 November 2020) <http://eulawanalysis.blogspot.com/2020/11/the-proposal-on-adequate-minimum-wages.html>; Giampiero Proia, 'La Proposta Di Direttiva Sull'adeguatezza Dei Salari Minimi' (2021) 1 Diritto delle Relazioni Industriali 26, 34–36.

[180] Which allows the EU to support and complement the activities of the Member States in the field of working conditions.

[181] See case C-620/18 *Hungary v Parliament and Council* [2020] ECLI:EU:C:2020:1001, para 80. On the interpretation of Article 153(5) TFEU, see Tiziano Treu, 'La Proposta Sul Salario Minimo e La Nuova Politica Della Commissione Europea' (2021) 1 Diritto delle Relazioni Industriali 1, 9–11.

[182] Aranguiz and Garben (n 179) 166. Likewise Emanuele Menegatti, 'Il Salario Minimo Nel Quadro Europeo e Comparato. A Proposito Della Proposta Di Direttiva Relativa a Salari Minimi Adeguati Nell'Unione Europea' (2021) 1 Diritto delle Relazioni Industriali 41, 57.

[183] See https://www.consilium.europa.eu/it/press/press-releases/2022/06/07/minimum-wages-council-and-european-parliament-reach-provisional-agreement-on-new-eu-law/.

seriously undermined.[184] Hence, the analyses carried out in the literature seeking for a more suitable legal basis,[185] which might have allowed to adopt a more ambitious directive or will perhaps allow to modify, once adopted, the current directive.

In this context, the aim of this Section is to assess whether Article 116 TFEU could potentially constitute an appropriate legal basis for the adoption of a minimum wage directive freed by the constrains imposed by Article 153(5) TFEU. To do so, the conditions for the use of Article 116 TFEU outlined in Section 2 will be assessed against the framework of minimum wage legislation.

4.2 The existing disparities between Member States' minimum wage legislations

Within the framework of labour legislation, there are two types of labour standards. The first type refers to actual terms of employment, quality of work, and protection of workers at a particular location and point of time. The second type corresponds to prescriptive (or normative) standards which, based on collective organisation and action, set minimum levels of protection for workers. Minimum wage legislation belongs to the category of prescriptive standards. Therefore, it is characterised by specific rules at both substantive and procedural level. Substantive rules are normally compulsory but might allow for a certain degree of flexibility, especially when considering variations and deductions which negatively affect minimum wage level. Procedural rules vary depending on whether the legislator directly sets the minimum wage or leaves more room for manoeuvre to collective bargaining.[186]

The different national approaches to labour market regulation have led to a rather fragmented European context, where '[m]inimum wage laws come in a variety of forms which reflect the wide range of rationales which have been given for this type of legislation'.[187] For instance, while some EU countries couple collective agreements with statutory minimum wages, some others rely exclusively on collective agreements.[188]

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[184] In Commission Staff Working Document, 'Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on adequate minimum wages in the European Union' SWD(2020) 245 final, the Commission estimates that the reform of minimum wages might benefit up to 24 million workers across the EU. It has however been submitted by several authors that, in the absence of complementary fiscal reforms, the redistributive function of minimum wage legislation is significantly limited. See in particular Richard B Freeman, 'The Minimum Wage as a Redistributive Tool' (1996) 106 The Economic Journal 639, 643; Simon Deakin and Frank Wilkinson, 'Minimum Wage Legislation' in Gerrit De Geest (ed), *Encyclopedia of Law and Economics* (Second edition, Edward Elgar Publishing 2015) 150 158.

[185] See Ane Aranguiz, 'Securing Decent Incomes at a Crossroads: On the Legal Feasibility of a Framework Directive on Minimum Income' (2020) 22 European Journal of Social Security 467, 467 ff; Aranguiz and Garben (n 179) 165–173.

[186] See Erika M Szyszczak, *EC Labour Law* (Longman 2000) 180–181.

[187] Deakin and Wilkinson (n 184) 150. On the three main European approaches to labour regulation (Romano-Germanic, Anglo-Irish, and Nordic) see Mia Rönnmar, 'Labour and Equality Law' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Third edition, Oxford University Press 2020) 613.

[188] See Commission (n 177), Recital 10.

On a political level, these differences render almost impossible to reach harmonisation through unanimity, especially when considering the strong opposition of social democratic countries (in particular Denmark),[189] and the reluctance of both neoliberal and right-wing populist Member States (in particular Hungary).[190]

On a substantive level, as of 2018, minimum wage legislation was incapable of ensuring that workers reached the risk-of-poverty threshold in nine Member States.[191] The available data provided by the Commission show that, as of January 2022, minimum wages in the EU Member States varied on a scale of 1 to 6.8, ranging from EUR 332 per month in Bulgaria to EUR 2,257 per month in Luxembourg. Moreover, there are significant differences also when considering national minimum wages in proportion to median gross earnings, the resulting ratio ranging from 42% in Estonia to 66% in France.[192]

Therefore, minimum wage is a field within which Member States' legislations present disparities within the meaning of Article 116 TFEU.

4.3 Can disparities in minimum wage laws result in distortions that need to be eliminated?

In 1960, in his taxonomic analysis of competition distortions, Campet divided them into two main categories, namely financial and technical distortions. Amongst the former category, he found that distortions could have either fiscal or social origin. Finally, he observed that financial distortions of social origin could derive from, *inter alia*, disparities concerning the terms and conditions of salaries.[193]

Sixty years later, somehow confirming the validity of Campet's taxonomy, the President of the Commission von der Leyen declared: 'for too many people, work no longer pays. Dumping wages destroys the dignity of work, penalises the entrepreneur who pays decent wages and *distorts fair competition in the Single Market*'.[194]

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[189] See Menegatti (n 182) 42; Charlie Duxbury and Paola Tamma, 'Sweden Backs EU Minimum Wage after Longtime Opposition' (*POLITICO*, 3 December 2021) <https://www.politico.eu/article/sweden-backs-eu-minimum-wage-directive-longtime-opposition/>; Hans Von der Burchard, 'Brussels' Plans for EU Minimum Wage Meet Nordic Skepticism' (*POLITICO*, 14 January 2020) <https://www.politico.eu/article/brussels-plans-for-eu-minimum-wage-meet-nordic-skepticism/>.

[190] See János Ammann, 'EU Council Agrees Negotiating Position on Minimum Wage Directive' (*Euractiv*, 7 December 2021) <https://www.euractiv.com/section/economy-jobs/news/eu-council-agrees-negotiating-position-on-minimum-wage-directive/>.

[191] See Commission (n 177), Recital 11 (emphasis added). See the report of European Foundation for the Improvement of Living and Working Conditions, 'Working Poor' (2022) <https://www.eurofound.europa.eu/topic/working-poor> according to which about 10% of European workers are at risk of poverty.

[192] See https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics. According to Treu (n 181) 12, one sixth of European workers are 'low wage earners', as their salary is below the two thirds of the national median wage.

[193] Campet (n 45) 1619.

[194] State of the Union Address by President von der Leyen at the European Parliament Plenary (16 September 2020) https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655

Disparities between minimum wage systems and their adequacy, effectiveness, and enforcement favour social dumping and unfair competition amongst undertakings, especially in cases of strong lack of compliance.[195] Indeed, minimum wage legislation directly impacts the cost of labour. In turn, changes in costs conditions, which lead competitors in other Member States to be put at a competitive advantage/disadvantage, are a strong indicator of the presence of a distortion.[196]

While von Quitzow has more generally observed that 'differences between social legislations of the various Member States may create distortions of competition',[197] Aranguiz and Garben have delved into detail and described some ways by which differences in minimum wages legislation might affect competition conditions and alter the level playing field:

> 'Member States that (think they) cannot afford to ensure adequate wages due to their position in the EU market and economy, may be subject to excessive emigration and population decline which, simultaneously, could lead to further harmful effects on the internal market such as a lower aggregate internal demand, and to brain-drain which may prevent them from increasing the innovative potential of their economy and their productivity, trapping them in a cycle of low-wage, low-productivity'.[198]

The relationship between labour standards and competition distortions, highlighted in Recital 6 of the current Proposal,[199] has been addressed by the CJEU.[200] In particular, the EU legislator's use of the internal market competence to regulate social policy has pushed the Court to investigate on several occasions the balance between the 'market-making' and the 'market-regulating' dimension of EU legislation.[201] Interestingly, in *Commission v UK*, the Court made explicit that labour standards safeguarding employees' rights must be intended as both ensuring comparable protection for employees' rights in the different Member States and harmonising the costs which those protective rules entail for EU undertakings.[202]

In Section 3, the interplay between regulatory competition in the field of taxation and competition distortions was assessed. On a similar note, the relationship between 'social

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[195] See Commission (n 177), Explanatory Memorandum.
[196] See Commission, 'European Social Policy: A Way Forward for the Union: A White Paper' COM(94) 333, Part A, p 5.
[197] von Quitzow (n 26) 43.
[198] Aranguiz and Garben (n 179) 161.
[199] Accordingly, '[c]ompetition in the Single Market should be based on high social standards, innovation and productivity improvements ensuring a level playing field'.
[200] For instance, see case C-43/93 *Vander Elst v Office des migrations internationales* [1994] ECLI:EU:C:1994:310, para 25.
[201] See De Witte, 'A Competence to Protect' (n 11) 46; Claire Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights: As Good As It Gets?' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 205 ff.
[202] See case C-382/92 *Commission v UK* [1994] ECLI:EU:C:1994:233, para 15.

dumping', as a form of regulatory arbitrage, and distortions of competition seems to strongly advocate for the introduction of common minimum wage standards through the available means included in the Treaties,[203] amongst which Article 116 TFEU stands. Interestingly, the formulation and structure of Article 116 TFEU closely recall those of Article 91 of the Treaty of Rome. The latter contained a transitory anti-dumping provision and envisaged the possibility for the Commission to address recommendations to the persons liable of dumping practices and, at a second stage, to allow the Member States affected to adopt protective measures.[204]

With regard to the *sui generis de minimis* contained in Article 116 TFEU, when considering the criteria proposed above in §2.3, one might argue that social dumping poses indeed a vital threat to market integration.[205] Indeed, it prevents undertakings from operating on the market with the highest competitiveness that they should be able to achieve under the equal conditions provided for in the Treaties.

Nevertheless, as observed above, the reach of the *de minimis* threshold is a matter depending mainly on the discretion of the Commission. Significantly, the Commission seemed to have accorded priority to the implementation of the European Pillar of Social Rights[206] even before the crisis of inequality was exacerbated by the Pandemic crisis.[207] Moreover, the need for strong centralised EU intervention might be further increased by the economic and migratory challenges emerging from the war in Ukraine.[208] Therefore, it would not be surprising if the Commission considered the said *de minimis* threshold to be met.

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[203] See Bernard Ryan, 'Pay, Trade Union Rights and European Community Law' (1997) 13 International Journal of Comparative Labour Law and Industrial Relations 305, n 36.

[204] On the history of that provision, see Richard Dale, *Anti-Dumping Law in a Liberal Trade Order* (Palgrave Macmillan 1980) 97–98; Camilla Prawitz and Jonas Kasteng, 'Effects on Trade and Competition of Abolishing Anti-Dumping Measures' (Kommerskollegium 2013) 2013:6 4–6 <http://www.kommers.se/publikationer/Rapporter/2013/Effects-on-Trade-and-Competition-of-Abolishing-Anti-Dumping-Measures/>.

[205] See Gaby Bischoff, 'The Uphill Battle for Equal Work in Europe 2022' (*POLITICO*, 2 June 2022) <https://www.politico.eu/sponsored-content/the-uphill-battle-for-equal-work-in-europe-2022/>; Karima Delli, 'EU Minimum Wage Required to Combat Social Dumping' (*The Parliament Magazine*, 7 April 2015) <https://www.theparliamentmagazine.eu/news/article/eu-minimum-wage-required-to-combat-social-dumping>.

[206] The European Pillar of Social Rights (EPSR) was announced by the then President of the Commission Juncker in 2015, and proclaimed by the European Parliament, the Council, and the Commission in 2017 at the Gothenburg Summit. On the interaction between the EPSR and minimum wage legislation, see Sacha Garben, 'The European Pillar of Social Rights: An Assessment of Its Meaning and Significance' (2019) 21 Cambridge Yearbook of European Legal Studies 101, 114–115.

[207] See Aranguiz and Garben (n 179) 156–158.

[208] Pursuant to Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection ST/6846/2022/INIT [2022] OJ L 71, persons displaced from Ukraine are now covered by the Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L 212). According to Article 12, last sentence of the Temporary Protection Directive, '[t]he

In conclusion, it appears that the effects of the disparities between Member States' minimum wage legislations are capable of falling within the scope of the distortions of competition that need to be eliminated within the meaning of Article 116 TFEU.

4.4 Harmonising social standards through internal market tools

The analysis carried out so far seems to show that, in the field of minimum wage legislation, all the requirements for recourse to Article 116 TFEU are potentially met.

In particular, when considering that Article 114(2) TFEU excludes the applicability of Article 114(1) as legal basis for measures related to the rights of employees, and that the unanimity required by Article 115 is unlikely to be reached for an agreement on an ambitious and incisive measure, Article 116 remains the only internal market provision through which minimum wage legislation could be efficiently harmonised.[209]

Therefore, the Commission might address the Member States where minimum wages are too low vis-à-vis other wages or the risk-of-poverty threshold and the Member States where minimum wages are in principle adequate but suffer from lack of compliance and enforcement.

After the prior consultation phase, the Commission might draft a stronger proposal, replacing the vague criteria of adequacy and the broad discretion left to Member State by Article 5 of the current Proposal with clearer and objective benchmarks. For instance, the 'Kaitz index', defining the optimal minimum wage as 60% of the gross median wage and 50% of the gross average wage, which is only mentioned *en passant* in Recital 21 of the current Proposal, might constitute the core of a new EU measure on minimum wages.[210]

Finally, von Quitzow argues that the market distortion legal basis might allow for 'a more far-reaching degree of policy harmonization […] than is possible under the social provisions in [the] Treaty'.[211] However, concerns arise as to whether the intervention on labour standards through internal market legal bases may trigger an interpretation of those

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general law in force in the Member States applicable to *remuneration*, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply [to persons enjoying temporary protection]' (emphasis added). However, temporary protection will only last until 4 March 2023 (although, if the reasons for granting temporary protection persist, it will be automatically extended for one year and, after that, the Commission can propose to the Council to extend the protection by up to another year).

[209] See von Quitzow (n 26) 191.

[210] The Kaitz index criteria are instead included in Amendment 65 of the European Parliament's position at first reading, available at https://www.europarl.europa.eu/doceo/document/A-9-2021-0325_EN.html. On the potential role of the Kaitz index, see Torsten Schulten and Thorsten Müller, 'A Paradigm Shift Towards Social Europe? The Proposed Directive on Adequate Minimum Wages in the European Union' (2021) 14 Italian Labour Law e-Journal 1, 7–12. On 14 September 2022, when this thesis had already been finalised, the European Parliament adopted the final version of the Directive, which includes in its Article 5(4) reference to 'values commonly used at international level such as 60% of the gross median wage and 50% of the gross average wage'. However, the choice as to whether to make reference to such thresholds remains within the discretion of the Member States.

[211] von Quitzow (n 26) 197.

standards as 'ceiling' rather than 'floor' of protection.[212] Such doubts derive from the case-law of the CJEU, and in particular from cases like *Laval*,[213] *Rüffert*,[214] *Alemo-Herron*,[215] *Bundesdruckerei*,[216] and *AGET*.[217] In essence, the use of Article 116 TFEU might lead the Court to prioritise the market over the social dimension when interpreting the rights provided by the measure adopted.[218] As observed by Aranguiz and Garben, the risk in the case of a minimum wage directive could be an interpretation of the measure as if it was 'harmonising the maximum rates of pay that a Member State can require'[219] to ensure that competition amongst undertakings is not distorted.

In that respect, it is here submitted that such an issue might be overcome by interpreting social measures based on internal market legal bases in light of horizontal provisions such as Articles 2 and 3(3) TEU and Article 9 TFEU.[220] Furthermore, interpreters might follow the circular reading envisaged in Article 151 TFEU: accordingly, a functioning and competitive internal market is conditional upon enhanced protection of workers' rights and vice versa.[221]

5. Conclusions

The aim of this dissertation was to concretely analyse the option provided by Article 116 TFEU within the context of internal market legislation. In particular, the research aimed at exploring how this legal basis, which does not require unanimity, could foster the effectiveness of EU decision-making in fiscal and social matters. Indeed, EU action in those fields has so far been constrained by the limitations enshrined in Article 114(2) TFEU.

The research began from the consideration that tax and labour policies are closely intertwined as both are strongly linked with issues of democratic legitimacy and distributive justice. In turn, the political sensitivity of these matters explains their exclusion from the scope of Article 114(1) TFEU.

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[212] See, *ex multis*, Aranguiz and Garben (n 179) 172; Simon Deakin, 'Regulatory Competition after Laval' (2007) 10 Cambridge Yearbook of European Legal Studies 581, 608–609; Rönnmar (n 187) 623; Herwig Verschueren, 'The European Internal Market and the Competition between Workers' (2015) 6 European Labour Law Journal 128, 140–141; Piet Van Nuffel and Sofia Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-Border Provision of Services' (2018) 3 European Papers 1401, 1411.

[213] *Laval un Partneri* (n 117).

[214] Case C-346/06 *Rüffert* [2008] ECLI:EU:C:2008:189.

[215] Case C-426/11 *Alemo-Herron and Others* [2013] ECLI:EU:C:2013:521.

[216] Case C-549/13 *Bundesdruckerei* [2014] ECLI:EU:C:2014:2235.

[217] Case C-201/15 *AGET Iraklis* [2016] ECLI:EU:C:2016:972.

[218] On the problematic subordination of values to market logic within EU legislation, see Davies (n 9) 2 ff; Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' in Jan Wouters, Daniele Gallo and Cristina Fasone (eds), *Re-conceptualizing Authority and Legitimacy in the EU*, vol 5 Special Section (European Papers 2020) 260–261.

[219] Aranguiz and Garben (n 179) 173.

[220] Article 9 TFEU contains the so called 'horizontal social clause'. For an overview of that provision, see Ane Aranguiz, 'Social Mainstreaming through the European Pillar of Social Rights: Shielding "the Social" from "the Economic" in EU Policymaking' (2018) 20 European Journal of Social Security 341, 341 ff.

[221] For similar considerations in the field of tax competition, see Perrone (n 16) 344–351.

However, such an exclusion must not necessarily be read as entailing an absolute unanimity requirement for EU action in the concerned subjects. The Treaties do not contain any explicit and positively formulated unanimity requirement for the fields listed in Article 114(2) TFEU. In fact, there are other legal bases (e.g. Article 153 TFEU) which allow for legislation in those matters through qualified majority voting. Finally, and most importantly for the purposes of this work, a thorough analysis of the history of Article 116 TFEU suggests that that provision was included in the Treaties precisely to provide the EU with a flexible instrument to face the most serious distortions of competition through qualified majority voting. In other words, the unlimited reach *ratione materiae* of Article 116 TFEU was designed to protect market integration from major threats which might not be effectively addressed through unanimity.

The tests carried out in Sections 3 and 4 confirm, in principle, the applicability of the market distortion provisions to matters of fiscal and labour policy. Article 116 TFEU's design renders that legal basis particularly suitable to address phenomena of harmful regulatory competition, where (de)regulation triggers a race to the bottom capable of lethally impacting States' financial capacity and encouraging social dumping and unfair competition between undertakings.

As for the type of measures that can be adopted on the grounds of the market distortion legal basis, an *a contrario* reading of Article 117 TFEU allows to conclude that Article 116(2) can be the legal basis for the adoption of not only directives addressed to one or more Member States, but also directives addressed to all the Member States. In other words, Article 116(2) TFEU allows for the adoption of harmonising directives.

Nevertheless, this is not to say that the EU can count on a 'nuclear option' to exercise undue interference in fields that traditionally fall within Member States' domain. The use of Article 116 TFEU is, in fact, subject to certain limitations. First, four conditions have been identified in this thesis for recourse to the legal basis in question. Whereas the first three conditions concern the origin, type, and intensity of a certain competition distortion, the last condition shows a more 'political' nature. Second, measures adopted under Article 116(2) TFEU must pursue internal market goals. Third, the legal soundness of fiscal and/or labour legislation adopted under Article 116(2) TFEU does not necessarily correspond to its political feasibility.

With regard to the four conditions enshrined in the TFEU for the application of Article 116(2), they can be summarised as follows. First, the application of Article 116 TFEU requires a disparity between the laws or administrative practices of two or more Member States. Second, such a disparity must cause a distortion of competition. In particular, the interpretation according to which Article 116 TFEU would be only applicable to face specific distortions seems not completely convincing. Instead, the wording of that Article, albeit rather

obscure, gives shape to an instrument suitable to address all kinds of competition distortions, and especially those of financial nature, which normally have either fiscal or social origin. Third, Article 116 TFEU is applicable only to address distortions that need to be eliminated. Such a condition represents a *sui generis de minimis*, which confirms the relationship between Article 116, *lex specialis*, and Article 114, *lex generalis*. The Commission retains a wide margin of discretion in assessing which distortions reach the threshold at stake. Fourth, before using the legal basis enshrined in Article 116(2) TFEU, the Commission must enter into dialogue with the Member State(s) responsible for the distortion. The (few) cases where this 'political' phase was opened seem to show that the Commission tends to adopt a lenient approach aimed at reaching a non-traumatic and consensual solution with the Member States responsible for the distortion.

As regards the second limitation, i.e. that measures adopted under the market distortion legal basis must pursue internal market goals, Article 116 belongs to the 'Common rules on competition, taxation and approximation of laws',[222] the internal market-related provisions. Therefore, measures adopted under that legal basis cannot exclusively pursue purely democratic and redistributive goals. On the contrary, those measures must be aimed at restoring the market's level playing field when it has been altered by Member States' actions or omissions. This consideration brings further consequences. First, in fiscal matters, it might be problematic for the Commission to act without somehow identifying a fair level of taxation, thereby arguably exceeding the powers conferred upon it in the Treaties. This seems particularly true when considering general tax competition, which may be addressed via direct tax harmonisation based on Article 116(2) TFEU. Second, measures directly intervening on labour standards through the internal market backdoor might risk being interpreted as setting ceilings rather than floors of protection. In the case of a minimum wage directive, in practice, the risk would thus be to set maximum salary levels and harm, rather than enhance, labour conditions.

Finally, although some of the said issues might be overcome through a sufficiently flexible interpretation of Article 116 TFEU in light of the values enshrined in horizontal provisions such as Articles 2 and 3(3) TEU and Article 9 TFEU, crucial questions of political feasibility remain to be answered. In that respect, instincts of 'self-preservation' and 'reciprocal deference' may play a role in preventing Member States from taking the initiative of concretely supporting the use of Article 116 TFEU. The new stress on solidarity and the political momentum generated by the pandemic crisis and the war in Ukraine might turn out to be the 'black swans' which break the pattern.

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