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The Legal (Im)possibilities of the EU Implementing the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting

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Abstract:

To reform international taxation requires united and uniform global agreement. The OECD/G20 Base Erosion and Profit Shifting (BEPS) Project's Inclusive Framework statement arrived on 1 July 2021 to much political fanfare for supposedly promising just that. Whilst heralded as the achievement of an agreement on issues which have previously caused difficulty in reaching international consensus, such as the global minimum corporate tax rate of "at least 15%", not all member jurisdictions were in agreement. The identity of the then so called 'holdout' countries is therefore important. This is because Ireland, Hungary and Estonia are all Member States of the European Union. The 'holdout' countries became the 'carve-out' countries, as Estonia, Hungary and Ireland only agreed to the 8 October 2021 updated political agreement at the last minute, after they had secured concessions enabling them to sign up. Whether it is legally possible for the EU to implement any agreement is crucial due to its own stated agenda. It wants to be an international regulator. This would clearly not be achievable if the EU found it legally impossible to implement the Inclusive Framework because of some of its Member States. When it comes to the legal (im)possibilities of legislating for global tax reform, rather than trying to get around its limited competence, which then necessitates the unanimity criteria amongst other difficulties in using the legal bases in the Treaty, the EU should utilise the treaty provisions already available in the form of the enhanced cooperation mechanism. This does not eradicate the question of EU competence or the fact that if the EU wants to act at all it has to deal with Member State sovereignty head on. However, it is a better option than using the awkward provisions of Article 116 TFEU and a necessary opportunity to address the problems caused by the unanimity criteria contained in Articles 113 and 115 TFEU by directly providing for the non-participating, or 'holdout', now 'carve-out', Member States, to be accommodated, at least in principle.

Key words: Base Erosion Profit Shifting (BEPS), OECD / G20 Inclusive Framework, EU tax, tax avoidance, Enhanced Cooperation

To reform international taxation requires united and uniform global agreement. The OECD/G20 Base Erosion and Profit Shifting (BEPS) Project's Inclusive Framework statement arrived on 1 July 2021[2] to much political fanfare[3] for supposedly promising just that. Whilst heralded as the achievement of an agreement on issues which have previously caused difficulty in reaching international consensus, such as the global minimum corporate tax rate of "at least

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[2] OECD/G20 Base Erosion and Profit Shifting Project, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy' 1 July 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf accessed 30 September 2021.

[3] Financial Times, 'World's leading economies agree global minimum corporate tax rate', Chris Giles, London, 1 July 2021.

15%”,[4] not all member jurisdictions were in agreement[5]. Countries holding out on providing their consent included Ireland, Hungary and Estonia.[6] Furthermore, what the political fanfare actually heralded were headline statements, the devil in the detail was still to follow. On 8 October 2021,[7] an updated statement was concluded, with the stated aim to update and finalise the July 2021 political agreement between members of the Inclusive Framework. Notable for its brevity, this eight-page statement contained what is described as a detailed implementation plan in its Annex, which effectively stated that implementation of the Inclusive Framework would occur through a Multilateral Convention and implementation framework to be concluded in 2022 and to come into effect in 2023.[8] The ‘holdout’ countries became the ‘carve-out’ countries, as Estonia, Hungary and Ireland only agreed to the 8 October 2021 political agreement at the last minute, after they had secured concessions enabling them to sign up. For Hungary, it secured a transition period to enable it to offer a lower rate of tax for tangible investments within its jurisdiction for 10 years. Estonia, had its fears allayed that the proposals will not impose too much on Estonian entrepreneurs, meaning that it has to room for manoeuvre around the revenue thresholds and percentage rates to minimise the impact on Estonian businesses. Ireland, secured the headline concession as “at least 15%”[9] became “the minimum tax rate”[10] of 15%. As the world waits expectant as to whether the remaining issues will be finalised by consensus within the statement’s advertised timescale,[11] focus understandably turns to the legal possibilities for implementation of what is agreed. With so many technical details to conclude, united and uniform global agreement is certainly not a given and if legal implementation of any agreement proves impossible, competitive tax planning will continue

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[4] OECD/G20 Base Erosion and Profit Shifting Project, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy’ 1 July 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf accessed 30 September 2021.

[5] There are 136 member jurisdictions in agreement with the Inclusive Framework statement as at the date of the updated political agreement on 8 October 2021 on the OECD website. This is the case at the time of writing on 10 October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm?utm_source=Adestra&utm_medium=email&utm_content=Statement%20%26%20Implementation%20Plan&utm_campaign=Tax%20News%20Alert%2008-10-2021&utm_term=ctp accessed 10 October 2021.

[6] Doug Connolly, ‘No global minimum tax holdouts have left negotiations, OECD official notes’ 14 July 2021, MNE Tax https://mnetax.com/no-global-minimum-tax-holdouts-have-left-negotiations-oecd-official-notes-45092 accessed 31 August 2021

[7] OECD/G20 Base Erosion and Profit Shifting Project, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy’ 8 October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf accessed 10 October 2021.

[8] OECD/G20 Base Erosion and Profit Shifting Project, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy’ 8 October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf accessed 10 October 2021.

[9] OECD/G20 Base Erosion and Profit Shifting Project, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy’ 1 July 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf accessed 30 September 2021.

[10] OECD/G20 Base Erosion and Profit Shifting Project, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy’ 8 October 2021 https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf accessed 10 October 2021.

[11] This is the date set out in the statement https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf accessed 10 October 2021.

on the basis of tax rules provided by sources including tax treaties, national legislation and tax rulings by national tax authorities.

The identity of the so called 'holdout', now 'carve-out', countries is therefore important. This is because Ireland, Hungary and Estonia are all Member States of the European Union. Whilst admittedly there is no guarantee the US will be successful in legally implementing the terms of any global agreement,[12] whether it is legally possible for the EU to implement any agreement is crucial due to its own stated agenda. It wants to be an international regulator. As Van Vooren suggests, "the EU indubitably has an ambitious political agenda and legally binding mission statement to shape the international legal order".[13] This would clearly not be achievable if the EU found it legally impossible to implement the Inclusive Framework. The ramifications for the EU's agenda are also significant because not only would it fail in its mission with regard to the implementation of any current agreement, it would consequently be impossible to utilise the Inclusive Framework as the foundation for a more extensive EU tax legislative agenda, on the basis of which it could seek to influence the international legal order further in the future.[14]

This is not just limited to the EU's effectiveness in shaping the international legal order with regard to tax, it is also linked to the EU's digital agenda, which stresses the need to enhance the EU's digital sovereignty.[15] The rationale of the July and October 2021 Inclusive Framework statements, as promulgated in the title 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy' clearly reinforces the importance and relevance of the Inclusive Framework for the EU's ability to influence the direction of international law in its own image, and potentially using taxation as a springboard from which to do so.

Consequently, whilst the response at the international level grapples with the political issues of global tax harmonisation,[16] the EU focuses equally on the issues of harmonisation regarding its own integrative agenda. Both raise fundamental issues of the economic sovereignty of the State,[17] with the EU perspective also raising its own internal issues of legal competence and institutional competence. The EU has very limited legal and institutional competence of its own with regard to tax, with this area of law being primarily the purview of the Member States. Seeking to take action at the EU level by legislating in the area of tax needs unanimous agreement between the Member States as a key requirement of the legislative process. If united and uniform global agreement is to be reached in order to achieve reform of international taxation, consensus reached internationally would need to be implemented into EU law through unanimity between the Member States. However, the 'holdout', now 'carve-out', countries are Member States seeking a differentiated agreement for themselves at the international level.

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[12] Bloomberg Tax, 'Congress Unlikely to Ratify Global Tax Deal, Senator Says', 28 September 2021, https://news.bloombergtax.com/daily-tax-report/congress-unlikely-to-ratify-global-tax-deal-gop-senator-says accessed 30 September 2021.

[13] Bart Van Vooren, 'The EU's financial transaction tax: shaping global financial governance in its own image?' chapter 14 in Dimitry Kochenov and Fabian Amtenbrink (eds) *The European Union's Shaping of the International Legal Order,* (Cambridge University Press 2014) page 347, see also the chapter 3, Joris Larik, 'Shaping the International order as an EU objective' in the same book.

[14] Anzhela Cédelle, 'Enhanced cooperation: A way forward for tax harmonisation in the EU?', Oxford University Centre for Business Taxation, Working Paper 15/33, p39

[15] European Council, 'A Digital Future For Europe' March 2021 https://www.consilium.europa.eu/en/policies/a-digital-future-for-europe/ accessed 31 August 2021

[16] OECD Base Erosion and Profit Shifting (BEPS) Action Plan

[17] See Dominic de Cogan, 'Tax Law, State-Building and the Constitution', (Hart Publishing, Oxford, London, New York, New Delhi, Sydney 2020).

Their success so far in achieving a differentiated agreement through carve-outs in order to agree to the Inclusive Framework at the international level, means that the same differentiation will need to be replicated at the EU level. Additionally, the 'carve-out' countries may seek not just to replicate the differentiated agreement so far achieved at the international level, but they could insist on continued, or further, differentiation at the EU level. The EU would need to consider alternative ways of legislating to avoid the unanimity requirement if it is to make legal implementation possible.

This article will explore the legal (im)possibilities and conclude that implementation of a OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting in the EU could require differentiated integration, specifically use of the enhanced cooperation Treaty mechanism.

1. The EU's Position and its Legal Competence in Taxation

The EU has vocalised a commitment to reaching a consensus-based global solution on international digital taxation within the framework of the OECD, reiterated in the European Commission Presidents' latest State of the Union address.[18] The EU's position is that once a detailed Inclusive Framework is agreed upon internationally after 8 October 2021, the Commission will bring forward proposals for implementing Directives.[19] It is important to note that the EU's position is that it will only do so "in line with the EU's tax agenda and the needs of the Single Market".[20] The emphasis on the Single Market here suggests not only that the EU seeks to preserve its own agenda, but that it is also laying the political groundwork for using the few potential options available to it as legal bases for Directives in the Treaty, being those Articles relating to the internal market.

1.1 Legal Basis

The EU operates on the principal of conferral of competence from the Member States to the EU.[21] Direct taxation is still very much a Member State competence linked clearly to Member State sovereignty.[22] For the EU to legally implement tax harmonization in relation to corporate income tax it will have to tackle the question of state sovereignty head on. One should not underestimate the difficulty of achieving this, as Van Arendonk states, "the idea of the EU being able to levy taxes of its own, which is so cherished by federalists, is an illusion".[23] Approximation of tax law would need to be directly in the interests of the Member States.[24]

[18] 2021 State of the Union Address by President von der Leyen, 15 September 2021 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_4701 accessed 30 September 2021.

[19] European Commission, 'Global Agreement on Corporate Taxation: Frequently asked questions' 10 July 2021 https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_3564 accessed 31 August 2021

[20] European Commission, 'Global Agreement on Corporate Taxation: Frequently asked questions' 10 July 2021 https://ec.europa.eu/commission/presscorner/detail/en/QANDA_21_3564 accessed 31 August 2021

[21] Article 5 TEU.

[22] See for example Case C-524/04, *Test Claimants in the Thin Cap Grp. Litigation v. Commissioners of the Inland Revenue*, 2007 E.C. R. 1-2157, 25; Case C-80/94, *Wielock v. Inspecteur der Directe Belastingen,* 1995 E.C.R. 1-2493, 16; Case C-279/93, *Finanzamt Koln-Altstadt v. Schumacker*, 1995 E.C.R. 1-225, 21; Mathieu Isenbaert, *The Contemporary Meaning of 'Sovereignty' in the Supranational Context of the EC as Applied to the Income Tax Case Law of the CJEU*, (2009) 18 EC Tax Rev. 264; and L. Lovdahl Gormsen, *European State Aid and Tax Rulings,* (Elgar 2019).

[23] Henk van Arendonk, 'The European Cooperation Project, Tax & Sovereignty' (2016) 25 EC Tax Rev 242, page 245.

[24] Ibid.

The EU's position it that it intends for the Inclusive Framework to be implemented in EU law but with a different strategy adopted for Pillar One and Pillar Two.[25] It envisages the legal implementation of Pillar One to be mandatory "in order to ensure its consistent implementation in all EU Member States, including those that are not Members of the OECD and do not participate in the Inclusive Framework".[26] This demonstrates the difficulty the identity of the 'holdout', now 'carve-out' countries could pose in making legal implementation possible. As regards Pillar Two, things are not much easier. Even in the EU's envisaged agenda for business taxation,[27] which specifically addresses ideas from the European Commission for legal implementation, there is an admission that full approximation and uniformity may not occur regarding the tax rate because it will effectively be subject to Member State competences: "Progress at EU level should be complemented by supporting national action in areas where Member States may be best placed to judge the needs of their economy and society. This includes setting the level of the corporate income tax rate above the minimum levels to be agreed internationally … which will remain a national competence in the EU".[28] The EU's legislative options are therefore limited for implementation of an Inclusive Framework.

The EU's experience in legislating for its own internal tax agenda demonstrates how limited these options are and the difficulty in utilising them, suggesting that implementation may be impossible. The EU would, first of all, like to avoid unanimity between the Member States, ideally through use of an Article in the Treaty which provides the EU with competence to enact supranational law with Qualified Majority Voting (QMV) in the Council. In its Action Plan to instrumentalise tax to respond to the pandemic,[29] the European Commission has suggested using Article 116 TFEU, "To fully deliver on the EU's fair tax agenda, all existing policy levers have to be activated. … the Commission will explore how to make full use of the provisions of the Treaty on the functioning of the EU (TFEU) that allow proposals on taxation to be adopted by ordinary legislative procedure…".[30] But this is not tried and tested, either in the Court of Justice of the European Union, nor in the area of indirect tax. As Englisch states, "the provision is still plagued by legal uncertainty, an overruled minority of Member States can be expected to challenge its use in the European courts. Moreover, even a qualified majority of Member States may often be hard to gather behind a Commission proposal … If the Commission really intended to make 'full use' of Article 116 TFEU where necessary, it would therefore be well-advised to begin doing so with a reform project where chances of sufficient political support and legal success are high".[31] Experimenting with the use of Article 116 TFEU in a politically contentious issue which has proven legally difficult to solve for a considerable amount of time would not be an advisable way to start to try and avoid the unanimity

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[25] European Commission, Communication From The Commission To The European Parliament And The Council: Business Taxation in the 21st Century, COM(2021) 251 final, Brussels, 18.5.2021.
[26] Ibid.
[27] European Commission, Communication From The Commission To The European Parliament And The Council: Business Taxation in the 21st Century, COM(2021) 251 final, Brussels, 18.5.2021. https://ec.europa.eu/taxation_customs/system/files/2021-05/communication_on_business_taxation_for_the_21st_century.pdf accessed 31 August 2021.
[28] European Commission, Communication From The Commission To The European Parliament And The Council: Business Taxation in the 21st Century, COM(2021) 251 final, Brussels, 18.5.2021 page 6.
[29] European Commission, Communication From The Commission To The European Parliament And The Council: An Action Plan For Fair And Simple Taxation Supporting The Recovery Strategy COM(2020) 312 final, Brussels, 15.7.2020, page 2.
[30] European Commission, Communication From The Commission To The European Parliament And The Council: An Action Plan For Fair And Simple Taxation Supporting The Recovery Strategy COM(2020) 312 final, Brussels, 15.7.2020, page 2.
[31] Joachim Englisch, 'Editorial: Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?' EC Tax Review (2020) Vol 29, Issue 2 p58 - 61.

requirement, if indeed it was even possible to do so. The criteria for legislation stipulated in Article 116 TFEU are stricter than those laid down in the alternative legal bases, because of the necessity to demonstrate that a distortion of the conditions of competition in the internal market already exists and that it is as a result of differential tax systems between the Member States.[32] Article 116 TFEU also requires there to be a need for the distortion to be eliminated and the Commission is then required to consult with the Member States concerned to achieve this. As this is likely to be a holdout, now carve-out, country, should they not agree to alter their domestic tax systems, Article 116 (2) TFEU states that a Directive is then required. This is therefore not an easy set of conditions to fulfil. Englisch's suggestion that this is the "nuclear option" becomes quite clear.

The only alternative legal bases there really are, as Article 114 TFEU, the classic internal market provision, has a fiscal exemption,[33] are Articles 113 and 115 TFEU, which relate to indirect taxation in respect of Article 113 TFEU specifically, and approximation of law as directly affects the establishment of the internal market more generally with regard to Article 115 TFEU.[34] Both Articles require unanimity between the Member States, which has proved a so far insurmountable hurdle for the EU's own legislative tax agenda. For example, the legal basis for the EU's Digital Services Tax, now termed digital levy, currently postponed, is Article 113 TFEU, and the legal basis for the Common Consolidated Corporate Tax Base (CCCTB),[35] and presumably its potential replacement, the Business in Europe: Framework for Income Taxation (BEFIT), is Article 115 TFEU.[36] The years of struggles the EU has had so far in enacting legislation to provide for a DST or the CCCTB can be attributable to the unanimity requirement and the preservation of Member State sovereignty when it comes to tax. As the BEFIT is even more comprehensive, the EU is likely to continue to struggle to pursue its own internal agenda utilising these legal bases and quite foreseeably encounter the same legal impossibilities in attempting to implement an Inclusive Framework.

The EU has recognised the difficulties it has encountered through the application of the unanimity requirement by even providing a report from the European Commission on using passerelle clauses,[37] specifically Article 48 (7) TEU to alter the voting requirements applicable in the field of taxation, from unanimity to QMV. This would however need the European Council to propose it, which it has not yet done, and the Member States would have to be in unanimous agreement to accept the change. The report itself envisages that it will probably

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[32] Joachim Englisch, 'Editorial: Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?' EC Tax Review (2020) Vol 29, Issue 2 p58, 58.

[33] Article 114 (2) TFEU.

[34] The author has written on this elsewhere: Maria Kendrick, 'Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?' in A. Biondi & P. Birkinshaw (eds) Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU, (Kluwer, 2016); Maria Kendrick, 'Differentiated Integration Amongst the EU27: Will Brexit Make the EU More Flexible?', in Patrick Birkinshaw, Andrea Biondi and Maria Kendrick (eds), *Brexit: The Legal Implications*, (Kluwer, 2018); and Maria Kendrick, *The Future of Differentiated Integration: The Tax Microcosm*, (2020) 7:2 Journal of International and Comparative Law 371 – 387.

[35] COM(2016) 685 final and COM(2016) 683 final.

[36] European Commission, Communication From The Commission To The European Parliament And The Council: Business Taxation in the 21st Century, COM(2021) 251 final, Brussels, 18.5.2021.

[37] European Commission, 'Communication From The Commission To The European Parliament, The European Council And The Council: Towards a more efficient and democratic decision making in EU tax policy', COM(2019) 8 final, Strasbourg, 15.1.2019 https://ec.europa.eu/taxation_customs/system/files/2019-01/15_01_2019_communication_towards_a_more_efficient_democratic_decision_making_eu_tax_policy_en.pdf accessed 31 August 2021.

take four stages of implementation to achieve, with harmonisation positively enacted in fields such as taxation likely to be last. As this very much still remains to be seen, unanimity is therefore the likelihood, unless Article 116 TFEU is used, and the aforementioned discussion demonstrated the difficulties with this option. While impossibilities are quite clear at this stage, there is a possibility which remains open.

2. The Possibility of the EU Utilising the Enhanced Cooperation Treaty Mechanism

Laid down in Article 20 TEU and Articles 326-334 TFEU are a significant but vague criteria for the authorisation to pursue EU legislation via enhanced cooperation.[38] These Articles provide for a stringent list of criteria, as well as procedural hurdles, which must be complied with before the mechanism can be used. However, one such requirement is authorisation to utilise the enhanced cooperation mechanism itself, which is by a Qualified Majority Vote between all Member States, rather than unanimity, creating one possibility not available under Articles 113 and 115 TFEU.

Whilst the criteria are significant, the pertinent aspects for the current discussion are the number of Member States required to join an enhanced cooperation endeavour and the last resort requirement.

With regard to the former criterion, the Treaty permits a minimum of at least nine Member States to engage in a legislative endeavour at the EU level on the basis of a proposal, which would have initially been suggested as an EU wide measure, but for reasons such as a failure to meet the unanimity requirement due to objections to the imposition of a minimum corporate tax rate, has been rejected by some Member States. This could include the 'holdout', now 'carve-out' countries. The Enhanced Cooperation mechanism essentially splits the Member States up into participants and non-participants, with only the former being bound by the legislative proposal.[39] This would be achievable with the number of Member State countries which initially signed up to the draft Inclusive Framework, without carve-outs, should they maintain their agreement to the detailed proposals due in 2022.

With regard to the latter criteria, Enhanced cooperation can only be authorized as a last resort, which the Treaty describes as occurring when 'the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'.[40] This arguably restricts the operation of the Enhanced Cooperation procedure to circumstances where there has been a break down in legislative negotiations and potentially a difficult political atmosphere of animosity between Member States. This is arguably one of the worst and most negative elements of the criteria of utilising the Enhanced Cooperation mechanism and is a significant and unfortunate reason why differentiated integration more generally is not wholeheartedly embraced at the EU level. In the particular instance of the Inclusive Framework, however, this criterion may not be as difficult or as time consuming to satisfy. Negotiations have been ongoing for a significant amount of time at the international level and should 'holdout', now 'carve-out', countries continue to require opt-outs then arguably negotiations have stretched to an extent that the last resort criterion has been met at the EU level, because the objectives of the Inclusive Framework implementing Directives would have not been attained through legal

[38] For a detailed critical discussion of the enhanced cooperation mechanism see: Maria Kendrick, Differentiated Integration Amongst the EU27: Will Brexit Make the EU More Flexible?' in Patrick Birkinshaw, Andrea Biondi and Maria Kendrick (eds), *Brexit: The Legal Implications*, (Kluwer, 2018).
[39] Art. 20(1), (2) and (4) TEU
[40] Article 20(2) TEU

implementation by the Union as a whole within a reasonable period, potentially now already, or nearly fulfilled.

The TFEU further specifies that enhanced cooperation must 'respect the competences, rights and obligations' of non-participants,[41] therefore also providing, at least in principle, some of the protection sought by the 'holdout', now 'carve-out' countries.[42] The Enhanced Cooperation mechanism may therefore be the only way to make legal implementation of the Inclusive Framework possible in the EU, because it creates opportunities[43] to address the impossibilities of the unanimous procedure for approval of Directives by all Member States.

3. Conclusion

When it comes to the legal (im)possibilities of legislating for global tax reform, rather than trying to get around its lack of competence, which then necessitates the unanimity criteria amongst other difficulties in using the legal bases in the Treaty, the EU should utilise the Treaty provisions already available in the form of the enhanced cooperation mechanism. This does not eradicate the question of EU competence or the fact that if the EU wants to act at all it has to deal with Member State sovereignty head on. However, it is a better option than using the awkward provisions of Article 116 TFEU and a necessary opportunity to address the problems caused by the unanimity criteria contained in Articles 113 and 115 TFEU by directly providing for the non-participating, 'holdout', or 'carve-out' Member States, to be accommodated.

[41] Article 327 TFEU.
[42] Anzhela Cédelle, 'Enhanced cooperation: A way forward for tax harmonisation in the EU?', Oxford University Centre for Business Taxation, Working Paper 15/33
[43] Carlo Garbarino, 'Harmonization and Coordination of Corporate Taxes in the European Union' (2016) 25 EC Tax Rev 277, 290.