Social Justice and Tax Competition in the European Union.

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Abstract

This dissertation addresses several normative questions about tax competition between the European Union Member States. My answers to these questions are part of a wider way of thinking about justice in the EU. I maintain that this economic phenomenon should be regulated in order to of protect a social minimum within each Member State and to protect the fair value of citizens' political liberties. I distance myself from proposals which seek to stop countries from being able to affect each other through this form of competition. In this vein, the dissertation analyses and rejects a given proposal that seeks to regulate tax competition in favour of an ideal of fiscal self-determination. After advancing my own proposal, I develop it by locating within a conception of justice for the EU. I maintain that the EU should intervene in the economic phenomena it promotes when these undermine the justice and legitimacy of Member States. The EU has a duty to intervene when this happens. I contrast my proposal with another conception of justice that, in essence, seeks to extend distributive principles that typically obtain within Member States to the EU. The dissertation draws on two different arguments in opposing the latter proposal. Finally, I maintain that there are several reasons why my normative proposal for the regulation of tax competition in the EU can be legitimately implemented. I assess my proposal against the main standards of political legitimacy and conclude that this is indeed legitimate. I also ambitiously claim that it may, in fact, enhance the legitimacy of both EU Member States and the EU itself.

Resum

Aquesta tesi desenvolupa una valoració filosòfica de la competició fiscal entre els estats membres de la Unió Europea. Aquesta valoració s'emmarca en una determinada concepció de justícia distributiva en clau europea. Sostinc que aquest fenomen econòmic ha de ser regulat a fi de protegir un mínim social a cadascun dels estats membres i de protegir el valor just de les llibertats polítiques dels ciutadans. Rebutjo propostes que pretenen impedir que els països es puguin afectar els uns als altres volgudament mitjançant aquesta mena de competició. En aquest sentit, la tesi ressegueix i rebutja un altre plantejament que promou un ideal d'autodeterminació fiscal. Després que desgrani la meva proposta, la ubico en una concepció de justícia distributiva a nivell europeu. Defenso que la Unió Europea ha d'intervenir en els fenòmens econòmics que afavoreix quan la justícia i la legitimitat dels estats membres en surten malmeses. La institució adquireix el deure d'intervenir-hi en cas que això es produeixi. Contrasto la meva proposta amb una altra concepció de justícia que, sumàriament, trasllada els principis distributius que s'impulsen en el marc dels estats membres cap a la Unió Europea. La tesi empra dos arguments a l'hora de rebutjar aquest altre plantejament. Finalment, defenso que hi ha un reguitzell de raons per les quals la meva proposta filosòfica per la regulació de la competició fiscal a la Unió Europea és susceptible de ser impulsada legítimament. En aquest sentit, valoro la meva proposta a l'empara dels principals estàndards de legitimitat política.

Contents

Introduction

My aim in this dissertation is to answer various normative questions about the regulation of tax competition in the European Union. Economists have extensively discussed the question of tax competition. Debates have focused on the effects of competition on, for example, employment and income distribution. They have also discussed the circumstances in which countries may profit from tax competition. Some predict that developing countries, for example, in some scenarios may profit from competing fiscally while others maintain that this practice is most damaging precisely for these states.

These social scientific debates are also of considerable importance for political philosophy. Theories that are concerned about what individuals are owed by social institutions often draw on tax-and-transfer schemes to explain how a given conception of social justice can be implemented. As we shall see, when countries attempt to attract international investment by lowering rates of corporate taxation they are competing over the means required by institutions to honour its duties of justice towards its citizens. This may raise dramatic problems from the point of view of political morality. It is therefore surprising that political philosophers, with some notable exceptions like Peter Dietsch and Thomas Rixen, have not delved into the normative problems that are raised by the phenomenon of tax competition.

The questions addressed by this dissertation bridge two important topics. The first, as noted, is the question of the ethics of tax competition and the second is the issue of which conception of justice should obtain in the EU. This question too is undertheorized although some political philosophers have done important work, including Philippe Van Parijs, Andrea Sangiovanni and, more recently, Juri Viehoff.[1] No less importantly, several theorists have written about the empirical question of whether the EU can be said to pursue or have pursued a conception of justice. Andrew Williams (Law, Warwick), for instance, has focused on case law on the part of one of the EU's most important decision-

[1] See Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019) and Andrea Sangiovani, "Solidarity in the European Union," *Oxford Journal of Legal Studies* 33 (2013) and Juri Viehoff, "Eurozone Justice," *The Journal of Political Philosophy* (2018).

making bodies, the European Court of Justice and thoroughly analysed whether it may be said to pursue any values.[2]

Most of the discussion about the EU has focused on two distinct questions. Firstly, the question of whether there is a real European *demos*, or people, or political identity. Secondly, the question of whether there is a democratic deficit in the EU. These questions are related to the discussion contained in this dissertation, but it is only partially connected with the debate about what conception of distributive justice should guide the design of the EU.

This dissertation is, therefore, in one way particularly ambitious. Its topic lies at the intersection of two very neglected discussions in analytic political philosophy. It is, concomitantly, also modest given that it does not seek to exhaust the discussion about the ethics of tax competition, nor does it aspire to present a full-fledged conception of distributive justice for the EU. I avoid any such attempt not just due to limited time and space but also because I take a position according to which the EU should not impose one unique conception of justice across all Member States.

Before I describe my proposals in more detail, a few clarifications about why I focused on Peter Dietsch's position are in order. Dietsch's monograph, which constitutes a development of ideas he advances elsewhere with his co-author Thomas Rixen, constitutes the philosophically most advanced treatment of the problem of tax competition to date.[3] Not only does Dietsch defend a set of principles for regulating tax competition, he also grounds his proposals by appeal to broader claims about the international system of states and state sovereignty.

Because of its prominence and appeal, I begin this dissertation with an analysis and critique of Dietsch and Rixen's proposals. Doing so also helps to explain the spirit of my own proposal. Having said that, I urge readers to avoid considering my proposal as an attempt to rival that of Dietsch and Rixen. Their proposal applies to global tax

[2] Andrew Williams, "Taking values seriously," *Oxford Journal of Legal Studies* 29 (2010).
[3] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015).

competition. Mine, on the other hand, is restricted to the EU. Neither author is precluded from advocating, say, as a transitional step to their global idea, a form of regulation for European regional tax competition that differs from the one they currently advance for global tax competition. They could coherently embrace my criticisms of their proposal if someone suggested it should be mechanically to the European context.

To understand the background to my view of tax competition, as well as considering the most developed rival view, it is also profitable to bear in mind how views differ by providing distinct answers to a set of key questions. Firstly, there is a question of whether institutions should protect countries from the costs of international competition, or whether the fact some agents lose from the practice of strategic tax-setting qualifies as a morally objectionable type of harm. Secondly, there is a question of whether tax competition should be regulated to protect the ability of countries to tax and to generate revenue at the level they see fit or is it, instead, more valuable to protect certain outcomes, such as avoidance of absolute deprivation. Dietsch and Rixen rely on a conception of tax sovereignty that seeks to protect, firstly, the ability of countries to determine the size of their public budgets relative to gross domestic product (GDP) and, secondly, the level of domestic redistribution.

There are, further to this, more specific debates within the ethics of tax competition. Both theorists and international legal practice have long considered that there is a normatively relevant distinction between the practice of attracting real economic activity through lowering corporate rates of income taxation and the practice of profit-shifting. The latter is the practice of enabling companies to set up subsidiaries in low-tax jurisdictions where they register their profits. This is often considered to be the most objectionable form of tax competition, alongside the practice of simply deceiving the tax authorities, in virtue of the fact that no economic activity of real substance takes place in the jurisdictions where taxes are paid. Tax ethicists and lawyers have assumed that this constitutes a particularly objectionable practice. However, they have seldom provided arguments for this assumption. One of the objectives of my dissertation, in this respect, is to attempt to present a more plausible account of when the practice of profit-shifting is objectionable.

It is also vital that this dissertation take a position on the question of what conception of distributive justice should obtain in the EU. As noted above, this is not an issue that has been greatly explored by political philosophers. I have chosen to contrast my position, however, with the work of the political theorist who has perhaps most written about the subject, Philippe Van Parijs. My reasons for doing so are twofold. Firstly, he has written extensively about the matter. Secondly, his position is, in a certain sense, markedly different from mine and I think that this contrast is a good explanatory device in presenting my own position. The central dispute, I believe, is between the idea that one single liberal conception of distributive justice should obtain across the entire the EU or whether the EU should enable states to each pursue their own conception of justice insofar as it hails from a family of liberal conceptions of justice.

The dissertation would be incomplete if it did not reflect on questions of political legitimacy. Regulating tax competition standardly involves the use of authoritative directives, and those who propose regulation need to reflect on the conditions under which such directives may be legitimately implemented. In doing so, I will reflect on some of the main standards of political legitimacy and whether my proposal can satisfy some of them. Moreover, given that my proposal is addressed to the EU, I hope that it carries some of the weight that the Union already has in this respect. I shall argue that my proposal can satisfy various standards of political legitimacy, including ones that appeal to democracy, state consent, and the service provided by authority in enhancing subjects' conformity with sound reasons.

Given that I hope that the legitimacy of my proposal can be based partly on the EU's current legitimacy-making features, I need to address the question of the EU's democratic deficit. This is a long and protracted debate and one that has several manifestations. There is no definition of what constitutes a democratic deficit. I try, nevertheless, to summon some of the versions of this criticism that could present a challenge to my proposal. I have sought to argue that my account is compatible with democracy. I add, however, that even if it were not approved democratically, this might not present a fatal challenge to the legitimacy of my account.

In Part I present an account of the phenomenon of tax competition and of the sense in which it gives rise to winners and losers. I explain that structural constraints are such that some countries are likely to profit from tax competition whereas others are likely to lose from it. Given that the regulation of this problem cannot, therefore, be based exclusively on appeal to Pareto efficiency, I subsequently present one proposal drawing on the work of Dietsch and Rixen. This proposal seeks to disallow tax competition when it is carried out with strategic intentions and when it is harmful to a country's so-called fiscal self-determination. Dietsch argues that both these conditions need to be met for tax competition to be impermissible. Otherwise the account would be too demanding, or so he argues.

After I present Dietsch's account, I advance some objections to it. One can divide the objections I present to the account in a number of different ways, but one valid way to do so is to class them into objections that are based on the implausibility and ones that are based on excessive burdens. The notion that Dietsch's account is excessively burdensome towards countries draws, partly, on the idea that the simple loss of some fiscal self-determination (albeit when it is a result of strategic intentions) is not grave enough to render tax competition unjust. Further to this, it could also be the case that the country that emerges victorious from the process of tax competition is a social democratic one whose wise and opportune investment in science and public infrastructure successfully attracts capital. This may conceivably limit the ability of a rival libertarian state to implement its libertarian economic programme. Should this count as an impermissible form of competition? In this Part I also question whether the interests which this proposal seeks to secure are valuable. I question whether determining the size of the public budget relative to GDP is a valuable goal.

I also briefly refer to a more recent proposal, that of Andrea Cassee, for the regulation of tax competition.[4] My discussion of his proposal focusses predominantly on the philosophical elements of his argument. Ultimately, I maintain that Cassee does not

[4] Andrea Cassee "International tax competition and justice: The case for global minimum tax rates," *Politics, Philosophy & Economics* 18 (2019).

distance himself sufficiently forcefully from the proposals made by Dietsch and Rixen, as he also relies on a given conception of fiscal self-determination.

Part I concludes as I mention the scenarios in which the EU should intervene and regulate tax competition. Firstly, I mention that the EU should regulate tax competition when it proves to be harmful to the interests of all the parties that are involved. The second scenario in which the tax competition should be regulated is one in which it leads to individuals falling below a social minimum. Finally, I argue that the EU should also intervene when it produces inequalities that undermine the fair value of political liberties.

Part II addresses the question of what conception of justice should inform my proposal for the regulation of tax competition in the EU. I begin this Part, however, with a discussion of the EU's track record from the standpoint of liberal conceptions of justice, broadly speaking. I devote one section to the discussion of its successes and another to its failures. A lot of this discussion focusses on decisions made by the European Court of Justice as it has been a key actor in promoting market integration as the EU's cornerstone value.

I subsequently look at one candidate proposal for a conception of justice for the EU, that of Philippe Van Parijs. I also describe his rationale for advancing such an ambitious proposal. This discussion is followed by the presentation of my own proposal. My proposal maintains that the EU should not seek to establish a single conception of justice across all its Member States. The maintenance of liberal democratic institutions should translate itself, at least, into two key requirements. The first is the erection and maintenance of a social minimum in each Member State. The second requirement is the protection of the fair value of political liberties within each Member State. I argue that my proposal is more attractive than that of Van Parijs with respect to the values of self-determination and stability. In doing so, I argue why these are important values to which the EU should attend.

Part III of the dissertation explores whether my proposal for the regulation of tax competition may be implemented legitimately. As mentioned before, this discussion

begins with a discussion about whether the EU suffers from a democratic deficit that could impair its ability to regulate tax competition in its midst. In this Part, however, I do not merely discuss how my proposal fares from the standpoint of three of the main standards of political authority. It also addresses one specific objection that may conceivably be levelled at my proposal, one from subsidiarity. Subsequently, it this part also argues that my proposal may be legitimacy-enhancing.

Part I: When should the EU regulate Tax Competition?

1. Introduction

Tax competition has become an issue in recent decades. The regime that governs corporate taxation has mostly been the same since the beginning of the twentieth century yet large companies did not tend to avoid tax. This started to change in the late 1960s and early 1970s in a context of rising inflation and declining corporate profits. The US entered a recession as a result of the budget-tightening measures the US government put in place in the context of the Vietnam War. Concomitantly, globalisation opened up new possibilities for tax competition. US companies, by way of example, only made 15% of their earnings abroad. When a company makes its entire earnings domestically, it cannot easily set up a shell company in, say, the Cayman Islands and claim that it carries out important economic activity there. However, in the 1990s the share of earnings made by US companies outside of the US skyrocketed. Similarly, research demonstrates that the share of foreign income in total company income of German firms has increased substantially since the 1980s.[5] Tax competition in the form of profit-shifting was governed by a legal system that was set up in the 1920s, shortly after the erection of the corporate tax, and that has since remained mostly unchanged. The ideological backdrop was, of course, very favourable to profit-shifting as the Berlin Wall had recently fallen. These figures pertain mostly to the US but they are indicative of the phenomenon of profit-shifting.

The EU's approach to the regulation of tax competition is currently lax. The free movement of capital is one of the central planks of the EU's legal and institutional order and it was greatly advanced by the emergence of new telecommunications technologies, which enabled the creation of financial markets that worked on a 24-hour basis. This helped to make the taxation of capital and of income from financial assets difficult. Technical and legal barriers have also been removed, rendering companies and their production bases more mobile. As per the EU's rules, moreover, matters in taxation must obtain the unanimous support of all Member States and this allows low-tax jurisdictions to block attempts at reform. In 2018, however, the European Commission and the

[5] Philipp Genschel, "Globalization, Tax Competition and the Welfare State," *Politics & Society* 30 (2002): 255.

European Parliament called for a common consolidated corporate tax base within the EU. More will be said about what this entails in Section 6 of Part III. It is, however, a step in the direction of defining a common tax base for corporate income in the EU.

Firstly, I will describe the problem that tax competition represents. Secondly, I will present some of the most prominent normative views on this debate. Thirdly, I will present my own positive proposal for a new philosophical account in favour of the regulation of tax competition in the European Union. I should note that I will analyse and reject philosophical accounts that were designed for the regulation of tax competition globally and not for the EU specifically. It is, therefore, best to read my critical remarks as comments about why such proposals would not be suitable for an EU-specific regulatory scheme. Given the prominence of these proposals and how rich they are, I believe that it is opportune to conceive of these positions as candidates for principles that should regulate tax competition in the EU. Perhaps not much will turn on this substantively, but rigour demands that I note that the authors' proposals have a global reach.[6] A final word of caution is that the purpose of this dissertation is not to advance a specific taxation regime. Instead, it seeks to advance part of what must be the right philosophical account for regulating tax competition in the EU. While this may not logically entail any specific taxation regime, it is compatible with a wide range of options, including, possibly, a degree of harmonisation of taxation rates. If harmonisation is the right regime for regulating European tax competition, it must conform to the principles that I outline in this dissertation.

1.1 Background of tax competition

I shall understand tax competition as the process by which countries compete to attract non-human capital through taxation. There is evidence that capital owners are attracted by lower tax rates. They are, of course, also exercised by several other factors, such as infra-structure and education. Taxes, however, also matter and there is evidence that they

[6] Andrea Cassee, "International tax competition and justice: The case for global minimum tax rates," *Politics, Philosophy & Economics* 18 (2019): 254.

matter more today than they did several decades ago.[7] The capital stock that one can find in so-called tax havens is growing at a faster rate than the number of people that are employed by multi-national firms in low-tax places.[8] There is no consensus about the definition of tax competition. Similarly, there is no consensus about harmful tax competition. Lilian Faulhaber notes that "although there was a short-lived consensus that harmful tax competition at least included preferential regimes that granted lower rates to geographically mobile income if those regimes were either secret or not open to domestic taxpayers, there was still no agreement over what else this term included, and the international community soon decided that this definition was too narrow".[9]

It is important to consider that tax competition produces winners and losers among states. In order to better grasp this, we will have a brief look at the economic picture that tax competition generates. Peter Dietsch's account contains an important presentation of the different incentives that states face under tax competition. He importantly stresses that most of the analyses of tax competition suggest that it is an instance of a prisoner's dilemma.[10] A prisoner's dilemma is one type of collective action problem in which rational agents fail to achieve that which is in the interests of each agent. A prisoner's dilemma has three general features. Firstly, each agent has a dominant strategy, the outcome of which is better for her regardless of the strategy that is pursued by the opponent. Secondly, the pursuit of the dominant strategy produces a suboptimal or a Pareto-inefficient outcome since there exists a feasible alternative outcome in which each agent would be better off. Finally, given that the dominant strategy is the rational choice, each agent acts rationally in making all parties worse off than is necessary.

This would suggest that "despite the fact that the Pareto-optimal outcome is the cooperative one, where the two countries do not compete on taxes", the suboptimal Nash

[7] Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: W.W. Norton & Company, 2019): 76
[8] Ibid
[9] Lilian V. Faulhaber, "The Trouble with Tax Competition: From Practice to Theory," *Tax Law Review* 71 (2018): 359.
[10] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 5.

equilibrium where they will end up is that of tax competition.[1112] However, in real-world cases, small countries have an advantage with respect to larger ones when it comes to tax competition. Dietsch explains that "while it is true that the Nash equilibrium is still the collectively suboptimal scenario of tax competition", it is not true that countries with both small and large populations prefer the co-operative outcome to the Nash equilibrium of tax competition.[1314] This, he notes, is a consequence of the interaction of two different effects, the tax rate effect and the tax base effect. The tax rate effect consists of the lesser collection of revenue (both total and average), ceteris paribus, that occurs because of the lowering of the taxation rates. The tax base effect, on the other hand, consists of the obtention of greater capital inflows that occurs when a tax rate is lowered, thus leading to a greater tax base and to greater revenue collection. The question of whether a country profits or loses from tax competition turns on which of these two effects dominates. Theory says that, in the case of large countries, the tax rate effect tends to predominate, whereas in the case of small countries the tax base effect tends to dominate. In the case of the latter, the gains from capital inflows tend to compensate for lost revenue. This explains the reluctance of small countries to cease to engage in the practice of tax competition. There is, however, a point at which the practice of tax competition ceases to be profitable even for small countries. This occurs because, at some point, the tax base effect ceases to compensate for the tax rate effect.

The previous analysis suggests that tax competition should at least sometimes be thought of as a form of asymmetric tax competition and not as a form of prisoner's dilemma.[15] Countries' position with respect to tax competition and tax co-operation will, therefore, vary as a function of the size of their populations. In virtue of the fact that the tax base effect tends to dominate the tax rate effect, countries with smaller population sizes are more disposed to compete fiscally. Their small size means that they are likely to profit

[11] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 55.
[12] The Nash equilibrium is a concept of game theory in which the optimal outcome is one in which no player has an incentive to depart from his chosen strategy after considering her opponent's choice.
[13] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 56.
[14] Dietsch takes a collectively sub-optimal state of affairs to be one in which the aggregate extent of the fiscal self-determination of countries is reduced.
[15] Vivek H. Dehejia and Philipp Genschel, "Tax Competition in the European Union," *Politics & Society* 98 (1998): 424.

from tax competition for two reasons. Firstly, they can obtain a greater amount of total tax revenue than they would otherwise. Secondly, their small population size means that the average revenue is greater. It is also worth noting that, according to some models, inequality is likelier to increase in large countries than in small countries.[16]

We should note, however, that the practice of undercutting a larger country's tax base and obtaining a disproportionately larger share of the internationally mobile tax base does not necessarily ensure that a small country will obtain higher capital tax revenues; the capital tax rates in question may be very low after all. It will likely, however, at least increase the capital-labour ratio, foster demand for labour and result in higher employment, higher wages and higher tax reveues from labour and consumption.[17]

Countries have responded to interactive tax-setting by shifting the taxation burden from capital to labour and consumption. Given that the concentration of capital assets is much greater than that of labour income, this makes overall taxation schedule less egalitarian. Countries have been able to maintain their levels of revenue, therefore, by becoming less egalitarian. The other change to the distribution of the tax burden between national taxpayers has consisted of relaxing the burden of multinational enterprises at the expense of nationally organised small and medium-sized enterprises. The other forms of taxation to which governments are expected to turn to are indirect taxation, such as VAT or sales taxes.

Some countries, however, may not even have the administrative apparatus with which to mitigate the revenue losses from tax competition.[18] They may not have a sufficiently strong tax-collection structure with which they can collect taxes. Expenditures on the social provision of health and education have, furthermore, an equalizing effect. Cutting

[16] Stefan Traub and Hongyan Yang, "Tax Competition and the Distribution of Income," *Scandinavian Journal of Economics* 122 (2019): 112.
[17] Philipp Genschel, Hanna Lierse and Laura Seelkopf, "Dictators don't compete: autocracy, democracy and tax competition," *Review of International Political Economy* 23 (2016): 292.
[18] Philippe Genschel and Laura Seelkopf, "Did they learn to tax? Taxation trends outside the OECD," *Review of International Political Economy* 23 (2016): 34. The authors note that most non-western countries levy a personal income tax, for example, but it does not have either the same revenue-raising capacity or symbolic significance of that in its western counterparts.

back on them may have an inegalitarian effect.[19] Dietsch states that cuts in government programmes affect the opportunities that individuals have at their disposal and that if "the equalizing effect of spending on health and education is compromised, this not only has knock-on effects for the distribution of income but, more importantly, it constitutes an injustice in its own right".[20] Rate cuts in developing countries cannot be refinanced by broadening the tax base; the tax base has fallen in many developing countries. In Ghana, for example, foreign companies have a ten-year tax-holiday after which they pay an 8% tax on profits.[21] This is problematic as corporate taxes are a handy tool for developing countries as their administration and enforceability is smaller than those of personal income taxes.[22] In OECD countries, nominal corporate tax rates have fallen substantially: from an average of 50% in 1975 to an average of 25.7% in 2010. Over the same period, nominal top personal income tax rates have fallen from 70% to 41.4%.[23]

There is evidence that the fall in the average of corporate tax rates is attributable to the practice of tax competition. Foreign direct investment and the assignment of profits to subsidiaries in other locations is extremely sensitive to international tax rate differentials. Corporate tax rate choices vary constantly as a function of neighbouring countries' decisions, and this is particularly clear among countries of regional institutions such as the European Union. As Philipp Genschel and Laura Seelkopf note, however, international competition is far from the only factor that matters with respect to the setting of corporate tax rates.[24] Factors such as infrastructure, access to technology, an educated labour force and social and political stability also play an important role.[25]

[19] George R. Zodrow, "Tax Competition and Tax Coordination in the European Union," *International Tax and Public Finance* 10 (2003): 665.
[20] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 52.
[21] Thomas Rixen, "Tax Competition and Inequality: The Case for Global Tax Governance," *Global Governance* 17 (2011): 453.
[22] Ibid.
[23] Peter Dietsch and Thomas Rixen, "Tax Competition and Global Background Justice," *The Journal of Political Philosophy* 22 (2014): 153.
[24] Philip Genschel and Laura Seelkopf, "The Competition State: The Modern State in a Global Economy," in *The Oxford Handbook of Transformations of the State*, eds. Stephan Leibfried, Evelyne Huber, Matthew Lange, Jonah D. Levy and John D. Stephens (Oxford: Oxford University Press, 2015): 241.
[25] Philipp Genschel and Peter Schwarz, "Tax Competition: A Literature Review," *Socio-Economic Review* 9 (2011): 349.

In the EU-28 countries, the average corporate rate of taxation decreased from 35% to 21.3% whereas in the EU-25 group of countries the rate fell from 38% to 24.2%.[26] This can be explained by increased tax competition and the mobility of taxpayers alongside economic integration.[27] Some argue that the sensitivity of foreign direct investment in Europe is greater than in the rest of the world.[28] Economic integration in the EU, as well as enlargement in the past, have fuelled tax competition.[29]

It should also be noted that not all small countries have an incentive to compete fiscally. This is so for political reasons. Non-democratic states have neither the same willingness nor the same ability to compete.[30] Democracies have incentives to compete if it benefits the median voter whereas autocracies, to an extent, may be more concerned about pleasing the elites on whose support they depend and which tend to be much wealthier than the majority.[31] The attitude of autocracies towards tax competition depends, to an extent, on the attitudes of elites towards capital inflows. Some autocracies may rely greatly on foreign capital and multinational groups, but others may be more concerned with short-term increases of defence budgets.[32] Other small autocracies may also find a convenient instrument in high capital tax rates as they may reward loyalty through selective tax exemptions.[33] Autocracies may be hampered, however, in their ability to compete as the usual absence of the rule of law means that investors tend to be more wary of arbitrary violations of property rights.[34] They are less credible before the eyes of international investors. On the other hand, it is also worth noting that there is evidence that there is a positive association between democratic institutions and redistribution and

[26] Askoldas Podviezko, Lyudmila Parfenova and Andrey Pugachev, "Tax Competitiveness of the New EU Member States," *Journal of Risk Management* 12 (2019): 4.
[27] Ibid: 4.
[28] Philipp Genschel and Peter Schwarz, "Tax Competition: A Literature Review," *Socio-Economic Review* 9 (2011): 349.
[29] Philipp Genschel, Achim Kemmerling and Eric Seils, "Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market," *Journal of Common Market Studies* 49 (2011): 585-606.
[30] Philipp Genschel, Hanna Lierse and Laura Seelkopf, "Dictators don't compete: autocracy, democracy and tax competition," *Review of International Political Economy* 23 (2016): 294.
[31] Ibid.
[32] Ibid: 296.
[33] Ibid: 296.
[34] Ibid: 297.

the adoption of direct progressive taxes.[35] These considerations, however, are unlikely to beset our project, as our focus is the EU and all its Member States are democratic.

2. Reflections about tax competition

Before we analyse Peter Dietsch and Thomas Rixen's proposal in greater depth, we should reflect briefly on the functions that taxation can perform. As Dietsch says, taxation can provide at least three fundamental services.[36] Firstly, taxation raises revenue to finance government spending. Such spending is supposed to fulfil an allocative function, particularly geared to the areas where market allocation does not produce efficient results. This "includes the provision of public goods, addressing externalities, competition policy, encouraging or discouraging certain kinds of economic behaviour, and so on".[37] Secondly, taxation represents an instrument that redistributes income and wealth and thereby implements a given conception of social justice. Virtually all theories of justice draw on tax-and-transfer regimes to implement their conception of what institutions owe individuals.[38] Finally, taxation should be conceived of as an instrument that can stabilise and smoothen the business cycle by contracting economic policy during years of boom and by putting in place expansionary policies during busts. We must now look at the main forms of tax competition.

One of the ways in which governments compete is by setting up so-called offshore tax havens, which offer zero or very low tax rates to individuals who seek to hold bank accounts in such jurisdictions. A key aspect of such havens is that they are usually governed by strong bank secrecy rules and "certain legal constructs" that enable individuals to hide ownership "vis-à-vis the tax administrations of their countries".[39] This

[35] Hanna Lierse and Laura Seelkopf, "Democracy and the global spread of progressive taxes," *Global Social Policy* 20 2 (2020): 178.
[36] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 12-13.
[37] Ibid: 13.
[38] This is the case of both John Rawls' Justice as Fairness and Ronald Dworkin's 'Equality of Resources' as espoused in Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000).
[39] Peter Dietsch and Thomas Rixen, "Tax Competition and Global Background Justice," *The Journal of Political Philosophy* 22 (2014): 154.

often takes the form of instituting a range of shell companies that make life hard for fiscal forensics teams. One particular way of evading taxation, "if you are a respectable person and you do not want to set up your tax avoidance structure in some remote little island" is to establish corporate vehicles without proof of identity and to, subsequently, establish bank accounts for these corporate vehicles.[40] The fact that it is always illegal is a distinctive element of this type of tax competition. Other forms of tax competition may not be illegal. In fact, one of the reasons why the effects of tax avoidance of this kind is hard calculate stems from the fact that it is illegal. Dietsch notes that "greater transparency of personal and corporate financial data would also help" and that "it might even make these calculations superfluous by handing tax authorities the means for a more effective tax collection".[41]

A second way of competition consists of allowing and encouraging transnational corporations to assign profits obtained in one country to subsidiaries in another country that taxes such profits to a lesser degree. The real economic activity remains in the former country. There are several techniques through which this can be done. One of them is that of transfer pricing. In line with the terms of some transfer-pricing arrangement, one company may decide to sell products or services to some of its subsidiaries. Although such transactions should be carried out with full respect for the arms-length standard (ALS) for intra-firm trading, the principle which decrees that such transactions should be carried out at market prices, the sold products are often not sold at lower prices with the objective of minimising the tax burden. One other technique through which this particular form of tax competition is carried out is referred to as 'thin capitalization' and consists of a shift from equity to debt finance and occurs when a high-profit arm of a multinational takes a loan from a low-profit subsidiary, based in a low-tax jurisdiction, which enables the high-profit subsidiary to write off the interest it has to pay on the loan from its tax bill. The interest earned on the loan in the other subsidiary will be subjected to very low effective tax. Gabriel Zucman and Emmanuel Saez note that this particular form of tax

[40] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 37-38.
[41] Ibid: 196.

competition started to take off in 1969 when the US entered into a recession when the government increased taxes to combat the budget deficit that ensued the Vietnam War.[42]

Profit-shifting became possible against the backdrop of a legal system erected in the 1920s, shortly after the invention of corporate income tax. This system established that the subsidiaries of a multi-national firm should be considered separate entities. One of the ways through which firms avoid the arm's length principle consists of the internal sale of assets and services that do not have a market price. These include things like logos, trademarks and management services. The fact they have no clear market value means that the arms'-length principle cannot be enforced. The prices that companies charge within themselves are those that maximise tax savings. The accountants that propose these prices and that certify them are paid by the companies themselves. High profits end up being recorded where taxes are low and low profits are booked where taxes are high. Google, for example, sold its search and advertisement technology to Google Holdings, a subsidiary incorporated in Ireland, that is, nonetheless, a tax resident in Bermuda for Irish tax purposes.[43] On the other hand, Google's subsidiaries in Germany and France, for example, pay billions of dollars in royalties to Google Holdings in order to obtain the rights to use the "so-called Bermudian technology, reducing the tax base in Germany and France, and increasing it in Bermuda by the same amount".[44] This form of corporate tax-dodging, Zucman and Saez maintain, is simple and has the predictable consequence of recording paper profits in subsidiaries in low-tax places, employ few workers and have little capital.[45] Of course if companies are taxed as consolidated entities and not subsidiary by subsidiary, there is no point in computing the prices of transactions between subsidiaries. This, in fact, informs the approach that has been taken by the EU in the form of a Common Consolidated Corporate Tax Base.

Some of these techniques are not illegal and constitute a legal form of tax avoidance. There have also been several cases of governments colluding with multinational enterprises in the act of helping shift profits to low-tax jurisdictions. Such support has

[42] Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: W.W. Norton & Company, 2019): 69.
[43] Ibid: 72.
[44] Ibid: 72.
[45] Ibid: 73.

often taken the form of tax deals struck with multinational enterprises which lower their tax bills.[46] The transfer of profits to low-tax jurisdictions – a decision which is very sensitive to taxation – is, to a great extent, a function of nominal tax rates. There are, however, other specially designed regimes to attract so-called 'paper profits'. This is the case, for example, of the Special Financial Institutions regime in the Netherlands.[47]

We should note that addressing only these two forms of tax competition is unlikely to solve the problem. This is because it would predictably intensify a third and final form of tax competition. In fact, we can already observe that to some extent. The OECD launched an initiative called "inclusive framework on base erosion and profit shifting" which constitutes the most ambitious attempt at reform to date to deal with profit-shifting.[48] Not only has it been mostly unsuccessful, it has also led to reductions in the corporate rates of income taxation. Since the launch of the OECD's initiative, Japan, the United States, Hungary, and several Eastern European State have carried out noteworthy reductions in their rate of corporate income taxation.[49] Finally, there is fiscal competition between countries for real economic activity. This is also known as competition for foreign direct investment. Two of the main ways through which this is done are the lowering of the corporate tax rate and the institution of a preferential regime for foreign corporations. This latter method serves, Dietsch notes, the advantage of protecting the revenue stream from domestic companies.[50] There is an important respect in which this third type of tax competition is different from the previous two we suggested. The other two types of competition do not involve a relocation of the actual economic activity.

3. A proposal

Regulation may often be justified on the grounds that it enables agents to move closer to

[46] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 42.
[47] Ibid.
[48] Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: W.W. Norton & Company, 2019): 80.
[49] Ibid
[50] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 43.

the Pareto frontier. In the cases of tax competition which are collectively self-defeating, the EU can indeed address competition based on moving agents closer to the Pareto frontier. In other cases, however, such arguments are insufficient to justify a regulation of tax competition. We must, therefore, appeal to a different set of considerations. Distributive principles are a possibility. We will explore, in detail, the proposals advanced by Peter Dietsch and Thomas Rixen. I will focus on important elements of their proposal and not just criticise them in general. I should also clarify, however, that the ultimate objective of my account is to propose principles that regulate tax competition within the EU whereas the scope of Dietsch and Rixen's proposals is global. There will, therefore, be differences between their proposal and mine because of differences in scope.

The debate amongst proponents of competing proposals about regulating tax competition is marked by a fundamental division between those who maintain that the regulation of tax competition should appeal to a substantive theory of distributive justice and those who do not. My proposal lies in the former category. It is distinctive in the sense that it maintains that tax competition should be regulated when it undermines the justice and legitimacy of EU Member States.

Before we examine their proposal in greater detail, one should note their proposals for tax competition may be the most elaborate, but they are not the first political or philosophical reflections about the phenomenon of tax competition. There are some generally accepted principles for the allocation of tax base, such as of residence in the case of individuals and the source principles for multi-national enterprises. These principles state that individuals and multi-national enterprises are liable for the payment of taxation where they reside and where their economic activity occurs, respectively.[51] These principles stand in need of justification and I will challenge them. Peter Dietsch and Thomas Rixen propose the following two principles of global tax justice:

[51] Peter Dietsch, "Whose Tax Base? The Ethics of Global Tax Governance," in *Global Tax Governance – What is wrong and how to fix it?,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 236.

"(1) Natural and legal persons are liable to pay tax in the state of which they are a member (the 'membership principle'). This requires transparency between taxpayers and their tax authorities, as well as between tax authorities (the 'transparency corollary');

(2) Any fiscal policy of a state is unjust and should be prohibited if it is both strategically motivated and has a negative impact on the aggregate fiscal self-determination of other states (the 'fiscal policy constraint')."[52]

Diestch commits to a view that says that tax competition is normatively problematic when it endangers *fiscal self-determination*. He proceeds to try and explain the different ways in which tax competition damages fiscal self-determination. He maintains that fiscal self-determination "covers two basic choices regarding the size of the public budget (the level of revenues and expenditures relative to Gross Domestic Product) and the question of relative benefits and burdens (the level of redistribution)".[53] Dietsch argues that effects of tax competition on fiscal self-determination are both predicted and supported by economic practice.[54]

He says that the problem of tax competition is tied to the existence of states.[55] Although he believes that a plausible justification for the existence of states may well exist, his monograph approaches the question at a lower level of abstraction and accepts the existence of states as a given.[56] Not only does he propose we accept the existence of states, he suggests that we accept them as having a certain degree of autonomy.[57] This does not mean, he maintains, that states should be written a blank cheque when it comes to exercising their autonomy.[58] This is because states have obligations and duties towards each other and towards their subjects. An obvious example of a restriction on states' autonomy that we all have reasons to accept is respect for human rights. He assumes, furthermore, that the states in his model are democratic and that democracy is a way to

[52] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 18.
[53] Ibid: 35.
[54] Ibid: 47.
[55] Ibid: 31.
[56] Ibid: 32.
[57] Ibid: 33.
[58] Ibid.

exercise their autonomy.[59] The whole point, he says, of self-determination is to give individuals a say over the decisions that affect them.[60]

In a subsequent piece, however, Peter Dietsch has recognised that a project such as his is weakened if he does not offer a plausible justification for the existence of states.[61] He opts for a mixed justification of the state. One one hand, the state can be justified by a concern with democracy and, on the other hand, by a concern with distributive justice. States may be justified if it is the case that they are an institutional device that best realizes the ideals of equal respect for persons and the ideal that individuals are the ultimate unit of moral concern. For all of the injustices that are associated with the existence of states, it may be the case that there is not an alternative institutional structure which best fulfils these ideals. Dietsch also provides a democracy-based justification for his proposal that supplements his case in favour of the existence of states.[62] In fact, he considers this argument more plausible. He argues that it is plausible that decentralization of power to states is a safeguard against the potential abuses of power on the part of a global government.[63] On the other hand, on the assumption that democracy is concerned about individuals controlling certain collective rules, institutions and procedures, one may think that it is important to establish a tight connection between individuals and the polity that issues decisions on these matters.[64] This also has the advantage of creating an incentive for individuals to invest themselves in their communities.[65] He notes, however, that these are not arguments for states as we know them necessarily. Instead, they are arguments in favour of a multi-layered structure of governance of which states may be a part. At any rate, he says that we may interpret states as a placeholder for one important level of governance that achieves a balance between deciding on issues centrally and locally.[66]

[59] Ibid: 34.
[60] Ibid.
[61] Peter Dietsch, "The State and Tax Competition: A Normative Response," in *Taxation: Philosophical Perspectives*, eds. Martin O'Neill and Shepley Orr (New York: Oxford University Press, 2018): 204.
[62] Ibid: 206.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid: 207.

Dietsch adds, however, that his "argument does not favour any particular role of the government in the economy, nor does it advocate any particular level of redistribution" and that, as far as his monograph goes, he does not call for higher or lower taxes, but that these choices should be available for the electorate to make via a democratic process.[67] Tax competition, he argues, is problematic because he wants to explicitly defer such decisions to the democratic process in a way that immunizes states from certain competitive pressures.[68] Fiscal self-determination, in the way that has already been defined above, is supposed to reflect the autonomy of states as far as fiscal matters are concerned. Dietsch's claim is that tax competition poses a threat to the autonomy of states, which is one of the given parameters of his account.[69] He explains that, for the most part, his conception of fiscal autonomy rests on democratic foundations as it reflects the supposed importance of citizens' fiscal choices. Dietsch maintains that fiscal self-determination is, furthermore, a requirement of states having effective sovereignty; he says that in our world states are formally sovereign with respect to taxation, but that they "de facto lose control over their fiscal policy".[70] For him, the appropriate level of effective or de facto sovereignty is, precisely, the ability to decide on the size of the public budget relative to GDP and to decide on the rate of redistribution.

Dietsch makes clear that his argument is not contingent upon a particular theory of either domestic or global justice and, in this sense, he cannot "appeal to some independent standard of justice to claim that the inegalitarian impact of tax competition is unjust".[71] It is interesting that he makes such a claim, given that one of the perverse impacts of tax competition that he signals in the introduction is the widening gap between rich and poor and between labour and capital.[72]

In other words, he cares about fiscal self-determination for several reasons. He seems to care about it because he thinks it derives from both democracy and effective sovereignty.

[67] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 13.
[68] Ibid.
[69] Ibid: 35.
[70] Ibid: 6.
[71] Ibid: 51.
[72] Ibid: 31.

Fiscal self-determination, however, is not the only thing that he cares about. His proposal for the regulation of tax competition also seems to embody a concern for fairness. That becomes evident in his statement of his first principle, the Membership Principle. Membership should be construed in the following sense: individuals and companies are members in countries where they benefit from public services and infrastructure and should pay taxes there.

Dietsch and Rixen argue that benefiting from public goods such as education and infrastructure places individuals and transnational companies within a co-operative venture – an economic nexus.[73] By benefiting from such cooperatively produced public goods they incur the obligation to contribute to their financing. They mention that, in the tax literature, there is a kind of agreement that a nexus of sorts is necessary to justify taxation, but that there is disagreement as to its nature.[74] There is also disagreement as to where it should be placed and that this is somewhat arbitrary.[75] We are asked to consider the case of a street with two health clubs. The first is a high-end club with expensive equipment and all sorts of freebies such as club towels and shaving equipment whereas the other one is a less fancy club that is a lot less resourced. The membership fee of the former is unsurprisingly much higher. Suppose that you are a member of the other club and that you find out that your membership card allows you to get through the turnstile of the club that is superior in quality. Suppose that you do so. Dietsch argues that, in this scenario, members of the superior club can reasonably maintain that you are acting impermissibly by free-riding on their membership fees and that the club can permissibly take action from stopping you from doing so.[76] He claims that this situation is comparable to the forms of tax competition that encourage shiting tax base without moving the underlying activity.[77] He says that "when a company uses the service of a country – that is, its infrastructure, human capital, and so on – to produce a certain commodity, but then

[73] Peter Dietsch, "Whose Tax Base? The Ethics of Global Tax Governance," in *Global Tax Governance – What is wrong and how to fix it?,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 236.
[74] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 84.
[75] Peter Dietsch, "Whose Tax Base? The Ethics of Global Tax Governance," in *Global Tax Governance – What is wrong and how to fix it?,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 236.
[76] Ibid: 81.
[77] Ibid.

shifts the paper profit made with this economic activity to low-tax jurisdictions through practices such as transfer pricing or thin capitalization, the citizens who finance these services have a legitimate complaint."[78] Dietsch emphasizes that both the Membership Principle and the Fiscal Policy Constraint must be a part of the solution to addressing competition. This is so partly because upholding the Membership Principle alone would intensify the latter form of tax competition that we identified, that of competition for real economic activity.[79]

The protection of the Membership Principle and of fiscal self-determination, however, still do not exhaust what Peter Dietsch is concerned about. He is not concerned only about outcomes. He says that to focus only on either the membership principle and the effect on aggregate fiscal self-determination would be excessive.[80] Dietsch is also concerned about intentions. He asks us to consider the case of a two-country world, consisting of England and Sweden. Suppose the English prefer a leaner public budget and a lower level of redistribution than the Swedes. This preference manifests itself in a lowering of the corporate rate of taxation. This may lead to a shift of the tax base from Sweden to England. In such a scenario the English continue to act according to the same fiscal preferences as before, whereas the Swedes now face a new fiscal constraint.[81] In the aggregate, he says, the fiscal self-determination of countries is reduced. This may not be the objective that is sought by England, but it is the effect that is produced. If we were to be concerned only about impeding reductions in aggregate fiscal self-determination, England would not be permitted to compete fiscally in this way. Therefore, "the candidate principle would place the entire burden of adjustment on England, thus undermining precisely the kind of fiscal sovereignty that the membership principle is designed to protect".[82] To do so, he argues, would amount to overshooting the target of the proposed reform and not distinguish fiscal interdependence from illegitimate tax competition.[83]

[78] Ibid.
[79] Ibid: 87.
[80] Ibid: 95.
[81] Ibid.
[82] Ibid.
[83] Ibid.

On the other hand, Dietsch does not want a reform proposal that is only focused on intentions. He says that the focus on intentions would have the important advantage of allowing the reform proposal to drive a wedge between mere fiscal interdependence and illegitimate tax competition.[84] He maintains, however, that it would suffer from an important drawback. The condemnation of strategic intent would generalise to forms of competition that went beyond tax competition, such as investments in infrastructure and in higher education. He asks to consider the case of strategic infrastructure investments, in particular:

"suppose Belgium invests in high-quality and specialized infrastructure in order to attract entrepreneurs from various countries, who benefit from the fact that many people and firms from the same sector are geographically close. Over time a highly interdependent cluster develops. These agglomeration effects will positively impact growth in the country. As a reaction, other countries may follow suit in promoting infrastructure or technology clusters. The result is a race to the top. While it is true that the initial move by Belgium temporarily violates the fiscal prerogatives of other countries, the resulting economic growth and tax revenues will allow the other countries to realize their preferences in terms of fiscal prerogatives in the long run. In these cases, there is no need to rule out strategic considerations."[85]

He concludes, therefore, that the focus on strategic intentions would too overshoot the target, albeit in a different way.[86] It would be unable to distinguish between regulatory competition with good collective outcomes from regulatory competition with bad collective outcomes. The constraints should be sensitive to both the intentions behind tax competition and to the consequences on *de facto* aggregate fiscal sovereignty.

He, therefore, suggests that both approaches be combined in one mixed constraint. With respect to the component of intentions, he suggests we should ask whether a country would still engage in tax competition if the benefits in the form of attracting the tax base

[84] Ibid: 96.
[85] Ibid: 97.
[86] Ibid.

of another country did not exist.[87] If the answer is yes, it is evident that the change in policy is not motivated by strategic considerations and is, therefore, legitimate. If the answer is no, it becomes evident that it is motivated by strategic considerations. The mere presence of strategic intentions is not sufficient, however, for Dietsch to deem this form of tax competition impermissible.[88] The permissibility of engaging in tax competition also depends on the causal impact of a specific fiscal policy on the fiscal prerogatives of the affected states. He asks us to consider whether a tax policy has a negative impact on the aggregate extent of fiscal self-determination.[89] He argues that there is not a feasible alternative which would allow us to assess fiscal autonomy trade-offs on a state-by-state basis and that the focus on aggregate self-determination is a good proxy for this.[90] It ensures, he says, that a net inflow of capital into the country has taken place.

To conclude, Dietsch and Rixen maintain that only fiscal policies that are strategically motivated and that have a negative effect on the aggregate fiscal self-determination of the affected countries should be prohibited. I will present several objections to Peter Dietsch and Thomas Rixen's views. One of these objections will be from a concern with excessive burdens put on states. The second will be an objection from a concern with plausibility and the third will be an objection from a concern with arbitrariness. I will begin by mentioning the argument from excessive burdens.

3.1 Objection from excessive burdens

The notion that Dietsch's principles can place excessive burdens on states can be expressed by the following thought experiment. Suppose we have a world comprised of two states: state A and B. The electorates of both states systematically vote along libertarian lines such that both states have a minute public budget and a very high level of inequality. There is a change in heart of the electorate in state A which decides it wants to embark upon a social democratic path. It raises taxes progressively and steeply and the state decides to carry out smart investment in science and higher education, attracting a

[87] Ibid: 98.
[88] Ibid: 96.
[89] Ibid: 99.
[90] Ibid: 100.

lot of the capital from state B. State B's loss of capital leaves it with no reasonable alternative but to similarly increase taxes progressively and respond by making similar state investments. Do we have reason to think that state B's loss of fiscal autonomy is objectionably violated? Does state B have reason to complain that its sovereign preference for libertarianism has been impermissibly jeopardised? Presumably not. This may suggest, as I shall later argue, that tax competition is objectionable in virtue of its distributive effects and not in virtue of the negative impact on fiscal autonomy.

Having said this, it may be the case that we if compare the economic progress of a social democratic state with that of a less social democratic we would arrive at a different conclusion. Suppose we run the same example and, in virtue of a social democratic state's successful investment in infrastructure and science, a competing social democratic state is left unable to implement the theory of justice that is democratically preferred by its citizens. Whether or not this is a permissible instance of competition depends, I believe, on what other options the social democratic state that loses the race has at its disposal. On the assumption that it still has at its disposal a range of liberal theories of justice from which to choose from, I do not think that the social democratic state that is defeated can maintain that it has been harmed objectionably. One could, however, consider a scenario in which the social democratic state that is defeated in the economic race can opt only for one possible theory of justice in virtue of competitive pressure from abroad. Is this an objectionable state of affairs? Imagine that the theory of justice that the defeated state could still implement would ensure that no individual would fall below a threshold of sufficiency and that excessive inequalities – capable of jeopardising the fair value of political liberties – would not be permitted. My conviction is that the defeated state does not have grounds for complaint. Insofar as a country is still able to fulfil liberal political goals, it does not seem to be problematic that the brand of liberalism it must now implement is not the one it would have liked to advance absent competition. In conclusion, Dietsch's account seems to offer undue protection to the libertarians from the strategic social democrats.

Further to this, there are many forms of competitive harm between countries which we seem to be intensely relaxed about. Presumably, there is a range of types of interaction

between different political units that generate economic externalities that we tend to consider permissible. What is distinctive about competition in tax rate-setting that warrants this kind of protection? To understand why the question is relevant, consider other forms of international competition, such as publicly-funded higher education and investment in infra-structure. Such strategic policies also bring economic costs to other states and yet we do not seem to have convictions in favour of protecting states from them. Dietsch does argue that there is a normative difference between a race to thetop in the form of investment in something like infra-structure and in a race to the bottom in the form of tax competition.[91]

It is not clear what the normative difference is between the two forms of competition. One can envisage a country losing out from competition in higher education badly to the point where it loses an important part of its tax base as a result of, say, a brain drain. Some countries are not well-equipped to compete in these sectors or they may try to compete in a way that is inefficient. We do not seem to have the conviction that countries should be protected from all the costs of these types of competition. These other forms of competition are, moreover, ones which also affect the ability of the citizenries of countries to democratically determine the size of their public budget and they affect the extent to which they can pursue a given policy of distribution of benefits and burdens.

Further to this, it is worth bearing in mind that Dietsch and Rixen's proposal is very demanding indeed. A country may lose redistributive capacity by a marginal amount. The upshot of Dietsch's argument is that a reduction, however small, in the responsiveness of states to their citizens' fiscal preferences amounts to an objectionable violation of fiscal self-determination. This does seem to be too demanding.

Their proposal is also implausible in terms of distribution. It is not obvious that the implementation of Peter Dietsch and Thomas Rixen's tax reform proposal would be beneficial from the standpoint of distribution. As noted by Laurens van Apeldoorn, tax competition, according to the data that Dietsch relies on, has led to a fall in the tax revenue

[91] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 97.

of low-income countries from 2.6% to 0.6% of GDP.[92] This difference is a very modest one when compared to the difference between the corporate tax revenues of high-income countries and those of low-income countries.[93] It cannot, therefore, be expected that the implementation of their tax reform would mean that the fiscal self-determination of low-income countries would approximate that of high-income countries. In this sense, their proposal is implausible in terms of distributional effects.

I should note that one of the flaws of Dietsch's views is not only that it does not consider distributive considerations that could more forcefully justify the conclusion that we should regulate tax competition. It is also a flaw that the view does not condemn a national government's exercise of fiscal self-determination with the deliberate intent of rendering society more inegalitarian and more unjust by a liberal egalitarian standard. It allows, for example, for a country to respond to defeat in tax competition by slashing corporate taxation, becoming drastically more inegalitarian as long as it does so without strategic intentions and the ability to decide on size of public budget and ability to decide on rate of redistribution are not undermined. Laurens van Apeldoorn has noted that Dietsch does not clarify how the notion of fiscal self-determination should be operationalised, but argues that it plausibly comes in degrees and that it would, therefore, be necessary to clarify how much fiscal self-determination each state should have access to for the international order to be just.[94] This is an issue on which Dietsch is silent. In this vein, Andreas Cassee asks the pertinent question of whether a state's effective fiscal self-determination depends on how well it can determine the size of the public budget relative to GDP or whether wealthy states enjoy a greater level of fiscal self-determination because they can attain a higher level of public spending in absolute terms.[95] One of the awkward implications about thinking about issues in this way is that it allows for a poor country to be maximally fiscally self-determining by shrinking GDP while keeping the public budget constant and inequality could be reduced simply by making everybody

[92] Laurens van Apeldoorn, "BEPS, tax sovereignty and global justice," *Critical Review of International Social and Political Philosophy* 21 (2018): 488.
[93] Ibid
[94] Ibid: 490.
[95] Andreas Cassee, "International tax competition and justice: The case for global minimum tax rates," *Politics, Philosophy & Economics* 18 (2019): 255.

poor. As Cassee notes, "it sounds counterintuitive that this should count as a sign of a high level of effective fiscal self-determination".[96]

When addressing the possibility that the rules and ethics of tax competition incorporate an explicitly distributive element, Dietsch and Rixen maintain that "attempting to assess redistributive obligations before the fair rules of the game have been determined amounts to a Sisyphean task" and that "redistribution to correct for an institutional bias and injustice is analogous to swimming against the current – it takes a lot more energy while getting you less far".[97] It is not clear what he means by this. Dietsch may be alluding to the fact that, as he more recently has elaborated, an adequate normative response to the question of tax competition has two components – a jurisdictional one and a redistributive one.[98] The jurisdictional response consists of a set of ground rules that apply to the fiscal structure under which countries and mobile economic agents operate.[99] On Dietsch and Rixen's view, the jurisdictional response consists of trying to secure the Membership Principle and the Fiscal Policy Constraint.[100] He also allows, however, for a redistributive response that consists of sharing tax revenues with countries that lose out from tax competition; it also consists of sharing revenue with countries that lose out in the sense that a constraint on global justice is violated.[101] This constraint will be clarified below. He argues that we cannot rely on the jurisdictional or the redistributive strategy alone. He maintains that an exclusively 'jurisdictional' strategy is not feasible given the difficulty in reforming the international community in view of establishing the principles that he favours.[102] Multilateral agreement of this sort, he notes, is hard to come by.[103]

On the other hand, an exclusively 'redistributive' approach – consisting of unilateral decisions to share a country's tax revenue with countries that lose objectionably from tax competition – ignores the counterproductive effect that unsatisfactory jurisdictional rules

[96] Ibid.
[97] Peter Dietsch and Thomas Rixen, "Tax Competition and Global Background Justice," *The Journal of Political Philosophy* 22 (2014): 17.
[98] Peter Dietsch, "The State and Tax Competition: A Normative Response," in *Taxation: Philosophical Perspectives*, eds. Martin O'Neill and Shepley Orr, eds. (New York: Oxford University Press, 2018): 214.
[99] Ibid: 215.
[100] Ibid.
[101] Ibid.
[102] Ibid: 216.
[103] Ibid.

exert on the inequalities that one is trying to address.[104] It amounts to 'swimming against the current' as there are calmer waters that we can navigate in order to achieve the same objective.[105]

It might be the case, however, that the optimal form of redistribution is one which allows for the practice of tax competition when it is duly regulated to ensure certain distributive scenarios. In the same way that the functioning of the domestic market, appropriately subjected to a certain kind of taxation system, can fulfil liberal principles of justice, a permission to compete fiscally that is accompanied by distributive rules may be able to fulfil international principles of justice. If the points I have been making thus far are sound, therefore, we have reasons to fight for a 'jurisdictional' solution that incorporates a stronger distributive element.

One of the scenarios which Diestch contemplates is that of developing countries which have been pushed into carrying out tax competition either explicitly or implicitly by international organisations such as the IMF and the World Bank.[106] Some of these cases may even involve the requirement of lowering taxation on capital as pre-condition for the attribution of bail-out packages.[107] There are, furthermore, other examples of countries whose reliance on the lowering of tax competittion has markedly improved its economic performance. Some of these countries may have high rates of extreme poverty. Dietsch is happy to concede that, before his institutional reforms are put into practice, countries in these circumstances should be allowed leeway to compete fiscally.[108] This, however, should not deter us from engaging with the possibility that some of the small, high-income countries of the EU may carry out tax competition successfully in order to maintain a social minimum and avoid excessive inequalities.[109]

[104] Ibid: 218.
[105] Ibid.
[106] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 205.
[107] Ibid: 205.
[108] Ibid: 206.
[109] Ibid.

More recently, Dietsch has clarified his position by recognizing that there are certain minimal demands of global justice that trump fiscal autonomy.[110] He argues that "while, as we have seen, a thick or substantial notion of global justice fails the test of pluralism, it is reasonable to assume that there are some global institutions and some level of deprivation that any plausible theory of justice views as unjust".[111] Subsequently, he argues that this very thin or minimal conception of global justice generates duties for the state and its citizens which trump his conception of fiscal self-determination. This brings his position closer to one which says that, in the context of a supra-national institution, there may be more local minima that also trump fiscal self-determination. It is not obvious why Dietsch's conception of fiscal autonomy may be trumped by these weighty demands of global justice, but not by, say, the need to secure domestic social minima in each state.

There is another sense in which Peter Dietsch's proposals are too demanding. There is somewhat of a mismatch between the protection of so-called fiscal self-determination and the implementation of his proposal. He argues that aggregate fiscal self-determination may not be easily observed but that it should be possible for a goverment to maintain, and support with empirical evidence, that it has lost tax base to another country.[112] Even if this is true, it is somewhat different to protecting either the choice of the size of the public budget relative to GDP or the extent of redistribution. It could well be the case that a given government has just come into power in a country that is losing part of its tax base to another country, but this does not conflict with its preferences with respect to either the size of the public sector or the extent of redistribution. Perhaps such a government was elected on a platform that promised to somewhat reduce the size of the public sector and has not yet had an opportunity to put this into practice. Perhaps the size of the public sector it desires is fully compatible with the tax base the country is shedding. Nevertheless, under Dietsch's proposed model, it has grounds for complaint. This would mean that the country which profits from tax competition is acting impermissibly even though it is not violating either of the policy variables that are covered by fiscal self-determination. This is because, in conclusion, the loss of tax base does not always mean

[110] Peter Dietsch, "The State and Tax Competition: A Normative Response", in *Taxation: Philosophical Perspectives*, eds. Martin O'Neill and Shepley Orr (New York: Oxford University Press, 2018): 209.
[111] Ibid.
[112] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 109.

that a country's preferences in terms of public sector size and redistribution are not satisfied.

One may think that the objections that I raise apply only to part of Peter Dietsch's recipe for the regulation of tax competition. The membership principle, one may think, is evidently plausible and even if it does run into some of the objections I mentioned above, the importance of ensuring that "natural and legal persons are liable to pay tax in the state of which they are a member" is obvious.[113] Individuals are to be taxed on the basis of residence as benefits determine where they receive public services. Companies, in turn, should be taxed on the basis of their source, as they benefit from public services and infrastructure in the country in which their substantial activity occurs. Dietsch concedes that the principles of source and residence do not track membership perfectly, but that they are good proxies for it.[114] Dietsch notes that the residence principle in the case of individuals and the source principle in the case of companies are commonly accepted principles.[115] He is right to note this. The reform proposals that I have noted, on the part of the EU and the OECD, for example, share this common feature. Laurens van Apeldoorn notes that the principle that taxes should track economic activity has become universally accepted.[116] Adam Kern, similarly, notes that academic proposals for the regulation of tax competition also tend to have this common feature.[117] Thomas Piketty has recently maintained that a few tiny tax havens rob the rest of the planet.[118]

Let us recall one of Dietsch's arguments for it. He maintains that the fact that companies benefit from a web of public services in a given location inserts them in an 'economic nexus' which generates a liability to pay tax.[119] Dietsch concedes that the definition of

[113] Ibid: 82.
[114] Peter Dietsch, "Whose Tax Base? The Ethics of Global Tax Governance?" in *Global Tax Governance – What is wrong and how to fix it?*, eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 236.
[115] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 85.
[116] Laurens van Apeldoorn, "Exploitation, international taxation, and global justice," *Review of Social Economy* 77 (2019): 165.
[117] Adam Kern, "Illusions of Justice in International Taxation," *Philosophy & Public Affairs* 48 (2020): 153.
[118] Thomas Piketty, *Capital and Ideology* (Massachusetts: Harvard University Press, 2020): 19.
[119] Peter Dietsch, "Whose Tax Base? The Ethics of Global Tax Governance?" in *Global Tax Governance – What is wrong and how to fix it?*, eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 236.

economic nexus is irredeemably somewhat arbitrary, but claims that "while the argument for sub-unit autonomy appeals to the idea that people should have a say over the (fiscal) decisions that affect them, current state boundaries are just one possible way among infinitely many to carve up the world into fiscal entities. What matters in our context is that we have normative reasons – namely the value of self-determination – to carve the world up into sub-units. These sub-units then constitute the contingent, but nonetheless normatively salient economic nexus that underpin our practical tax principles."[120]

This move on the part of Dietsch is too quick. Even if we could establish that there are autonomy-based reasons to carve the world into sub-units, it does not follow that 'economic nexus' should be situated at the level of states. If states can be maintained if we place the economic nexus elsewhere, it is not obvious why the justification for the existence of states leads to the conclusion that companies should be taxed at source. We may have, furthermore, independent reasons to consider placing the economic nexus elsewhere. Should states belong to supra-national institutions which promote a great deal of economic interaction between the countries that comprise it, it might make more sense to consider that the relevant economic nexus is found at the level of the supra-national institutions in question.

One way to try and defend the membership principle might consist of saying that it expresses some kind of notion of fairness. The argument may be that corporations that benefit from operating in a given state but pay it little or nothing in tax act in an objectionable manner because they free-ride off the sacrifices of the people. Dietsch seems to have an argument of this kind in mind. This, however, would mischaracterise the principle of fairness. It is important to distinguish between two issues with respect to co-operation.[121] One issue concerns how to organise co-operation in the best possible way and how the benefits and burdens of co-operation should be distributed between parties in a scheme. The second issue concerns whether individuals have a moral obligation to meet the roles they have been assigned. The position Peter Diestch takes (and that others, who maintain something comparable to the Membership Principle, take) concerns the

[120] Ibid: 237.
[121] Adam Kern, "Illusions of Justice in International Taxation," *Philosophy & Public Affairs* 48 (2020): 162. Here Adam Kern strikes this distinction.

first issue. It is a substantive position that concerns the duties that corporations have. Assigning taxing rights to countries is a matter of stipulating roles in a co-operative scheme. The principle of fair play, however, does not concern this issue. It only concerns the second issue, that of whether individuals have an obligation to meet the role they have been assigned.

Even if the argument did not rest on a mischaracterization of the notion of fairness, it is not clear whether it would lead to the conclusion that market participants have duties to pay taxes where they operate. As I suggested above in my remarks about the notion of the 'economic nexus', the public goods and infrastructure from which individuals and transnational companies benefit, in the case of the EU, are not limited to those of the Member States where they reside and operate. This point does not apply solely to the EU, but it is especially pressing in its case given the level of economic integration of the institution. The current state in which countries find themselves and the public services they offer are a consequence of global and pervasive economic interaction throughout history. It is not even possible to counterfactually speculate about what a country would be like if it had not partaken in such co-operation.[122] If corporations, therefore, had fiscal duties towards countries on the basis of fairness, it is not obvious that these countries would be the ones in which their activity takes place.

The arguments I draw on above about global and, particularly, EU economic co-operation may also serve to dispel a more straightforward attempt at justifying the Membership Principle. This may consist of saying that countries have a claim on activities that take place within its borders. In the domestic case, Nagel and Murphy clarify that pre-tax income is not a morally relevant baseline.[123] Pre-tax income distributions are already

[122] Peter Dietsch and Thomas Rixen are aware of the complications of this debate and express it in "Debate: In Defence of Fiscal Autonomy: A Reply to Risse and Meyer," *The Journal of Political Philosophy* 27 (2019): 499-511 in which they note, in a footnote, that the revenues of a firm in a country A depend on the demand for its goods and services in country B. They add that "multinational production chains and, in particular, the digitalization of the economy puts a lot of pressure on the traditional allocation of taxing rights across states"; in summary, the nexus for taxation cannot be easily tracked and localized. They seem to maintain, however, that this problem is more pressing in the case of corporate taxation, whereas in the case of personal income taxation it does not apply so forcefully. It is not clear why the degree of economic interaction does not create similar problems for the taxation of personal income.

[123] Thomas Nagel and Liam Murphy, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002): 99.

shaped, to a great extent, by judgements of political morality and one cannot address questions of tax fairness without assessing those judgements. As they say, "there is no market without government and no government without taxes".[124] If there were no legal system supported by taxes, there would not be money, banks, corporations, patents and many other elements which comprise the skeleton of an economy. It is, impossible, therefore that people are entitled to their pre-tax income. Similarly, in the international case, the fact that countries interact with each other in virtue of migration, trade and many other facets of globalisation means that they are not entitled to their pre-tax competition revenue.

The fact that countries cannot argue that they are naturally entitled to their national income absent the practice of tax competition – in the same way that Thomas Nagel and Liam Murphy maintain that we are not naturally entitled to our pre-tax income – does not mean, of course, that nothing belongs to anyone and everything is up in the air, morally speaking. It does mean that it should be determined politically. The points I have been making thus far have been that it is not clear why the membership principle is the most plausible way of determining the issue politically.

The Membership Principle too, however, has implausible distributive implications. As Laurens van Apeldoorn notes, it does not "reliably give priority to increasing the fiscal self-determination of low-income countries".[125] If a multi-national enterprise creates 80% of its value – as per market prices – in a high-income country and the 20% in a low-income country, the membership principle would allocate taxing rights in the same proportion to the two different countries.[126] This would be a highly inegalitarian outcome. It widens the disparity between the fiscal self-determination of the two countries.

We may question the extent to which tax havens can really stimulate economic activity when the competition is for financial assets. Financial assets that are not directly related to real activity may not be tremendously beneficial economically and, if the capital on

[124] Ibid: 32.
[125] Laurens van Apeldoorn, "BEPS, tax sovereignty and global justice," *Critical Review of International Social and Political Philosophy* 21 (2018): 490.
[126] Ibid.

taxes are low, tax havens may fail to profit fiscally from them as well. The fact seems to be that they can be beneficial indeed, however. Firstly, some tax havens are really very small and so do benefit from whatever injection of capital they can get. Secondly, as we have seen above in our definition of 'tax haven', these countries may compete across bank secrecy and so still retain the capacity to profit fiscally from incoming capital. Thirdly, the arrival of financial capital may fuel demand for financial services. These, in turn, often provide highly-killed jobs, "contribute to human-capital formation and are subject to agglomeration economies".[127] Countries may also obtain small service fees as revenue.[128] One should also note, as Zucman and Saez do, that countries which engage in this form of tax competition may derive a sizeable influence from it, as Luxembourg does within the EU, in virtue of the disproportionate size of its financial sector.[129] Furthermore, applying tiny effective tax rates to the huge amount of paper profits that these countries attract means that tax havens are able to obtain very large revenues.[130] Indeed, it is very plausible that the only way through which some peoples can instantiate a given liberal conception of justice is through ensuring that governments have at their disposal a set of policy options through which the allocative and distributive functions of government can be performed. These may have to include the possibility of a country setting itself up as a tax haven. Dietsch himself notes that the boost to economic growth of small countries that act as tax havens can be considerable, may favour the least advantaged and give governments room to promote equality of opportunity.[131]

3.2 Objection from implausibility

The objection from implausibility will focus mainly on how implausible it is to focus on agents' strategic intentions. Firstly, the idea of addressing tax competition when it is strategically motivated is unfeasible. It is not clear whose intentions, on Dietsch's view,

[127] Philipp Genschel and Laura Seelkopf, "Winners and Losers of Tax Competition" in *Global Tax Governance. What is wrong with it and how to fix it,* eds. Peter Dietsch and Thomas Rixen (Colchester: ECPR Press, 2016): 68.
[128] Thomas Rixen, "Tax Competition and Inequality: The Case for Global Tax Governance," *Global Governance,* 17 (2011): 454.
[129] Ibid: 79.
[130] Ibid.
[131] Peter Dietsch, "Tax competition and its effects on domestic and global justice," in *Social Justice, Global Dynamics: Theoretical and Empirical Perspective*, eds. Ayelet Banai, Miriam Ronzoni and Christian Schemmel (Routledge: New York, 2011): 108.

are relevant and how you ascertain them. Does it require the intention has to be stated explicitly, for example, in the manifesto of the political parties that govern? Is it a view that must be held by the head of government? Andreas Cassee has advanced several criticisms along these lines.[132] How would Dietsch assess the intentions of a given country if a given part of the government of a country supported the lowering of a tax rate for strategic reasons and the other part did so for non-strategic reasons?

Diestch and Rixen do admit that that the assessment of intentions is a difficult task and say, therefore, that the institutionalisation of his principle should rely, as much as possible, on "objectively observable proxies for the defendant's intentions".[133] They note that in judicial and quasi-judicial settings, courts assess intentions on a constant basis in the international arena. The International Court of Justice, by way of example, has the duty of assessing alleged offenders when applying the convention on genocide, they note, and the World Trade Organisation, on the other hand, also must engage in the practice of assessing intentions. As far as the rules of the latter are concerned, policies that have protectionist effects are forbidden but if they are implemented in view of protecting consumers' health and safety, an exception to the rule of non-protectionism is conceded. The WTO too, say Diestch and Rixen, focus on the observable implications of countries' intentions, such that "a government has to provide valid scientific evidence of the claimed adverse effects on consumers' health and safety".[134]

However, in the case of these examples, it is not intentions that are assessed per se. The WTO instead ascertains whether these policies are defensible considering non-protectionist considerations by looking at scientific evidence. This proves to be a much more contained and feasible task. There are, however, instances of measuring intentions. When courts have to address cases of conscientious objectors, they may assess whether the claimant does indeed have a personal history of pacificism or of attending events and rallies against wars or that war in particular. These, however, are cases of measuring intentions of one individual, as opposed to that of a government or of a substantial part of

[132] Andreas Cassee, "International tax competition and justice: The case for global minimum tax rates," *Politics, Philosophy & Economics* 18 (2019).
[133] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 109.
[134] Ibid: 111.

a parliament. Assessing group intentions is a much harder task. Furthermore, in this case, it is not totally clear what the relevant group is.

One should also note that those countries which compete strategically in the domain of fiscal competition do not seek the possible effects of their tax competition on other countries – the governments of such countries do not habitually seek that countries that lose from tax competition obtain less total revenue nor a smaller average revenue. There is no sense in which the intention itself can constitute an act of disrespect to the welfare and prosperity of countries that lose out.

I do not seek, however, to deny that intentions can play a very important rule in the justification of policy. Many decisions by the US Supreme Court, for example, about constitutional essentials or highly divisive issues depend crucially on the intentions which animate them. It is important that decisions concerning matters such as religious-mandated consumption of meat are not animated by an intention to deliberately harm given religious practices. In this case, however, it is not evident that there is impermissible harm in suffering from the practice of tax competition against a country that is acting with a competitive intent.

3.3 Objection from arbitrariness

I maintain in this section that the components of Dietsch's notion of fiscal self-determination are arbitrary. One of the interests that Member States have is in protecting their political independence and in being able to ensure the economic well-being of their citizens. These interests can plausibly ground the ability for states to provide a series of public goods, the absence of which renders co-operative societies impossible, but this is not enough to justify an entitlement to determine the size of public budget relative to GDP. This is because it may be possible to ensure that states provide a series of public goods without having the capacity to determine the relative size of its budget. It is conceivable that the transfer of powers to multilateral institutions may, in fact, be a more effective way for states to discharge their responsibility in ensuring the economic well-being of its citizens.

There is no apparent reason to immediately rule out the possibility that a multilateral institution's influence over the design of national budgets could prove to be an effective way of serving the economic well-being of its citizens. The question of what comprises an adequate range of choices for a state to meet the threshold of political independence and ability to ensure well-being of its citizens is an interesting one, but Dietsch offers no argument as to why this justifies an entitlement of states to be able to determine the size of its public budget relative to GDP.

Of course, the notion that states should have certain powers in the fiscal department and in other areas of policymaking is not unique to Peter Dietsch. Internationalists – members of an important school of thought in philosophical debates about global justice – maintain that there are international duties of "background justice" that should enable states to operate as self-determining polities that can realise social justice domestically and secure fair relations among themselves.[135] Dietsch is plausibly appealing to this kind of collective entitlement. Miriam Ronzoni, for example, argues that one of the vital interests that states have is that of controlling the socio-economic dynamics of a territory.[136] Furthermore, she maintains that a state has positive sovereignty when it has internal resources to be able to decide the kind of polity it would like to become and is able to successfully carry it out.[137]

I am not committed to internationalism. Having said this, one can plausibly maintain that states should be capable of realising justice domestically and deny that this interest is best protected by Dietsch's notion of fiscal self-determination.[138] In other words, one can coherently defend the need for states to be able to promote social justice domestically and

[135] Miriam Ronzoni, "The Global Order: A Case of Background Injustice? A Practice-Dependent," *Philosophy & Public Affairs* 37 (2009): 231.
[136] She maintains that it might be necessary to establish a global basic structure if, in fact, this is necessary to ensure that the global order ensures that states are able to regulate their domestic socio-economic dynamics. She, therefore, takes this to be a fundamental interest of states: 248.
[137] Miriam Ronzoni, "Two conceptions of state sovereignty and their implications for global institutional design," *Critical Review of International Social and Political Philosophy* 15 (2012): 577.
[138] To be clear, however, Miriam Ronzoni, in "Global Tax Governance: The Bullets Internationalists Must Bite – And Those They Must Not," *Moral Philosophy and Politics* 1 (2014): 49 defends supra-national regulation of tax competition in order to protect the ability of state institutions to tax as their citizens see fit.

deny that it is particularly valuable for individuals to be able to decide democratically on these two economic variables relative to GDP. Those are, on my view, somewhat arbitrary preferences for the relative versions of two economic variables. Internationalists in debates about global justice often focus on the need to protect effective sovereignty. This, however, need not be expressed in the form of the ability to determine the relative size of the public sector and the ability to democratically determine the level of redistribution.

There are several reasons for wanting normative outcomes to be sensitive to individuals' choices when faced with alternatives under the right conditions. These reasons may be classified into three classes: instrumental, symbolic or representative.[139] Instrumental reasons for valuing choice apply when our choices are a good 'predictor' of future satisfaction and this, in turn, depends on things such as our knowledge of the question we are faced with. There are also representative reasons to want what happens to depend on our choices – these are reasons to do with the fact that the meaning of a given choice is different in virtue of who makes it. For example, it is important that, on my partner's anniversary, I buy him a gift. This is not because I can better track his preferences. He can do that better than me. Instead, it is because the gift has a different meaning if I purchase it. Finally, there are symbolic reasons. These are reasons in which the denial of the possibility to choose can reasonably be seen – say, because people are usually expected to make such choices – to reflect some stigmatising judgement that a given agent is incompetent.[140] It is manifestly unclear how any of these three classes of reasons could establish that citizens should decide on the size of their state's public sector relative to GDP.

Dietsch and Rixen argue, however, that the regulation of different policy fields usually considers other dimensions other than the distributive impact of different proposals.[141] Dietsch claims that his own concern with fiscal self-determination is comparable to monetary policy; monetary policy also seeks to achieve other goals like financial stability

[139] Thomas Scanlon, *On What We Owe to Each Other* (Cambridge: The Belknap Press of the Harvard University Press, 1998): 251-253 for this account on the reasons for wanting outcomes to be sensitive to choices.
[140] Ibid.
[141] Peter Dietsch and Thomas Rixen, "Debate: In Defence of Fiscal Autonomy: A Reply to Risse and Meyer," *The Journal of Political Philosophy* 27 (2019): 505.

and inflation.[142] It is not clear that this analogy works in favour of Dietsch and Rixen's conclusion. One could make the case that the commitment to financial stability and inflation is decisively important for the interests of the worst-off. In this sense, it is worth drawing on the recent work of Jens van 't Klooster who argues that, when evaluating central bank independence, it is important that the distributive consequences of the central bank's mandate are taken into consideration.[143] He also argues that, for Rawlsians, central bank independence must be justified as part of a system of political economy that works to the benefit of the least advantaged.[144] In other words, it is indeed the case that the regulation of finance should be more concerned with distributive questions. The analogy that Dietsch draws on does not support, therefore, the conclusion that the regulation of tax competition should not be informed by distributive considerations. In this vein, it worth considering another point. Tax competition has potentially massive implications for the distribution of money and so there does not seem to be a reason to resist the conclusion that the regulation of tax competition should be, to a great extent, a function of the principle one thinks should regulate the distribution of money.[145] The points I am making are consistent with Simon Caney's view when he opposes the suggestion that some of the currencies of distributive justice should be governed by distinct principles that apply solely to those goods.[146]

One of Dietsch's reasons for appealing to fiscal self-determination is his embrace of pluralism. He maintains that the fact that there is disagreement about the content of states' global justice obligations means that it would be unjust to impose a one-size-fits-all on everyone. One way to address this, he argues, is to devolve a degree of fiscal autonomy to states, such that they may implement their own, democratically preferred conception of justice.[147] Dietsch is right to argue that the fact of pluralism presents a reason to reject a one-size-fits-all approach. It is also plausible that it follows from this that some degree

[142] Ibid.
[143] Jens van 't Klooster, "Central Banking in Rawls's Property-Owning Democracy," *Political Theory* 47 (2019): 697.
[144] Ibid.
[145] In "Just Emissions," *Philosophy & Public Affairs* 40 (2012): 281, Simon Caney refers that this point was made to him by both John Brrome and Andrew Williams with respect to another issue: the distribution of rights to emit greenhouse gases.
[146] Simon Caney, "Just Emissions," *Philosophy & Public Affairs* 40 (2012).
[147] Peter Dietsch and Thomas Rixen, "Debate: In Defence of Fiscal Autonomy: A Reply to Risse and Meyer," *The Journal of Political Philosophy* 27 (2019): 501.

of autonomy should be enjoyed by states and that this should translate itself into policy space of some kind. There is, however, no justification for thinking that individuals have a claim to a set of institutions that protects them from the costs of economic competition when it does not threaten the ability of a state to implement a liberal conception of justice. Similarly, the fact of pluralism does not lead to a permission to implement any kind of conception of justice even if it is markedly illiberal. Modern democratic societies, characterized by free institutions, engender a social fabric comprised of incompatible yet reasonable doctrines about how to exercise political authority based on terms that can be justified to others. There are, of course, doctrines and attitudes which fall outside of this space. The adequate attitude with respect to the latter, however, consists of containing them and preventing them from unravelling the hopes of social co-operation on sufficiently justifiable terms. Respectable doctrines belong to a family of liberal conceptions of justice.[148] It is, therefore, not clear why the focus of Dietsch's analysis is pluralism and not reasonable pluralism. Moreover, as Rawls notes "history tells us of a plurality of not unreasonable comprehensive doctrines. This makes an overlapping consensus possible, thus reducing the conflict between political and other values".[149] We should maintain that the value of democratic self-determination only enters the picture after considerations of justice are made.[150] It is worth noting that reasonable pluralism, as such, is not a regrettable feature of modern societies unlike pluralism perhaps given that the latter includes doctrines that are mad and aggressive.[151]

4. Another proposal

It is useful to explore one other set of reflections about international tax competition, that of Andreas Cassee. [152] At the outset, it is worth bearing in mind that the scope of Cassee's proposal is also global whereas mine is confined to the European Union. It is also

[148] This is especially pertinent in the case of the EU, given that it is a supra-national institution that sees itself as liberal.
[149] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996):140.
[150] Mathias Risse and Marco Meyer, "Tax Competition and Global Interdependence," *The Journal of Political Philosophy* 27 (2019): 496.
[151] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 144.
[152] Andreas Cassee, "International tax competition and justice: the case for global minimum tax rates," *Politics, Philosophy & Economics* 18 (2019).

necessary to bear in mind that Cassee makes the case for a specific institutional proposal whereas I am largely concerned to provide the philosophical terrain that should inform the regulation of tax competition within the EU. I will therefore focus primarily on the philosophical component of his view. Cassee argues in favour of a preference-independent mechanism to address tax competition: that of global minimum tax rates on mobile tax bases.[153]

Cassee notes that the introduction of this 'fiscal policy constraint' contains a perverse status quo bias.[154] The application of such policies at any given point in time favours those countries that have already been carrying out predatory forms of tax competition up until that point and inhibits countries that have lost from this practice from reacting to earlier competitive tax cuts by their rivals. I am not sure this argument is quite right, however. It is available to Dietsch to argue that the fiscal policy constraint does not apply only to the strategic change in taxation rate, but also to the strategic maintenance of taxation rates that negatively impact other countries' fiscal self-determination.

Cassee argues that tax competition raises an issue of fairness that is comparable to two individuals who are in a park making noise.[155] He asks to us to imagine a system of noise control that is broadly analogous to the fiscal policy constraint insofar as it focusses on strategic decisions that respond to other agents' decisions.[156] In his example, we are to assume that individuals are permitted "to play music at whatever volume and time they wish, as long as this reflects their genuine preferences. However, to limit escalation of the noise level in public parks and densely populated areas, there would be a ban on strategically adapting to the noise created by other people. If you really prefer listening to music at a low volume but cannot hear your own stereo because of the loud music coming through from your neighbour's place, you may not turn up the volume".[157]

[153] Ibid: 253.
[154] Ibid: 249.
[155] Ibid.
[156] Ibid.
[157] Ibid.

According to Cassee, this system raises two issues of fairness.[158] First, he points out that individuals who adapt strategically to others with a preference for loud music are disadvantaged objectionably because not only is their first preference – i.e. listening to music at a low volume – not viable but they are also prevented from acting on their second preference, which is that of listening to their preferred music at a lower volume rather than their neighbours' preferred music.[159] The second issue of fairness is that supposedly those with a preference for low volumes of sound may complain that Peter Dietsch's proposal does not take their preferences into account sufficiently. They are negatively impacted even in the cases where nobody reacts strategically to the other agents' actions.

It is not clear that Cassee's proposal captures the problematic aspects of Peter Diestch and Thomas Rixen's account. It does not necessarily seem morally objectionable that a country is unable to act on its preferred policy choice, whether it is motivated by strategic or non-strategic intentions. As previously argued, we tend to be relaxed about other forms of competition impeding the satisfaction of our preferences and deterring us from carrying out the plans we initially had in mind. In other words, mere preference frustration in virtue of another agent's decision is not usually enough to motivate a sound complaint at the institution which allows it. Secondly, we have also already argued that it is very questionable whether the two policy variables that Dietsch and Rixen seek to protect are valuable. Thirdly, even setting aside these two previous considerations, one should still remember that, in the case of tax competition, unlike the case of the music in the park, countries may still have the means to counteract the externalities that are generated by the 'winners'. This does not seem to be the case in the example that Cassee compares with tax competition. After all, assuming effective noise-cancelling headphones are unavailable, if one cannot listen to one's music as a result of a fellow park user's loud speakers – and, furthermore, cannot strategically increase the volume – there do not seem to be alternative means of listening to music.[160] In this respect, there seems to be an important dissimilarity between Cassee's sound example and Dietsch and Rixen's proposals. A state may, for example, counteract the impact of tax competition through other policies.

[158] Ibid.
[159] Ibid.
[160] Let us assume that there is a valuable interest in listening to music through speakers in the park.

Cassee, on the grounds of political realism that discourage bolder proposals such as creating supra-national institution that raise taxes, recommends a more modest approach. He proposes the introduction of binding minimal tax rates.[161] Cassee's system would leave the power to tax in the hands of individual states, but tax rates below a commonly defined threshold would be prohibited.[162] At this stage it is useful to remind readers that it is conceivable that, in some circumstances, the imposition of minimum rates of corporate taxation may be the best institutional proposal to satisfy the principles that I think should regulate tax competition. I outline these principles in the next section below.

Cassee argues in favour of his proposal on the grounds that it more effectively secures countries' fiscal self-determination.[163] Having said this, he is open to understanding the policy variables that comprise fiscal self-determination in an absolute sense.[164] Although this avoids some of the objections that I mentioned about relative economic variables, it still runs into some of the objections about distribution and about placing excessive burdens on states.

5. My proposal

I will examine some of the different scenarios in which the European Union should intervene in the extent to which its Member States can compete fiscally in order to influence investment decisions on the part of owners of capital. The first scenario in which it makes sense for the European Union to intervene is one in which ongoing tax competition is disadvantageous for all the parties involved. The second scenario we will discuss is one in which intervention is necessary to prevent citizens from falling below a social minimum. The third class of situations in which the European Union should intervene to regulate the practice of tax competition are those in which countries lose the

[161] Ibid: 253.
[162] Ibid.
[163] Ibid: 255.
[164] Ibid: 256.

ability to correct for excessive inequalities which threaten the fair value of political liberties.

The European Union has reason to regulate tax competition in a scenario in which all parties to it are losing from it; scenarios in which tax competition is collectively self-defeating.[165] These may be situations in which the practice of tax competition takes the form of a prisoner's dilemma.[166] These may be scenarios in which some countries are taxing corporations at a level that is strongly Pareto suboptimal in the sense that all countries affected in the EU could be made better off by the the cessation of tax competition or by taxation at some other rate. The Pareto-superior alternative, in this situation, would be one in which countries would not compete on taxes or compete at a different rate, but the Nash equilibrium is that of a collectively suboptimal scenario. A Nash equilibrium is the situation in a game in which a player stands to gain no additional benefit from changing strategy, assuming her adversary does not change strategy. It is not altogether impossible that, in some circumstances, tax competition produces collectively sub-optimal scenarios. One of the reasons for this is that tax competition can have a negative impact on economic efficiency. The reduction of taxation rates may lead to a situation of misallocation of public revenue sources that may have a harmful effect on the national welfare of the country.

Rawls and others advocate that institutions should play a role in regulation. He says that the activity of government may be thought of as being divided into four branches and that its aim is to preserve certain social and economic background conditions.[167] The allocation branch, for instance, seeks to maintain a competitive price system and to avoid the concentration of unreasonable market power. It also seeks to rectify the "more obvious departures from efficiency caused by the failure of prices to measure accurately social benefits and costs".[168] The stabilization branch seeks to bring about approximately full

[165] Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984): 53 on collectively self-defeating theories and activities.
[166] An account of Prisoner's Dilemma-type situations can be found in David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986).
[167] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999): 243.
[168] Ibid: 244.

employment to the extent that those who want to work can find it.[169] The transfer branch – another branch of government – is responsible for the institution of the social minimum. The distribution branch, in turn, is responsible for the raising of revenues, with recourse to taxation, that justice requires. The idea of regulation of competition is not, therefore, anathema, to the most important theories of justice.[170] It is widely accepted that institution designers have a role to play in securing efficiency. Advocates of regulation, in fact, tend to advocate regulation in scenarios in which their favoured principles of justice and in which reforms will enable a move to a situation along the Pareto frontier in terms of satisfaction of preferences.

One may question whether this part of my proposal does not face similar problems to the ones I found in Dietsch and Rixen's account regarding strategic intentions. The same problems – or perhaps some – that I identified in ascertaining strategic group intentions may obtain, one might think, in the case of the identification of preferences. The preferences I am referring to, however, are the democratically chosen ones as expressed by the governments of the peoples. We could, therefore, take governments' expressed preferences at face value. We are not relying on their alleged intentions. Furthermore, the scenario in which there is unanimous convergence on the desire to regulate tax competition is extremely unlikely. I should also note, however, that the EU should not attend to the preferences of governments in every single case. It should not, for example, do so when these conflict with the other principles that should govern the regulation of tax competition on the part of the EU: securing a critical threshold of sufficiency and protecting the fair value of political liberties. I say more about these below. I should note, moreover, that Peter Dietsch and Thomas Rixen have the resources to be able to welcome this proposal of mine. They focus on cases of tax competition that do not take this form and so do not address this type of situations directly. It is, however, perfectly consistent with their account.

Secondly, if a country severely lowers corporate income tax, say, at the expense of its ability to perform other functions, such that the failure of basic institutions means that a

[169] Ibid.
[170] Ibid.

large portion of citizens falls below a critical threshold of advantage, the EU should regulate tax competition. It may seem unlikely to contemplate the possibility that an EU Member State would engage in the practice of tax competition if it proved to be so harmful for them. We should not be too quick to dismiss this possibility, however. This may occur if a country massively lowers its corporate tax rate with the intention of attracting capital and investment, but for some reason this does not materialise. Let us assume that capital owners do not express an interest in the country in question because it considers that it does not have an adequate level of infrastructure. Let us assume further that the lowering of the tax revenue deprives a country of its ability to guarantee that an appropriate level of sufficiency is met. Assume additionally that, for some reason, the government of the country in question, in an act of incompetence, does not address and rectify the situation. Perhaps it does not detect that its lowering of the corporate taxation rate is what drives the situation. In such a scenario, the EU has a duty to intervene and rectify the situation – if necessary, by disallowing tax competition on the part of this country. The moral urgency of securing a social minimum, coupled with the EU's standing as an institution that can co-ordinate policy, means that it is duty-bound to intervene in such situations. Alternatively, a country may compete fiscally in a way that deprives one or more other countries of their ability to secure a social minimum. In this case, the EU too should intervene to protect these countries, whose ability to maintain a social minimum is impaired.

A social minimum may be conceived of in a variety of different ways. On some accounts, the social minimum should be regarded as an approximation to a principle of justice which may stipulate that individuals are entitled to something like an equal share of social wealth. In contrast, it may be conceived of as what is "objectively necessary for the satisfaction of certain basic needs".[171] Whereas there may be a dispute as to whether a member of the least-advantaged class of citizens in society would instantly withdraw allegiance from its institutions as soon as they imposed avoidable sacrifices on her, it is less controversial that a system in which its individuals face situations of, say, starvation and desperation, is likely to be beset by the hostility of those in such circumstances.[172]

[171] Jeremy Waldron, "John Rawls and the Social Minimum," *Journal of Applied Philosophy* 3 (1986): 21.
[172] Ibid: 27.

Rawls advanced that a certain level of arbitrariness is inevitable in identifying the least advantaged group and that, at some point, we may have to plead to practical considerations, "for sooner or later the capacity of philosophical or other arguments to make finer discriminations" runs out.[173] Nevertheless, some considerations could help inform how the threshold should be set in different EU states. One of them relates to the different 'needs' of citizens in each EU state as a result of, for example, different costs of living. This notion of protecting an economic minimum domestically and internationally is not new in political philosophy, of course. For Rawls, as a matter of domestic distributive justice, all countries must meet minimum economic security for its members.[174] Secondly, liberal and decent peoples have a duty to assist burdened societies.[175] My conception of a social minimum, however, is somewhat stronger as it incorporates a 'relative' element as we will see in section 4.2 of Part II.

Thirdly, I will now argue in favour of the regulation of tax competition in scenarios in which it leads to the emergence of excessive inequalities that undermine the fair value of political liberties. We have already observed a tendency for countries that engage in tax competition to make up for the loss in revenue by resorting to greater taxation on consumption and labour, which militates towards making the tax system more inegalitarian. This could contribute to making the society in question less egalitarian overall. One of the most powerful considerations against permitting a certain amount of concentration of wealth and income is that they may mean that a small part of society can control the economy and political life itself, thus undermining democracy, whereby this is taken to include the fair value of political liberties. The fair value of political liberties may be understood as equal opportunity for those who are similarly motivated and endowed to influence the political process irrespective of their economic and social class. We should not only be concerned with formally free elections, formally equal access to public office, eligibility to join political parties and to hold places of authority. Rawls maintains that "if the public forum is… free and open to all, and in continuous session,

[173] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999): 84.
[174] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999): 65.
[175] Philippe Van Parijs, "International Distributive Justice" in *A Companion to Contemporary Political Philosophy*, eds. Robert E. Goodin, Phillip Pettit and Thomas Pogge (Malden: Blackwell Publishing, 1993): 641.

everyone should be able to make use of it".[176] Political liberties lose their value, however, when those who dispose of greater private means are able to control the course of public debate.

There are, of course, measures that could potentially insulate the political process from the unequal distribution of wealth and property. Political parties, as well as electoral campaigns, could be publicly funded, for example. In virtue of the pervasive impact of wealth, however, and of the greater influence that the wealthy can wield through their status in society and through connections, it is unlikely that the cited surgical measures could ensure the fair value of political liberties against rampant wealth inequalities. This suggests that containment of inequalities is necessary to protect the fair value of political liberties. The requirements of fair value of political liberties are, however, complex and controversial and I will have more to say about this in Section 4.2 of Part II.

Finally, we should also note that if the EU should decide to regulate tax competition on the grounds that I mention above, it must be careful with the costs that its institutional reform generates. There may be a risk that the regulatory model of tax competition has the same consequences that it is supposed to address. The costs that flow from whatever measures the EU does implement must abide by the same principles that I outline above.[177]

We must consider the possibility that there may be other ways of securing a social minimum and of preventing excessive inequalities. It is worth clarifying, at this stage, that my proposal does not advocate the regulation of tax competition whenever it runs the risk of placing individuals in the EU below a threshold of sufficiency or whenever it threatens to jeopardise the fair value of political liberties. This is because a country that is affected by tax competition may nonetheless still have a policy toolkit that is sufficiently robust to prevent these states of affairs. I propose that regulation of tax competition only kicks in when it is likely that this will happen.

[176] Ibid:197-198.
[177] In "Tax Competition and the Ethics of Burden Sharing," *Fordham International Law Journal* 42 (2018), Ivan Ozai makes the point that "the lack of an explicit discussion on how to share the costs arising from an institutional change might result in countries with less negotiating power bearing most of these costs": 61.

This point does, of course, invite the question about what these other measures might be. One possibility is that a country could offset its revenue loss by redistribution of income with recourse to a rise in the rates of personal income taxation. Should this be a viable alternative, it could be deemed acceptable by the European Union authorities.

Nevertheless, as will be seen below, there are doubts about the general plausibility of such alternatives to corporate taxation. On one view, however, taxes on corporations may be seen as a mere form of withholding on the income tax that is due from the different individual shareholders and bondholders. It does not matter, therefore, if corporation tax is not collected provided that the shareholders and bondholders pay what they earn from the company income tax in their country of tax residence.

However, empirical evidence casts doubt on the extent to which personal income taxation may replace corporate taxation. As was stated above, the broadening of taxation is a mechanism of defence against the outflow of mobile profits. One of the phenomena that takes place concomitantly with the lowering of corporate income taxation is the lowering of personal income tax rates. If the nominal rate of corporate taxation is lowered, private individuals come under a greater pressure to re-label their income by incorporating. Governments have often, therefore, aligned the top rate of income taxation with that of corporate taxation to prevent such arbitrage on the part of high-earning individuals.[178] Emmanuel Saez and Gabriel Zucman note that low capital tax rates incentivise the wealthy to shift highly taxed wages into lightly taxed capital income.[179] There are many types of professionals who cannot pass their wages as dividends. Several others, however, may choose to incorporate. Further to this, these authors note that "once every rich person has become a company, not only is the progressive income tax dead (it is now a mere consumption tax), but the possibilities of evading this residual consumption tax are limitless".[180] This is because consumption can take place within the firm; corporations may pay for personal expenses. While this may be a form of stone-cold tax evasion, it is

[178] Peter Dietsch and Thomas Rixen, "Tax Competition and Global Background Justice," *The Journal of Political Philosophy* 22 (2014): 156
[179] Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: W.W. Norton & Company, 2019): 98.
[180] Ibid: 100.

very hard to stop when a significant portion of a country's population is a single-person company that is not accountable to anyone but to oneself.

This contributes to making the personal income taxation schedule less progressive and reduces hopes of achieving socioeconomic redistribution through this means. Stephen Ganghof and Philipp Genschel note that tax competition has "indirect effects on the progressivity and revenue-raising potential of personal income taxation".[181] As stated above, it is plausible that the role of corporate taxation is to act primarily as a back-stop for personal income tax. This means that exemption of profits from taxation – or, less severely, a reduction in the rate of taxation – would create a loophole in the tax system. It would provide an incentive for high-income taxpayers to store their income, or part of their income, in a corporation. If a polity wishes to maintain a high rate of personal income taxation, therefore, it is important to avoid a large gap between the rates of the two types of taxation. In fact, "lower corporate tax rates are associated with higher tax rate gaps between corporate and personal income taxation (tax rate gap effect) and that they tend to pull down personal income taxes (pull-down effect), everything else being equal".[182] Tax competition, Ganghof and Genschel maintain, constrain national taxation systems in different ways. Germany, for example, sought, during the years of the Red-Green coalition to reduce social security contributions for low-income workers in order to stimulate employment and to make up for the revenue loss by raising the top rate of personal income taxes, but failed to do so in virtue of the pressure from tax competition to a great extent.[183]

Laura Seelkopf and Hanna Lierse, her co-author, note that tax competition does not affect all countries univocally.[184] There is perhaps hope of redistribution through other means. She notes that there is a school of thought, that of compensation, which claims that

[181] Steffen Ganghof and Phillip Genschel, "Taxation and democracy in the EU," *Journal of European Public Policy* 15 (2008): 58.
[182] Ibid: 63.
[183] Ibid: 69.
[184] Hanna Lierse and Laura Seelkopf, "Taxation and Inequality: How Tax Competition Has Changed the Redistributive Capacity of Nation-States in the OECD," in *Welfare State Transformations and Inequality in OECD Countries*, eds. Melike Wulfgram, Tonia Bieber and Stephan Leibfried (London: Palgrave Macmillan, 2016): 97.

globalisation does not pose an imminent threat to the redistributive capacity of the state.[185] They say that the evolution of the top rates of income tax and the rate of corporate taxes in OECD countries between 1980 and 2013 would suggest that inequality is rising, but that the picture is somewhat more complex.[186] Although some indirect forms of taxation have increased, as predicted by the model, there has been a fall in the revenue stemming from general consumption tax and excises. There has not been, therefore, a general increase in regressive consumption taxes in the OECD. Further to this, revenue from social security contributions and corporate income taxes has increased.[187] This is attributable to several factors. Firstly, there has been a base broadening of corporate taxation. Secondly, higher corporate incomes and an increase in investment can offset the lost revenue from tax cuts. Statistics for the tax wedge for the average production worker for this group of countries during this period suggests that the tax burden has even reduced by a few points. It is possible, however, that the tax burden on high-income earners has fallen by a greater amount.[188]

Some countries have lost redistributive capacity, they argue, but not others. France, for example, experienced a sharp rise in market income inequality, but a decline in net income inequality, suggesting that it has not lost redistributive capacity.[189] In Denmark, for example, net income inequality has remained relatively stable despite the rise in market income inequality.[190] Redistributive efforts have increased there. Capital and corporations are taxed at a low and flat rate while a progressive tax system has been maintained on wage incomes. There has even been a fall in revenue from indirect taxes. In Ireland both market income inequality and net income inequality have fallen. Their drastic cuts to the rates of corporate income taxation have been successful in attracting

[185] Ibid.
[186] Ibid.
[187] Philipp Genschel, writing in 2002, advanced data that was in line with this in that, across sixteen OECD countries since 1970, there had been no decline tax revenues. In fact, there had been a rise in the share of tax revenues from 32 per cent in 1970 to about 40 per cent in 1998. Corporate tax revenues, furthermore, had increased as well: He argues, nevertheless, that it is plausible that, in the absence of tax competition, revenues would have been greater: "Globalization, Tax Competition and the Welfare State," *Politics & Society* 30 (2002): 247-250.
[188] Hanna Lierse and Laura Seelkopf, "Taxation and Inequality: How Tax Competition Has Changed the Redistributive Capacity of Nation-States in the OECD," in *Welfare State Transformations and Inequality in OECD Countries*, eds. Melike Wulfgram, Tonia Bieber and Stephan Leibfried (London: Palgrave Macmillan, 2016): 102.
[189] Ibid: 104.
[190] Ibid: 105.

not only more investment, but also more employment and higher wages. Seelkopf and Lierse conclude that some countries have been able to maintain redistributive capacity and also that similar tax responses may lead to different outcomes in different contexts.[191]

Further to this, it should be noted that, since 2008, OECD governments have raised personal capital income taxes. Since the G20 countries intensified the fight against banking secrecy, average tax rates on dividends, interest and capital gains in the OECD have increased. Some authors note that this is partly attributable to increased financial transparency in the form of automatic exchange of information held by non-residents.[192] This is because the latter increases the risk of detection for households with undeclared bank accounts in secretive tax havens. Subsequently, the risk of capital flight associated with increases in the taxation of capital income has lowered. Although this is not a universal trend, "out of 35 Member States, 19 have increased their corresponding rates between 2008 and 2018, whereas only 4 have reduced them over the same period".[193]

Other explanatory factors for this include budgetary constraints in the aftermath of the last economic crisis.[194] There have been increases in the personal rate of income tax in the aftermath of the financial crisis. This may be attributable to notions of fiscal fairness that have changed during and after the financial crisis.[195] One should note, however, that there has not been a parallel increase in co-operation with respect to profit-shifting by corporations. This may explain, to an extent, why the downward trend on taxation on corporate profits has not been reversed.[196]

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[191] Ibid.
[192] Lukas Hakelberg and Thomas Rixen, "Is neoliberalism still spreading? The impact of international cooperation and taxation," *Review of International Political Economy* (2020): 2.
[193] Leo Ahrens, Fabio Bothner, Lukas Hakelberg and Thomas Rixen, "New room to maneuver? National tax policy under increasing financial transparency," *Socioeconomic Review* (2020): 3.
[194] Hanna Lierse and Laura Seelkopf, "Room to Manoeuvre? International financial markets and the national tax state," *New Political Economy* 21 (2016): 150.
[195] Julian Limberg, "'Tax the Rich'? The financial crisis, fiscal fairness and progressive income taxation," *European Political Science Review* 11 (2019): 322. See also Julian Limberg, "What's Fair? Preferences for Tax Progressivity in the Wake of the Financial Crisis," *Journal of Public Policy* 40 (2018) for a similar argument.
[196] Lukas Hakelberg and Thomas Rixen, "Is neoliberalism still spreading? The impact of international cooperation and taxation," *Review of International Political Economy* (2020): 20.

The chances of successful redistribution in the face of tax competition is, we can see, subject to an intense empirical debate. It does seem to be, however, a highly contingent matter. Furthermore, we should note that tax competition is made possible by globalisation. The latter, in turn, increases international labour mobility as well as capital mobility. There is a dispute as to how much tax-driven migration there really. Some say there is relatively little evidence for it and others disagree vehemently.[197] If it is a genuine possibility, it will provide an important constraint on the design of personal income tax policy.

We should also consider the possibility that a government could institutionalize other redistributive mechanisms that do not rely on tax-and-transfer. These might include greater legal support for the bargaining power of trade unions, for collective bargaining in general and may also include increases in the minimum wage. They may also consist of reforms to corporate governance, equalizing access to higher education, regulating intellectual property better and restraining the excesses of the finance industry. Having said this, personal income taxation has historically been the most effective tool in curbing the concentration of riches. If tax competition, however, does indeed hurt countries' redistributive capacities to a point in which they can no longer secure either a social minimum or the fair value of political liberties, the EU should intervene and regulate it.

6. Considerations about my proposal

It is now opportune to consider one possible objection to my proposal. One of the possible objections to my proposal lies in the fact that it is too permissive with respect to tax havens. This turns on the conviction that there is something distinctively objectionable about tax competition in the form of a country setting itself up as a tax haven.

[197] Stefan Traub and Hongyan Yang, "Tax Competition and the Distribution of Income," *Scandinavian Journal of Economics* 122 (2019): 113.

This is the fact that tax havens seek to induce individuals and companies to not incur their legal obligations before their domestic tax authorities. I believe that this powerful consideration can sometimes be defeated by countervailing reasons, such as the need to deliver a liberal theory of economic justice. A country may use the benefits that tax havebs can sometimes obtain in the form of greater revenue, for example, to secure a social minimum and to protect the fair value of political liberties.

Nevertheless, I cannot pretend to be able to exhaust all the instances in which the erection of tax havens is objectionable. It seems obvious to me that the EU's fiscal rules should prevent tax havens from being able to attract profits that flow from egregious injustices, for example. Nazis sought to place stolen money from Jewish people in tax havens and thieves often seek to do the same. This is surely a practice that we should condemn. We should not permit tax havens to engage in this kind of activity. There are surely many other situations in which we should regulate, or outright forbid, tax havens and it would, therefore, be impossible to aspire to devise a complete list. Gabriel Zucman and Emmanuel Saez note that tax havens have been used to hide clients behind shell companies, smuggle diamonds in toothpaste tubes and hand out bank statements concealed in sports magazines.[198] They can be used, furthermore, to practise insider trading, launder money, pocket illegal commissions, finance electoral campaigns under the table and support terrorist activity.[199] These considerations demonstrate that a comprehensive approach to tax havens on the part of the EU must go beyond the principles I advocate.

I think it is important that I consider one thought experiment. It says that the tax base of a country is, in some sense, a resource that is comparable to natural resources. If there is a river that crosses two countries and is an important resource for the populations of both states, would it be permissible for the state of one population to decide to block the river at the border? Let us assume that the country that blocked the river did so in virtue of strictly domestic reasons. Assume further that after the river is blocked, both countries continue to be able to implement a liberal theory of justice and no severe humanitarian

[198] Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay*, (New York: W.W. Norton & Company, 2019): 65.
[199] Ibid: 63.

damage is brought about? Is this course of action permissible? Some may say that it is not. I believe I can meet this objection in several ways. One possible response consists of biting the bullet and saying there is nothing impermissible in what is done. After all, if both countries continue to be able to fulfil important public policy objectives – including the avoidance of humanitarian catastrophes, of course –, there is nothing objectionable about blocking the river. One may also say, on the other hand, that countries are not naturally entitled to their resources. It may concede that they are not naturally entitled to their tax base any more than they are entitled to their natural resources. Their control and benefit must, therefore, be negotiated and established by international institutions. Perhaps the solution to this problem at the level of international institutions could perhaps include the principles, or something close to them, that I advocate for the case of tax competition.

It is likely, however, that the most adequate treatment of natural resource cases differs from tax competition in virtue of the fact that one good is mobile and the other is not. The fact that the EU constitutes an environment in which capital can freely move and does constantly move creates somewhat of an expectation that a country can be deprived of accessing it. Given that rivers are not mobile, the way in which a given population relies on it is likely to be morally weightier than the reliance of a tax base of a given size.

There are, finally, other scenarios which test my proposed principles. One could imagine a scenario in which the only circumstance in which a country can ensure that its citizens remain above a certain threshold of sufficiency comes at the expense of another country failing to do so. It is not clear what the morally adequate principle is in such a situation. Perhaps a polity can, to some extent, prioritise its citizens who are below a social minimum vis-à-vis citizens below a social minimum in other countries. This cannot be permissible, however, in all cases irrespective of the economic damage that is done to the citizens in other countries. Social minima should be different in each country. As I will argue in Part II, it should consist of an absolute and a relative dimension. These are not equally weighty. A country should not be permitted to compete fiscally to lift individuals out of relative poverty at the expense of individuals abroad finding themselves below a threshold of absolute deprivation. It is unlikely that any of the current Member States of

the EU may find themselves in a situation in which they must resort to tax competition in order to fight absolute deprivation. Having said this, it is a scenario that we should reflect upon as it may challenge the force of our principles. The next Part will seek to develop my proposal by locating it within a broader conception of justice for the European Union.

Part II: Distributive Justice in the European Union

1. Introduction

The purpose of this Part is to advance a vision of distributive justice that is defensible and that can lend support to the proposal on the regulation of tax competition that I favour, and show that, compared with rivals, it is able to generate its own support when implemented. I will proceed by exploring some of the alleged successes and failures of the EU from the standpoint of liberal conceptions of justice. I will argue that the EU has shown a mixed record in this respect. Firstly, I will focus on some of the strengths of the EU in this respect and, subsequently, I will examine some of its shortcomings. This will be a lengthy empirical assessment of some of the practices of the EU. This section will be followed by the normative section of the Part. I will present my own distributive proposal, which can be understood as a form of political liberalism. Specifically, it requires that the EU realise a family of liberal values. This includes the maintenance of a social minimum and the protection of the fair value of political liberties. I will then explore a rival proposal. Finally, I will argue that my proposal fares better than the rival proposal in virtue of considerations from stability and collective self-determination.

Before I begin my assessment of the EU's mixed record with regards to distributive justice, however, I will make a few introductory remarks. Their purpose is to locate the debate about justice in the EU in terms of the wider debate about international distributive justice in political philosophy.

Debates on international distributive justice – both about questions about what states owe each other and about what individuals owe one another – are lively and unlikely to garner consensus. There is a spectrum of views on the debate. At one end of the spectrum we may find a view that maintains that duties of justice towards all individuals are the same as our obligations towards our fellow co-citizens. At the other end of the spectrum, we may find those who argue that there are no duties of justice beyond the borders of the state. Instead, the thought goes, our obligations towards those outside of our borders are merely of a humanitarian nature. As far as the spectrum of views on international distributive justice goes, the concern for inequality beyond the state requires greater explanation.

At one end of the spectrum is the view put forward by Thomas Nagel who maintains a dualist view according to which principles of egalitarian distributive justice apply only within the domain of the state as it is backed by a monopoly on the legal use of coercion and because it claims to possess authority over and speak on behalf of the people it rules.[200] While it is true that there are views, those of egalitarian extensionists, that call for a simple extension of principles of distributive justice applied in the domestic context to the international realm, there is a general awareness that there are powerful considerations in favour of restricting the application of egalitarian principles of distributive justice or at least not applying the very same egalitarian principles to the domestic and global context.

Political philosophers have written extensively about the European Union. The unique nature of the institution renders it a fascinating subject for theorists. Most of the political philosophy on the subject, however, has focused on two different subjects: firstly, the question of whether the EU suffers from a democratic deficit. Secondly, whether there is such a thing as a European identity. The latter question, in turn, may have implications for whether the EU should openly pursue more integration and become a full-fledged federation. Comparatively, a lot less has been written on what standard of distributive justice should obtain within the EU. This is the question of what duties EU institutions owe European individuals regarding the fair distribution of benefits and burdens.

The question of this part concerns what distributive duties exist between EU citizens and EU Member States. I should clarify that the subject of this part is not that of injustices committed towards non-Europeans. I recognise that there is a series of injustices committed both presently and in the past on the part of the EU and its Member States with respect to non-Europeans. These facts could make a decisive difference to the overall justice deficit of the EU. For the purposes of this dissertation, however, I set aside this important issue. This is a useful exercise as it seeks to demonstrate what duties of justice obtain between individuals within the EU. It is also valid as it may serve to demonstrate what conception of justice should obtain in a supra-national institution. This is an

[200] Thomas Nagel, "The Problem of Global Justice," *Philosophy & Public Affairs* 33 (2005): 113-147.

important reflection as it may help to inform what duties of justice exist within other existing and future supra-national institutions.

It is useful to now look at the EU's mixed record when it comes to distributive justice. Part of the EU's track record is clearly objectionable from a liberal egalitarian standpoint. On the other hand, it also has achieved some important successes which demonstrates its ability to support Member States' pursuit of a liberal egalitarian conception of justice.

2. Successes of the European Union

One of the most important instruments of the EU's 'social policy' is the European Social Fund. It is devoted to improving matters of employment and job opportunities. In fact, according to the EU, this is its main instrument when it comes to employment. It claims to fund tens of thousands of local, regional, and national employment-related projects across Europe. The European Commission decides, alongside each Member State, on one or more Operational Programme that will receive funding for a seven-year period. Furthermore, it is noteworthy that the level of European Social Fund funding – and the types of project that are funded – vary according to which region a given country belongs. There are three categories in which EU countries may find themselves for the purposes of funding. These categories vary across regional gross domestic product per head compared to the EU average.

There is also some evidence that, to an extent, the EU is committed to protecting EU citizens from various forms of deprivation, such as poverty and involuntary unemployment. In 1987, an aid programme aimed for the most deprived persons was launched by Jacques Delors with the aim of redistributing agricultural surpluses. In the aftermath of the crisis, the Fund for European Aid to the Most Deprived (FEAD) was launched and it focused on material deprivation.[201] With respect to schemes that already existed, the latter is a wider programme in the sense that it focuses on fighting material

[201] Maurizio Ferrera, "A Missing but Necessary 'Political Good'," in *A European Social Union after the Crisis*, eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere (Cambridge: Cambridge University Press, 2017): 65.

poverty and social exclusion, as opposed to focussing strictly on food aid. It also has greater resources at its disposal and its participation is compulsory for EU Member States. Maurizio Ferrera, for example, maintains that strengthening FEAD and similar instruments would represent the most promising way of materialising beneficence at the level of the EU.[202] It disburses items such as food, clothing and other items of essential use to the most deprived. The EU may decide which types of assistance it wishes to disburse – whether it is food or something else, or a mixture of both – and how these items are obtained and distributed. National authorities may choose whether to purchase the food and goods themselves and then distribute them to partner organisations or they can finance the latter so that they may purchase the goods. Partner organisations tend to be public bodies and non-governmental organisations. The programme has €3.8 billion at its disposal for the 2014-2020 period. Member States should also contribute 15% in national co-financing to the programme.

The European Court of Justice's (ECJ) action has also, in some departments, helped to create social standards across the EU. There have been points during which the EU has developed its jurisprudence in a way that reflects the European Convention on Human Rights (ECHR) and shared principles taken from the legal systems of the Member States. In the Yvonne Watts case, for example, the European Court of Justice determined that the national health services of Member States would have to refund hospital treatments in other Member States if the patients had to endure waiting lists longer than were medically acceptable. This was the case of a woman who requested a permission from the British National Health Service to be operated on outside of her country. She was operated in France and demanded a refund of the costs of the operation, which she paid for herself initially. This ruling entailed that country's priorities must include "an objective medical assessment of the patient's medical condition, the history and probable course of his illness, the degree of pain he is in, or the nature of the disability at the time when the request for authorisation was made or renewed".[203] Thus, we can draw on the Yvonne

[202] Ibid.
[203] Oliver Gerstenberg, "The Question of Standards for the EU," in *Europe's Justice Deficit*, eds. Dimitry Kochenov, Gráinne Búrca, and Andrew Williams (Oxford: Hart Publishing, 2015): 74.

Watts case as a counter-example to the notion that the supra-national, European sphere always suppresses social policy-making.

Several other EU practices provide evidence (although not definitive proof) that it has the capacity to act in pursuit of a liberal egalitarian conception of justice. These include budget contributions and the funds for regional cohesion that have been disbursed to economically more fragile Member States over the years.

National contributions from Member States represent the largest source of the EU budget and are calculated on the basis of Gross National Income (GNI). This seeks to ensure that the budget of the Union is always initially balanced. The GNI call rate is established on the basis of the additional revenue that is required to finance the budgeted expenditure that is not financed by the EU's other resources, consisting of VAT-based payments, levies and duties. The so-called GNI Call Rate, therefore, varies from one financial year to another and is limited with reference to Member States' Gross National Income. Currently, the amount of resources allocated to the Union to meet annual appropriations for payments cannot surpass 1.20% of the sum of all Member States' GNI. Cohesion policy is a complex system of allocation of funds – during the budget period 2007-08, the sum of €308 billion was expected to be disbursed.

One of the most noteworthy aspects of the EU's social policy, recently, is the Social Pillar. This new agenda advanced by the European Commission has been the source of both hope and scepticism. According to Simon Deakin, "as a restatement of the goals of European social policy, the Pillar lacks the ambition and sense of purpose of earlier instruments to which it bears some resemblance, such as the Community Charter of the Fundamental Social Rights of Workers of 1989".[204] Nevertheless, as he also says, it is positive that the institution puts forward an initiative that is not yet another call for de-regulation in the name of market integration.[205] The European Commission allegedly conceives of social policy as a mechanism that can address inequalities. On the other

[204] Simon Deakin, "What Follows Austerity? From Social Pillar to New Deal," in *A European Social Union after the Crisis*, eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere (Cambridge: Cambridge University Press, 2017): 194.
[205] Ibid.

hand, the Pillar is missing a clear and explicit mention of the means to achieve its supposed ends.

Furthermore, we should be careful to note that the 'liberalisation' agenda pursued by the ECJ was not always inegalitarian. The Court has, for a long time, protected migrant workers against discrimination based on nationality and protected equal pay for men and women. ECJ decisions in some ambits has also allegedly performed a valuable service. In the domains of environmental protection, health and safety protection and consumer protection, European legislation has tended to be quite demanding and been above the level of the lowest common denominator.[206]

3. Failures of the European Union

Notwithstanding all that was said above, we can plausibly maintain that the EU suffers from a justice deficit. Below I will enumerate some instances of this.

Several of the ECJ's most emblematic rulings, that of Viking, Laval, Ruffer and Commission v Luxembourg, concern the issue of balancing economic and social freedoms. Despite controversy over the real meaning of such decisions, they have all, to some extent, represented an advance of the internal market to the detriment of the social dimension of the EU. For the most part, the absence of a strong social dimension in the EU relates to the fact that "the authors of the Treaties used to believe that market liberalization would by itself bring about social progress".[207]The harmonization of labour and social standards would, so the hope went, be the product of market integration as opposed to a condition for it.[208]

[206] Fritz W. Scharpf, "The asymmetry of European integration, or why the EU cannot be a social market economy," *Socio-Economic Review* 8 (2010): 227.
[207] Koen Lenaerts and José A. Gutiérrez-Fons, "The European Court of Justice as the Guardian of the Rule of EU Social Law," in *A European Social Union after the Crisis*, eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere (Cambridge: Cambridge University Press, 2017): 433.
[208] Sjoerd Feenstra, "Resolving the Viking/Laval Conundrum," in *A European Social Union after the Crisis*, eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere (Cambridge: Cambridge University Press, 2017): 311.

Social policies were clearly confined to the remit of the national Member States, whereas the Community would, at the supra-national level, seek to accomplish the economic objectives that included economic freedoms and a system of undistorted competition.[209] Notwithstanding the EU's several actions and legislative initiatives with respect to issues such as employment and social policy, increasing economic integration has never been substantially compensated by the development of social policies. As Sjoerd Feenstra notes, "it is easier to promote integration by reducing state legislation interfering with economic activities (negative integration) than by creating common standards and regulatory frameworks for economic agents (positive integration)."[210] Similarly, Miguel Poiares Maduro notes that one of the questions that should be addressed in the context of the European Union is whether competition among the different states with respect to 'social rights' should be accepted or whether a common set of policies and rights, to which competition would have to conform, should be established.[211]

Furthermore, over the years national social standards and welfare systems have been challenged by the broad and 'functional' interpretation given to market integration rules. The EU has indeed been successful in reducing barriers to trade, but not so much at building sets of EU law and policies to tackle issues. This has put great pressure on national welfare states. There has been a thin line between ensuring market access to further market integration and securing access to the market to enlarge economic freedom. When the European Court of Justice analyses effects on the provision on free movements, it is not solely focused on the effects of trade: it also focuses on the level of market integration. The latter has, on the view developed by the ECJ, spilled into virtually all areas of national legislation.

During the first two decades of European integration, however, there was not much tension between the European Union and the development of national welfare states. The practice of unanimous decision-making ensured that legislation that removed economic barriers could not be approved without Member States' approval and countries could

[209] Ibid: 313.
[210] Ibid.
[211] Miguel Maduro, "Europe's Social Self: The Sickness unto Death," in *Social Law and Policy in an Evolving European Union*, ed. John Shaw (Oxford: Hart Publishing, 2000): 327.

"control the interaction effects between economic liberalization and the functional requirements of their nationally bounded welfare states, their systems of industrial relations", as well as their public revenue, public infrastructures and public services".[212] Fritz Scharpf notes, nevertheless, that as a consequence of diversity in Member States, incompatible product standards and trade regulations, hopes turned to the European Court of Justice to solve the political impasse.[213] Scharpf claims that the ECJ made use of a strategy that consisted in using law as a mask for politics and imposing doctrinal decisions with far-reaching political obligations in cases lacking much substance.[214] He notes that these decisions could not be easily politically reversed. In the case of nation-states, judicial interpretations of a statute may be reversed by simple majorities in parliament and interpretations of constitutional law may be reversed by qualified parliamentary majorities. The reversal of decisions by the ECJ, on the other hand, that are based in European primary law require treaty amendments that must be approved in all member states. Decisions based on European secondary law, furthermore, can be changed only with recourse to an initiative by the European Commission that commands a qualified majority in the Council and usually an absolute majority in the European Parliament. This means that ECJ interpretations of EU law are a lot more immune to political changes than constitutional law within Member States. The difficulty in securing political change at the EU level is, moreover, aggravated by the existence of an ever-increasing diversity in national preferences and in national interests.

Some of the specific presumptively egalitarian national decisions that the ECJ annulled include legislation that was intended to increase opportunities for the elderly, the subordination of the right to strike to freedom of establishment[215], the subordination of the right to collective bargaining and legislative wage determination to the freedom of

[212] Fritz Scharpf, "The asymmetry of European integration, or why the EU cannot be a social market economy," *Socio-Economic Review* 8 (2010): 215.
[213] Ibid.
[214] Ibid: 216.
[215] Freedom of establishment is covered in the Treaty on the Functioning of the European and consists of a permission for self-employedpersons, professionals and legal persons, that legally operate in one Member State, to carry out an economic activity in a sustained fashion in another Member State or to offer and provide their services in other Member States temporarily while remaining in their country of origin.

service provision and the legislative determination of corporate governance to the freedom of capital movement.[216]

The EU has, on occasion, pursued a policy of compelling Member States to carry out privatisation. The Treaty on the Functioning on the European Union has been interpreted by the European Court of Justice in a way that deprives Member States of the prerogative to reserve certain activities to their public sectors.[217] Subsequent EU directives have liberalised and reinforced this interpretation by the ECJ. These have been such that the state may still, in some cases, own the previous monopoly firm but is now forced to compete with other service providers. This kind of liberalisation "brings in its wake an inevitable degree of privatisation" as it tends to be the private sector that profits from liberalisation.[218] The ECJ's interpretation of European competition law has been extended in a way that promotes the access of private providers to public services or infrastructures that Member States had previously protected from competition.

It is also worth reflecting on what values the EU actively pursues. The values that are enshrined in the Treaty on the European Union, such as liberty, democracy and respect for the rule of law, "have been grafted onto the institutional framework of the EU by the ECJ…in a way that leaves them at best ill-defined and worst ancillary, contingent and frequently incoherent".[219] At any rate, when they have been interpreted, they have been taken to be values that should be subordinated to integration of the single market. One of the values that we may think the EU furthers is that of fundamental human rights. Progress has been made undoubtedly in areas of fighting sexual discrimination and in the rights of defence. Nevertheless, the Court's approach to human rights is such that its application is a function of the preservation of the EU and the integration of the single market.

[216] Fritz W. Scharpf, "The asymmetry of European integration, or why the EU cannot be a social market economy," *Socio-Economic Review* 8 (2010): 229.
[217] Danny Nicol, "Swabian Housewives, Suffering Southerners: The Contestability of Justice as Exemplified by the Eurozone Crisis," in *Europe's Justice Deficit*, eds. Dimitry Kochenov, Gráinne Búrca, and Andrew Williams (Oxford: Hart Publishing, 2015): 168.
[218] Ibid.
[219] Andrew T. Williams, "Taking Values Seriously: Towards a Philosophy of EU Law," *Oxford Journal of Legal Studies*, 29 (2009): 563.

Perhaps the occasion in which the weakenss of the EU's social dimension manifested itself most clearly was the imposition of measures of austerity as a condition for the bail-out of several countries that were troubled by the sovereign debt crisis. The initial institution that was tasked with the establishment of the bail-out packages was registered under EU law and so bound by community legislation. Several cases were filed against it before the European Court of Justice, but the latter tended to say that it was mostly inconclusive whether the measures were a direct imposition of the Union. This took place in the case of Romania where salaries in the public sector were cut by 25% in 2010 as part of an austerity package.[220] The European Comission and the European Central Bank played an important role in the decision-making process that disbursed the bail-out packages. The ESM (European Stability Mechanism) Treaty attaches important tasks to both the Commission and the European Central Bank with respect to the negotiations of the Memoranda of Understanding and with respect to signing the agreements on behalf of the ESM. The Court repeatedly considered, important though this role undoubtedly was, it did not confer these bodies any real power to make any decisions of their own. The Court maintained that these decisions commit the ESM Treaty.[221]

With respect to the supposed obligation of acting under EU law in all undertakings, the Court concluded that the austerity measures in question did not amount to a "sufficiently serious breach" of EU law and that this is the bar that must be met if the case is not to be dismissed.[222] Therefore, even though the Court interpreted that the Charter applies to EU institutions even when they are acting outside of the EU legal framework, it soon became clear that "actions brought against the Union in the context of the ESM would only very rarely be successful on substance".[223]

One of the manifestations of the EU's justice deficit lies precisely in the absence of a clear commitment to normative principles with respect to taxation. One may say that "the function assumed by the EU taxation system is very different from that one assumed by

[220] Alexander Kornezov, "Social Rights, the Charter, and the ECHR," in *A European Social Union after the Crisis*, eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere (Cambridge: Cambridge University Press, 2017): 410.
[221] Ibid: 413.
[222] Ibid: 414.
[223] Ibid.

the national tax legislations" in the sense that the EU conceives of its role in a strictly negative sense.[224] This means it seeks to avoid the distortionary effects of the taxation system as opposed to positively affecting the consistency of the national wealth and "the redistribution process of the income among the members of the civil community".[225] Pietro Boria maintains that the EU's main interest in taxation lies in ensuring that national taxation rules do not present substantial obstacles to freedom of market competition in a way that interferes with economic integration.[226] Additionally, Fritz Scharpf notes that one of the weaknesses of the EU is precisely "its inability to regulate competition over taxes on company profits and capital incomes".[227] He maintains that it is, furthermore, an area (alongside industrial relations) in which the Court's protection of economic liberties prevents action at the national level.[228] Scharpf also predicts that the fact that harmonization is not politically feasible means that it is likely that the Commission will leave progress in the field of corporate taxation simply to the Court.[229] One of the controversial decisions of the Court is the decree that restrictions to the common market must be justified by mandatory requirements of public interest and it reserves itself the right to decide what these are.

The ECJ could have developed jurisprudence that promoted the regulation of tax competition, but, in practice, it has reinforced it. Between 1986 and 2003, Member States have lost more than 80 per cent of the corporate tax cases before the European Court of Justice.[230] The Court has frequently ruled national tax rules inconsistent with the four freedoms. The Court has attached much greater priority to upholding rights of mobility than to the alleged requirements of Member States' public policy.[231] This is so to the extent that shopping for new tax jurisdictions is virtually a constitutional right.[232]

[224] Pietro Boria, *Taxation in European Union* (Chan: Springer, 2014): vi.
[225] Ibid.
[226] Ibid.
[227] Fritz Scharpf, "Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis," MPIfG Discussion Paper 12/6, Koln: Max Planck Instituten fur Gesellschaft: 14.
[228] Fritz W. Scharpf, "The asymmetry of European integration, or why the EU cannot be a social market economy," *Socio-Economic Review* 8 (2010): 225.
[229] Ibid: 227.
[230] Philipp Genschel, Achim Kemmerling and Eric Seils, "Accelerating Downhill: How the EU Shapes Corporate Tax Competition in the Single Market," *Journal of Common Market Studies* 49 (2011): 599.
[231] Ibid: 600.
[232] Ibid.

4. My proposal

The question of international distributive justice is one that has become the subject of intense debate as I mentioned in the introduction. Nevertheless, the conception of political morality between Europeans must include very weighty concerns and demands, such as the most fundamental aspects of justice and legitimacy within EU Member States. I maintain that it is vital that the EU does not damage justice and legitimacy within Member States. The EU is an institution that massively impacts the life prospects of individuals across the continent. It does so in a variety of ways. Crucially, it establishes a regime of free movement of capital, labour, services and goods. It is, to date, the biggest exercise in economic integration involving more than one country. These are important aspects one should bear in mind when reflecting about political morality in the EU. It is important that the EU, in virtue of its pervasive impact on citizens' life prospects, does not undermine basic demands of justice and legitimacy domestically. There is, one might say, a negative duty on the part of the EU not to undermine the justice and the legitimacy of states.

4.1 Negative duty not to undermine justice and legitimacy of states

In a well-ordered society that successfully fulfils a conception of justice that belongs to a family of liberal theories, individuals enjoy a certain degree of freedom. Individuals do not have to feel responsible for everything they could have prevented. Individuals should not be excessively burdened in the pursuit of their own life plans by the demands of impartiality in the treatment of others.

Thomas Nagel notes that the lack of a washing machine by the family next door is not something I am morally responsible for even if I could have purchased one.[233] This does not apply, however, to the relations we have with each other through common institutions such as the state. He notes that "we are responsible, through the institutions which require

[233] Ibid.

our support, for the things they could have prevented as well as for the things they actively cause".[234]

The EU is not, granted, a state and does not have the coercive apparatus that one typically associates with a state. Its regulations and directives must, however, be transposed to Member States' national legislations and supersede the latter. The policy repertoire which it covers is very ample as we have seen in the two previous sections. Regarding tax competition specifically, it is an issue which the EU affects both positively and negatively. It does so positively through its legal enforcement of economic integration as we also have seen.

The free movement of capital – for example – induces countries to compete via corporate taxation in ways that are potentially very detrimental to the satisfaction of egalitarian standards of distributive justice. As a result, the EU cannot plausibly claim that it merely allows outcomes to occur. Given its involvement in favouring this situation, the EU has a duty to remedy it. This position I take is akin to Thomas Pogge's position with respect to global justice; he maintains that "once one is a participant in social practices, it may no longer be true that one's negative duties require merely forbearance".[235]

Further to this, it is plausible that there are a set of specific harms, the severity of which means individuals should not have to experience them. Individuals should be protected from these harms not in virtue of the loss in welfare they provoke, but because of their inherent disvalue. It is plausible that it is the job of the EU to protect its citizens from experiencing its harms. As far as political morality goes, it is plausible that these harms include finding oneself below a threshold of sufficiency. This is, plausibly, one of the specific harms that institutions are obliged to prevent. If, therefore, tax competition is such that it leads to some of these harms, the EU has plausibly a duty to intervene and prevent this.

[234] Ibid.
[235] Thomas Pogge, "Cosmopolitanism and sovereignty," *Ethics* 103 (1992): 52.

4.2 A Family of Liberal Political Values for the European Union

We must now take a greater look at the content of the EU's negative duties and the specific harms from which individuals should be protected. In what follows, I will argue that the EU should protect the individuals living under the Union from falling under domestic sufficiency thresholds and should protect them from economic inequality if it undermines the fair value of political liberties. What reasons are there for ascribing so much weight to these features? I will say more about this in what follows, but, summarily, we can say that the EU is a liberal international association and, considered as such, it is essential that it realises a family of liberal political values. These, importantly, include the protection of a social minimum and the fair value of political liberties. These are not merely utopian demands since the European Union is already committed to them to at least some degree.

When reflecting upon what duties European citizens have towards one another, it is informative to look to the Rawlsian notion of a family of liberal values.[236] There are several elements that define a family of reasonable liberal political conceptions of justice. Not all of them, however, are obviously relevant in a proposal in favour of the regulation of tax competition and so I do not mention them. Liberal conceptions are marked by three conditions. As Rawls says: "first, a specification of certain rights, liberties, and opportunities (of a kind familiar from democratic regimes); second, a special priority for these freedoms; and third, measures assuring all citizens, whatever their social position, adequate all-purpose means to make intelligent and effective use of their liberties and opportunities."[237] One necessary feature of liberal conceptions of justice is, therefore, that they affirm a social minimum. One can plausibly read this statement as the idea that a social minimum should be lexically prior to the principle of equal basic liberties.

Rawls is unequivocal about this and notes that the first principle of justice, that of equal basic liberties, "may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to

[236] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): xlviii.
[237] Ibid.

understand and to be able fruitfully to exercise those rights and liberties".[238] In other words, the same interests that require basic liberties also require protecting basic economic necessities. He is similarly unequivocal about the central importance of safeguarding the social minimum when he argues that "a social minimum providing for the basic needs of all citizens is… an essential" while what he refers to as the difference principle is not.[239] Rawls argues that "the history of successful constitutions suggests that principles to regulate economic and social inequalities, and other distributive principles, are generally not suitable as constitutional restrictions".[240] Incidentally, Thomas Nagel notes that one of the institutional requirements of the social minimum is high progressive taxation.[241] The social minimum could, therefore, be threatened by tax competition insofar as it undermined the prospects of high progressive taxation, for example.

The EU's commitment to basic liberties is such that it does not allow countries to join the Union if they fail to express this commitment. As such, it would stand to reason that the EU should act to protect them if states are rendered unable to fulfil the economic necessities that are required by the basic liberties and which are, in a sense, prior to them.

It is difficult for philosophy to define where the social minimum should be situated. This task lies, to a great extent, outside of the framework of political philosophy. It is plausible, however, to insist that the minimum should possess both an absolute and relative element. In other words, finding oneself above the threshold should mean that one is safe from both absolute deprivation and the most severe forms of relative deprivation. Rawls notes the difficulties of defining the social minimum.[242] Rawls, moreover, advanced that a certain level of arbitrariness is inevitable in identifying the least advantaged group and that, at some point, we may have to plead to practical considerations, "for sooner or later the capacity of philosophical or other arguments to make finer discriminations" runs out.[243] Nevertheless, some considerations could help inform how the threshold should be

[238] Ibid: 7.
[239] Ibid: 228-9.
[240] Ibid: 337.
[241] Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991): 84.
[242] Incidentally, Rawls notes that his own preferred conception of justice is more immune to this problem, given that the social minimum is complemented by the difference principle. How to set the social minimum is subject to potential arbitrariness on the part of those who are better off.
[243] John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999): 84.

set in different EU states. One of them relates to the different 'needs' of citizens in each EU state because of, for example, different costs of living. The cost of living in a country puts upward pressure on where the threshold of advantage is placed.

There are, of course, multiple ways of defining the social minimum. Some of these are subjective and the others are objective. Gillian Brock makes note of the fact that philosophers are alive to the contributions made by social scientists about what should count as needs.[244] These include the two preconditions that enable participation in any form of life: physical health and mental competence to pursue a given ethical project. Further to this, there is a class of subsequent needs which connects these two notions to information made available by the social sciences: nutritious food, clean water, shelter, non-hazardous labour conditions, suitable health-care, security in childhood, significant primary relationships, physical security, economic security, appropriate education, safe birth control and safe child-bearing.[245]

Brock herself appeals to a notion of basic needs that are necessary for human agency. Brock maintains that this may circumvent the question of whether an account can be objective.[246] She argues that one can derive a list of basic needs from an analysis of human agency. In order to deliberate and choose, one needs to have physical and mental health, "sufficient security to be able to act" and a sufficient understanding of what is choosing between a certain amount of autonomy.[247] She adds a fifth condition which is important in developing and maintaining these which is the need for decent social relations with at least some others.[248]

One of the problems with appeals to subjective notions of 'needs' is it that may run into the problem of expensive tastes. Someone may claim that in order to function minimally, say, she requires expensive training in piano education whereas, say, a poor single mum

[244] Gilian Brock, "Sufficiency and Needs-Based Approaches," in *The Oxford Handbook of Distributive Justice*, ed. Serena Olsaretti (Oxford: Oxford University Press, 2018): 100.
[245] Ibid.
[246] Gilian Brock, "What Does Cosmopolitan Justice Demand of Us?" *Theoria: A Journal of Social and Political Theory* 104 (2004): 188.
[247] Ibid: 190.
[248] Ibid: 188.

who finds herself in the lowest income bracket of the population and is resigned to her fate does not claim to require any more resources than the ones she currently has.[249] The use of subjective judgements as the relevant metric to determine needs may warrant ascribing resources to the former to the detriment of the latter. This would amount to a counter-intuitive conclusion. Ingrid Robeyns, on the other hand, has written that capability theorists must rise to the challenge of what capabilities matter.[250] This is akin to the question of what the currency of a theory of distributive justice should include.[251]

It is also plausible that the social minimum must comprise a comparative element. Policy-makers tend to be concerned with rates of relative poverty, whereby this is a threshold that is set at either 50% or 60% of the median income. Amartya Sen has praised the focus on relative poverty that research and policy-making has taken, in recent decades, given that it has opened up discussion on how to conceive of the poverty line and that it has served to combat the smugness on the part of the governments of some developed countries that claimed to have eradicated poverty.[252] It is important, however, that the conception of poverty not be exclusively relative. This is so for several reasons. Firstly, if sufficiency is related, for example, to the average rise or fall in real incomes, it is very hard to eliminate poverty and for an anti-poverty strategy to be completely successful. Secondly, even if one fixes the poverty rate at 60% of the median income, it is still possible for an economy to suffer a massive contraction as a result of a severe recession or a depression and for the rate of poverty not to increase. This would happen if the relative picture did not change; if the number of people whose incomes were below, say, 60% of the median income did not change.

As Sen argues, "a sharp fall in general prosperity causing widespread starvation and hardship must be seen by any acceptable criterion of poverty as an intensification of poverty".[253] Even though one may think this kind of scenarios are less likely in developed

[249] Ingrid Robeyns, "The Capability Approach," in *The Oxford Handbook of Distributive Justice*, ed. Serena Olsaretti (Oxford: Oxford University Press, 2018): 118.
[250] Ibid: 120.
[251] They are capability theorists in the sense that they maintain that capabilities should be a part of the true view about political morality and not necessarily in the sense that they provide a capability-based full-fledged theory of justice.
[252] Amartya Sen, "Poor Relatively Speaking," *Oxford Economic Papers* 35 (1983): 154.
[253] Ibid: 157.

countries, they are by no means impossible and an adequate conception of poverty must be able to take into account other needs besides avoiding starvation. In other words, an adequate conceptualisation of poverty and, in turn, of the social minimum must have both an absolute and a relative element.

There is one further respect in which it must have both elements. As Sen puts it, the absolute satisfaction of some needs depends on the position an individual may find herself in relative to others.[254] In order to satisfy the absolute need to avoid shame, for example, it is possible that one must have leather shoes or a linen shirt.[255] Other absolute needs also require considering one's position relative to others. One may summarise this position by saying that avoiding poverty is an absolute notion in the space of capabilities but it often takes a relative form in the space of commodities or resources.[256] The commodities and resources one needs, in turn, are relative to the situation of others.

None of this means, of course, that there are not certain basic capabilities, the satisfaction of which does not involve roughly the same amount of resources. These include the meeting of nutritional needs, escaping avoidable disease, shelter, being clothed, travelling, and being educated.[257] We should not focus so much, Sen says, on resources or commodities as it does not inform us about what a person can indeed do with them.[258] The constituent part of the standard of living is not the good nor its characteristics but the ability to do several things with that good.[259] The commodity requirement of capability fulfilment, on the other hand, varies tremendously.[260] Finally, all of this suggests that an adequate conceptualisation of poverty must have both an absolute and a relative element and the EU should take this into account.

As the debate over sufficientarianism indicates, there is ample debate about where the sufficiency threshold should be placed. Harry Frankfurt penned one of the most famous

[254] Ibid: 159.
[255] Ibid: 161.
[256] Ibid: 168.
[257] Ibid: 163.
[258] Ibid: 160
[259] Ibid.
[260] Ibid: 163

defences of the principle of sufficiency and yet his own specification of the threshold was notoriously ambiguous.[261] The approach to defining social minima in each EU member state should consider what it has employed, since 2009, as one of the measures of poverty and social exclusion: that of material deprivation. One of the three components of Europe's anti-poverty targets by 2020 include the reduction of severe deprivation, whereby this is defined as the enforced lack of four items from a list of nine.[262] As the EU has used this as a target since 2009, we have a contingent reason to incorporate it in the critical threshold above which all EU citizens should be.[263]

Another plausible requirement of the family of liberal values is the creation and maintenance of liberal democratic institutions. My proposal reflects the importance of democracy within Member States. It does so in the sense that I propose that tax competition be regulated when it undermines the fair value of political liberties. The fair value of political liberties may be defined as the idea that those who are similarly endowed and motivated should enjoy approximately the same chance of achieving positions of political authority regardless of their economic and social class.[264] The principle also requires that people have approximately the same chance of influencing the political process. Tax competition would undermine this principle if it led to a level of inequality, the severity of which meant individuals did not have this approximately equal opportunity.

Democracy is an important pan-European value. Not only is it something to which the EU appeals, it is also the main legitimating standard of Member States. The protection of the fair value of political liberties is one very plausible way for the EU to cash out its protection for the domestic democracies of Member States. There are, of course, other threats to democracy, some of which are very blatant. These include gerrymandering and other ways of subverting the electoral processes. For the purposes of this project,

[261] Paula Casal, "Why Sufficiency Is Not Enough," *Ethics* 117 (2002): 313 discusses the alleged ambiguity of Frankfurt's specification of sufficiency.
[262] These are the capacity to afford mortgage or rent, utility bills, purchase instalments and other loan payments, a one-week holiday away from home, a meal with meat, chicken, fish or a vegetarian equivalent every second day, unexpected financial expenditures, telephone bills (including mobile telephone), a colour television, a washing machine, a car and heating to keep the home duly warm.
[263] Anthony Atkinson, *Inequality: What Can Be Done?* (London: Harvard University Press, 2015): 36.
[264] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999): 197.

however, I focus on the fair value of political liberties as it is unlikely that the EU will be at risk of subverting the domestic democracies of Member States in these other ways.

In fact, Rawls' preferred conception of justice, Justice as Fairness, requires a democratic political regime. The 'principle of participation' – which is part of the first principle – establishes that "all citizens are to have an equal right to take part in, and determine the outcome of, the constitutional processes that establish the laws with which they are to comply".[265] One of the strengths of democracy, required by the Rawlsian principle of the fair value of political liberties, is that it expresses an unconditional concern with the good of everyone and effectively encourages and supports self-respect. Self-respect, in turn, is vital because it offers a firm sense of one's own value and the conviction that one's conception of the good is worth pursuing.[266] The absence of self-respect may usher in the feeling that nothing is worth pursuing.[267]

Rawls notes that identifying the means necessary to secure the fair value of political liberties lies outside of philosophy.[268] It is, however, something the EU should address. It is a very plausible way of guaranteeing the health of a democracy. The fair value of political liberties, on Rawls' view, secures for each citizen the access to a public facility, specified by the constitutional rules and procedures, which determines the political process and positions of entry into public life.[269] One important feature of the political space is that it is limited. One might even say that it is a competitive good: this would mean it would not be possible to give more of it to some without taking some from others. One does not need to go this far, however, to note that it is a limited space in the sense that those who have relatively greater means can combine with ease to exclude those with less in the absence of a guarantee of fair-value.

Just as it is impossible for political philosophy to provide a full sketch of how to preserve a social minimum (and where to situate it), it is also very difficult for political philosophy to detail how to maintain the fair value of political liberties. This will depend greatly on

[265] Ibid: 194.
[266] Ibid: 156.
[267] Ibid.
[268] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 328.
[269] Ibid: 328.

the public political culture of each society and the type of political economy that is in place. Rawls, however, offers some clues. He maintains that it is at least necessary to keep political parties independent of large concentrations of private economic power.[270] It is also necessary that society bears a large part of the cost of the management of the political process and it must also regulate the electoral process.[271]

One may wonder why political liberties, unlike other basic liberties, should have their fair value protected. This is not because we deem political participation to be a more valuable and more important conception of the good than other activities. It is but one conception of good among several others.[272] In the context of modern states, one expects most individuals to make a much more extensive use of other basic liberties in their pursuit of the conception of the good than political liberties. The fair value of political liberties is required to ensure the production of just legislation and to ensure that the fair political process is open to everyone on the basis of rough equality. Further to this, one should note that the political liberties, just like the liberty of occupational choice and unlike most other basic liberties, is a constituent part of a competitive process. There are other basic liberties, such as that of a right to physical integrity which lack this character. In this sense, the fair value of political liberties should be protected in order to protect the fairness of this competitive process. Given, therefore, the importance of the fair value of political liberties, it is essential that the EU does not allow for its procedures and for economic integration to violate them.

There is, plausibly, a spectrum of reasonable views about the impact the economic system may have on individuals' political holdings. On one extreme end of this spectrum, one may find a view which says that insofar as people formally maintain their political liberties, there should be no restrictions on the extent to which income and wealth should influence individuals' political influence. At the other end of the spectrum, one may find a view which says that no variation in the political influence of individuals should be explained by variations in their levels of income and wealth. One can safely say that

[270] Ibid: 330.
[271] Ibid.
[272] Having said that, the moral power of exercising a sense of justice constitutes one of our higher-order interests and favours democracy as a political regime.

members of the family of liberal conceptions are all required to avoid indifference to the worth of political liberties. As such, we can rule out the view that only requires strictly formal equal political rights.

We need to clarify what renders a view more reasonable. The reasonableness of a view depends on whether it is favoured or not by sound reasons. In the sense relevant to political liberals, the reasonableness of a view depends on the way in which it is supported or opposed by sound reasons. If there are undefeated reasons to affirm a view, and so no decisive reasons to affirm a conflicting view, then the view is *fully reasonable*. A view may fail to qualify as fully reasonable in two very different ways. Thus, a view might be sufficiently supported by certain sound reasons to qualify as a reasonable view even if there are decisive reasons to affirm a conflicting fully reasonable view. Instead, a view might fail to possess such support and be sufficiently opposed by sound reasons that it qualifies as an unreasonable view. For illustration, compare justice as fairness, a mixed conception that affirms the basic liberties and a generous social minimum but rejects the difference principle, and an illiberal conception that denies certain basic liberties. On Rawls's view of the various reasons at stake, his own theory of justice qualifies as not merely reasonable but fully reasonable, the second view qualifies merely as reasonable but not fully reasonable, and the third view is unreasonable. The distinctions matter because political decisions supported by justice as fairness and the mixed conception are both politically legitimate even though the latter are in a sense unjustified. The same need not be true of decisions supported by the third illiberal view.

To return to the liberty-based reason for the EU to address certain economic inequalities, it is important to recall Rawls' distinction between *liberties* and the *worth of liberties* and the view that reasonable views do not have a merely nominal concern with political liberty.[273] The basic liberties, Rawls argues, constitute a framework of legally protected paths and opportunities.[274] Ignorance, poverty and lack of material means prevent people from exercising these liberties, but these constraints should not count as restrictions of people's liberties, but as a limitation of the worth of these liberties, or of their usefulness

[273] Ibid: 325.
[274] Ibid.

to persons.[275] The usefulness of the liberties to individuals may be influenced by their share of an index of primary social goods. Rawls himself maintains that the idea of the fair value of political liberties means that the worth of individuals' political liberties must be roughly equal such that everyone has "a fair opportunity to hold public office and to influence the outcome of political decisions".[276] He also notes, interestingly, that it is not clear whether the inequalities permitted by the difference principle when considered in isolation are sufficiently small to protect the fair value of political liberties.[277] The notion of what worth of political liberties is enough is comparative. This makes sense given that democracy is itself a comparative notion. It requires equal political votes and we would begrudge proposals that sought to ascribe greater political rights to the wealthiest and to the more educated.

In the absence of other means to secure the basic political liberties' fair value, this, once again, speaks in favour of restraining sufficiently inequalities and the idea that liberal political conceptions must maintain some form of cap on the extent to which wealth may enable some to have more political influence than others. The EU should, therefore, be unafraid to hold a comparative principle with respect to the protection of the worth of EU citizens' political liberties.

On the other hand, it might be the case that it is possible to insulate the effects of differential wealth in the political process. There are several measures which countries may adopt to achieve this, such as public financing of campaign and electoral expenditures and limits on contributions as well as a series of other types of regulations. In spite of Rawls' allusion to such measures, one may argue that he does not consider strategies that insulate the political sphere from the economic sphere.[278] It is highly unlikely, however, that these strategies succeed in the context of welfare-state capitalist societies. If, indeed, this is either not possible or proves to be too difficult, the EU has reason to intervene and regulate tax competition if it leads to inequalities that threaten the fair value of political liberties.

[275] Ibid.
[276] Ibid: 327.
[277] Ibid: 328.
[278] Martin O'Neill, "Liberty, Equality and Property-Owning Democracy," *Journal of Social Philosophy* 40 (2009): 387.

Thomas Christiano, however, considers several different mechanisms through which wealth can influence the political sphere.[279] The first consists of financing either given elected politicians or political parties in return for a favour such as a law perhaps that advances the donor's economc interest. As Christiano notes, the favours in question may take the form of support for public policy or legislation, the relaxation of the execution of certain laws or close access to a given politician.[280] This is one of the most classic ways in which wealth seeks to influence the political sphere and the campaign finance laws of many jurisdictions are designed to erase this. The second form of influence is that of money as a gatekeeper and consists of seeking to determine the agenda of the political debate in a given moment in a polity. An instance of this consists of financially supporting a politician or political party so these may raise a given set of issues to the detriment of other issues promoted by other would-be candidates whose lesser economic clout means they do not have the resources to campaign. It is different from the first form of influence as no form of quid pro quo is involved in this case. This form of influence is particularly likely in contexts in which candidates for public office have to raise their own resources. Money has declining marginal utility which means the wealthy are much more likely to finance political campaigns. This, in turns, means that political campaigns are obliged to appease or please the wealthiest. In such a scenario, "disagreements may occur, but they will be limited primarily to those among the affluent" whereas other dissenting convictions, however strongly held among other sectors of the population, will tend to be marginalised.[281] Christiano cites evidence that the US Senate is unresponsive to the concerns of the least well-off sector of the population.[282] There is also evidence that when there is a conflict between the interests of different sectors, it is those of the wealthiest classes that prevail.[283] This is plausibly an instance of the violation of the fair value of political liberties as it means that individuals have different opportunities to shape the process of collective decision-making in virtue of their economic position.

[279] Thomas Christiano, "Money in Politics," in *The Oxford Handbook of Political Philosophy*, ed. David Estlund (New York: Oxford University Press, 2012): 241-257.
[280] Ibid: 242.
[281] Ibid: 245.
[282] Ibid.
[283] Ibid.

There is yet another mechanism for influencing the political process which is relevant for our purposes. This is the production of elaborate opinions and broadcast of ideas to the public. The wealthy have greater means to finance the production of ideas and arguments. This is something which critically also takes place in periods such as election debates and campaigns. As Christiano notes, if there is a sector of the population that is much more influential than others with respect to the creation and dissemination of opinion, it is likely to determine what conceptions of justice are available for discussion and for pursuit in society in any given moment.[284] This form of influence on the political process may also take the form of financing think tanks and intellectual activity in general.[285] Often the financing of such kinds of activities is private and, again, given the declining marginal utility of money, it is likely that this stems from the affluent.

Perhaps none of these mechansisms would be particularly worrisome if the interests of persons were randomly scattered across the population and were not correlated with economic class. This, however, seldom if ever is the case. Commonalities of interest tend to be strongly correlated with economic class.[286] The latter may well be the strongest determinant of people's interests. This is particularly serious given that one of persons' strongest interests concerns the question of how to share wealth and money. It follows from all this that there is a tendency for the wealthy to shape the political process in favour of their interests, which, in turn, include their perpetuation as the most advantaged economic class. The wide variety of ways in which the wealthy, therefore, influence the political process suggest that it may, in some cases at least, be impossible to protect the fair value of political liberties without containing inequalities.

There are of course more demanding views, such as one which maintains that economic inequalities are intrinsically democracy-undermining. The argument maintains that this is so because democratic decisions are subordinated to the investment decisions of

[284] Ibid.
[285] Ibid: 249.
[286] Ibid: 251.

capitalists, thus rendering it hard for polities to take decisions such as an increase in the progressivity of the tax system.[287]

I do not want to oppose such a view, but merely to note that it runs into powerful objections and that, therefore, we should seek to rest our case on more ecumenical grounds. The sheer fact that some individuals have a greater capacity to impact others does not in itself constitute a violation of the principle of fair value of political liberties. Ronald Dworkin usefully distinguishes between the principle of equal impact and equal influence.[288] He notes that influence concerns a person's ability to persuade or induce others to her side whereas impact concerns what a person can achieve in virtue of her opinion "without regard to what others believe".[289]

A plausible interpretation of the principle of fair value of political liberties does not require that individuals have an equal ability to impact society. After all, people who hold authority in the executive, legislative and judicial branches of government can inevitably impact the political process a lot more than ordinary citizens. As Dworkin observes, caring about equality of impact is irrational once we recognise that it is both "unattainable and undesirable".[290] Furthermore, the fact that some individuals have a greater ability to impact in virtue of greater wealth stems from an inevitable feature of global capitalism: free mobility of capital. Free mobility of capital is, plausibly, something we all have reason to value as it creates wealth and prosperity. It would also be less consistent with European values to argue in a direction that suggests that capitalism is structurally in

[287] One may consider that inequalities of wealth, beyond a certain level, undermine democracy necessarily. This is not a view I want to depend on as I maintain that inequality can be rejected on more ecumenical grounds. See Joshua Cohen, "The Economic Basis of Deliberative Democracy," *Social Philosophy and Policy*, 6 (1989): 28, for an example of more demanding views of democracy. Cohen argues that the fact that investment is privately controlled significantly limits the democratic nature of the state. This occurs because the decisions of the democratic state are subordinated to the investment decisions of capitalists. The fact that investment is privately controlled renders the implementation of a more progressive tax system, for example, much harder. Capitalists refrain from investing when more of their capital is taxed away. Declining investments, in turn, impose long-term material losses on individuals and because citizens anticipate them, they refrain from increasing the rate of taxes as they would have preferred. He also argues that the typically unequal distribution of income and wealth in a capitalist society by undermining equal access of citizens to the political sphere and equal capacity to influence outcomes. He clarifies that "economic resources provide the material basis for organised political actions" and, subsequently, "groups that are materially disadvantaged face important organisational and political disabilities".
[288] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: The Belknap University Press, 2011): 388.
[289] Ibid.
[290] Ibid: 389.

strong tension with democracy.[291] We, therefore, have reason to accept the greater ability for the wealthy to impact on the political process.

We should, therefore, be more concerned with influence. Having said this, we should not demand that all citizens have an equal ability to influence the political process. Most of us accept that, at any point in time, some people are always going to be more influential than others. Some characters will inevitably have a greater capacity to persuade others. This is not something that we can plausibly condemn. We accept and salute the fact that characters like Martin Luther King and Mahatma Ghandi have been more influential than their co-citizens.

Influence that is grounded in wealth, on the other hand, is something that we have reasons to oppose: it should not make a large difference in the forum even if it can play such a role in the marketplace. This is a more ecumenical position as it is something that is also shared by those who favour a thicker interpretation of the fair value of political liberties.

One of the features of my proposal for the EU that is worth mentioning is the fact that it is consistent with Rawls' view on international relations. In the *The Law of Peoples*, John Rawls argues that the principles that should regulate the relations between liberal peoples consist of several familiar principles of equality among peoples.[292] While it is true that the set of principles advocated by Rawls for the relations between liberal peoples do not offer guidance with respect to the content of international organisations in the field of socio-economic justice, Rawls does say these should be animated by relations of equality between peoples.[293] This does allow for economic inequalities between peoples. Rawls

[291] See David Estlund, "Political Quality," *Social Philosophy and Policy* 17 (2000): 127-160 for an argument in favour of the permissibility of inequality of influence in the political process in virtue of wealth differentials. His argument is, he says, like the Rawlsian case in favour of the difference principle. Estlund rejects the notion that political influence is a competitive good (the notion that no-one cannot get more of it without someone else getting less) and distinguishes between influence and input. Influence can be expressed as a person's fraction of the total political input, whereas input may stand for a person's absolute quantity of political participation. He argues that it is possible that, at a certain level of inequalities, (albeit smaller than the ones observed in contemporary societies) allowing for wealth differentials in the political sphere may produce some strongly Pareto superior outcomes. I do not advance objections to his view in my dissertation, but I assume it is mistaken or that my proposal can be refined in a way that renders it consistent with Estlund's view.

[292] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999): 35-36.

[293] Ibid: 42.

claims that, much as is the case with the appropriate principles of distributive justice for domestic societies, the appropriate principles in the international sphere begin with the baseline of equality and equal rights of all peoples.[294] Departures from these principles are permitted, in the context "of organisations and loose confederations of peoples" in which "inequalities are designed to serve the many ends that people share".[295] Concretely, Rawls adds that larger and smaller peoples are ready to accept proportionately larger and smaller returns. Countries are, therefore, permitted to arrange organisations in a way that allows for inequalities when these inequalities favour, for example, the least advantaged. One may, therefore, even maintain that these considerations need to form part of a European public reason that states the fair terms of co-operation between European individuals. I should also note, at this stage, that the ambition of this Part is not that of presenting a full-fledged conception of distributive justice. Instead it merely argues that the best conception for distributive justice at the level of the EU must include these points. This, however, does not mean that we cannot maintain that our proposal is superior to some of its more expansive rivals. They are so in virtue of the importance of maintaining stability, respecting the national self-determination of countries and the fact that they can be implemented with greater clarity and are more likely to be feasible.

5. Rival proposals

One prominent view of distributive justice within the EU is held by Philippe Van Parijs. Van Parijs maintains that the pursuit of maximin socio-economic advantages at the level of each country may tend to unravel into an unrestricted rush for competitiveness, which may undermine even the provision of welfare states as they currently exist.[296] In order to avoid such a situation, he argues that, when faced with the question of whether to pursue local maximins in every country taken separately or in the world as a whole, we should choose the latter.[297] Van Parijs notes that whatever conception of justice is deemed to be adequate for the distribution of resources between members of a domestic society should

[294] Ibid.
[295] Ibid: 41.
[296] Philippe Van Parijs, *Real Freedom for All: What (if anything) can justify capitalism?* (Oxford: Clarendon Press, 1995): 228.
[297] Ibid.

also "provide a suitable characterization of global distributive justice".[298] He argues, therefore, in favour of a conception of justice that is a planet-wide blow-up of distributive justice conceived domestically.[299]

Van Parijs also argues that nation-states of the world should realise that they compete on the same global markets, that their economic activities produce externalities that impact on the shared environment and that many of them are made vulnerable by migrants from the world population.[300] He maintains that addressing such policies necessitates significant transnational redistributive policies.

Nevertheless, Rawlsian justice as fairness has been interpreted in favour of policies that lead to or might produce a downward competitive race, spurred by an ever fiercer competition for scarce factors of production, and market shares, that is damaging to the welfare states.[301] Van Parijs's conclusion is that, at least in part, the strategy to combat this dire state of affairs must consist of the pursuit of redistributive mechanisms on a global scale, "indeed ultimately an individual basic income at the highest sustainable level for each human being".[302] He adds that the political feasibility of such a tendency requires the spreading of attitudes of solidarity and tolerance, which, in turn, require the work and contribution by different social movements and non-governmental organizations, such as Amnesty International and Greenpeace.[303] Van Parijs claims, moreover, that the approximation to a one-man, one-vote world democracy is a necessary strategy in this respect.[304] He says that "democratic scale-lifting is the first strategy that must be adopted both in order to protect and regain the fast-shrinking leeway for intranational redistribution for its own sake, as there is no morally non-arbitrary boundary to our equal concern, save the limits of mankind itself".[305] To put his view more specifically, Van

[298] Philippe Van Parijs, "International Distributive Justice," in *A Companion to Contemporary Political Philosophy*, eds. Robert E. Goodin, Phillip Pettit and Thomas Pogge (Malden: Blackwell Publishing, 1993): 638.
[299] Ibid: 639.
[300] Philippe Van Parijs, *Real Freedom for All: What (if anything) can justify capitalism* (Oxford: Clarendon Press, 1995): 228.
[301] Ibid: 227.
[302] Ibid: 228.
[303] Ibid.
[304] Ibid: 229.
[305] Ibid.

Parijs advocates the distribution of a universal basic income on a global scale to each individual and that the value of the grant should be set at a level that sustainably maximises the opportunities of the least well-off globally.

More recently, Van Parijs' view has expressed concerns that European integration may have generated what he refers to as 'Hayek's trap'.[306] He refers to a view espoused by Friedrich Hayek in an article in which Hayek depicts European integration as the fulfilment of a classical liberal dream. On this view, European integration results in the loss for member states of a considerable section of the redistributive public policy space previously available, which is not susceptible of being replaced by substitute redistributive mechanisms operating at the European level.[307] These effects might arise partly as a result of European Court of Justice rulings that remove the ability of Member States to legislate on various issues. The free movement of individuals, capital and goods and services would mean that "it would become clearly impossible to affect the prices of the different products through action by the individual state", contended Hayek, and this restriction would not be limited to price-fixing and would instead also apply to deciding on issues like working hours and child labour.[308]

According to Hayek, such changes will occur for two reasons. Firstly, differences between member states' economies would mean that uniform economic policy-making at supra-national European level could hardly be optimal to all states.[309] Van Parijs quotes Hayek in saying that the movement of goods, services, people and money mean that it ceases to be possible for states to affect prices through individual state action.[310] National governments would not be the only weakened national agent. Several domestic

[306] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 24.
[307] Ibid: 25-26.
[308] Philippe Van Parijs, "Hayek's trap and the European utopia we need," in *Reducing Inequalities. A Challenge for the European Union?,* eds. Renato Miguel Carmo, Cédric Rio and Márton Medgyesi (London: Palgrave Macmillan, 2018): 213-223.
[309] Christian Joerges, "Social Justice in an Ever More Diverse Union," in *A European Social Union after the Crisis*, eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere (Cambridge: Cambridge University Press, 2017): 110. He alludes to this when he states that the best efforts to define an average do not eliminate the unequal impact of decision-making on countries that are as diverse as those in the EU.
[310] Philippe Van Parijs, "Hayek's trap and the European utopia we need," in *Reducing Inequalities. A Challenge for the European Union?,* eds. Renato Miguel Carmo, Cédric Rio and Márton Medgyesi (London: Palgrave Macmillan, 2018): 214.

organisations would also lose their capacity for influence, including trade unions, cartels, and professional organisations as they would all lose their "monopolistic position".[311]

Van Parijs notes that Hayek maintains that it is not likely that the capacity to intervene redistributively at the level of the Member State can be reproduced at the level of the EU. This would not occur as some forms of state interference that may be regarded as a form of progress in one state would be seen as an impediment in another state.[312] Hayek argues that even matters such as the limitation of working hours, compulsory unemployment insurance, the protection of amenities will be viewed differently in rich and poor EU regions and in regions that find themselves at different levels of economic progress. These predictions seem to have been vindicated, to an extent, by the history of European integration. The construction of a 'social Europe' with the same constitutional status as economic integration was impeded by diversity of welfare states and economic development after southern enlargement.[313]

We now look at the second reason why, on Hayek's view, a national redistributive strategy would not be replaced at the European level. According to Van Parijs' account of Hayek's view, the lack of a sense of shared identity at the European level means that the peoples of Europe would not be willing to support a project of distributive justice at the level of the Union.[314] The Union is marred by features such as the lack of comparative homogeneity, common convictions and ideals and the whole common tradition of the people of a national state. The submission to the myth of nationality facilitates the acceptance of issues and directives. Van Parijs notes that the decisions that are taken by people who are not regarded as compatriots are not as readily accepted. In order to counteract the lack of a shared identity, he proposes that several strategies be deployed, including the strengthening of European institutions, the creation of a pan-European electoral constituency and that the use of English be encouraged as a means of favouring the emergence of something that approximates a European civil society.[315] It would

[311] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* (2019): 20.
[312] Ibid: 21.
[313] Fritz Scharpf, "The European Social Model: Coping with the Challenges of Diversity," *Journal of Common Market Studies*, 40 (2002): 650.
[314] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 21.
[315] Ibid.

similarly be impossible, or at least very difficult, to conceive of a re-erection of national borders and a return to a traditional model of state sovereignty given the enormous transition costs and uncertainty that this would usher in.

Hayek is not the only author to note how something akin to right-wing libertarianism can be advanced by international institutions. James Harmes, for example, notes that neoliberalism has an explicit project for multi-level governance.[316] This consists of two main elements. Firstly, sub-national governments should not have the ability to restrict the right to enter or exit their jurisdiction. "This implies", he says, "the centralization of most 'market-enabling' policy capabilities at the federal level to ensure a national economy characterized by the free movement of individuals, firms and goods".[317] A second element of the neoliberal project is that policy competences such as social spending and taxation should be decentralised.[318] This prevents national policies on most economic issues; market-regulating powers and taxation will be left to smaller units, which would be heavily constrained by the competition for mobile individuals and firms.[319] This federal project, which neoliberals defend in the realm of the nation-state, is extended to the international realm as well. Market-promoting competences are centralized in organizations such as the IMF and the World Bank.[320] These include an exit option for mobile individuals and firms. Political jurisdictions are then forced to compete for investment.[321] This, in turn, renders it unlikely that they engage in heavy regulation or redistribution.[322] This way of implementing neoliberalism is, broadly speaking, very similar to that proposed by Hayek.[323]

Van Parijs, of course, is not convinced that the EU is doomed to have to accept this neo-liberal project. He believes that it is indeed possible for the European Union to assume a

[316] James Harmes, "Neoliberalism and multilevel governance," *Review of International Political Economy* 13 (2006): 726.
[317] Ibid: 736.
[318] Ibid.
[319] Ibid.
[320] Ibid: 740
[321] Ibid.
[322] Ibid.
[323] Hayek was, seemingly, more optimistic from a neoliberal point of view. He was very dismissive of the feasibility of redistribution on a European scale, whereas Harmes notes that several libertarian thinkers are adamant about the need for caution in warding off this danger.

redistributive function and that the challenges identified by Hayek can be met.[324] Van Parijs' own specific proposal famously includes the introduction of a 'euro-dividend', or a modest unconditional basic income that would be disbursed to every EU resident and would be funded by an EU-wide value added tax.[325] This would provide, on his view, an important macroeconomic stabilizer for the single currency and a demographic stabilizer for the political sustainability of the free movement of people.[326] It would amount to a desperately needed contribution to the perceived legitimacy of the EU as it would improve its popularity before those citizens who are less able or disposed to migrate.[327]

With respect to his broader project, Van Parijs is conscious of the difficulties that it faces, some of which are highlighted by Hayek. He mentions that it is important to prevent the space provided by the European public forum from being dominated by Anglo-American institutions, such as the press (e.g. *The Economist* and *Politico*), which may have a strong bias in favour of right-wing policies and conceptions of justice.[328] He also defends the need to protect native languages alongside the expansion of the English language.[329]

On Van Parijs's view, the EU might be conceived of as a somewhat transitional institution in the pursuit of global justice; as a regional institution that can fulfill justice beyond national borders. He argues that in principle there is no good moral reason to restrict duties of egalitarian justice to the EU.[330] There is no evidence, however, claims Van Parijs, to believe that the EU countries would be more successful in terms of the obligations (these are obligations of both justice and humanitarianism) towards those outside of the EU if the Union were disbanded and each country would act on its own.[331] The EU is, furthermore, an important instance of institution-creation that is required to achieve a fair distribution of resources across national borders. There is no supra-national

[324] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 25.
[325] Ibid: 26.
[326] Philippe Van Parijs, "Hayek's trap and the European utopia we need," in *Reducing Inequalities. A Challenge for the European Union?,* eds. Renato Miguel Carmo, Cédric Rio and Márton Medgyesi (London: Palgrave Macmillan, 2018): 217.
[327] Ibid.
[328] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 30.
[329] His views about this subject matter are compensated by a principle of linguistic territoriality which claims that countries whose parity of esteem is violated by the diffusion of the lingua franca should be able to establish their own official language.
[330] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 17-18.
[331] Ibid: 18.

project that has gone as far as the EU in doing so and in trying to develop widespread support among public opinion. Global justice requires the creation or enhancement of similar supra-national enterprises in other regions and these could learn from the successes and failures of the EU. He adds that such supra-national institutions are necessary, furthermore, to produce global public goods.[332] These include the instruments to fight climate change and the pursuit of peace.[333]

The idea of world democracy, Van Parijs maintains, however remote it may currently be, should guide the design of regional institutions.[334] The European Union, he argues, has a role to play in mitigating the pressures on domestic welfare states from economic competition and presents an opportunity to institutionalise large-scale transfers across boundaries.[335] He calls for a system of transfers that is as "individualized, as unconditional and as high as possible".[336] This is what he has mind when he calls for an extension of egalitarian principles from the nation-state to the world at large.

At times, Van Parijs notes that the political institutions that we currently have do not have intrinsic value.[337] They are, instead, mere instruments in the pursuit of social justice and we should not refrain from engineering and shaping these institutions in light of this desideratum: "nations, politically organised peoples, are not part of the ethical framework of global egalitarian justice. They are sheer instruments to be created and dismantled, structured and absorbed, empowered and constrained in the service of justice".[338] In this sense, for Van Parijs, democratising the EU matters inasmuch as it contributes to making it more just.

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[332] Ibid: 18-19.
[333] Ibid.
[334] Philippe Van Parijs, *Real Freedom for All: What (if anything) can justify capitalism* (Oxford: Clarendon Press, 1995): 229.
[335] Ibid.
[336] Philippe Van Parijs, *Just Democracy: Rawls-Machiavelli Programme* (Colchester: ECPR Press, 2011): 20.
[337] Philippe Van Parijs, "International Distributive Justice," in *A Companion to Contemporary Political Philosophy*, eds. Robert E. Goodin, Phillip Pettit and Thomas Pogge (Malden: Blackwell Publishing, 1993): 650.
[338] Philippe Van Parijs, *Linguistic Justice for Europe and for the World* (New York: Oxford University Press, 2011): 139.

Clearly, then, Van Parijs' view tends to focus on results more than procedures, but the results that he calls for are not simply the neo-liberal objective of competitiveness through jobs and growth.[339] Instead, the results Van Parijs favours are, predominantly, the satisfaction of his standard of justice. The first, second and third objectives of politics, Van Parijs argues, are to be just.[340] In this sense, he maintains that Europe is beset by a justice deficit to a much greater extent than a democratic deficit.[341]

Van Parijs does qualify his view, however, by saying that he wishes to be faithful to the principle of subsidiarity – the principle that decision-making should be lowered and decentralized as much as possible even if only for the "linguistic distinctiveness of debates".[342] Accordingly, the EU should not become a mega federal state like the US.[343] The EU does need to, however, move in a slightly more federal direction in order for the content of European welfare states not to unravel into something as "pathetic" as the actual US welfare state.[344]

5.1 Reflections on Van Parijs' proposal

I will now present several arguments that seek to explain why my way of conceiving justice in the EU is preferable to that of Van Parijs. I will make some reflections first about possible tensions within Van Parijs' argument.

One aspect about Van Parijs' view which is confusing is the fact that he combines his convictions about the creation of institutions which we described earlier with the advocacy of the development of solidaristic patriotism.[345] The proposed institutional changes are likely to take a considerable amount of time and of political will and,

[339] Philippe Van Parijs, "Justifying Europe," in *After The Storm: How to Save Democracy in Europe*, eds. Luuk van Middelaar and Philippe Van Parijs (Tielt: Lannoo Publishers, 2015): 247.
[340] Ibid: 247-48.
[341] Ibid: 248.
[342] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 27.
[343] Philippe Van Parijs, "Hayek's Trap and the European Utopia We Need," in *Reducing Inequalities: A Challenge for the European Union?*, eds. Renato Miguel Carmo, Cédric Rio, Márton Medgyesi (London: Palgrave Macmillan, 2018): 218.
[344] Ibid.
[345] Philippe Van Parijs, *Real Freedom for All: What (if anything) can justify capitalism?* (Oxford: Clarendon Press, 1995): 230.

according to Van Parijs, we cannot wait that long as the existing pressure against intranational redistribution is mounting and he claims that it is necessary to have another strategy which "enables us to keep and regain at least part of the required leeway" in the meantime.[346] He claims that the pressures facing national member states would be greatly alleviated if Member States could bank on a strong commitment on the part of those who are likely, in virtue of their skills and assets, to be net contributors to commit to a solidaristic conception of justice.[347] This is because pride in the ongoing national solidaristic project would prevent the rich and talented from constantly being on the lookout for more lucrative opportunities abroad or from attempting to exploit loopholes in their domestic tax systems that would enable them to be subject to a lower tax bill on a substantial portion of their actual income.[348]

The problem with the second part of this strategy, that of fomenting solidaristic patriotism, is that it is in strong tension with the first prong of his approach. Van Parijs partly acknowledges this and argues that while the two elements of the strategy are in tension they are not totally incompatible.[349] It seems difficult, however, to reconcile the development of a strong allegiance towards non-nationals based on a commitment to global inter-individual redistribution with the development of a solidaristic patriotism.

Effectively, the successful promotion of solidaristic patriotism would likely make national citizens less amenable to accept global distributive principles. Even if certain individual policies that express an ideal of solidaristic patriotism are compatible with the emergence of thicker institutions at the global or European level, there is an attendant risk that we cannot ignore. The promotion of a package of policies as part of an ideal of solidaristic patriotism may conceivably promote nationalistic attitudes that are hard to contain.[350] They may spill-over into policy areas which the EU eventually brings under its remit and into areas which have already been vested in the Union and which should ideally be governed by an impartial attitude towards all European citizens. Furthermore,

[346] Ibid.
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] I use the term 'nationalistic' here loosely. I mean the attachment of greater concern to the co-citizens of one's country which may or may not be aligned with a given idea of nationhood.

there is a distinct and prior concern: this kind of psychological strategy may not work in the first place. Most importantly, however, should be concerned that the successful promotion of solidaristic patriotism may be hard to contain and conflict with the democratic scale-lifting that Van Parijs envisages.

There is a further reflection that is worth making about Van Parijs' proposal. One can agree with Van Parijs about the fact that the current state of affairs requires the existence of powerful supra-national institutions that act as a bulwark against fierce competition, but why is inter-personal redistribution required at regional or indeed at a global scale? In other words, Van Parijs' assessment of our current predicament does demonstrate the need for a new institutional framework but does not adequately explain why the needed higher-level organisations cannot be guided simply by the distributive goals of buttressing national welfare states and, broadly speaking, of supporting national redistribution.

There are, in addition, several reasons as to why we should favour relatively modest proposals, such as ours, when compared to that of Van Parijs. These include the fact that it is best able to garner support for European institutions and because they accommodate the value of self-determination more successfully. Before I look at such reasons, however, it is worth pointing out that some elements of his proposal are consistent with mine. My own view does not reject at the outset, for example, the idea that the universal basic income should be used as part of the egalitarian toolkit. It does require, however, that if adopted, basic income schemes be implemented locally as part of nationally affirmed liberal conceptions of justice. One particular Member State of the EU, for example, may design and implement a basic income at the service of, say, a prioritarian conception of justice while another Member State may design and implement a basic income at the service of a sufficientarian conception of justice. Over the course of the next two sections I will argue that there are reasons from stability and collective self-determination to prefer my proposal to that of Philippe Van Parijs.

6. Stability

I will argue that Van Parijs' proposal is unlikely to be stable. I have in mind Van Parijs' proposed broad conception of justice for the EU and not just one of his favoured policies, that of the institution of a basic income. I understand stability as a desideratum that applies to reasonable political conceptions and maintains that they should be able to generate a sufficiently strong supporting sense of justice when implemented. As Rawls writes, a conception of justice "must contain within itself sufficient space… for ways of life that can gain devoted support".[351] Establishing the sufficiency of a theory of justice is, for Rawls, an essential part of its justification.[352]

This is to be distinguished from a notion of stability as a pure balance of forces and as a modus vivendi. Stability, in this sense, is not purely a practical matter. The problem is not the simple process by which one brings others who do not share a conception to accept it through state power if necessary; the task is not that of imposing the conception once it is found sound. Instead, it is the guarantee that citizens act willingly to give one another justice over time.[353]

Stability is secure when citizens have the motivation of the appropriate kind under just institutions. It is, therefore, in a different sense, the question of whether the realization of a conception of justice on the part of basic institutions can shape those who grow up and live under them to acquire a sufficiently strong sense of justice.[354] A second question of stability, according to Rawls, is that of whether, in virtue of the facts about a society's public political culture, such as reasonable pluralism, a political conception can be the object of an overlapping consensus.[355] This is an idea that is useful to explain societies how societies may be unifed and stable. In a consensus of overlapping comphenesive doctrines, reasonable doctrines endorse the political conception of justice, each from its own point of view. One important element of this idea is that it concerns an overlapping

[351] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001): 141.
[352] Samuel Freeman, "Congruence and the Good of Justice," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (New York: Cambridge University Press, 2003): 277.
[353] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 142.
[354] Ibid: 141.
[355] Ibid.

consensus of reasonable doctrines as opposed to a consensus *tout court*. The Rawlsian project assumes certain features of a human reasonable psychology and the normal conditions of human life and tries to ensure that those who grow up under them acquire an allegiance to institutions that is informed and reasoned.[356]

One of the traits of a stable society is that its directives and commands be self-enforcing under reasonably favourable conditions.[357] A stable society is one in which most of its citizens accept their political order as legitimate or at least as not grossly illegitimate such that they are willing to abide by its commands and its directives assuming enough other members are similarly willing.[358]

One of the requirements of a stable constitutional regime, according to Rawls, is that its political conception specify not only a shared, but ideally a clear basis of public reason and that this may be considered sufficiently reliable in its own terms.[359] One further requirement of stability is that the regime in question may foster the cooperative virtues in public life, such as that of reasonableness, a sense of fairness, a spirit of compromise and a willingness to meet others halfway.[360] The assurance of stability requires that the conception of justice at stake provide reasons to counterbalance "or else to silence, the desire to renegotiate or to violate the current terms of cooperation".[361]

One may wonder whether stability is not merely a relatively peripheral feature of Justice as Fairness. After all, as Rawls himself notes, it is an idea which has played a limited role in the history of political philosophy.[362] Nevertheless, there are good reasons to think that a theory about institutions must not neglect the question of whether those who grow under up a just scheme will come to acquire a sense of justice such that they will generally comply with just institutions. Given the practical ambitions of the task at hand, this seems a fundamental question. There are, of course, views, such as those of G.A. Cohen, who

[356] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: University Press, 2001): 187.
[357] Ibid: 125.
[358] Ibid.
[359] Ibid: 116.
[360] Ibid.
[361] Ibid: 125.
[362] John Rawls, John Rawls, *Political Liberalism* (New York: Columbia University, 1996): xix.

maintain that thinking of stability as a constraint on principles of justice is absurd.[363] On such a view, we cannot say that a society is just for the time being but that, for whatever empirical reasons, it is not one that is expected to last. Regardless of whether it is correct to think of stability as a feature and a constraint of justice, it is a desirable property for a system of regulation. In that sense, if my proposal is more successful than Van Parijs' in this respect, this counts as an argument in its favour.

The fact of reasonable pluralism – the fact that modern societies are marked by pervasive disagreements between reasonable yet incompatible comprehensive doctrines – poses an obstacle to stability understood in this sense. The very wide disagreement within the EU over theories of justice would present a big challenge to the implementation of a theory of liberal egalitarianism at the level of the institution. There is also, however, pervasive disagreement at the level of the nation-state over questions of basic justice and constitutional essentials and that does not impede us from seeking a consensus on a political theory of justice. What should detract us from doing so at a European-wide level?

One should note, firstly, that the range of views at the level of the EU is considerably larger than that which exists within any nation-state. It follows quite naturally that a very wide diversity of ways of life poses a challenge to the obtention of stability. It is plausible that a very demanding set of socioeconomic principles at the level of the EU could prove to be incompatible with stability. The wide diversity of preferences on the part of Europeans with respect to key aspects of the structure of their economies and their labour markets, for example, is likely to present an important hindrance with respect to the implementation of a standard of justice in the EU that is more ambitious and demanding than the one we advocate.

It is likely to prove to be a particularly big hindrance to the implementation of extending egalitarian principles of justice from the nation-state to a supra-national organisation such as the EU. It would be an extraordinarily complex activity that is beyond the scope of anything it does presently. As Juri Viehoff notes, "there are different ways of organising

[363] G.A. Cohen, *Rescuing Justice and Equality* (Cambridge: Cambridge University Press, 2008): 327.

economic life, each expressing different political cultures, values, and traditions".[364] Within the EU, one could distinguish, for example, conservative fiscal and monetary policies and cooperative capital-labour relations to pursue export-led growth from approaches that privilege more inflationary fiscal goals and monetary goals in view of creating domestic demand-driven prosperity. Within the EU, there is an array of ways of regulating economic life that vary across institutions such as the organisation of social insurance, labour-market institutions and size, structure and financing of different packages of public goods. The implementation of a single theory of justice across these different systems on the part of supra-national institutions is a terribly complex activity.

One of the main ideas in *Political Liberalism* is that a theory of justice can gain acceptance in virtue of the fact that it draws on ideas that are familiar to the individuals of a given public political culture as opposed to ideas that belong only to particular comprehensive moral doctrines. The EU could, nevertheless, have, at its disposal, a set of socializing institutions that allowed it to carry out a liberal theory of justice that generated support for itself. This is not the case. The EU does not have supranational coercive capacities or any other set of institutions that grant it anything that resembles a monopoly of coercion. Proposals to establish centralized capacities to review and inspect budgets, for example, have been met with severe criticism. There is no common civil society and no common education system which draws the attention of Europeans to existing problems and which foments sentiments of solidarity between Europeans. Furthermore, individuals live under different legal systems. One other important feature is the overwhelming dominance of national issues in European elections, which we will highlight in Section 2 of Part III. Notwithstanding the fact that some Eurosceptic political parties openly discuss the EU, this is not a common trait of European election debates across the board. Furthermore, one should bear in mind that when a political party, like UKIP, makes frequent reference to the EU, it does so with the intention of questioning the institution and not of reforming it. In this sense, it is further evidence of the lack of a civil society across the EU. One another factor that constitutes an absence of socializing institutions is the absence of a common language.

[364] Juri Viehoff, "Eurozone Justice," *The Journal of Political Philosophy* 26 (2018): 400.

The wide diversity of preferences in the EU is the not the only stability-based reason for favouring a more modest conception of justice than that favoured by Van Parijs. Verifying whether a principle of justice has been satisfied is important from the standpoint of stability. Andrew Williams notes, for example, that we have reason to dismiss conceptions of justice which "given the fact of limited information, are too epistemically demanding to be public and stable" and that we should "like Rawls, favour conceptions whose scope is restricted to publicly accessible phenomena".[365] One of the reasons as to why this is important relates to accountability: institutions are more accountable to individuals if they can more accessibly be monitored and assessed by its subjects. These constitute strong considerations in favour of refraining from defending principles of justice that are more demanding than the satisfaction of a social minimum.

Compared with other distributive principles, it is easier to reliably judge whether a social minimum has been satisfied. As Rawls notes, the question of whether the aims of the principles covering social and economic inequalities are realized is infinitely more complex and "are more difficult to ascertain".[366] The social minimum, for example, is far easier to ascertain than the difference principle or more demanding principles of egalitarian justice. Rawls notes that the latter "are nearly always open to wide differences of reasonable opinion".[367] He makes these considerations with respect to discussions about principles of justice within the sphere of a nation-state. Insofar as they are pertinent within the sphere of a country, they become even more pertinent in the case of a supra-national organisation where the difficulties of assessing public policy are even greater and likely to lend themselves to greater controversy. This does not mean that ascertaining whether each individual Member State has achieved a minimum threshold is an easy task. It is likely to prove a tricky task, but it is at any a case to be far simpler than the ones we are comparing it with. This, therefore, also presents a reason in favour of opting for a more modest conception of justice at the level of the European Union.

[365] Andrew Williams, "Incentives, Inequality and Publicity," *Philosophy & Public Affairs* 27 (1998): 225-247.
[366] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999): 327.
[367] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 229.

Gillian Brock also argues that needs-based principles can more easily be extended to cover principles such as environmental justice and future generations.[368] A robust set of principles of justice for an entity such as the EU must consider issues such as those of the climate crisis and our duties towards future generations. Brock notes that "we need to make sure that in our rush to make the currently worst off better off we do not end up neglecting other responsibilities we have".[369]

None of this means, however, that we cannot embrace some of the proposals made by Van Parijs in the direction of creating a stronger sense of solidarity between countries. In fact, it is probably adequate to conceive of the EU as an institution that finds itself in a transitional phase before it is in possession of the socializing institutions that enable it to move towards a more egalitarian standard of distributive justice.

One of the strengths of my proposal, with respect to that of Van Parijs' is that it coheres more with the existing features of the EU. With respect to the nation-state, we fix the content of public reason by analysing historical documents, prominent pieces of jurisprudence and well-established constitutional documents. In the same vein, we can seek to establish the content of a European public reason by considering the most important values that it claims to pursue, can feasibly pursue and has pursued over its existence. The ideas are drawn from a list of ideas that are embedded in the public political culture of the EU and that are familiar to the citizens themselves. These include a commitment to the preservation of a social minimum, the freedom of movement of labour, capital, goods and services, the protection of parliamentary democracy within Member States and the maintenance of peace, among others. For all of the criticisms that we surveyed above of how the EU fares across distributive socioeconomic justice, we should find comfort in the fact that the EU already incorporates distributive concerns into some of its important policies and initiatives. In this sense, my proposal is more likely to be stable than that of Philippe Van Parijs.

[368] Gilian Brock, "What Does Cosmopolitan Justice Demand of Us?" *Theoria: A Journal of Social and Political Theory* 104 (2004): 190.
[369] Ibid.

7. Collective Self-Determination

It is true that we have, in Part I, opposed one particular account of the right to collective self-determination, according to which the state should have control over, say, the rate of redistribution within its borders or of the public budget relative to GDP in a way that protects the state from bearing various costs arising through competition. It does not follow, however, that a more restricted conception of self-determination is not plausible and relevant to debates about distributive justice and the regulation of tax competition. In this section, we address this important issue.

It is important that a political community has opportunities to make decisions on a range of issues that affect its collective affairs, including, for example, how much to consume and how much to save. A proposal that simply extends principles of egalitarian justice to the European sphere is unlikely to reflect the different decisions that European Member States with respect to these issues. Rawls provides a paradigmatic example of this in the *The Law of Peoples* when he considers the case of two societies, both of which are liberal and decent and find themselves at the same level of wealth, but one of them decides to industrialize and increase its real rate of saving while the second does not.[370] As time passes, one of the societies achieves a much greater level of wealth while the other does not. An international egalitarian principle would require a transfer of wealth from the first society to the second. This, however, seems implausible and unacceptable on the assumption that both peoples are free and responsible.

As this previous example indicates, the conception of collective self-determination that we should have in mind must allow for political communities to make decisions about the rate of consumption and saving and about other issues such as the rate of population growth. To understand more fully why collective self-determination is an important value that makes a difference to how the requirements of international distributive justice should be understood, it is worth bearing in mind some remarks by Rawls and Anna Stilz.

[370] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999): 36.

A public conception of justice, Rawls, says, contains an educational role in the sense that individuals, as a matter of common sense political sociology, who grow under a well-ordered society form a conception of themselves as citizens based on the prevailing public culture and on the conception of the person and society implicit in it.[371] Such citizens will see themselves as having certain basic rights and liberties and will respect others' claim to the same freedoms.[372] There are several elements of a constitutional democracy which play this role. Disputed judicial decisions in important constitutional cases call forth deliberative political discussion about fundamental political values.[373] These are some of the ways in which the exercise of collective self-determination is valuable.

Rawls claims that justice as fairness is good for individuals: firstly, the exercise of the moral powers itself is experienced as a good.[374] He maintains that "part of the essential nature of citizens (within the political conception) is their having the two moral powers which root their capacity to participate in fair social co-operation".[375] Political society is also good, Rawls maintains, in the sense that it secures for individuals the good of justice and the social bases of self-respect.[376] Ensuring that citizens have equal basic rights and liberties and fair equality of opportunity, for example, is a way for political society to guarantee the essentials of persons' public recognition as free and equal citizens.[377] It is naturally a good, he argues, for individuals and associations to be connected to their cultures and to partake in its public and civic life.[378]

With respect to the question of self-determination, and drawing on the kinds of assumptions found in Rawls, Anna Stilz draws a useful distinction between makers and takers.[379] She says that as 'takers', we have interests in the state's protection of our rights, and in the state providing a range of public goods and in promoting a given conception

[371] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2011): 122.
[372] Ibid: 146.
[373] Ibid.
[374] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 203.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999): 61.
[379] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019): 93.

of distributive justice.[380] She says, however, that we are also makers in the sense that we are also authors of the institutions which govern us.[381] One important dimension of individuals' membership in political communities is the fact that they are 'makers'; people who are co-authors of laws and regulations.[382]

Why should we then be concerned about the self-determination of such entities and how does it satisfy our maker freedoms? In presenting this account, I broadly follow the reasons advanced by Anna Stilz.[383] A concern for self-determination does not mean that we should consider the identity of peoples to be determined by pre-political factors such as religion, language or nationhood. Nevertheless, there are groups of people – which may or may not be aligned with states – who may share views as to what the appropriate decision-making procedures should be. This is what she refers to as a systematic affirmation of second-order values such as a system by which decisions are made.[384] It is valuable that such groups of people form states. Insofar as the existing EU Member States represent peoples in this sense, we may value that they are able to decide on collective affairs that transcend questions of basic justice. This is important for a host of reasons.

The protection and maintenance of stability, understood as a degree of support for European institutions, is one of them. Stability is important not just in itself, as we argued before, but also instrumentally. It is important to guarantee the viability of the state so that it may properly perform its role with respect to the provision of public goods and duties of distributive justice.

The other reason is that people's well-being may be damaged if their long-term commitments and projects are damaged. Philosophically distinguished conceptions of well-being ascribe importance to the satisfaction of people's projects and relationships. One important part of their relationships is bound to be the political relationships in which they stand with respect to the state. If citizens cannot affirm their relationship with the

[380] Ibid.
[381] Ibid: 94.
[382] Ibid.
[383] Anna Stilz, "The Value of Self-Determination," in *Oxford Studies in Political Philosophy Volume 2*, eds. David Sobel, Peter Vallentyne and Steven Wall (Oxford: Oxford University Press, 2016).
[384] Ibid: 118.

state, their well-being is bound to suffer. There are, of course, as Stilz points out, projects and relationships which do not have any value whatsoever. This is the case, for example, of belonging to the mafia or any other form of ignominious criminal enterprise.[385] For reasons that I mention, below, however, I believe that citizenship of a liberal democratic community can indeed have value. In order to affirm one's participation in a liberal democratic state, one does not need to be politically active any more than one needs to wear a company's badge in order to affirm pride in belonging to such an enterprise.

Thirdly, self-determination is important to ensure that individuals do not experience a feeling of alienation from their political community. Should people be systematically alienated or defeated with respect to matters which they value – even if they are not questions of basic justice –, they are likely to feel that this important dimension of their citizenship has been damaged.[386]

Christiano's argument in favour of democracy also lends support to the notion of not being alienated in this sense. He argues in favour of the importance of one feeling at home in one's community; he maintains that sense of feeling of one in one's community is fundamental to well-being.[387] It is important that the preferences of a significant portion of the population not be systematically defeated in the field of political reasoning. Stilz points out that alienation may not be too serious in the case of a private association from which one can leave easily. Alienation is, however, problematic in the case of an institution that coerces individuals and which has a pervasive impact on individuals' expectations. As Stilz notes, "since the state determines so many aspects of our lives – many more than other institutions such as universities, churches, or corporations – alienation from the state is an important concern".[388] These concerns, furthermore,

[385] Anna Stilz, "The Value of Self-Determination," in *Oxford Studies in Political Philosophy Volume 2*, eds. David Sobel, Peter Vallentyne and Steven Wall (Oxford: Oxford University Press, 2016): 114.
[386] Ibid: 117-124.
[387] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (New York: Oxford University Press, 2008): 53.
[388] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019): 141. Stilz maintains that liberal nationalists usually argue that cultural groups that maintains a host of shared practices are good candidates for political self-determination. Her account, she argues, differs from those of liberal nationalists in that her account peoples are not defined in terms of cultural characteristics. They are defined, instead, by "their willingness to engage in political co-operation together". It is not immediately obvious what, on her view, gives rise to this willingness. This is an

connect with our previous discussion about stability. An institution that is stable is one whose subjects are less likely to experience feelings of alienation.

One may wonder why these interests speak in favour of a plurality of states. To answer this question, it is plausible to focus on some of the so-called taker interests. Thomas Christiano offers an account in favour of self-determination that appeals to both our maker and our taker interests. It is plausible that states are the political construction that has, thus far, most effectively advanced values such as justice, democracy, and accountability. While it is possible that these values may be realised under a different type of political structure, the construction of such institutions would represent a big leap in the dark and so we should refrain from supporting this scenario. Christiano argues that "the state is the most important case of the attempt to establish justice" and that "one of the main functions of the state is to establish justice among persons".[389] This is so, according to him, in the sense that the state establishes a legal system, which, in the case of a reasonably just society abides by principles of justice. He recognises that the state is socially necessary, albeit not logically necessary, for justice to be established "when the full complexity and richness of human societies are at issue".[390] This is due, in part, to the fact of pervasive disagreement and some of the other features of modern societies.

Further to this, we have reasons to reject the erection of, say, a global government. A world-state, as noted plausibly, by Kant and Rawls, would either take the form of global despotism or it would otherwise "rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy".[391] This may not necessarily speak in favour of the existence of states as we know them, but it does favour the existence of political units at approximately the same level. As Dietsch

important question, especially because she allows for the emergence of new peoples. Her account, in a sense, is compatible with nationalism through the backdoor as it is conceivable that nationalist ties could be, precisely, what explain willingness to co-operate politically. A complete version of my account would too need to rise to this challenge, but, for the moment, I sidestep the issue, but I assume that the longevity of (most) existing EU member states lends credibility to the notion that the interests of self-determination apply to them.

[389] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (New York: Oxford University Press, 2008): 53.

[390] Ibid.

[391] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999): 36.

argues, it is plausible that there should be entities, at least akin to states, that strike a balance between centralisation and de-centralisation.[392]

One may wonder what reason all this presents to reject Van Parijs' conception of justice. If European institutions were designed in such a way as to try and bring about a 'maximin' outcome, this would likely deter the different peoples in the different Member States of the EU from satisfying their preferences in a range of topics that transcend questions of justice. This is an especially pertinent concern in the sphere of the EU given the wide difference in cultural tastes and preferences between peoples. For this reason, we should be wary of institutionalising uniform egalitarian principles across the EU that could be damaging for the collective self-determination of its political units.

There is also another sense in which aiming to support and uphold just institutions and treating others justly is good; a sense in which the good in question is not related to the aforementioned good for citizens individually. Society realizes a social good through citizens' joint activity because they depend on each other taking adequate action to achieve a shared final end.[393] Rawls maintains that reforming imperfect democratic institutions over time is a distinctive social good and is one that should be valued as such.[394] It is akin, he notes, to the feeling that the members of an orchestra or of a sporting team experience after delivering a good performance.[395] This is perhaps harder to satisfy in the case of large and complex societies, but the sentiment may well still be present, especially if one can successfully identify improvements to the democratic constitution of a given society. Although he argues that these goods can be still be obtained in the case of large and complex societies, he does recognise that this presents a challenge. He says this when he argues that "…whatever the persons' conceptions of the good are, their conceptions will be enlarged and sustained by the more comprehensive good of social union provided that their determinate conceptions lie within a certain range and are compatible with the principles of justice".[396] As such, it is conceivable that a given society

[392] Peter Dietsch, "The State and Tax Competition: A Normative Response", in *Taxation: Philosophical Perspectives*, Martin O'Neill and Shepley Orr, eds. (New York: Oxford University Press, 2018): 207.
[393] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999): 79.
[394] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001): 201.
[395] Ibid.
[396] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 283.

may be too large and complex, to the point where they lie outside of said range, such that these goods may not be obtained in the case of excessively large units.

In this sense, one may discuss self-determination as being an important part of political well-being. This is not to say that it is our job to present a full-fledged account of well-being or that we support a welfarist account. It is merely to say that self-determination, in a limited sense, must be a part of political well-being.

It may well be true that the glories of self-government are exaggerated, but it does not follow that it is preferable to erect very large countries. In a sense, Rawls alludes to this in a famous exchange with Philippe Van Parijs and asks whether there is not a "conflict between a large free and open market comprising all of Europe and the individual nation-states, each with its separate political and social institutions, historical memories, and forms and traditions of social policy".[397]

Van Parijs is convinced, however, that his proposal can be implemented and not lead to massive uniformity. He says that this can be achieved insofar as the principle of subsidiarity is amply used.[398] He says, in fact, that the institution of his ideals would perhaps be necessary to protect the diversity of cultures from the rush towards uniformity that neoliberalism generates.[399] I do not seek to deny that his conception of justice for the EU is preferable, from the standpoint of self-determination and stability, to the current economic predicament in which our societies find themselves in. It is, however, weaker in these respects than our social-democratic proposal. Insofar as the values of self-determination and stability, which we mention, manifest themselves in a society's choice of its conception of justice, there is reason to allow for different EU Member States to self-determine which liberal theory of justice they seek to pursue.

There is, however, one more reason, not directly related to self-determination and stability, which supports my proposal as opposed to that of Van Parijs'. In spite of the

[397] John Rawls and Philippe Van Parijs, "Three Letters on The Law of Peoples and the European Union," in *Autour de Rawls*, special issue of *Revue de philosophie économique* (2003): 9.
[398] Philippe Van Parijs, "Just Europe," *Philosophy & Public Affairs* 47 (2019): 27.
[399] Philippe Van Parijs, *Just Democracy: Rawls-Machiavelli Programme* (Colchester: ECPR Press, 2011): 20.

great economic interaction at the European level and the fact that the EU's own decisions have a pervasive impact on individuals, ultimately individuals are still a lot more affected by decisions taken in their Member States. There is a raft of issues over which Member States cannot but decide. These include decisions related to labour law, environmental protection and public investment on infrastructure. Such decisions are often very detailed. In this sense, states cannot but take a stand on which conception of justice guides them. This is not the case, however, in the European realm. The EU can avoid taking a stance on several issues precisely because they are taken at the level of Member States. In this sense, the EU does not have to commit to a conception of justice in the same way that its Member States must.

In conclusion, Van Parijs offers an ambitious and reasoned conception of justice for the EU. It is informed by the forewarnings of inegalitarian thinkers who placed great hopes in supra-national institutions as a vehicle for their ideals. He rejects the notion that supra-national institutions are necessarily inimical to liberal egalitarianism. He proposes that the possible tendencies of such institutions be countered by implementing Europe-wide redistribution, by fostering the use of English across the EU and a federal electoral space. I have instead sought to argue that given the current state of the EU – the absence of socializing institutions, as I have called them –, there are reasons from stability and self-determination to avoid extending egalitarian domestic principles to the international or global realm. We can instead adopt a more modest proposal, along the lines that I have sketched, based on the protection of a social minimum and domestic democracies, that could also be a bulwark against neoliberalism. There are several aspects of Van Parijs' proposal which could be implemented under the terms of my proposal, such as, for example, a set of EU-backed domestic basic incomes.

Throughout this section, I have compared my proposal to some elements of Van Parijs' thinking about the EU. At this stage, it is worth noting that other authors have written about justice in the EU, such as Juri Viehoff. The latter, however, has written about justice in the context of the economic and monetary union specifically.[400]

[400] Juri Viehoff, "Eurozone Justice," *The Journal of Political Philosophy* 26 (2018): 388-414.

Part III: The legitimacy of regulating tax competition

1. Introduction

I will argue that my proposal for the regulation of tax competition can be implemented in a way that satisfies standards of political legitimacy. For the EU to satisfy my proposal in favour of regulating tax competition when it produces situations of citizens falling below a social minimum or democracy-undermining inequalities, it must either create new structures or embrace new competences. The latter would have powers of enforcement which Member States of the EU would not be allowed to defend themselves against. As such, any philosophical treatment of this subject would be incomplete if it did not reflect upon whether the EU may legitimately and permissibly regulate tax competition.

I will begin by explaining how I understand legitimacy. I will then provide a critique of the EU's legitimacy. Subsequently, I will offer some considerations in defence of the EU's legitimacy. I will then proceed by exploring potential objections to my proposal from the concerns with democracy and from state sovereignty and will explain that these are either implausible or not devastating to my ambition. Subsequently, I will consider whether consent can legitimate my proposal. I will then argue that my proposal can be legitimised in virtue of the service that it performs. Finally, I will argue that my proposal not only is legitimate, but that it is also legitimacy-enhancing. Importantly, I will argue that even in the presence of the imperfections of the EU's legitimacy, my proposal in itself is legitimate given the important service that it performs.

This part has both a negative and a positive element. The purpose of the negative element is to deny that my proposal for the regulation of tax competition on the part of the EU is illegitimate. The positive element of this Part seeks to more ambitiously claim that, not only is the proposal not illegitimate, it is also legitimacy-enhancing. It is legitimacy-enhancing, I argue, with regards to Member States of the EU and the EU itself. Establishing that a proposal is legitimate involves comparing two worlds. One is the world in which the democratic demands within the Member States are extended to the EU. This would lead to the conclusion that the EU is currently illegitimate. This is a very high price to pay. I will also opt for another strategy. The positive strategy will draw on the idea that my proposal for tax competition is comparable to a lot of the services the EU

currently performs. To deny the legitimacy of my proposal would commit one to denying the legitimacy of the services performed. To do so would be, once again, to incur too high a price. In following this strategy, I take legitimacy to be an interpretive concept.[401] This is the notion that a concept should be defined according to what is its most valuable interpretation. I maintain that the adequate interpretation of a concept like legitimacy cannot be one that is detrimental to the fate of the worst-off or that strips a supra-national organisation from the ability to perform morally mandatory goals.[402]

1.1 Considerations about legitimacy

I should, at this point, remind readers that I argue in favour of a model of regulation of tax competition at the level of the EU whenever doing so would produce Pareto optimal improvements, prevent citizens from falling below a social minimum and when it prevents inequalities that undermine the fair value of political liberties. It is now important to address whether such a proposal for the European Union can be legitimately implemented.

An entity is said to possess political legitimacy if it is morally justified in wielding political power, whereby this is understood as the exercise, within a jurisdiction, of the making, application and enforcement of laws.[403] My interpretation of legitimacy also encompasses a host of prerogatives on the part of legitimate authorities. These prerogatives comprise what one may understand as the right to rule. The right to rule is possessed by an entity that has a power to engage in authoritative political decision-making. These include the permission to issue bindings commands, to enforce decisions and the possibility to change the duties of subjects. It also includes immunity from attempts on the part of other agents from either dislodging them or preventing them from

[401] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press, 2011): 160.
[402] Of course, it makes a difference if there is a possibility of quickly replacing the supra-national organisation with another one, but it is unlikely that the EU could be replaced by another supra-national organisation without massive transaction costs.
[403] Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112 (2002): 689-70. See also Joseph Raz, *Morality of Freedom* (Oxford: Clarendon Press, 1986) for a distinction between public authorities and private corporations and private associations by referring to the general authority that public authorities claim to have to regulate all aspects of life, "including the terms of incorporation and the rules governing the activities of other corporations": 4.

exercising any of the two latter prerogatives.[404] Political authorities also have the permission to sanction disobedience to the directives that they issue. They can also sanction those who act with the intention of stopping them from issuing directives.

It is now important to reflect on the nature of the relationship between justice and legitimacy. We can begin to understand it by referring to the difference between 'the right to rule' and 'ruling rightly'. The latter should be understood as exercising authority according to the balance of reasons or according to undefeated reasons. Directives, therefore, can be issued rightly to a greater or lesser extent. A directive, issued by an authority that has the right to rule, cannot be disregarded for the simple fact that it is not backed by the balance of reasons. Joseph Raz says that mistaken directives can still be binding on us.[405]

One of the reasons for not collapsing our conception of justice into our conception of legitimacy is that, "even if we all agreed on what justice requires, withholding support from institutions because they fail to meet the demands of justice would be self-defeating from the standpoint of justice itself, because progress towards justice requires effective institutions. To mistake legitimacy for justice is to make the best the enemy of the good."[406]

Similarly, Allen Buchanan and Robert Keohane note that we should be wary of conflating justice and legitimacy. They note that there are "two reasons not to insist that only just institutions have a right to rule. First, there is sufficient disagreement on what justice requires that such a standard for legitimacy would thwart the eminently reasonable goal of securing coordinated support for valuable institutions on the basis of moral reasons. Second, even if we all agreed on what justice requires, withholding support from institutions because they fail to meet the demands of justice would be self-defeating from

[404] Following Raz, I recognise of course that authorities do much more than this as they attribute powers and rights, permissions, immunities and change status, create and terminate legal persons and regulate the relations between legal persons in Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90 (2006): 1003.
[405] Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90 (2006): 1023.
[406] Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20 (2006): 412.

the standpoint of justice itself, because progress toward justice requires effective institutions."[407]

As Rawls points out, "a significant aspect of the idea of legitimacy is that it allows a certain leeway in how well sovereigns may rule and how far they may be tolerated".[408] Legitimacy allows for an "indeterminate range of injustice that justice does not".[409] In this sense, Rawls is saying something similar to what the authors cited above maintain. However, the notion of range suggests that the injustice that legitimacy allows for is not infinite. A legitimate law need not be perfectly just, but it cannot produce gravely unjust outcomes, because there is a point at which the injustice in the outcome of a procedure may subvert its legitimacy. One may be tempted to think that legitimacy is inconsistent with any gravely unjust law, but it might be best to refrain from having such a stringent account. It could be the case that a given law is gravely unjust but that conformity with reason still requires that individuals consider such laws to be legitimate. Discriminatory laws which forbid mistreatment of some but not all ethnic groups can be said to be gravely unjust in virtue of the fact that it does not attach equal importance to the moral worth of all individuals. This being said, in the event that such a law has been generated, and it is unlikely that it can be revoked and replaced by a more just law, it may make sense for such citizens to take the law as legitimate because it would comply with reason to refrain from mistreating the citizens that are protected by the unjust law.

Rawls also notes that, while the idea of legitimacy is manifestly related to justice, one of the special roles played by democratic institutions is to act as special procedure for making decisions when conflicts and disagreements in political life render unanimity virtually impossible or something that cannot be expected.[410] Legitimacy is compatible with many procedures of different shapes and sizes yielding valid decisions depending on the case: "from various kinds of committees and legislative bodies to general elections and elaborate constitutional procedures for amending a constitution".[411] He claims that a legitimate procedure is one that all citizens may reasonably accept as free and equal when

[407] Ibid.
[408] John Rawls, "Political Liberalism: Reply to Habermas," *The Journal of Philosophy* 92 (1995): 175.
[409] Ibid: 176.
[410] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 428.
[411] Ibid.

collective decisions must be made and agreement is normally lacking.[412] Quakers, as Rawls notes, as pacifists will always oppose the decision to engage in war but they also endorse a constitutional regime and, therefore, accept the legitimacy or majority rule or rule according to some other procedure.[413] He notes that while they refuse to serve in a war that the citizenry reasonably and democratically decides to wage, they remain committed to democratic institutions and the basic values they embody. Subsequently, "they do not think that the possibility of a people's going to war is a sufficient reason for opposing democratic government".[414] He also allows, however, for the possibility that religion enjoins many things and that it may require the support for a constitutional government that is most concerned with the basic rights and fundamental interests of others as our own.[415]

Justice and legitimacy interact in yet another way at least. One can maintain that a theory of social justice is deficient unless it can, at least sometimes, be legitimately implemented. A similar point applies to a set of proposals that should guide authoritative rule-making. If a proposal for the reform of a set of authorities cannot be implemented legitimately, we have reason to either reform our proposal or our conception of legitimacy.

It is also important to distinguish, in debates about political authority, between the power to create reasons and the permissibility to enforce sanctions. We previously spoke of the prerogative which political authorities have in the form of imposing sanctions on those who disobey it. This is something, however, that is different from the other characteristic of authorities which is the power to create reasons for action. One of the traits of authority is that it can modify the reasons that the subjects face. Some authorities have this normative power at their disposal but it is not accompanied by a permission to exercise sanctions. Conversely, sometimes there is a permission to exercise sanctions but not that of adjusting the reasons of its subjects. This is a scenario which may occur in life and death scenarios in which one may think that it is permissible for an individual to sanction

[412] Ibid.
[413] Ibid: 393.
[414] Ibid.
[415] Ibid: 394.

another in order to save him or herself but does not possess any claim to authority over its subjects.

There may be cases in which the EU may regulate tax competition and impose sanctions, plausibly, on certain states over which it does not have a normative power. This may be the case of a country like the United Kingdom in a post-Brexit scenario which acted as a pirate state. If a rich state located outside the European Union acted in a way that was damaging to the EU and it could defend itself from such a state such as that one with recourse to tax competition, there would not seem to be anything problematic about doing so. In such a case, the state in question would not be involved within the procedure that imposes such sanctions, but it seems perfectly legitimate for the EU to exercise its authority in a way that is self-defensive. This is especially plausible in a scenario in which a country had been given, or formerly had wielded, a role in the decision-making process of the organisation and had declined. The purpose of our project, however, is not to focus on scenarios such as that of exercising sanctions with respect to countries outside of the EU but to focus on internal decision-making.

The remit of the reform of tax competition-regulation I favour is broad; I contend that the EU's actions on the regulation of tax competition are something that Member States have reason to submit to. It would not be acceptable for a Member State of the EU to unilaterally impose sanctions on one of its neighbour states in a scenario in which it deemed that the latter engaged in tax competition impermissibly. The issue is not, therefore, a permission to exercise sanctions but of setting up an authoritative scheme which Member States should abide by.

Nevertheless, if the European Union could contribute to rendering Member States substantially more just domestically, this would help remove doubts about the legitimacy of both domestic and European institutions and would reinforce our reasons of justice to comply with the demands of those institutions. Of course, the EU should, in line with what we maintain, allow for the fact that different Member States will implement different theories of justice within a family of reasonable doctrines. If EU threatened to coerce a state, that was already in the process of implementing a liberal theory of justice, into

implementing one that is more reasonable, this would not be legitimate. There are, therefore, scenarios in which it is not legitimacy-enhancing for the EU to improve the domestic justice of Member States.

2. Critique of the EU's legitimacy

Legitimacy is a word that is used in several senses, but before we explore standards of political legitimacy, it is important to distinguish between two senses in which the concept 'legitimacy' is used. In one primary sense, which is our main concern, institutions are legitimate if they genuinely possess a particular moral status.[416] In another important more sociological sense, institutions are often described as possessing or lacking legitimacy in virtue of individuals possessing certain moral beliefs about them. In this latter sense, it seems evident to various commentators that the European Union has for a while now faced a crisis of legitimacy.

Criticism of the European Union is often based on its so-called 'democratic deficit', the thought that the institution does not meet appropriate standards of legitimacy. There is not a single meaning of 'democratic deficit', as Andreas Follesdal and Simon Hix note.[417] Instead, this term is used to refer to several distinct perceived problems of the EU's structure from the standpoint of legitimacy in the primary sense. I will sketch some of the main criticisms that point to the EU's supposed democratic deficit.

The EU's legislative branch consists, predominantly, of the ordinary legislative procedure, involving the European Parliament and the Council of the European Union. The latter represents the governments of the individual member countries. The European Parliament represents EU citizens directly as it is elected by them. The European Commission is the main executive arm of the Union. The Commission holds a monopoly on the initiative for presenting new legislation. In this respect, the EU is different from

[416] Allen Buchanan, "Reciprocal legitimation: Reframing the problem of international legitimacy," *Politics, Philosophy & Economics* 10 (2011): 14.
[417] Andreas Follesdal and Simon Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcisk," *Journal of Common Market Studies* 44 (2006): 534.

the functioning of most parliamentary democracies as parliaments also tend to have the possibility of initiating legislation in these. Habitually the European Commission proposes new laws and either the European Parliament or the Council adopt them. It is then the task of the Commission and the Member States of the EU to implement the new laws. Subsequently, the Commission ascertains whether the Member States are properly applying and implementing the legislation.

We will provide a brief survey of some of the main criticisms that are levelled at the EU. These have to do with the nature of the European Commission, with the weakness of the European Parliament, the fact that there is unclarity about the 'demos' of the EU and the apparent lack of a European consciousness on the part of voters when voting.

The fact that neither the European Commission nor its President are elected may be considered an instance of lack of democracy. This is not a very promising criticism, however, as national governments and heads of executive in parliamentary democracy are also not elected. The problem, however, may be that the executive power in the EU is not politically accountable either to the Council or to the Parliament. One may say that the "actions of these executive agents at the European level are beyond the control of national parliaments".[418] This may be particularly concerning given that the Commission, unlike national governments, holds a monopoly on the initiative for EU legislation.

The election of the different entities of the EU also expresses a lack of clarity with respect to the groups that constitutes the 'demos' of the institution. One could argue, however, that the demos of the EU is simply who can vote in European elections. This presents a challenge in the sense that one may consider it a logically prior question to that of democracy. One cannot resort to a democratic procedure to establish the demos, because it is precisely the people who would participate in that would-be democratic procedure that we need to establish.[419]

[418] Ibid: 535.
[419] See David Miller, "Democracy's Domain," *Philosophy & Public Affairs* 37 (2009): 201-228. The fact, however, that we cannot resort to democratic procedure does not mean that democratic theory and ideals cannot offer some guidance with respect to the definition of the demos. David Miller offers a set of such considerations that depend on what one's conception of democracy is.

On one hand, the European Parliament's election suggests that the EU is a truly pan-European body. On the other hand, the other main decision-making body of the EU, the Council, is comprised of government representatives, thus suggesting that the institution is an inter-governmental organization. There is nothing inherently problematic about an institution having multiple centres of decision-making. In the case of the EU, however, the existence of a variety of electorates has added to the confusion and uncertainty about the nature of the institution – whether it is a truly pan-European entity or whether it is an inter-governmental arrangement – and whose approval the institution may be said to require.[420] European citizens are represented in a variety of different ways at the EU level. They are represented through elections to the European Parliament, through their representatives at the European Council or at the Council for the European Union and, finally, in domestic elections which hold national governments accountable to national parliaments. This gives rise to tensions in the representation of individuals; when and, for what purposes, are they to be represented as European citizens, on one hand, and as members of states, on the other hand? Systems of "compound representation", note Bellamy and Castiglione, can serve to prevent government from falling prey to sectional interests.[421] They argue, nevertheless, that, presently, this logic is not present in the EU. The different channels of representation are not connected in a systematic and coherent way. They offer rather "incompatible images of the relations between individuals and states in Europe".[422]

Larry Siedentrop maintains that the uncertainty about the different entities of the EU constitutes a crisis of legitimacy of another kind; he argues that a crisis of legitimacy exists when there is "deep and pervasive uncertainty about the location of final political

[420] Richard Bellamy and Dario Castiglione, "Three models of democracy, political community and representation in the EU," *Journal of European Public Policy* 20 (2013): 207. The authors argue that an institution with different centres of decision-making and electoral systems for each chamber may be productive and may have such features in order to bring different 'voices' to the dialogue – perhaps representing minority and regional interests. No such features can be attributed, on their view, to the EU political system.
[421] Ibid.
[422] Ibid.

authority" and that this is an unintended consequence of the direct election of the European Parliament.[423]

One may also consider that the weakness of the European Parliament is another source of its democratic deficit.[424] This concern may be about the very limited legislative competences of the Parliament.[425] Several reforms of EU treaties since the 1980s have drastically reinforced the powers of the Parliament. Nevertheless, it is plausible that it still finds itself in a position of weakness with respect to the Council.[426] Moreover, one may argue that expanded legal competences for the Parliament in themselves may not make much of a difference if "structural preconditions on which authentic democratic processes" depend are missing.[427] We may also attack the EU for the increasingly powerful role of the Council in decision-making. This has come at the expense of a reduced role for the European Parliament – an institution that many still deem as the most democratic of the Union.[428] Despite the establishment of European Affairs Committees in national parliaments, when ministers speak and vote in the Council, when national bureaucrats make policies in the Council working groups and when officials in the Commission draft or write legislation they are much more isolated from national parliamentary control relative to national ministers in the domestic arena.

Tax legislation is one of the areas of EU law that are marked by a special procedure: the requirement of unanimity. Vanistandael notes that whereas in all Member States of the EU tax legislation can be changed with recourse to simple majority voting, this does not obtain in the case of the European tax legislator. He maintains that the "legislative process

[423] Larry Siedentrop, "Some Unintended Consequences of Integration," in *After The Storm: How to Save Democracy in Europe*, eds. Luuk van Middelaar and Philippe Van Parijs (Tielt: Lannoo Publishers, 2015): 74.
[424] Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004): 324. He argues that "democratic deficit" critics are right to point out that power does not lie mainly with the EU's "most democratic body".
[425] Miriam Ronzoni, "The European Union as a demoicracy," *European Journal of Political Theory,* 16 (2006): 5.
[426] Andreas Follesdal and Simon Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik," *Journal of Common Market Studies* 44 (2006): 535.
[427] Fritz Scharpf, "Economic integration, democracy and the welfare state," *Journal of Economic Public Policy* 4 (1997): 19. The author refers to the absence of European political parties and of European-wide media of political communication.
[428] Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004): 324.

is cumbersome and because of the unanimity principle, it is very difficult to introduce and change tax law at the EU level".[429] As per the Treaty, the EU's mandate on matters of tax policy is restricted to matters of market integration.[430] Having said that, the question of what is necessary and what is not is often far from clear.[431] As we argued in Part II in the section about the EU's shortcomings, the EU is not simply an apolitical market-creating body. Even if market integration may be what drives the institution, it still has a pervasive effect on Member States' taxation capacities.[432]

An alternative piece of criticism of the EU's democratic credentials may be based on the lack of debates about the Union in European elections. Campaigns for the election of European parliamentarians revolve around national issues within each Member State and do not have a truly 'pan-European character'.[433] In fact, these elections are used by citizenries to punish and convey warning signs to their national governments. The parties and the media treat them as mid-term national elections and participation rates are remarkably low. The tendency for European elections to be second-order elections has, in fact, increased with time.

One may wonder why this poses a problem for legitimacy, specifically. To do so, it is helpful to draw on the notion of public reason. The content of public reason is given by a family of reasonable political conceptions.[434] It is a form of reasoning in the public sphere about constitutional essentials and questions of basic justice that all reasonable citizens can be expected to endorse. Public reason requires that we justify our political judgements to others by appeals to beliefs, grounds and values that it is reasonable for others to acknowledge.

[429] Frans Vanistendael, "On Democratic Legitimacy of European Law," in *European Tax Integration: Law, Policy and Politics*, ed. Pasquale Pistone (Amsterdam: IBFD, 2018): 103.
[430] Philipp Genschel and Marcus Jachtenfuchus, "How the European Union constrains the state: Multilevel governance of taxation," *European Journal of Political Research*, 50 (2011): 307
[431] Frans Vanistendael, "On Democratic Legitimacy of European Law," in *European Tax Integration: Law, Policy and Politics*, ed. Pasquale Pistone (Amsterdam: IBFD, 2018): 119.
[432] Philipp Genschel and Marcus Jachtenfuchus, "How the European Union constrains the state: Multilevel governance of taxation," *European Journal of Political Research*, 50 (2011): 306.
[433] Ibid.
[434] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): li.

We also have a duty to endorse the basic principle of humanity according to which all lives have the same objective importance. As Dworkin notes, no one can sensibly think that "officials will always act out of principles that he himself thinks right, but he can expect his officials to act out of the principles that they endorse".[435] Acting out of whimsy, bias, self-interest or favouritism diminishes the authority of national legislation as it fails a duty toward the subjects of power: to act in a morally responsible way that expresses equal concern for all. If the act of deliberation that precedes such acts of voting does not even consider the fate of other European citizens, it is unlikely that the ideal of public reason is respected.

The ideal of public reason is necessarily incomplete given that it is not something that applies to our entire decision-making. It does not apply to the context of a business where management tends to think exclusively in terms of what maximises shareholder value. Given the ideal of the European Union, however, one should expect that citizens reflect, at least minimally, about the fate of fellow Europeans. One may argue that the ideal of public reason at the level of the EU does not make the same demands that it does at the level of the nation-state. After all, public reason is compatible with agent-centred prerogatives. The exercise of public reason does not prevent individuals from attaching special concern to family members, for example.

A form of European public reason would, nevertheless, require a greater presence of European issues than that which is currently present in European elections. While the European Union is not an institution that enjoys comparable powers to those of national governments, it is plausible that its citizens should exercise their authority in European elections in ways that are justifiable to their fellow Europeans. The content of this minimal reflection, if carried out in good faith, should lead at least require a greater amount of debate on European affairs than that which tends to take place. The absence of a concern for European affairs in European elections evidences a degree of negligence between European co-citizens towards each other. If one does not take an interest for the members of one's electorate, in what sense can one plausibly maintain that one is making

[435] Ronald Dworkin, *Justice for Hedgehogs* (London: The Belknap Press, Harvard University Press, 2011): 113.

political judgements that others can reasonably accept? While it is possible that policies may favour certain groups, this must be in virtue of general reasons that express equal respect for all individuals. This is the way in which individuals may join a political association and remain as free as before.

3. In defence of the EU's legitimacy

There are reasons, however, not to fret too much about the EU's alleged democratic deficit. Firstly, this is because perhaps it is inaccurate to say that the EU and the EU parliament suffer from a legitimacy deficit even if you subject it to the same standards as nation-states. Secondly, we have reasons not to subject an organisation such as the EU to the same standards as nation-states.

One may maintain that the European Parliament does not suffer from a greater deficit than most national parliaments. As is the case with national parliaments, members of the European Parliament are elected at regular intervals. The voting rules, in turn, are comparable to those in place in national parliaments. Given the non-ideal circumstances the EU finds itself in terms of reasoning along the lines of a European public reason, the fact that elections are held in national circumscriptions might be good. Frans Vanistandael remarks that national circumscriptions and national voting rule are more familiar to voters than "alien European rules".[436]

The European Parliament's democratic credentials may be questioned because of the geographical distance from Brussels to local voters and because one single person represents a large number of voters. This latter aspect means that small parties tend not to be represented in the chamber. These challenges, however, are common to geographically large countries or to countries with big populations. Australia, Brazil, Canada, India and the United States are not usually considered to be undemocratic in virtue of their size.[437] Regarding the more specific issue of representation, one

[436] Frans Vanistendael, "On Democratic Legitimacy of European Law," in *European Tax Integration: Law, Policy and Politics*, ed. Pasquale Pistone (Amsterdam: IBFD, 2018): 115.
[437] Ibid: 116.

representative in the US lower chamber represents 750,000 people, whereas the EU achieves a better score of one representative for every 680,000 people.[438]

Further to this, perhaps we should not fret too much about the lack of a European 'element' to elections either. This is because European elections are not the only way in which the EU is democratically accountable. Democratically elected governments of Member States dominate the still greatly inter-governmental and territorial nature of the EU. Moreover, Follesdal and Hix note that national media increasingly scrutinise the performance of governments in Brussels.[439] It is also plausible that European elections will not have a truly pan-European dimension for the foreseeable future given that the issues that the EU addresses are not the most salient from the standpoint of voters.[440] Voters seem to care predominantly about taxation and spending and these are still predominantly competences of Member States. On one view, this might not be regrettable as 'universal involvement' in government policy would impose costs beyond the willingness of any modern citizen to bear.[441]

One can also plausibly maintain that it does not make sense to think of the EU as a distant and opaque body as, currently, interest groups, the media, national politicians and private individuals have greater ease in accessing EU policy information than in accessing national information. Follesdal and Hix note that EU technocrats are increasingly forced to take note of societal interests.[442] The European Court of Justice and national courts carry out extensive judicial review of the EU and the European Parliament and national parliaments have reinforced scrutiny powers.

Beyond empirical debates about the EU's accountability, we may also maintain that democracy may be less appropriate at the international level than it is within states. Or at least we should not subject international organisations to the same stringent standards as

[438] Ibid.
[439] Andreas Follesdal and Simon Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik," *Journal of Common Market Studies* 44 (2006): 539.
[440] Ibid: 541.
[441] Andrew Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union," *Journal of Common Market Studies* 40 (2002): 614.
[442] Ibid: 540.

nation-states. This may be because perhaps some of the necessary conditions for the maintenance of a democracy that are present within a nation-state, are not present, at least currently, at the international level. We will now analyse a prominent account of what these conditions are. We should note that these are not intended to be arguments against introducing elements of democracy in international institutions. Instead, they are conditions which institutions plausibly need to meet should they aspire to be democratic in an individual-majoritarian sense.

Thomas Christiano takes this view and maintains that these conditions include equality of stakes when it comes to political decision-making, the fact that, at the global level, there is a greater danger that persistent minorities are formed as well as oppressive majorities and, finally, that it is unlikely that, at the global level, there is an informed citizenry that is capable of making judgements about the relevant issues.[443]

Christiano argues that for democracy to genuinely be able to treat people as equals, the set of issues on the table must be such that individuals have overall equal stakes.[444] If two people have fundamental interests at stake with respect to one particular set of issues, but one person's interests are much stronger, it is not fair, so the thought goes, to give them both an equal say on such matters.

The issues at stake in a transnational association are likely to be variegated, such that political decisions impact on the interests of some to a much greater extent than others. The main reasons for interdependence in the modern world are global communications and trade, the impact of environmental degradation and pollution. No country, he says, is untouched by same phenomena, but the domestic system of trade and exchange reaches much more deeply into people's lives than the international one.[445] Furthermore, in international institutions such as the WTO, decisions are taken on issues which affect the interests of some countries much more than others. He also maintains that the larger the

[443] Thomas Christiano, "Is democratic legitimacy possible for international institutions," in *Global Democracy: Normative and Empirical Perspectives*, eds. Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (Cambridge: Cambridge University Press, 2012): 73-78.
[444] Ibid: 74.
[445] Thomas Christiano, "Democratic Legitimacy and International Institutions," in *The Philosophy of Law*, eds. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010): 132.

constituency – the demos – the larger the chance that "particular minorities would simply get lost" in the process of political decision-making.[446] This is something which, on his view, sometimes undercuts the authority of the democratic assembly.

Notwithstanding the possibility of minorities in one location coalescing with minorities elsewhere, it is plausible to think that there will be a long period of time during which a substantial group of people will find itself in a minoritarian position.[447] In the domestic case, these problems can be fought with recourse to a host of devices, such as constitutional protections and forms of political autonomy. Some of these include partial political autonomy for a region and a federal structure of governance. They may also include the requirements of supermajorities or consociational forms of government. All of these measures are somewhat controversial in the sense that they involve departures from egalitarian decision-making. Furthermore, it is not clear whether this array of tools for addressing the problems of persistent minorities is available at the international level in an institution like the EU.

The continued existence of a democratic system at the European level would also require a web of pan-European institutions that comprise what is often referred to as civil society. Such institutions play a host of key roles. They play a role in obtaining information regarding policy and its effects and in monitoring its implementation. Their function is not merely to monitor government, however. Individual citizens do not have the expertise and, in virtue of their occupations, the time to inform themselves competently and sufficiently about politics. They may conclude that it is rational for citizens not to inform themselves about political matters. For this point to obtain, we need not assume that individuals are driven by narrow self-interest. Christiano asserts that given the minute influence that each individual may have on the political process and the complexity of

[446] Thomas Christiano, "Is democratic legitimacy possible for international institutions," in *Global Democracy: Normative and Empirical Perspectives*, eds. Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (Cambridge: Cambridge University Press, 2012): 76.

[447] Whether this is problematic for democratic legitimation is debatable, however. Perhaps the idea that individuals must not have their preferences over-ridden above a certain number of times would be overly demanding. Indeed, it is unclear why it would be problematic. The fact that an individual finds herself on the losing side of the political process does not mean her interests are not treated with equal respect and concern.

political issues, "it is hard to become interested in the moral issues that are involved in the decisions even if one is a moral person overall".[448]

In virtue of this, institutions in civil society are crucial in supplying citizens with the information that they do not obtain themselves. When seeking to inform themselves about an issue, citizens may rely on a trusted politician's judgement or on the main findings of a report published by a non-governmental organisation. Individuals overcome some of the problems of information in decision-making with the assistance of established institutions in civil society. Individuals essentially use them as shortcuts.

The European Union does not currently have a civil society, or at least does not have one that is sufficiently robust to be able to play such a role. It has had decision-making institutions for a long time and yet still does not have strong pan-European institutions like political parties and interest groups. As Andrea Sangiovanni notes, the EU civil service "is the size of a medium-sized European city".[449] Its budget is set a limit of 1.23% of EU GDP when, in each of the Member States, it is habitual for a Member State to have a budget of about 40 to 50%.

We should also consider whether it might be unreasonably costly to subject the European Union to stringent democratic standards. International institutions may be necessary to pursue what we may deem to be morally mandatory goals, such as the struggle against the effects of anthropogenic climate change.[450] If one is prima facie disposed to apply the same democratic standards that apply in nation-states to international institutions, one must make a decision: either conclude that no international institution is legitimate or conclude that such standards are too demanding in the international context and therefore revise them. Notwithstanding these considerations that should give pause to more pro-democratic reformers in the EU, it could well be the case that the balance of reasons supports reforming the EU in the direction of a democracy.

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[448] Ibid: 88.
[449] Andrea Sangiovanni, "Global Justice, Reciprocity and the State," *Philosophy & Public Affairs* 35 (2007): 21.
[450] Thomas Christiano, "The Legitimacy of International Institutions," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, 2012): 388.

Some democrats may maintain that democracy at the international level is appropriate but may be a lot more relaxed about it given that it already exists at the level of the nation-state. This provides some discretion, from the point of view of legitimacy, for state democratic leaders to decide which international organisations they would like to adhere to.

This does not mean that we should not strive for the democratic election of international institutions in the long run. This may indeed be chiefly important. It simply notes that, although possibly sub-optimal, non-democratic decision-making processes may still be legitimate. Moreover, it is important that we strike a distinction between the assessment of the legitimacy of the EU and an assessment of the legitimacy of my proposal. Despite the connections between the two subjects, the implementation of my proposal would not undermine the democratic credentials of the EU.

There is one further consideration that should make democrats wary of denouncing a non-democratically authorised regulatory model of tax competition as illegitimate. Tax competition is currently an ongoing phenomenon and it has not been democratically approved. In other words, the state of affairs concerning tax competition is currently being decided on anyway. Commentators who believe the EU suffers from a democratic deficit presumably do not think issues about tax competition are currently addressed democratically. My proposal would not make matters worse in this respect.

The aforementioned points suggest that there are reasons to think that the EU is democratic and legitimate. I have suggested that the EU has important elements of democracy. On the other hand, even if this is not true, it might still be legitimate. Irrespective of the discussion about whether the EU is, all things considered, democratic, my proposal itself would still be legitimate given that it would not undermine democracy. It also has other sources of legitimacy that I will discuss throughout the remainder of this dissertation. We will now turn to the question of whether the regulation of tax competition specifically can be legitimately implemented.

4. Democracy and Regulation of Tax Competition

As noted, doubts about the specific democratic legitimacy of a potential tax competition-regulating agency could also arise. With respect to the proposal that Thomas Rixen advocates – that of creating an International Tax Organisation – he considers whether it may be undemocratic.[451] Rixen maintains that the current practice of tax competition narrows the range of fiscal policy choices that are available to government, for which, he claims, there is "direct democratic accountability".[452]. He responds to this concern by saying that the regulation of tax competition would "make sure that there is effective democratic choice within this realm."[453]

Rixen notes that the restriction in fiscal policy is compensated by a *de facto* gain in sovereignty.[454] The thought is that by limiting tax competition, countries gain de facto sovereignty as tax bases become less mobile and governments do not run the risk of losing capital from tax competition. This empowers governments to tax more effectively, or so the argument goes. I am not convinced by Dietsch and Rixen's explanation as to why the regulation of tax competition is not problematic from the standpoint of democracy. There are other considerations that may more plausibly explain why the creation of an agency that regulates tax competition is not undemocratic.

Thomas Rixen's and Peter Dietch's proposals also restrict policy choices for governments that may want to lower capital taxation below a certain level. While it is plausible that it can be more valuable to have a smaller range of good-quality choices than a more ample set of choices of lesser qualities, this does not apply to the case of those EU Member States who may stand to gain from the practice of tax competition. The inflow of capital may render their tax policies more effective in promoting national prosperity. Furthermore, as I argued in Part I, the proposal made by Thomas Rixen and Peter Dietsch

[451] Thomas Rixen, "Institutional Reform of Global Tax Governance: A Proposal," in *Global Tax Governance – What is wrong and how to fix it?,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 343.
[452] Ibid.
[453] Ibid.
[454] Ibid.

does not reliably secure adequate distributive outcomes and focuses on arbitrary policy variables.

It is not clear why the restriction of fiscal policy choice *per se* is a problem from the standpoint of democracy. Equally, it is not clear why the enlargement of the range of fiscal policy options helps to assuage concerns about the legitimacy of the international institution, or indeed, why it is relevant for democratic legitimacy. Democratic legitimacy does not demand 'fiscal self-determination' or that governments wield some scope of power that is currently denied by international tax competition. After all, governments may have a robust policy toolkit that offsets the effects of tax competition. Furthermore, we should note that my proposal, for example, would constrain governments' ability to compete fiscally by perhaps restricting their scope to lower corporate taxation but, in return, they would acquire protection from deprivation and from the political liberties being undermined.

There is no fundamental reason for distinguishing between the prospective legitimacy of our proposal and other core aspects of the EU, such as its approach to monetary policy. Monetary policy is unified across a range of EU Member States, which comprise the Economic and Monetary Union, such that these do not set their interest rates or define the level of money supply in their economies.[455] This is done in the interest of promoting price stability and stabilising financial markets.

It is acceptable to introduce inequality with respect to the different impact that different citizens have within the political process. This is so when the inequality in question does not express any lack of respect for citizens' dignity. Delegation of the power to control the supply of money to an institution such as the European Central Bank does not express such lack of respect. It does not express the idea that some people were born to rule. It does not express "an aristocracy of birth, which includes an aristocracy of gender, caste,

[455] This is compounded by the fact that these Member States of the EU adhere to a set of other macroeconomic objectives in the domain of fiscal policy, including targets related to the level of public debt and budget deficits.

race or ethnicity".[456] It expresses the idea that the citizenry is not best placed to protect itself from a government that is recklessly inflationary, but this is not objectionably insulting to individuals.

One may think that the notion that the citizenry should not have decision-making powers about the supply of money in virtue of governments' possible manipulations is an insult to its intelligence. The alleged insult in question, however, does not turn on an invidious distinction between individuals in virtue of traits such as gender, caste, race or ethnicity. In this sense, the unflattering message that is conveyed to people about their inability to be aware to manipulation is not objectionable.[457]

A constitutional structure which lowers the impact of all citizens across the board by leaving a decision to an elected parliament or to a decision-making body that is selected by an elected parliament does not express an aristocratic ideal. Similarly, it is not obvious why decisions about whether to belong to constitutional structures such as different bodies of the European Union should be put to a referendum.

There are further examples of issues that we do not usually take to require democratic ratification. Rawls discusses the question of the incorporation in the constitution of liberal rights and was open to the insulation of certain issues from the main political agenda.[458] He argues that this is a question of constitutional design and that the answer to it presupposes principles of right and justice, but also one of "the historical study and a grasp of the workings of democratic institutions under particular patterns of historical, social and cultural conditions."[459] Rawls maintains that this is a discussion that must take place at the stage of the constitutional convention.[460] He maintains that the differences in

[456] See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: The Belknap Press, 2011): 392, in which the author argues that any significant difference in the political impact of citizen's votes is undemocratic unless it meets two conditions, one of which is the one we mention in the text and the second one is that the difference in the impact improves the legitimacy of the community.
[457] The delegation of monetary policy to an independent central bank is a practice that extends far beyond the EU and is carried out by many countries: in the interest of price stability, the daily management of monetary policy is insulated from politics. This is, of course, a hotly debated empirical question, nevertheless.
[458] John Rawls, "Political Liberalism: Reply to Habermas," *The Journal of Philosophy* 92 (1995): 157.
[459] Ibid: 166.
[460] Ibid.

points of view with respect to such matters depend on the historical evidence in favour of constitutional protections in each jurisdiction. He maintains that it is not just a matter for philosophy or political and social study to address, but also one of "case by case examination of instances and of considering the particular political history and the democratic culture of the society in question".[461] Given the EU's track record on matters such as monetary policy, the erection of a body with power to regulate tax competition would be legitimate.

Furthermore, there are several other instances of regulation of tax competition that the EU has already carried out and which we alluded to in the Part I. The EU has, as noted before, made substantial progress in one aspect that is relevant to tax competition: definition of a common corporate tax base. The EU has defined the corporate tax base, the one on which corporate taxes are supposed to be levied, with recourse to a version of unitary formula and apportionment. The latter is a formula that determines that a company should pay taxes in each country in which it operates a fraction of its total income depending on how relevant said country is for the company in terms of sales, assets and payroll. Another example of EU regulation concerns VAT (Value Added Tax). VAT is a domain in which there has been massive European integration. Insofar as one can think of this process as legitimate, the process of regulation of corporate tax competition is too.

One key aspect of the EU we should consider is precisely the issuance of directives about capital mobility. The Treaty of Maastricht and the Single European Act require that Member States co-ordinate their economic policies and guarantee a multilateral surveillance of such co-ordination. Additionally, states became subjected to financial and budgetary discipline. Insofar as it is legitimate for the EU to obtain powers in this domain, it stands to reason that it is legitimate for it to regulate tax competition. The regulation of tax competition is itself a form of economic co-ordination. There is a wide array of policy swathes and economic fields such as labour which the EU already regulates, for example. Is it legitimate for the EU to do all this? Presumably, yes. As such, we should be confident that the regulation of tax competition is also legitimate.

[461] Ibid.

If my proposal is not democratic, this would mean that the legitimacy of other crucial regulatory activities that are carried out by the European Union too are undemocratic. If the EU's current pursuit of economic freedom does not fatally threaten democracy, the same can be said about pursuing a 'social agenda' alongside those economic freedoms.

Moreover, the practice of regulating tax competition can be conceived as a way of improving the outcomes that are delivered by the economic freedoms that the EU brings about. One possible distinction between the existing forms of regulation and the one that I uphold is that the former tends to regulate competition between firms and the latter proposes a form of regulation of competition between countries. One should note, however, that the EU does have some policies in place that protect countries from competition, such as regional funds. One of the main services the EU performs is the institution of a large single market and, in this sense, the disbursement of regional funds can plausibly be understood as a form of compensation from the competition within such a space. Whether the protection of Member States takes the form of regulating competition directly or whether it takes the form of disbursement of funds is not normatively distinct.

A democrat may, however, seek to bite the bullet and argue that the current provisions on the free market and four freedoms too raise concerns from the standpoint of democratic legitimacy. They should not, however, fret too much about this. This is because, at least, my proposal would not diminish the democratic credentials of the EU. Tax competition and capital mobility, in their current forms in the EU, have not been subjected to the stringent democratic standards that some democrats demand of international institutions. In other words, my proposal for the regulation of tax competition would be, on a stringent democratic view, a non-democratic proposal to reform an arrangement that itself is non-democratic.

5. A violation of state sovereignty?

Sovereignty is a concept that relates to my proposal in several different ways. On one hand, the prospect of treaty-making is considered one of the fundamental manifestations

of state sovereignty. In this sense, the possibility of a state acquiring certain treaty-based obligations should be consistent with sovereignty. Nevertheless, it is conceivable that one may oppose my proposal on the grounds that it is an impermissible violation of state sovereignty.

We should note that sovereignty is often defined as 'finality, supremacy and comprehensiveness'.[462] Sovereign authorities must have the final words on matters, they must be supreme with respect to other authorities and have a comprehensive jurisdiction over the authorities that are subject to it. Supremacy does not, of course, mean that the authority of states cannot be limited in important ways. It should, for example, be limited by respect for a class of basic human rights. In fact, respect for human rights in a necessary condition for sovereignty.

One may think that fiscal policy is an example of a policy department which states should not cede to a supra-national organisation and lack the normative power to relinquish. One may think that, because fiscal policy has traditionally been vested in national governments, it is essential that it remain under the yoke of the nation-state.

The curtailment of national sovereignty in this domain, as per my proposal, may strike some as objectionable. European integration, in fact, has vested sovereignty on fiscal matters in the Member States of the EU. Fiscal sovereignty has in many ways been a last bastion of nation-states' sovereignty: "in contrast to the theoretical monetary policy of full harmonisation, tax harmonisation processes in the EU are sluggish, while only the minor progress is noted in the VAT regulation. Consequently, EU members are unlikely to be prone to surrendering their tax regulation to the European Commission as it is one of their remaining pillars of sovereignty".[463] In fact, polities that seek to argue in favour of the permissibility of competing fiscally do so on the grounds of sovereignty.

[462] Richard Bellamy, "A European Republic of Sovereign States: Sovereignty, republicanism and the European Union," *European Journal of Political Theory* 16 (2017): 190.
[463] Askoldas Podviezko, Lyudmila Parfenova and Andrey Pugachev, "Tax Competitiveness of the New EU Member States," *Journal of Risk and Management* 12 (2019): 2.

In 1980, for example, the European Commission, contra earlier signs in the direction of tax regulation on the part of the bloc's integration, decided to identify tax sovereignty as a major pillar of sovereignty. It did so on the grounds of differences in economic development between the different participating countries and because of the effects of tax rates and tax policies on the growth of a country's economy.[464] Proposals to submit the issue of taxation to qualified majority voting in the EU have met the resistance of Member States concerned about sovereignty.[465]

Traditional thinking about sovereignty is based on the autonomous territorial state as the preeminent mode of political organisation. States are the entities that merit distinct colours on political maps of the world and for practically each person and each piece of territory there is one single government that has preeminent authority and primary responsibility for each person and each territory. Traditional thinking about sovereignty rests on the so-called Westphalian notion of the state as the locus of political decision-making. The basic rule of Westphalian sovereignty is that states should not interfere in each other's internal affairs. This is understood to be a way of guaranteeing the autonomy of domestic state authorities over their territories. Westphalian sovereignty, as Peter Dietsch noted, was respected in the domain of taxation while economic activity and factors of production were immobile.[466]

Dietsch argues that upholding a notion of Westphalian sovereignty is no longer adequate in an increasingly interdependent world.[467] If countries are increasingly interdependent, it is also the case that international co-operation in such a context is increasingly necessary. Dietsch maintains that a Westphalian approach is no longer logically possible.[468] If the policies of state A affect those of state B, the Westphalian authority of the latter state is effectively compromised even if it maintains all the relevant formal prerogatives. He also considers that tax competition as it is currently taking place in the

[464] Ibid: 4.
[465] Philipp Genschel, "How the European Union constrains the state: Multilevel governance of taxation," *European Journal of Political Research* 50 (2011): 297.
[466] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 169.
[467] Ibid: 173.
[468] Ibid.

world right now is objectionably sovereignty-compromising. This is because, he claims, countries may still freely establish their tax rates de jure, but their "de facto control over actual government revenues is weakened considerably".[469]

There is now an abundance of proposals about how sovereignty may be dispersed. It ight be dispersed either vertically or horizontally. As Pogge notes, "when one thinks about it more carefully, it turns out to be surprisingly difficult to come up with examples of indivisible governmental functions".[470] Functions as different as the control of raw materials and judicial review can be carried out at levels of decision-making other than the state. As Pogge notes, "from the standpoint of cosmopolitan morality – which centres around the fundamental needs and interests of individual human beings, and of all human beings – this concentration of sovereignty at one level is no longer defensible."[471] He proposes that people should be governed by several political units of various sizes and that one single political unit should not be dominant. Consequently, individuals would owe political allegiance to a variety of units, including neighbourhood, town, county, province, state, region and the world in general, such that individuals would feel 'at home' in all of them.[472]

With respect to the question of how power should be dispersed between the different units, Pogge makes several considerations. He argues that power should be decentralized as much as possible.[473] There are certain matters about which it is likely that outsiders will not be competent decision-makers. There are matters about which outsiders typically lack the knowledge and sensitivities that are required to make responsible judgements.[474] In light of this, the question of whether to invest the power of regulating tax competition 'upwards' or 'downwards' depends on who is likely to be the decision-maker who can predictably issue directives that better comply with the principles that we have constructed. It is perfectly possible that the decision-maker which meets this standard is a supra-national organisation. A plausible account of sovereignty allows, therefore, for

[469] Ibid: 169.
[470] Thomas Pogge, "Cosmopolitanism and sovereignty," *Ethics* 103 (1992): 60.
[471] Ibid: 58.
[472] Ibid.
[473] Ibid: 65.
[474] Ibid.

the existence of supra-national organisations which embody duties that countries have towards each other.

Pogge's conception of sovereignty may be consistent with my proposal. Economic global justice is one of the factors based on which power should be transferred either upwards or downwards.[475] Given that our proposal seeks to improve economic justice by EU regulation of tax competition, it may well be that his proposal recommends this move if the regulation proves reliable.

Bellamy, however, suggests that this conception of sovereignty may be too radical and inconsistent with the EU's main features.[476] Bellamy suspects that, in the absence of a comprehensive mechanism, the dispersal of sovereignty "among a multiplicity of discrete regimes would risk degenerating into a chaos of conflicting and partial polities, each self-reflexive and incomplete".[477] We can be confident that our proposal does not incur such risks. Tax competition should be addressed either by Member States or by the EU. Either approach is unlikely to subvert the EU's existing structure.

There is another sense in which sovereignty is relevant to the question of the regulation of tax competition. This is the discussion about whether respect for sovereignty requires countries supporting each other's capacity for government. This is expressed in different ways. Sometimes it is referred to as a country's problem-solving capacity or a country's de facto sovereignty.

Dietsch himself proposes that international relations be governed by a standard of sovereignty that he refers to as 'sovereignty as responsibility'.[478] This consists of the notion that sovereignty entails rights as well as duties and that the latter include a duty to care for the well-being of its citizens.[479] It also consists of the duty to measure the impact

[475] Ibid: 62.
[476] Richard Bellamy, "A European Republic of Sovereign States: Sovereignty, republicanism and the European Union," *European Journal of Political Theory* 16 (2016): 202.
[477] Ibid: 204.
[478] Peter Dietsch, "Rethinking sovereignty in international fiscal policy," *Review of International Studies* 37 (2011): 2112.
[479] Ibid: 2120.

of decisions countries take on the individuals of other countries. It follows from sovereignty as responsibility, he says, that tax co-operation should not be understood as a violation of sovereignty.[480] Instead, we should think of it as a demand of sovereignty according to Dietsch. One of the implications of sovereignty as responsibility, for fiscal policy, is that countries should shore up the effectiveness of the fiscal policy of neighbouring countries.[481] Dietsch argues that, while notion of sovereignty has not taken hold in the fiscal context, it simply means democratic choice about the size of the state and the level of redistribution of income and wealth.[482] As is clear from my opening Part I, I do not find this a plausible demand of justice. It is not clear why this is a plausible demand of sovereignty.

After all, it is not a conviction that we seem to have with respect to other ambits of public policy. With respect to agriculture or investment in higher education, we do not seem to have any conviction that demands shoring up the effectiveness of states' policies in these areas. Given that these are ambits across which countries also compete massively, we need a clarification as to what is distinctive about fiscal policy that requires this greater restriction. As Fritz Scharpf notes, democratic self-determination cannot be equated to

[480] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 178.

[481] Miriam Ronzoni, "Two conceptions of state sovereignty and their implications for global institutional design," *Critical Review of International Social and Political Philosophy* 15 (2012). The author argues that a plausible view of sovereignty must have a negative element (Westphalian) and a positive one. States must enjoy certain kinds of immunities from interference, on the one hand, but must also have the resources to decide on what kind of polity it wants to become. The latter is an important notion as it includes the services that states should perform towards their citizens. Current global conditions, so the argument goes, undermines the positive sovereignty of states in virtue of the "lack of regulation of some of the most important political and socio-economic dynamics that characterize it": 584. The pressure which international tax competition places on domestic welfare states is, arguably, an instance of this. Global institutional regulation is necessary, so the thought goes, is necessary to bolster positive sovereignty at the expense of some negative sovereignty in the form of immunity from sanctions. It is probably not accurate to depict Westphalian sovereignty as merely negative, because, as Laurens van Apeldoorn notes, Westphalian sovereignty also has a positive dimension in that it requires that "a state has a right to non-interference and that the corresponding obligations are, in fact, observed" in Laurens van Apeldoorn, "International Taxation and the Erosion of Sovereignty," in *Global Tax Governance – What is wrong and how to fix it?,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 218. Ronzoni also argues that the positive dimension of sovereignty is very much a substantive and empirical notion, whereas the negative one is a 'legal' one: 577. This is perhaps not a helpful distinction as the ability to impact the socio-economic dynamics of a territory also requires legal tools.

[482] Peter Dietsch, "Rethinking sovereignty in international fiscal policy," *Review of International Studies* 37 (2011): 2109.

wish fulfilment.[483] One may, he says, try to argue that sovereignty requires the satisfaction of citizens' undistorted preferences, but if one were to apply this to the case of individual self-determination, it would characterise the expectations of an immature person.[484] It is preferable for countries to have at their disposal an opportunity set which prevents individuals from falling below a social minimum and that ensures the democratic quality of the peoples of the EU.

Dietsch also argues, however, that one of the requirements of 'sovereignty as responsibility' is that of concern for distributive justice.[485] It is true that tax competition, in its current form, is plausibly objectionable from a distributve standpoint. It does not follow from this that the most adequate way to regulate the practice consists of forbidding competition whenever it reduces the policy space of a given country. Instead, it seems more coherent to intervene whenever it poses a threat to either sufficiency or democracy.

An objection to my proposal from state sovereignty may, however, take another form. It may draw on the idea of subsidiarity. This is the notion that decision-making should be placed at the lowest possible level of government when possible. The problem with making sense of the idea of subsidiarity is that its definition is far from clear. Peter Dietsch defines it as the requirement that a government function should be located at the lowest possible level that includes both the beneficiaries and cost bearers.[486] He argues that the principle at stake is attractive because it combines the idea of democratic accountability – "the inclusion of all interests that are affected and closeness of decision-makers and citizens" – and the notion of efficiency which requires an alignment of benefits and costs.[487] It could be the case, however, that decision-making at a higher level may perform a substantially better service, that it also succeeds in tracking the generation of costs and that the decision-makers are still relatively close to the subjects. How should the quality of the performance of a service be weighed against these other interests? The latter do not

[483] Fritz Scharpf, "Economic integration, democracy and the welfare state," *Journal of Economic Public Policy* 4 (1997): 28.
[484] Ibid.
[485] Peter Dietsch, "Rethinking sovereignty in international fiscal policy," *Review of International Studies* 37 (2011): 2119.
[486] Peter Dietsch and Thomas Rixen, "Redistribution, Globalisation and Multi-level Governance", *Moral Philosophy and Politics,* 1 (1) (2014): 64.
[487] Ibid.

seem to be sufficiently weighty to outweigh a substantial gain in service performance. Let us look at other conceptions of subsidiarity.

Miriam Ronzoni offers a strong definition of the principle when she says that decisions should be transferred upwards only when this needs to be done at all costs.[488] This strikes me as a very extreme conception of the principle. A principle which disallows upwards transfers that would do a better job, on balance, in terms of efficiency and efficacy is not plausible.

Frank Vandenbroucke defines the notion of subsidiarity in another way: the notion that a function should be performed at a lower level when it can be done without a loss in efficiency.[489] This conception is also not particularly attractive as there are other things that we have reason to value besides efficiency. Perhaps what Vandenbrocuke has in mind is that we should decide on the level of government, based on efficiency, once we have established what we have reasons to do. In other words, if our theory of justice can be administered by two different government agencies equally efficiently and they are at different levels, we should vest the power in the authority which finds itself in the lowest position. Although I find this a more plausible statement of the view, it is still not entirely convincing. There may plausibly be reasons for individuals in such a scenario to opt for the agency that finds itself in a higher level if doing so is a way of fomenting a greater connection between the rulers and the ruled. This might be particularly valuable if the rulers and the ruled are perceived to belong to different groups. Entrusting rule to those at a higher level may be a sign of trust and help break down barriers and prejudices. In other words, considerations of justice and efficiency do not exhaust all that we should be concerned about when deciding who should institutionalise a given policy. The value of maintaining relationships of civility and mutual respect between different groups may speak in favour of vesting power in a higher level of government even when there is a lower entity which can perform the task just as efficiently. Even if the EU and its Member

[488] Miriam Ronzoni, "Republicanism and Global Institutions: Three Desiderata in Tension," *Social Philosophy & Policy Foundation* 34 (2017): 204.
[489] Frank Vandenbroucke, "The Idea of a European Social Union," in *A European Social Union after the Crisis,* eds. Frank Vandenbroucke, Catherine Barnard and Geert De Baere, eds., (Cambridge: Cambridge University Press, 2017): 30.

States could perform a given function equally well, it is not obvious why the power should necessarily be devolved to the national level.

It is also important to consider that my proposal for the regulation of tax competition would have 'teeth' and that countries could be sanctioned for disobeying it. It is, therefore, important to consider whether this is permissible. I maintain that it is. Once again, I rely on the EU's current practices to justify this idea. The EU's current internal practice is no stranger to the use of sanctions whenever it deems that Member States have not transposed a directive either correctly or on time. It also initiates infringement proceedings against Member States deemed to have use the single market legislation incorrectly. As we note in Part II on justice, the single market legislation covers vast areas of policy-making and includes measures considered to have an impact on the functioning of the single market. This includes taxation, employment, culture, social policy, education, public health, energy, consumer protection, transport, environment, information society and media. If a country does not comply with a directive, it may be referred by the Commission to the European Court of Justice. If a country does not communicate measures that implement the provision of a directive on time, the Commission may request that the Court impose penalties.

There is one final reason as to why we should be convinced that the regulation of tax competition, as I have proposed it, is not an objectionable violation of state sovereignty. As Buchanan notes, when the participation in a supra-national institution or, for that matter, in a regulatory scheme, contributes to the legitimacy of states, our understandings of the bounds of the state themselves should be revised.[490] If the contribution to the legitimacy of the state is sufficiently important, it may make sense to include the participation of the state in this institution in its actual constitution. Insofar as this notion has traction, the idea that participation in such an international institution is problematic for state sovereignty loses force.

[490] Allen Buchanan, "Reciprocal legitimation: Reframing the problem of international legitimacy," *Politics, Philosophy & Economics* 10 (2011): 17.

While my view on sovereignty is different from that of Peter Dietsch and Thomas Rixen, I maintain that the most adequate conception of it must recognise the duties that individuals have towards their fellow co-citizens and to citizens of other states. It may plausibly be necessary for states to cede powers to supra-national organisations in order to better fulfil duties towards one's co-citizens and towards citizens in other states. This obtains in several areas of policy as globalisation strains the capacity of domestic states to address some issues. My proposal is, in conclusion, defensible in light of different ways of thinking about sovereignty. We should, therefore, be confident that it does not constitute an objectionable violation of state sovereignty.

6. Performs an important service

One additional source of legitimacy of my proposal for the regulation of tax competition is the fact that it performs a particularly important service. This is because my proposal will, very importantly, conform to reasons that its subjects had independently of it, namely the avoidance of collectively self-defeating scenarios, the protection of a social minimumm and the avoidance of democracy-threatening inequalities. I am appealing to the importance of yet another standard of authority, namely the service conception.

The latter maintains that authorities must satisfy two conditions if they are to be legitimate: "a subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not".[491] The second condition is that "that the matters regarding which the first condition is met are such that with respect to them it is better conform to reason than to decide for oneself, unaided by authority."[492] Part of the appeal and case for the service conception is that it makes the justification of authority conditional upon helping our rational capacity, the function of which is to ensure conformity with reason. We should value our ability to exercise our own judgement and to rely on it, but we should do so because of its purpose which is, in effect, to help

[491] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (New York: Oxford University Press, 2009): 136-7.
[492] Ibid: 137.

conformity with reason. The values of capacities should not be reduced to the value of their use, but even when their use also derives from the freedom to use our capacities, it depends on their successful use. Authorities should not be conceived as a negation of people's capacity for rational action, but as one mechanism through which people can indirectly achieve the goal of their rational function. In this sense, authorities are comparable to the use of, for example, alarm clocks.[493]

Regulation and restriction of choice are permissible in many aspects of life and public policy. In general, we should note that the limitation of the number of choices at one's disposal can sometimes be a good thing. It is not true that the acquisition of a greater range of choices is always better. This may be so because the expansion (or mere possession) of choice may bring the burdensome cost of having to decide. It may also be because it may be too costly to obtain another possible choice. Choice-making may also be undesirable in the sense that it may bring with it the cost of experiencing remorseful responsibility for decisions that have been taken. The fact that decisions are made from an ample set of choices means that it is more likely that one comes to regret such a decision. It may be the case that the disadvantages of having an ample spectrum of choices apply to the setting of corporate taxes on the part of countries as the chances that they will make disastrous choices is diminished.[494]

Indeed, choice should in some circumstances be limited for the purposes of avoiding collective-action problems. This may be the case of corporate tax-rate setting as we have already seen although this is unlikely. In the context of prisoners' dilemma situations, one way to avoid the dilemma is by restricting the scope of either party so that they cannot produce the dominant choice. In this scenario, therefore, "having fewer choices ensures that they will both be better off".[495] One may respond to this by saying that the preferred scenario for everyone is one in which she makes the dominant choice and the other party makes the non-dominant choice. The point, however, is that one "often cannot remain exceptional" and universal choice of some kind is required.[496] Choices are linked and the

[493] Ibid: 140.
[494] This critical account of choice draws on Gerald Dworkin, "Is More Choice Better than Less?" *Midwest Studies in Philosophy* 7 (1982): 56.
[495] Ibid.
[496] Ibid.

issue of whether one individual is to have more choices is also the issue of whether a larger group is to have them as well.[497] It is, therefore, "impossible to ignore the effect on the individual of others having the choice as well".[498] The enactment of minimum wage legislation and the imposition of a maximum number of working hours are other examples of restrictions of competition that many of us accept.

The appeal to the service conception as a legitimating device for my proposal would be weakened if the regulation of tax competition were not necessary. One may wonder why a new regulatory body for tax competition is, in fact, necessary. This is an important discussion from the standpoint of my proposal's legitimacy. Agents who oppose my proposal could also have grounds for complaint against it if the goals it seeks to achieve can be accomplished through other, readily available means. One may question whether a new body is necessary or, alternatively, whether any form of regulation is necessary altogether. I will seek to reply to both questions. If it was the case that the regulation of tax competition could be better performed by an alternative possible or existing authority, this would perhaps impugn the legitimacy of my proposal in light of the service conception.

There is a discussion as to whether a putative authority needs to be probable or merely likely for it to merit legitimacy. Raz notes that for an institution to have legitimacy, it must have de facto authority in the sense that it is, in fact, "followed or at least conformed with by segments of the population".[499] One strict position on this matter would maintain that authority can only be attached to bodies that already have de facto authority, whereas a more flexible reading of this question may suggest that bodies that could have effective authority may become legitimate. Bruno Leipold argues that it is more in keeping with the spirit of the service conception to say that a theory of authority should consider more alternatives.[500] Perhaps, he says, it would be too extreme to argue that a possible alternative could completely delegitimise an existing institution.[501] However, it does mean that an institution does not have authority to issue directives that seek to prevent

[497] Ibid.
[498] Ibid.
[499] Bruno Leipold, "Political Anarchism and Raz's Theory of Authority," *Res Publica* 21 (2015): 313.
[500] Ibid: 314.
[501] Ibid.

the emergence of a better alternative. If our theory of authority allowed authorities to prevent the emergence of better alternatives, it would mean that we would condone obedience to directives counteracting the purpose of the service conception: bringing people closer to reason.

There are reasons to believe that the EU can reliably and feasibly perform this service. There are, however, also reasons to perhaps have some reservations. When addressing the question of whether it makes sense for the EU to intervene and restrict the choices and decisions of countries in the domain of fiscal policy, it is worth reflecting about why the EU should intervene in tax competition at all. In the remainder of this section, I will argue that there is evidence that it is both technically and politically feasible for the EU to regulate tax competition. Firstly, I will consider whether countries can tackle tax competition unilaterally. Secondly, I will consider whether perhaps other bodies can address this problem. Thirdly, I will look at evidence that suggests the EU is apt for this task.

One objection to the EU's adequacy for regulating tax competition may be the conviction that supra-national intervention in this issue is not necessary at all. This, however, seems misguided. The suggestion may be that companies, amongst each other, might agree to the imposition of a withholding tax on investment income, such that corporate profits are taxed at least once. The available evidence suggests that informal co-ordination with respect to the issue of tax competition is unlikely to prove successful and, even when it is agreed, it is not likely to be forceful as such agreements do not have enforcement mechanisms.[502]

There are certain measures that countries may take individually. These include pressuring foreign governments and banks to disclose information and accounts of non-residents. The United States seems to have enjoyed a degree of success in this respect through the approval of the Foreign Account Tax Compliance Act (FATCA). It was approved by the US congress in 2010 and it threatens to enact sanctions on countries which do not share

[502] Thomas Rixen, "Institutional Reform of Global Tax Governance: A Proposal," in *Whose Tax Base? The Ethics of Global Tax Governance*, eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 343.

information on American citizens' use of foreign accounts by imposing a withholding tax on payments to and by these financial services institutions. Following its approval, the US reached bilateral agreements based on FATCA with 112 different jurisdictions, including major tax havens.[503] The EU, in turn, transposed into law the OECD's Agreement on Information Exchange. The latter does not allow its signatories to refuse requests of information simply because it is held by a financial institution. Further to this, it obliges signatories to compile and share "beneficial ownership data on trusts, foundations and other interposed legal entities".[504] The EU also transposed into law the OECD's common reporting standard that was based on the US FATCA.

Note that this kind of measures addresses only the first form of tax competition which we outlined in Part I, that of not complying with legal duties towards the tax authorities of one's country. It is plausible that such measures, however, are relevant in other ways to our discussion. In Section 5 in Part 1 we discussed whether states may still have a sufficiently robust policy toolkit to combat the perverse effects of tax competition. The sharing of information about non-residents' foreign accounts has enabled, it seems, OECD countries to raise personal capital income taxes. This adds to the redistributive capacities of member states. This trend, however, has not been universal. Moreover, it is plausible and prudent to assume that said personal capital income taxes will not always be able to offset the effects of tax competition in the form of citizens falling below a social minimum and ensuring the fair value of political liberties. It is also worth noting that FATCA was approved by the country which still has the most diplomatic and economic clout. As far as Europe is concerned, comparable measures were taken by the EU and not by individual countries.[505] That, in itself, suggests that unilateral courses of action against tax competition are not open to all countries. It, therefore, is an argument in favour of the necessity of the EU regulating tax competition. It is also worth recalling that in Part I we

[503] Lukas Hakelberg, "Redistributive Tax Cooperation: Automatic exchange of information, US power, and the absence of joint gains," in *Global Tax Governance – What is wrong and how to fix it?*, eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 124.
[504] Leo Ahrens, Fabio Bothner, Lukas Hakelberg and Thomas Rixen, "New room to maneuver? National tax policy under increasing financial transparency," *Socioeconomic Review* (2020): 6.
[505] Lukas Hakelberg, "Redistributive Tax Cooperation: Automatic exchange of information, US power, and the absence of joint gains," in *Global Tax Governance – What is wrong and how to fix it?*, eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 134. The author notes that FATCA was a "game-changer" that enables reforms in Europe.

suggested that it is plausible that addressing only tax evasion is likely to intensify other forms of competition, such as competition for real economic activity. This also suggests that supra-national regulation may be required in this field as well.

Rixen, furthermore, claims that the proliferation of bilateral and preferential trade agreements between countries have come with the price of welfare-reducing trade diversions.[506] He adds that these sorts of agreements may be, at most, second-best solutions to the problem of lack of regulation. He maintains that "if anything, the lesson to be learnt here is that while countries are reluctant to conclude agreements under the umbrella of the WTO, the world would be better off if they did."[507]

Recall that I propose that tax competition be regulated when it is collectively self-defeating. An ideal authority is one whose directives are based on the reasons that already apply independently to its subjects and are relevant.[508] One class of situations in which authorities act on such reasons are prisoners' dilemma-type scenarios. Under such scenarios, individuals have reason to change a given situation they face but are incapable of doing so themselves.[509] One of the scenarios of tax competition can be described in such a manner. In the absence of co-ordinating action, it is impossible to escape such predicaments.

Let us now consider whether tax competition can be regulated by other bodies. Thomas Rixen has considered whether proposals such as his (and presumably others) can be institutionalized under the aegis of institutions such as the OECD and the World Trade Organisation.[510] The OECD's ambit is not the same as that of the European Union and so it cannot implement a model of tax regulation that responds to the demands of justice that arise distinctly within the EU. It should also be noted that in the OECD the capacity of

[506] Thomas Rixen, "Institutional Reform of Global Tax Governance: A Proposal," in *Whose Tax Base? The Ethics of Global Tax Governance,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 344.
[507] Ibid.
[508] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986): 47.
[509] Ibid: 51.
[510] Thomas Rixen, "Institutional Reform of Global Tax Governance: A Proposal," in *Whose Tax Base? The Ethics of Global Tax Governance,* eds. Peter Dietsch and Thomas Rixen (Colchester: European Consortium for Political Research, 2016): 342.

'enforcement' in any of the areas of social and economic policy in which it is active is very limited. As Rixen notes, "granting enforcement powers and judicial review to the OECD in taxation would not fit the organisation's tradition and image and would undermine its credibility as a knowledge-broker."[511]

With respect to the question of whether such a role could be played by the WTO, it should be noted that the organisation has already deemed certain instances of tax breaks as incompatible with international trade law. It does not follow that the WTO can successfully address this issue. International trade law cannot address everything that is, from our standpoint, normatively relevant about international taxation; the wrong-making features of tax competition are its effects on inequality and the failure to observe a critical threshold of sufficiency. These situations will, not evidently, always coincide with violations of international trade law. Rixen, once again, argues that "generalised tax competition will not cause trade distortions and thus the WTO could not rule on such competitive moves by governments".[512]

I will now consider some points which actively suggest that the EU is apt to regulate tax competition. The EU has an established history of economic regulation which is analogous to the model that we are proposing for the treatment of tax competition. As a result of increased commercial integration, "European judicial and political institutions reacted to this challenge of integration with a significantly greater pro-trade approach than other integration projects".[513] The jurisprudence of the General Agreement on Tariffs and Trade (GATT) is less aggressive in this respect than that of Europe's. The European Court of Justice has deliberated on a wide array of matters, including Sunday trading rules, worker safety, consumer protection, product safety and "virtually every regulation of the marketplace with the potential to slow trade down".[514]

[511] Ibid.
[512] Ibid.
[513] Ari Afilalo and Dennis Patterson, "Statecraft and the Foundations of European Union Law," in *Philosophical Foundations of EU Law*, eds. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012): 288.
[514] Ibid.

In the domain of tax too, moreover, the EU has become more active despite criticisms of its allegedly laissez-faire approach with respect to fiscal competition. The European Council approved a Code of Conduct in 1997, under the terms of which Member States agreed to enter into a non-binding commitment to remove 'preferential tax regimes' (the establishment of lower taxation rates for foreign citizens). The Code of Conduct was presented as a piece of soft law – a piece of legislation which does not have binding force –, and its fulfilment was a condition of accession for central and eastern European countries. The principles contained within the code also applied to state aid rules for the 15 Member States at the time.[515] In 1997 and 1998, the EU connected the issue of tax competition and state aid in a very explicit way as the Commission issued a State Aid Notice with respect to the application of the state aid rules to measures that concerned business taxation.[516] This made it illegal for administrative tax rulings to provide guidance for taxpayers that allowed for administrative discretion that went beyond the management of tax revenue based on objective criteria.[517] The Commission issued a draft notice in 2014 that was even more explicit in this respect.[518]

One of the difficulties in regulating tax competition lies in arriving at a common definition of the tax base. In this respect, too, the EU has made some progress by developing a proposal for a common consolidated corporate tax base. The EU's Common Consolidated Corporate Tax Base (CCCTB) is a version of unitary taxation through formula apportionment. Unitary taxation considers the many different entities of a multi-national company as a single entity for the purpose of taxation. A set of consolidated accounts are produced for all entities in a group. It is an EU initiative and so this can only be done for EU member locations, but "the intent is to create a common corporate tax base within the EU, which will then become a prototype of good practice for ambition".[519] The reported benefit is then allocated to Member States based on a formula that calculates the proportion of the real economic presence of the company in each Member State.

[515] Peter Dietsch and Thomas Rixen, "Tax Competition and Global Background Justice," *The Journal of Political Philosophy* 22 (2014): 170.
[516] Lilian Faulhaber, "The Trouble with Tax Competition: From Practice to Theory," *Tax Law Review* 71 (2018): 330-331.
[517] Ibid: 336.
[518] Ibid.
[519] Jamie Morgan, "Taxing the powerful, the rise of populism and the crisis in Europe: the case for the EU Common Consolidated Corporate Tax Base," *International Politics* 54 (2017): 534.

Subsequently, each state proceeds to tax the profit and income of the company that is allocated to it. The tax rate is set by the Member State and not by the CCCTB. When the CCCTB was first launched, there was no plan to harmonise tax rates in the EU. One of the reasons for opposition to the CCCTB was the fear that it could ultimately result in tax harmonisation. In fact, the EU Ruling Committee proposed a 30% minimum rate of corporation tax in the EU. This was a lower proposed rate than those practised in the EU at the time, but it is substantially higher than the rates observed today in virtue of tax competition. Some of these avenues pursued by the EU may not be consistent with some of my reflections in this dissertation, particularly the ones about Dietsch and Rixen's Membership Principle, but they evidence that tax competition is an area in which the EU has already accumulated some expertise.

The Savings Tax Directive, approved in July 2005, required the automatic exchange of information between countries with respect to the savings of foreign residents. Dietsch maintains that, despite the several loopholes the directive contains, it demonstrates that the international sharing of such information can be implemented.[520]

The aforementioned considerations suggest that regulation of tax competition is not, technically speaking, anathema to the EU. It may still be the case, however, that current political and legal circumstances render it hard for the Union to act on this front. In the domain of taxes and duties, Member States still enjoy sovereignty and imperative rules are decided at the level of the EU with recourse to unanimous vote of Member States. The fact that some countries currently profit from tax competition renders unanimous agreement potentially very unlikely. More discussion is necessary on which particular agency should regulate tax competition. Perhaps it would require the creation of a new body. One can also consider, however, measures that consist of extensions to the prerogatives of existing authorities.[521]

[520] Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (New York: Oxford University Press, 2015): 171.
[521] Mihaela Tofan, "Reinforcing The EU Integration Using Tax Regulation," *Journal of Public Administration, Finance and Law* 15 (2019): 142.

We need to consider the question of the feasibility of implementing my proposal specifically, however relevant the general considerations about the regulation of tax competition may be. We should remember that the proposal allows for tax competition in case Member States have a sufficiently robust policy toolkit that allows them to protect sufficiency and the fair value of politival liberties. In this sense, we should ask whether it is feasible for the EU to assess whether a Member State of the EU has the appropriate policy tools to secure a level of sufficiency and the prevention of excessive inequalities. When a Member State invokes such a reason to demand an intervention in tax competition, the EU should carry out an assessment in order to ascertain whether such a country does not have other policy tools at its disposal to secure sufficiency and prevent excessive inequalities. The task of assessing whether tax competition will deprive a state of a sufficiently comprehensive policy toolkit may prove to be an exceedingly difficult task. The very reason why a country may find itself with enough policy tools may be attributable to tax competition previous tothe implementation of my proposal. Similarly, a country may find itself without a sufficiently comprehensive policy range in virtue of having been a losing party in a scenario of tax competition. Would it be doubly unfair on a country to prevent it from engaging in a practice because it unfairly suffered from it in the past?

These are important questions which can be better settled by looking deeper into the nature of the EU's obligation to regulate tax competition. We may maintain that in co-ordinating the practice of tax competition between countries, the EU is simply acting as an enforcer of duties that states had anyway. This would mean that instances of tax competition, previous to the implementation of our proposal, are liable of being either permissible or impermissible. It would not be reasonable to expect individual Member States to have individually assessed this accurately. To do so would have imposed an unreasonably burdensome cost. If this is so, most practices of tax competition are only liable for moral criticism once the EU's regulatory framework has been put into place.

Another potentially devastating scenario which my project must address is one in which the measures taken by the EU to limit tax competition lead to capital flight away from the region, thus making it even harder for countries to satisfy states of affairs such as a social

minimum. Elisa Orrù and Miriam Ronzoni, in fact, argue that there is not much point in establishing regional forms of tax competition as capital and labour would simply move away from that region.[522] My proposal is premised on the assumption that this would not take place. The discussion of how the EU should act towards tax havens outside of its jurisdiction lies outside of the scope of this paper, of course, and concerns distributive justice to third party individuals.

The purpose of this section has been to argue it is conceivable for the EU to play a far greater role in the regulation of tax competition. I have sought to demonstrate this by referring to the steps the EU has already taken in this department and in other fields. I also recognise that there are serious feasibility constraints that my proposal, specifically, faces.

7. Consent could legitimise my proposal

Consent is one of the main conceptions of international legitimacy. As such, if consent could legitimise my proposal, it would provide the latter with a stronger foundation. One of the sources of my proposal's legitimacy is the fact that Member States have consented to the EU. This is compatible with the notion that consent may not be necessary in certain circumstances. One may well consider that certain supra-national institutions perform morally mandatory goals such that, for example, countries should be required to join them.

Perhaps the most famous expression of the voluntarist position is that of John Locke who argued that following the commands of political authority amounts to the subordination by those who are subject to it.[523] Some voluntarists maintain that consent from states suffice to legitimise international institutions. Buchanan characterizes this position as being a simplistic one given that it states that international institutions of global

[522] Elisa Orrù and Miriam Ronzoni, "Which supranational sovereignty? Criminal and socioeconomic justice compared," *Review of International Studies* 37 (2011): 2105.
[523] John Locke, *Second Treatise on Civil Government* (Indianapolis: Hackett, 1990 (1690)).

governance are legitimate if, and only if, they obtain state consent.[524] More elaborate voluntarist views, however, maintain that consent must be coupled with other conditions.

The requirement of consent needs to be supplemented with a requirement that consent is not given under certain liability-limiting conditions of duress or under other conditions that may defeat the voluntariness of agreements. It is also the case that consent can only be valid if the institution in question is not grossly unjust to individuals. This must include a class of basic human rights.

One of the advantages of a voluntarist view with respect to international institutions is that it protects the positive functions that are exercised by states. According to a prominent view, states still are the primary vehicles through which justice, security, efficiency, order and a range of other public goods are delivered.[525] Additionally, states represent the most advanced mechanism through which individuals can exercise self-government. The fact that the voluntarist view ascribes such an important role to the state – through the requirement of its consent – is a strength of the view.[526] This occurs to an even greater degree in the state democratic consent view. This view maintains that consent on the part of democratic states confers legitimacy. This view of the legitimacy of international institutions would also protect the positive function of democracy.

There is a further discussion within the voluntarist camp about whether consent is only valid if it is delivered by democracies. In virtue of the challenges posed by the democratisation of international institutions, Christiano notes that resting the legitimacy of such entities on democratic states means that the act of consent carries with it the democratic mandate that the citizenries provide their governments.[527] One of the problems of this account is that not all states, of course, are democratic. We should not deny that non-democratic states can legitimately join international institutions that

[524] Allen Buchanan, "The Legitimacy of International Law," in The Philosophy of International Law, eds. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010): 90.
[525] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford: Oxford University Press): 53.
[526] Such a view does not have to be a fundamentally statist one; regardless of whether one considers that states are an ideal tool, one may believe that they play an important service.
[527] Thomas Christiano, "The Legitimacy of International Institutions," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, 2012): 385.

perform important services. This issue does not obtain at the level of the EU, however, given that all its member states are democratic.

A voluntarist position is not committed, nevertheless, to the position that the consent of democratic states is always a necessary condition for the legitimacy of a supra-national institution. Buchanan and Keohane note that internally just and democratic states can engage in brutal and unjust wars and refuse to participate in a supra-national organization that is vital to prevent unjust armed conflicts.[528] This does not scar the legitimacy of a supra-national organization that is vital for this purpose. The voluntarist position with respect to international institutions lies in part in the idea that states can transfer some of their legitimacy to the former. If, however, a state does not meet any standards of right and is grossly illegitimate, there is no legitimacy which it may transfer upwards. Further to this, there are other norms of international law the legitimacy of which does not require consent of states. These include *jus cogens* norms against slavery and genocide.[529] The point stated above suggests that the legitimacy of a supra-national institution that pursues morally mandatory goals is not tainted by the absence of states that are unwilling to co-operate. Furthermore, it is also plausible that there may even be a requirement for states to join such organisations.[530]

Buchanan and Keohane note that a "a reasonable position would be that there is a strong presumption that global governance institutions are illegitimate unless they enjoy the ongoing consent of democratic states".[531] This might mean that one possible appropriate conception of legitimacy for the European Union is one that requires the consent of Member States that meets urgent moral demands. One could argue that the EU is legitimate insofar as it receives its Member States' consent and meets a set of morally minimal conditions, such as a basic set of human rights. Indeed, there are aspects of the European Union's decision-making procedure that operate based on inter-governmental

[528] Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20 (2006): 415.
[529] Thomas Christiano, "Democratic Legitimacy and International Institutions," in *The Philosophy of Law*, eds. Samantha Besson and John Tasioulas (New York: Oxford University Press, 2010): 123.
[530] Thomas Christiano, "The Legitimacy of International Institutions," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York, Routledge: 2012): 388.
[531] Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20 (2006): 415.

agreements. Given that all the Member States of the European Union consented to joining the organisation, on this view, the EU would be legitimate. It would, therefore, also mean that my proposal for the regulation of tax competition would also be legitimate.

Beyond respect for a class of basic human rights, one may think that consent is enhanced when international institutions meet other sets of conditions. If we are concerned about whether consent can bind individuals within states, we may think that it is important that international institutions arise from a process of fair negotiation. This would be invalidated by large inequalities in the distribution of burdens and advantages. Powerful states can bully weak states into joining supra-national institutions. This is an ongoing practice in international law and one of the reasons why state consent is insufficient in legitimising international norms. States may arrive at agreements that are highly asymmetrical in terms of the benefits that they derive from them. Strong states may make the costs of not consenting prohibitive.

One natural way to conceive of international institutions would be to think of them as contracts if we are interested in thinking of them as a process of fair negotiation. There are, however, reasons as to why we should not think of international institutions in these terms. Firstly, one of the procedural requirements of contracts in the domestic case is that they be voluntary.[532] Before we have argued that voluntariness may not be an appropriate condition, in some cases, to make international institutions binding.

Secondly, it is worth noting that the value equality in exchange tends to be central in the doctrine of contracts. The thought behind this is that, once a competitive market price is established, the value of the good or service in question is equated to it.[533] This, however, is not something that can be accepted in the international context. On the contrary, in the case of international trade treaties and environmental treaties, developing countries tend to receive special treatment.[534] These provisions reflect a concern, conceivably, for distributive justice.

[532] Thomas Christiano, "Is democratic legitimacy possible for international institutions," in *Global Democracy: Normative and Empirical Perspectives*, eds. Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (Cambridge: Cambridge University Press, 2012): 85.
[533] Ibid: 86.
[534] Ibid.

Thirdly, contracts are celebrated against the background of domestic law and a basic structure. These institutions are, plausibly, the main subject of a theory of justice so that individuals may pursue their affairs and not have to constantly worry about coordinating their actions with others in order to ensure that a liberal theory of justice is satisfied.[535] A set of background institutions ensures that justice is secured when individuals negotiate with each other and act on their partial concerns.

This is part of the institutional division of labour. At the level of our existing international system, however, there is no corresponding global basic structure that may assume the function of pursuing global justice while leaving international institutions to pursue mutual advantage between countries. If the fulfilment of a theory of justice was left to private individuals, this would prove to be a very costly activity in virtue of the difficulty of coordinating the activities of millions of different individuals.[536] Not only could the demand that individual contracts fulfil substantive principles of justice prove to be a very demanding task, in the domestic case, it could also prove to be a very inefficient one.[537] As Rawls notes, "it seems natural to suppose that that the distinctive character and autonomy of the various elements of society requires that, within some sphere, they act from their own principles designed to fit their particular nature."[538] The conditions that comprise background justice can cease to obtain even if no individual acts in an unfair manner or knows the effect of countless transactions with regards to the opportunities of others.[539] In fact, we may posit that there is a tendency for background justice to be eroded even when individuals act in a fair manner.[540] Market forces have a tendency to drive things in the wrong direction and are sometimes conducive to oligopolistic outcomes,

[535] Samuel Scheffler, "Is the Basic Structure Basic?" in The Egalitarian Conscience: Essays in Honour of G. A. Cohen, ed. Christine Sypnowich (New York: Oxford University Press, 2006): 106. It is worth mentioning that, on the following page, Scheffler also distinguishes between the division of moral labour and the institutional division of labour. The former concerns the division between principles that apply to the basic structure and values that apply to other areas of life. The latter concerns the distinction betwen social forms that are needed to establish background justice and those that directly regulate individual economic transactions.
[536] Thomas Christiano, "Is democratic legitimacy possible for international institutions," in *Global Democracy: Normative and Empirical Perspectives*, eds. Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (Cambridge: Cambridge University Press, 2012): 87.
[537] Ibid.
[538] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): 262.
[539] Ibid: 267.
[540] Ibid.

which preserve unjustified inequalities and restrict fair opportunities.[541] Indeed, we may go further and say that it is impossible to determine whether the transactions are just or fair by focusing only on the conduct of individuals and associations in the local circumstances. This depends ultimately on whether background institutions succeed in maintaining justice.

This is part of the reason why the distribution of burdens and benefits in society is probably best left to the branches of government, including the tax-and-transfer system. The basic structure must therefore consist of a set of institutions that make up a just and legitimate social background (which carry out operations such as income and inheritance taxation) and, secondly, a set of institutions that directly relate to interaction between individuals and associations. The latter includes things such as the law of contract and addresses issues such as duress. These institutions must be marked by simplicity and practicality. As will be argued later, however, unfair contracts may be enforceable when it is in the victims' interests to be empowered to make them.

It is unlikely that these considerations obtain in the international sphere. Within global justice, there is a debate as to whether there is a global basic structure. A basic structure is the primary subject of justice for Rawls. This is taken to mean the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation. The major institutions, in turn, are the constitutional framework and the dominant social and economic arrangements. The latter include "the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in means of production, and the monogamous family".[542]

As far as the international sphere goes, however, the fact is that there is no international tax-and-transfer system that may distribute benefits and burdens. This means that treaty-making does not take place against a web of justice-securing background institutions. One can conceive of the difference between treaties and contracts by saying that contracts take

[541] Ibid.
[542] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999): 6.

place within a moral division of labour that allows for a form of constrained pursuit of self-interest whereas international treaties do not.

Additionally, the number of countries in the world – comparably much smaller than the number of individuals in any given Member State – is such that it is a lot less implausible to think that international treaties could assume the role of implementing principles of distributive justice in a way that is not prohibitively costly. Collective-action problems and co-ordination problems are much less likely to occur at the international level and are likely to be of a much smaller nature. It is plausible that "wealthy states could fairly easily co-ordinate with each other to achieve much more sizeable redistribution".[543] Not only does treaty-making not take place against a web of background institutions, it occurs against a background of egregious income and wealth inequality. This, Christiano says, is enough to vitiate the idea that all peoples of the world should engage in treaties as equal exchange.[544]

This speaks in favour of the plausibility of marrying consent with other values, such as the pursuit of distributive justice within states. My proposal is a way of doing just that. It ensures that states within the EU relate towards each other in a way that protects their social democracies and their welfare states. It does not follow from this, as Christiano notes, that every single act of treaty-making should be an instance for the pursuit of justice. As he says, "to be sure, not every treaty need implement justice in all respects. Just as only the system of domestic law and policy is supposed to realise justice so the system of treaties ought to be devoted to realizing justice on a cosmopolitan scale".[545]

My proposal for the regulation of tax competition would be an instance of the pursuit of justice in the sense that it would help states in becoming domestically more just and more legitimate. Regardless of whether such pursuits, in the field of social justice, are strict requirements for consent to be valid, they undoubtedly enhance it. This should mean that,

[543] Thomas Christiano, "Is democratic legitimacy possible for international institutions," in *Global Democracy: Normative and Empirical Perspectives*, eds. Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (Cambridge: Cambridge University Press, 2012): 88.
[544] Ibid.
[545] Ibid: 90.

under this richer consent model, my proposal for the regulation of tax competition should be legitimate.

We should now consider one objection to the notion that the EU is indeed an organisation that meets the requirement of state democratic consent. One may oppose the notion that the EU is a voluntary organisation on the grounds that withdrawing from it or not joining it has very high costs. Andrea Sangiovanni hints at this position in his discussion of costs.[546] This draws on a common idea: the idea is that the costs of exiting a state are so high that remaining in the state cannot count as an act of consent.

According to Andrea Sangiovanni, this is the case when the alternatives to a given course of action are excessively and unreasonably burdensome.[547] If this is the right conception of 'voluntariness', it may seem that the EU is not a voluntary organisation. Sangiovanni makes it clear that this is his view as he points to the very demanding norms that obtain in the EU, to the huge costs that are associated with withdrawing from it – for example, in terms of market access – and notes that the longer the membership of a Member State in the EU, the greater these costs are given the frustration of expectations to market access after a long period of access to the market.[548]

I am unconvinced by this argument. It would be strange for a voluntarist to say a country cannot bindingly consent to membership in the EU because the opportunity cost of not joining is very high. According to this argument, even if the victorious political parties, in a given Member State of the EU, were to explicitly commit in their manifestoes to continued membership in the institution, membership would still be non-voluntary given the costs of exit. This strikes me as implausible. A given organisation that prospers and is mutually advantageous to all its members, such that those who do not join miss out on very important benefits, is still susceptible of being joined and maintained voluntarily. Otherwise it would mean that consent to a very successful supra-national organisation is never valid. The picture would be different, of course, if a given weak country, say, was

[546] Andrea Sangiovanni, "Solidarity in the European Union: Problems and Prospects," in *Philosophical Foundations of EU Law*, eds. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012).
[547] Ibid: 393.
[548] Ibid.

actively coerced by a powerful one into remaining within an organisation (although this can still be plausibly permissible on the grounds of morally mandatory aims). The sheer fact that the organisation provides ample benefits to its constituent parties, however, does not seem to be an instance of this.

When considering whether our proposal may be legitimised by the standard of consent, we must also consider what states' attitudes towards the EU would have been if such background institutions had existed. In other words, if there was a web of global institutions that had the potential to satisfy a European social minimum, it is likely that states would consent to erecting it and to joining it. This is surely a relevant consideration with respect to assessing its legitimacy.

Finally, we should entertain one slightly more controversial way in which our proposal may be legitimated through consent. We should consider the possibility that even unfair contracts may be legitimate in certain situations. There are, of course, certain contracts whose content or sources are such that they are necessarily illegitimate. This obtains when an individual consents, for example, to be sold into slavery. There may be other cases, nevertheless, in which a contract may be unfair but legitimate. The prospective fairness of a contract depends, among other things, on how the parties to it are situated. If one of the parties is in a position of severe comparative weakness, the procedure is manifestly unfair. It does not follow, however, that it is necessarily illegitimate. It is often important that parties that are unfairly situated can bind themselves contractually. This may be so when the option of a party binding itself to a contract materially improves its condition. In this sense, it may often be detrimental to the interests of the worst-off if they are unable to bind themselves to duties. A robust account of legitimacy should, therefore, empower individuals to make unfair contracts in some circumstances. It is important to insist, however, that this point does not legitimate all instances of consent where it improves the fate of the worst-off. Moreover, this is not an attempt to say the EU is procedurally unfair. It merely seeks to establish that unfair contracts may be legitimate.

Should the EU be considered unfair, however, it could still be the case that perhaps countries should have the power to bind themselves contractually to my proposal. This is

because the social minima established by my proposal, for example, ensure a form of protection for the least advantaged. Having said this, we should note that this is only one possible route for the legitimation of my proposal and its absence is not incompatible with the possibility that there may be others.

There are, we should note, more demanding voluntarist standards. These include a demand that the institution be periodically reaffirmed. It is not clear, however, why this should be a plausible demand of the legitimacy of international institutions. After all, the national constitutions of countries – which require the satisfaction of more stringent democratic standards – are not subjected to periodic consent. Furthermore, one should remember that countries continue to have at their disposal the possibility of exiting the EU.

Some may maintain that the legitimacy of international institutions requires not the consent of states, but directly that of the individuals under its jurisdiction. This is, however, an implausible view. A view which required the direct consent of all individuals under its jurisdiction would struggle very much to 'get off the ground'. Theories of justice would struggle to get off the ground if they required, as a matter of principle, universal consent. This would place an impossible burden for them to meet. One should note that no current political authority meets this threshold. Furthermore, "politics seems to be concerned, in some fundamental way, about how to act when consent is lacking".[549]

The idea that consent may legitimise my proposal is, in fact, echoed by the current practice of the EU and that is something that is worth mentioning. Decisions on taxation requireme unanimity as per the Treaty on the European Union.[550] Gabriel Zucman and Emmanuel Saez note that, by doing so, the EU casts tax competition in stone.[551] EU countries have, therefore, the power to consent to a new proposal on the regulation of tax competition.

[549] Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112 (2002): 700
[550] There is, however, a material limitation on the rule of unanimity: the functioning of the internal market. This means that, in practice, the unanimity requirement is not observed as states have constantly provided exemption from taxation in order to attract investments.
[551] Emmanuel Saez and Gabriel Zucman, *The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay* (New York: W.W. Norton & Company, 2019): 104.

8. The legitimacy-enhancing potential of my proposal

We have reasons to think that not only do the concerns from democracy and state sovereignty fail to pose a devastating challenge to my proposal, but also that it may be legitimacy-enhancing. Throughout the course of this section, I will present several ways in which my proposal does contribute to greater legitimacy of the Member States.

The regulation of tax competition as I proposed it will render states more legitimate by eradicating grave injustices in the form of individuals falling below a social minimum. It will also enhance the political legitimacy of democracy by protecting the fair value of political liberties. Legitimacy allows for a degree of injustice, but it must not be too great. The existence and perpetuation of a situation in which individuals may find themselves below a social minimum – particularly when authority holders can opt for a policy or an international system that may avoid this – can amount to one of those grave injustices which disqualify their legitimacy.

Furthermore, previously we distinguished between different senses in which the word 'legitimacy' is used. One of these senses concerns the perception of whether an institution is indeed legitimate. Corporate tax avoidance renders institutions such as the EU less legitimate in this sense. It is, therefore, encouraging that my proposal has the potential to make the EU more legitimate in this sense as well even though this has not been the main subject of this Part. As Buchanan notes, however, there are important connections between the two senses in which the word is used: "on some accounts… an institution is legitimate only if it is possible for competent individuals who are subject to its exercise of power to be able to make a reasonable judgement that it satisfies at least the more basic requirements for being legitimate".[552] If participation in a supra-national institution or, for that matter, in a tax competition-regulating scheme reduces knowledge asymmetry between agents and citizens and contributes to their awareness of the valuable services played by states, states will be, as a result, more legitimate.

[552] Allen Buchanan, "Reciprocal legitimation: Reframing the problem of international legitimacy," *Politics, Philosophy & Economics* 10 (2011): 14.

There is another respect in which international institutions can enhance legitimacy. We may believe that democracy is not exhausted by the principle of participation. Democracy comprises the protection of rights, the representation of those who may, in given historical circumstances, tend to be under-represented, the need to keep factional interests in check and when it foments the epistemic quality of deliberation.[553] We should note, however, that the question of whether international institutions may enhance legitimacy depends upon the presence of certain conditions. The ability of an institution to "generate and involve civil society networks and organizations can… enhance transnational discussions, creating new forms of participation that may partially compensate for participatory forms that are lost."[554]

Keohane, Macedo and Moravcsik consider that the EU is, in effect, an example of an institution that has contributed to the enhancement of domestic legitimacy. They maintain that the economic liberalization, embodied by the EU, has helped to protect majoritarian interests against factions that are better able to coalesce and advance their interests, such as domestic firms that want protectionist policies in place at the expense of the exporting sector and consumers.[555] They also argue that the EU's advancement of diffuse, majoritarian interests vis-à-vis minority, factional interests obtains in other policy domains such as central banking, environmental policy and foreign aid.[556] They add that the EU's decision-making procedures, in particular, in which national legislators devise legislation and oversee rule-making have revealed a very high level of detail, expertise

[553] See Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, "Democracy-Enhancing Multilateralism," *International Organization* 63 (2009) for the case that multilateral institutions can enhance the quality of national democratic processes.

[554] Ibid: 25. The authors maintain that the capacity for an international institution to enhance domestic democracy requires that constituent countries commit to embracing the institution and not to undermine it or threaten to exit at every turn. It is also plausible that size and heterogeneity of a country influence the degree to which multilateral institutions may enhance local democracies. They maintain that small democratic countries with more homogeneous populations are more likely to exhibit greater levels of citizen satisfaction, and therefore are more likely to lose from belonging to a multilateral institution in the sense that it may come at the cost of citizen participation. As far as larger countries are concerned, it is harder for citizen participation to play as great a role in national policy deliberation. Nevertheless, the loss in participation need not, they argue, translate into a loss in accountability as the fact that countries are small may enable their citizens to better monitor their government's participation in international institutions and to influence the international institutions through their government. Small and homogenous countries are also most likely to suffer from some of the vices that international institutions may rectify, such as factional control.

[555] Ibid: 14.

[556] Ibid.

and reason-giving.[557] This should gives us hope that the virtues of the EU's procedures would spill-over to the body that I am proposing.

We should bear in mind that the institutionalisation of my proposal could require the creation of some sort of European financial and tax body. It is implausible to suppose that the only role that this body would perform would be to institutionalise the principles I favour for the regulation of tax competition. It should also provide advice in the form of technical assistance to the different legislative institutions and to national tax administrations. Pietro Boria, in fact, advocated the creation of a European Financial Administration and envisaged that it might perform a series of functions.[558] These concern things like obtaining information on the tax-relevant behaviours of residents in the EU, the establishment of procedures that solve tax disputes out of Court, the analysis of trends of national fiscal systems and problems of international taxation and the provision of information to national tax authorities.[559]

Advice and gathering and providing information is something which I think is key for the enhancement of the quality of democratic decision-making. Macedo, Keohane and Moravcsik note that individual democracies are more capable of drawing on information and expertise and can debate more effectively when they take part in multilateral institutions and networks.[560] They argue that the "wider scope, greater diversity, expert staffs and political insulation" of supra-national institutions have the potential to enhance the epistemic nature of democratic decision-making because it increases the range of information at the disposal of both governments and their public opinions.[561] They also note that despite the often emphasized disagreement and diversity on the international stage, there is great commonality between countries that find themselves at the same development stage and with similar economic structures.[562] International institutions

[557] Ibid: 19.
[558] Pietro Boria, *Taxation in European Union* (Rome: Springer, 2017): 203.
[559] Ibid: 204. The analysis of the trends in national tax systems would have the objective, he maintains, of "compiling statistics and details of general economic policy and fiscal policy, which should become the common reference point for the legislative activity in the field of taxation".
[560] Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, "Democracy-Enhancing Multilateralism," *International Organization* 63 (2009): 18.
[561] Ibid.
[562] Ibid: 19.

may, therefore, provide an opportunity and a forum for such countries to share best practices. The EU is a paradigmatic example of this and a body that would regulate tax competition in the EU ould be a way of doing just this. It would be an opportunity for countries to discuss best practices.

Organisations that are relevant for the world economy too have demonstrated an ability to improve the epistemic quality of democratic decision-making. Macedo, Keohane and Moravcsik claim that the Basel Committee on Banking Supervision, the Bank for International Settlements, the Organisation of Securities Commission, the Organisation for Economic Co-operation and Development and the OECD-based Financial Action Task Force are examples of this.[563] Given that my proposal falls squarely within the economic terrain as well, this also gives us reason for hope.

There is one other sense in which my proposal can be legitimacy-enhancing. Rich voters have weighty reasons to support my proposal. If our desired institutional reform is not carried out, well-off individuals may find themselves in a position in which they cannot enrich themselves in a way that is not unjust – in a way that either does not produce excessive inequalities or that places individuals below a social minimum. Rich voters and those who are willing and likely to become rich have reasons to offer more support for a scheme of institutions that allows them to become rich in a way that is not unjust. We considered that one of the ways in which tax competition may be unjust consists in producing some king of 'race to the bottom'. A government's authority is enhanced if firms know that their operations will not result in a poverty-inducing race to the bottom.

Finally, it is worth noting that if European tax regulation enhances the legitimacy of Member States, this would be a source of legitimacy for the EU itself and for the tax competition-regulating scheme. This point can be brought about by thinking about the analogy of legitimacy-enhancing institutions within a state. As Buchanan notes, "an independent judiciary, with the power to review legislation, can help ensure that the legislative branch does not violate individual rights, and its performing of this function

[563] Ibid: 20.

can contribute to the state's legitimacy".[564] The fact that the judiciary carries out this sort of task helps to add to the overall legitimacy of political power. Nevertheless, this is also a relevant consideration in assessing the judiciary's own legitimacy. A similar phenomenon occurs with respect to the regulation of tax competition on the part of the EU. This is because regulation of tax competition seeks to help secure the goods and protections from harms that citizens demand of states and by preventing excessive inequalities. This renders Member States more legitimate and this, in turn, reinforces the legitimacy of my proposal. In other words, even though this is a reflection about whether the EU may legitimately perform the task of reguating tax competition, it is the case that doing so will in fact reinforce the legitimacy of both the EU Member States and that of the tax competition-regulating scheme itself. This is surely a consideration in favour of the idea that tax competition may be legitimately regulated by the EU.

[564] Allen Buchanan, "Reciprocal legitimation: Reframing the problem of international legitimacy," *Politics, Philosophy & Economics* 10 (2011): 16.

Conclusion

This dissertation has examined how, from the point of view of political morality, a just European Union should approach the issue of tax competition amongst Member States. Part I contained an account of the phenomenon of tax competition and the challenges it raises. There is evidence that tax competition is, on some accounts, particularly intense in the EU. Some prominent viewpoints consider that tax competition is inherently objectionable as countries should be immunized from the specific competitive pressures it generates. Some also assume that taxpayers, whether individuals or companies, have a duty to pay tax where they operate.

In Part I, I explore a prominent approach of tax competition as presented by Peter Dietsch in his monograph, Catching Capital, which develops ideas he had already presented in papers written with Thomas Rixen. I outline the two central elements of their proposal, the Membership Principle and the Fiscal Policy Constraint. Throughout Part I, I refer to several of the ideas that underlie their principles, namely the desire to refrain from committing to one particular theory of distributive justice, to protect certain functions of the state and a desire to accept some of the widespread principles in debates about tax competition, such as the idea that taxpayers should pay tax wherever they operate.

I present several objections to Dietsch and Rixen's proposal. Despite the strong connections between some of the arguments I deploy, I have decided to divide my objections into three different groups. As such, I have presented objections from excessive burdens, from implausibility and from arbitrariness. The first class of objections seeks to convey that Dietsch's proposal is overly restrictive. I invoke a thought experiment, that of the social democratic state which outcompetes the libertarian one in attracting human capital to try to convey the notion that it is too burdensome to rule out competition that deprives states of, for example, the ability to achieve their preferred public sector size understood as a percentage of GDP. This is but one of the arguments that I draw on in this section. I also argue that the enactment of Dietsch and Rixen's proposals is potentially unreliable from a distributive standpoint. I clarify, moreover, that the objections to the analysed view also apply to the Membership Principle and not just

to the Fiscal Policy Constraint. I explore some of the independent arguments one might canvass in favour of the former principle and I argue they are implausible. I maintain that the principle is not defensible in light of any notion of fairness. Instead it rests on a misunderstanding of the idea of fairness. Moreover, even if this were not the case, it would not follow that the principle is sound as states have only come to be the way they are in virtue of pervasive interactions with each other.

In my set of arguments about the implausibility of the proposal, I focus on the fact that it ascribes weight to the strategic intentions of players in the practice of tax competition. I argue that part of the implausibility of this lies in the fact that it is not clear what the relevant group would be. I also argue that assessment of intentions in this case is manifestly more implausible than in other areas of regulation.

In the subsequent section I focus on the arbitrariness of focussing on the policy variables of a state's ability to decide on the extent of redistribution and on the choice of the public budget with respect to Gross Domestic Product. Desirable states of affairs with respect to the public provision of goods and distribution of income and wealth can potentially be ensured without protecting these two policy variables specifically. There do not seem to be reasons to value these two choices specifically.

I subsequently analyse one more ethical account of the regulation of tax competition, that of Andreas Cassee. The criticism that this account levels at Peter Dietsch's view of strategic intent strikes me as generally accurate and it informed my own view about the subject matter. I ultimately argue, however, that this account does not distance itself sufficiently from that of Dietsch and Rixen; this is because it still relies on a given conception of fiscal self-determination.

Part I proceeds to present my own positive proposal. In this section, I argue that the European Union should regulate tax competition in three different scenarios. Firstly, it should do so when it is collectively beneficial to all the parties involved in the practice. Given, however, the nature of tax competition as an asymmetric practice, I recognise that this is an extremely unlikely scenario. Nevertheless, it is not one which should be rejected

entirely. The second scenario in which the EU should intervene is that of preventing individuals from falling below a domestic social minimum. The third scenario in which the EU should regulate tax competition is that in which it produces inequalities that may threaten the fair value of political liberties. I also note that the EU should consider whether its Member States may still have a policy toolkit that, in spite of tax competition, allows them both to prevent its citizens from falling below a threshold of sufficiency and to prevent inequalities that undermine the fair value of political liberties.

Pursuing this issue, I engage with the question of whether it is plausible that Member States may have such a policy toolkit at their disposal. Section 5 considers evidence that, despite tax competition, some countries have retained sufficient redistributive capacity to, for example, reduce socioeconomic inequality. Recently there has been an upward movement in personal income taxes in OECD countries and it has been attributed to a variety of factors, including increased financial transparency and information-sharing about tax evasion on the part of individuals. It is undeniable, however, that tax competition can present a threat to the redistributive capacity of states. One of the reasons why this happens is the fact that the lowering of corporate tax rates encourages individuals on top incomes to incorporate and to 'consume' within firms. This, in turn, diminishes the efficacy of the personal income tax. The personal income tax and the corporate income tax are key elements of the progressivity of a tax system. I conclude the Part by discussing some of the limitations of my proposal.

Part II of my dissertation seeks to lend greater force to my proposal by locating it within the framework of a way of thinking about justice in the EU. Such a Part would be incomplete if it did not reflect about the EU's plausible successes and failures from the standpoint of liberal egalitarianism.

My own proposal for the EU is not intended to be a full-fledged theory. It does, however, seek to present two of the key principles that I argue a sound political morality should affirm: protection of a social minimum and the fair value of political liberties. Despite the lively debate about global justice, it is reasonable to contend that the EU cannot distance itself from the impact of the economic phenomena which it enables. There is then a further

question as to which of the many effects that the EU has on its subjects should be rectified. The EU should be conceived of as a liberal international institution and, as such, should not undermine basic demands of justice and legitimacy domestically. This, of course, invites the question of what these demands are.

There are a set of specific harms from which, as a matter of political morality, individuals should be protected. Given that the EU should be conceived of as a liberal political institution, I draw on the Rawlsian notion of a family of liberal values.[565] This requires taking measures that effectively ensure an economic social minimum. I reflect on the difficulties of defining a social minimum for each EU Member State and outline some of the key elements of this enterprise. I adduce a host of considerations about how social minima in the EU might conceivably be set. I draw partly on Amartya Sen's work to argue that the social minima should conceivably have both an absolute and a relative dimension.

I then argue that another plausible requirement of the family of liberal values is the maintenance of liberal democratic institutions. A plausible way to protect the liberal democratic institutions of Member States consists of the protection of the fair value of political liberties. One of the ways in which the latter may be undermined consists of inequalities that enable the rich to control the political process.

This triggers a discussion about whether it is permissible for wealth differentials to have some form of impact on the political process. I distinguish between equality of impact and equality of influence and contend that, while it is not possible nor indeed desirable to ensure that individuals should all have the same impact irrespective of their wealth, differences in wealth should not explain inequalities in influence. This section also importantly notes, however, that it is in theory possible for states to insulate the political process from wealth.

Part II then proceeds to mentioning another proposal, that of Philippe Van Parijs. This is a proposal that calls for extending principles of egalitarian justice from the nation-state to

[565] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996): xlviii.

the world at large. The European Union should be conceived of as an instrument in the pursuit of global justice. This is a position which is diametrically opposed to that which maintains principles of egalitarian justice only obtain within a coercive state that claims to speak on behalf of its subjects. Van Parijs argues that neoliberalism and an absence of solidaristic feelings are by no means inevitable in a supra-national institution and he advocates several measures that may fight this.

I then proceed to presenting several considerations in light of which my proposal for the European Union is preferable to that of Van Parijs. Before this, however, I suggest some ways in which his account is vulnerable. These considerations are largely related to concerns with the values of stability and self-determination. My concern from stability draws largely on the fact that at the level of the EU there is wide disagreement about theories of justice and about ways of organising economic and social life; this is so to a much greater extent than within each of the Member States. This would not be an insurmountable problem if the EU had a set of its socializing institutions, as I refer to them, that could promote a single conception of justice across the whole institution. These socializing institutions might have been a strong civil society. This, however, does not currently obtain in the EU. Further to this, this section of the dissertation maintains that my proposal in favour of maintaining different domestic social minima in the EU can more easily be verified. It is, therefore, less epistemically demanding and more likely to be stable.

This Parti then offers some considerations related to collective self-determination in favour of my proposal. It draws on the works of John Rawls, Thomas Christiano and Anna Stilz in order to account for the value of self-determination. I argue that collective self-determination is, partly, connected to the value of stability and to other interests such as the avoidance of alienation from political institutions. I try to explain that if European institutions pursue a single European conception of justice, individuals might not be sufficiently collectively self-determining. The enactment of ‘maximin’ across the EU would conceivably prevent different peoples from being able to satisfy their preferences about several aspects about how to organise economic and social life.

Finally, Part III seeks to make the case that my philosophical account about the regulation of tax competition in the EU can be legitimately implemented. The part begins with a series of considerations about legitimacy and then proceeds to discuss some of the perceived shortcomings of the EU from the standpoint of legitimacy. I reply that some of these criticisms are not particularly promising. I draw on Thomas Christiano's work to explain why it may not be plausible to demand that supra-national institutions meet the same democratic standards as individual countries. My interest in doing so is to partly attempt to legitimate my proposal in light of the range of factors currently assumed relevant to the EU's legitimacy. Part III then raises the questions of whether there might be anything problematic, from the standpoint of the democratic standard of political legitimacy and of state sovereignty, about the regulation of tax competition. After providing a negative answer to both of these questions, Part III then discusses whether my proposal can be legitimised by the service conception of authority and by state consent.

I argued that it is indeed necessary to embrace supra-national regulation of tax competition. In order to establish this conclusion, I explore unilateral measures that countries may take and have taken and show that they fall very short. This section also maintains that other bodies cannot adequately perform this service.

With regards to state consent, I argue that it is plausible that consent to international institutions may be supplemented by a concern for distributive justice. While this may not be a necessary condition for the validity of consent in the international sphere, it can supplement its force. It is, therefore, plausible to suggest that my proposal's display of concern for the protection of a social minimum, for example, reinforces the validity of the consent of member states when signing up to a tax competition-regulating authority.

In defence of consent as a possible legitimating standard for the EU, I consider one objection. The latter is an argument according to which membership in an international organisation may not be voluntary when the exit costs are too high. I maintain that this is implausible on the grounds that it would mean that successful supra-national organisations could not be subscribed to voluntarily. I also argue that there is another

sense in which consent may legitimise my proposal for the regulation of tax competition. I posit that, plausibly, there may be situations of manifest unfairness in which, nevertheless, parties should still have the prerogative of consenting to contracts and to international institutions. This is plausible as there are likely to be situations in which, despite unequivocal unfairness, refraining from joining an international organisation could worsen the condition of the worst-off in a Member State. This is relevant to my proposal. Should current inequalities between EU Member States be such that no country could fairly consent, it could still be preferable for a country to have the power to consent to joining an international institution if this proves beneficial to the fate of its least-advantaged individuals. It would therefore follow that situations of serious unfairness are not always illegitimate.

Finally, this section considers the bolder proposition that my proposal for the regulation of tax competition can, in fact, enhance the legitimacy of both the EU Member States and the EU itself. Should this turn out to be true, it would undoubtedly be a source of legitimacy of the proposal itself. The ways in which my proposal could contribute to greater legitimacy of Member States include the reduction of grave injustices, the epistemic improvement in the quality of policy-making and the fact that individuals acquire the possibility of enriching themselves in a way that does not endanger a social minimum or threatens the fair value of political liberties.

It is important to clarify that the purpose of my dissertation is not to provide a full-fledged account of the regulation of tax competition nor is it to provide a definitive theory of justice for the EU. I am also not convinced that I have supplied a devastating knock-down of the alternative proposals that I have discussed throughout this dissertation. One of the several aspects in which my proposal is incomplete concerns the question of how to address tax havens. I question the notion that economic agents have a moral duty to pay tax where they benefit from goods such as infrastructure but the alleged wrong-making features of tax havens transcend this discussion.

Furthermore, it is highly possible that the EU does not move in the direction of the kinds of reforms that I advocate. For those of us who wish to see the supra-national institution

advance in a more liberal egalitarian direction, the future is, at best, far from certain. There is a strong division between those who wish that the EU take on a more 'social' character and those who call for it to restrict its scope to the tasks of liberalisation and market integration.[566] There is evidence, cited in Part II of this dissertation, that the EU has been more committed to the latter than to the former. Its very own inaction with respect to tax competition should warn us against unbridled optimism. The fact that decisions such as taxation require unanimity in the European Union is one of the several practical reasons that should temper hopes that the supra-national institution will move in the kind of direction we advocate here anytime soon. The same can be said of proposals to enshrine liberal egalitarianism in EU treaties. Having said that, the simple fact that the EU finds itself at this historic juncture lends importance to the issue of debating future avenues for the institution; especially with respect to pressing challenges such as tax competition.

[566] Rutger Claassen, Anna Gerbrandy, Sebastiaan Princen and Mathieu Segers, "Rethinking the European Social Market Economy: Introduction to the Special Issue," *Journal of Common Market Studies* 57 (2019): 4.

Glossary

Arm's length standard: This is a principle according to which foreign branches and subsidiaries of multi-national groups should be taxed as if they were independent participants in the market.

Case law: This is the establishment of law by following judicial decisions made in earlier cases.

Common Consolidated Corporate Tax Base (CCCTB): This is a single set of rules to calculate companies' taxable profits in the European Union. With the CCCTB, companies across different countries only have to abide by a single EU system for calculating taxable profits, as opposed to several different national rules. One might say that this is the EU's version of unitary formula and apportionment.

Compensation school: This is a school of thought that maintains that globalization does not present an imminent threat to the redistributive capacity of the state. It stands in contrast with the efficiency school that is also defined in this glossary.

Constitutional essentials: These concern questions about the liberties and political rights that may be included within a written constitution, assuming there is a written constitution. These include fundamental questions such as who has the right to vote, what religions should be tolerated and who has the right to hold property. We may divide constitutional essentials into questions of two kinds. They include fundamental principles the structure of the political process and the structure of government. A second class of questions concerns equal basic liberties and rights of citizenship that legislative majorities should respect.

Corporate income tax: This is a tax that is levied on a company's operating earnings, which consist of the revenue minus the costs of what is sold, administrative expenses, depreciation, research and development and various other costs.

Democratic deficit: This is the name used by a variety of commentators to suggest that the EU is imperfect from the standpoint of the democratic standard of political legitimacy.

It does not have a univocal meaning as different commentators focus on different alleged shortcomings of the European Union.

Difference principle: This maintains that social and economic inequalities should be structured so that they are to the greatest benefit of the least advantaged in a way that is consistent with the just savings principle. There are several ways of interpreting the difference principle, of course.

Efficiency school: This is a school of thought that maintains that globalization weakens the ability of governments to pursue comprehensive redistributive policies.

European Convention on Human Rights: This protects the human rights of the peoples of countries that belong to the Council of Europe. All Member States of the Council of Europe have signed the document. It was established after the Second World War to protect human rights and to promote democracy. The European Court of Human Rights is tasked with upholding the rights that are contained in the Convention.

European Social Fund: This is the EU's main instrument when it comes to employment. It claims to fund tens of thousands of local, regional, and national employment-related projects across Europe. The European Commission decides, alongside each Member State, on one or more Operational Programme that will receive funding for a seven-year period. Furthermore, it is noteworthy that the level of European Social Fund funding – and the types of project that are funded – vary according to which region a given country belongs. There are three categories in which EU countries may find themselves for the purposes of funding. These categories vary across regional gross domestic product per head compared to the EU average.

FATCA: Foreign Account Tax Compliance Act. This is a piece of legislation approved by the US Congress in 2010 that obliges foreign banks to automatically report American clients and their entire capital income regardless of the legal structure behind which it is maintained. Financial service institutions that do not comply with FATCA are likely to pay a sanction in the form of a withholding tax on payments made to and by such banks.

Fiscal policy constraint: This is the principle which states that any fiscal policy of a state is unjust and should be prohibited if it is both strategically motivated and has a negative impact on the aggregate fiscal self-determination of other states.

Fiscal self-determination: There are several ways of defining this, but for the purposes of the present dissertation it has been understood as covering two policy prerogatives. On one hand, it covers a polity's right to be able to establish the size of a public sector relative to GDP. On the other hand, it establishes the possibility of deciding on the rate of redistribution of income and wealth.

Foreign direct investment: This is an investment carried out by a firm or an individual in one country into business interests in another country. It usually occurs in the form of an investor establishing foreign business operations or purchasing foreign business assets in a firm in another country.

Four freedoms: These are the freedoms of movement for goods, services, capital and people, enshrined in the EU treaties, and that are plausibly the defining characteristic of the EU.

Freedom of establishment: This is covered in the Treaty on the Functioning of the European Union and consists of a permission for self-employed persons, professionals and legal persons, that legally operate in one Member State, to carry out an economic activity in a sustained fashion in another Member State or to offer and provide their services in other Member States temporarily while remaining in their country of origin.

Fund for European Aid to the Most Deprived (FEAD): An EU programme in support of Member States' efforts to provide food and basic material to the least advantaged. It disburses items such as food, clothing and other items of essential use to the most deprived. The EU may decide which types of assistance it wishes to disburse – whether it is food or something else, or a mixture of both – and how these items are obtained and distributed. National authorities may choose whether to purchase the food and good themselves and then distribute them to partner organisations or they can finance the latter

so they can purchase these goods themselves. Partner organisations tend to be public bodies and non-governmental organisations. The programme has €3.8 billion at its disposal for the 2014-2020 period. Member States should also contribute 15% in national co-financing to the programme.

Gross Domestic Product: This is the monetary value of all finished goods and services produced in a country during a specific period of time. It refers to all goods and services produced both by the country's nationals and by foreign citizens. It is the most used indicator with respect to the state of a given economy.

Gross National Income: This is an alternative measure of wealth to Gross Domestic Product. In effect, this measure is the Gross Domestic Product coupled with money that is generated by sources abroad. It amounts to the total amount of money that is earned by a given country's individuals and businesses. It includes investment income irrespective of the place in which it was earned, as well as foreign investment and economic development aid.

Harmonisation: This is the alignment of taxation systems – perhaps in terms of statutory tax rates – in order to pursue a given policy objective.

Interpretive concept: These are concepts that we share, the best understanding of which is subject to disagreement. These are concepts that people agree have either value or disvalue but there is disagreement about how that should be characterized. There is perhaps agreement that justice or democracy are values, but there is disagreement about what makes something just or democratic.

Judicial review: This is the process by which the courts of a given country analyse the decisions of the legislative and the executive arms of government and decide whether they are consistent with the constitution.

Jurisprudence: The study, knowledge or science of law. The most prevalent forms of jurisprudence try to analyse, explain, classify and criticise entire bodies of law.

Liberal political conceptions: These have three defining features. Firstly, an elaboration of certain rights, liberties and opportunities that are familiar in democratic regimes. Secondly, the ascription of a special priority and protection to these rights, liberties and opportunities before the pursuit of other goals. Thirdly, they define measures that ensure that all individuals, irrespective of their social and economic background, have the all-purpose means to make use of these rights, liberties and opportunities.

Membership principle: This is the principle which states that natural and legal persons are liable to pay tax in the state of which they are a member (the 'membership principle').

Overlapping consensus: This is an idea that is useful to explain societies how societies may be unifed and stable. In a consensus of overlapping comphenesive doctrines, reasonable doctrines endorse the political conception of justice, each from its own point of view. One important element of this idea is that it concerns an overlapping consensus of reasonable doctrines as opposed to a consensus *tout court*.

Pareto-efficiency: This principle says that opportunities to make some better off without making someone else worse off should not be wasted.

Political legitimacy: This is the condition of issuing directives and obligations that are enforceable and that subjects have a duty to obey.

Prioritarianism: This is, succinctly put, the view that a benefit has greater moral value the worse the situation of the individual to whom it befalls.

Prisoner's Dilemma: This is a collective-action in which rational agents fail to chieve what is in the interests of each agent. The Prisoner's Dilemma has the following three general characteristics:

(i) Each agent has a dominant strategy. The outcome of it is the scenario which is most favourable to her regardless of the strategy pursued by her adversary;

(ii) If each agent pursues her dominant strategy, the outcome will be suboptimal or pareto inefficient as there is an alternative scenario in which each agent is better off

(iii) On the assumption that it is rational to pursue the dominant strategy, each agent acting rationally renders each agent worse off than is necessary.

Public reason: It is a form of reasoning in the public sphere about constitutional essentials and questions of basic justice that all reasonable citizens can be expected to endorse. Public reason requires that we justify our political judgements to others by appeals to beliefs, grounds and values that it is reasonable for others to acknowledge.

Questions of basic justice: These issues concern issues of basic economic and social justice and other aspects that are not covered by a constitution. Political discussions of, for example, fair opportunity and the difference principle may not be constitutional essentials are questions of basic justice.

Residence-based taxation: This refers to a type of taxation in which individual residents of a country are taxed on their worldwide income. Non-residents, on the other hand, tend to be taxed on the income that is generated locally.

Sales tax: See VAT.

Source-based taxation: This refers to taxation in the countries where income is generated.

Subsidiary: This is a firm that belongs to another firm – often referred to as the parnt company – and which owns more than half of the former's stock. Subsidiaries are distinct legal entities from their parent companies. If subsidiaries are found abroad, the must abide by the laws of the jurisdiction in which it operates.

Sufficientarianism: This seeks to minimise the number of people who find themselves below some critical threshold. The principle maintains that it is bad or unjust if some individual possess less than enough.

Tax base effect: consists of the obtention of greater capital inflows that occurs when a tax rate is lowered, thus leading to a greater tax base and to greater revenue collection.

Tax competition: This is the process by which countries compete to attract capital through taxation. It can take several different forms. Firstly, states compete for wealth shifted abroad illegally. Secondly, states compete for the so-called paper profits of multi-national enterprises through which companies feign economic activity abroad using a variety of different techniques. Finally, states compete for foreign direct investment which actually does involve a change in the place in which economic activity takes place. The paradigmatic example of competition for foreign direct investment is the lowering of the taxation rates on corporate incomes.

Tax haven: There is not an undisputed definition of this. A jurisdiction may be referred to as a tax haven, however, if it targets individual and corporate profits portfolio capital through means such as a very low or null tax rates, as well as legal measures that protect bank secrecy and trusts that hide the ownership of capital holdings. Controversy as to what constitutes a tax haven has been part of reason for controversy with respect to which countries the EU should regard as a tax haven.

Tax rate effect: This effect consists of the lesser collection of revenue (both total and average), ceteris paribus, that occurs because of the lowering of the taxation rates.

Transfer pricing: This is a practice in accounting that represents the price that one unit establishes when transacting with other units within the same parent company. It allows prices to be established for goods and services between an affiliate and a subsidiary. It applies to both domestic and international transactions. Usually transfer prices are based on the market prices for the service or good in question.

Unitary formula and apportionment: This is a system for allocating the profit of a particular corporation to different tax jurisdictions. It ascribes a corporation's taxable profits to different tax jurisdictions based on criteria such as sales, payroll and taxes.

Universal basic income: This is a grant paid by a government at regular intervals uniformly to each adult individual in society. The grant is disbursed to individuals irrespective of their income and wealth, of the number of people in their household and of their willingness to be in the labour market. It is supposed to act as a kind of material foundation on which a life can rest. Other forms of income, from either the market or the state, whether from work or from savings, can, depending on how the universal basic income, in some cases be added to it. It differs from many conditional-income schemes in Western Europe in the sense that it does not depend on willingness to work, ability to do so nor does it depend on demonstration that one does not have access to income from other sources.

VAT: Value-Added Tax. This is a consumption tax on the value that is added to goods and services. It applies to most goods and services that are bought and sold for use or consumption in the EU. Usually, goods and services that are sold for export abroad are not subject to VAT. Imports, on the other hand are taxed to maintain a standard of fairness for EU producers so they may compete on equal terms in the European market with suppliers from outside of the EU.

Westphalian sovereignty: This is a way of understanding sovereignty, common in political philosophy and international relations, arising allegedly from the 1648 Treaties of Westphalia that maintain a separation between the domestic and the international sphere to the extent that states are not permitted to mutually interfere in their domestic affairs.

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