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Editorial

A decade of E.C. Tax Review

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This year we celebrate the tenth anniversary of the E.C. Tax Review, which was published for the first time in the promising spring of 1992.

It was the conviction of the initiators of the review that at that time Europe had crossed the tax Rubicon and that there would always be a critical mass of tax events worthy of scientific analysis and comments. As for the critical mass we have been dead right. What we did not foresee however was the direction of tax events. In 1990 the parent subsidiary and the merger directives had been approved as well as the arbitration convention on transfer pricing and in March 1992 the Ruding Report had been published with a full reform programme on taxation of business income in Europe. The programme for the abolition of all border controls on intra-community operations for VAT purposes was well on its way. We were convinced that from then on we would be able to report regularly on a growing body of European tax legislation.

How wrong we were! With respect to (corporate) income tax there has been no hard legislation, only the soft law of the code of conduct on business taxation. On VAT there have been the refinements on intra-community operations and the new rules for refunds to foreign VAT operations and there has been some progress, although not a full breakthrough, on telecommunication and electronic commerce. On excises we are far from any form of taxation that would provide the economic framework of full market integration. In spite of all the goodwill and efforts by the European Commission, legislative progress on income taxation has been excruciatingly slow. The main if not the only reason for this state of affairs is that all Member States did not come to a unanimous agreement, as is prescribed by the treaty rules by which they play the European tax game.

However this absence of legislation has been more than compensated by the action on the part of the European Court of Justice: Wielockx, Schumacker, Safir, ICI, Eurowings, Baars, Saint Gobain, Hoechst and Athinaiki Zithopia are names which make the heart of every Secretary of Finance in the European Union, not to mention the hearts of many Court watchers, beat faster.

The European Court of Justice seems on the march for a borderless Europe, something that had already been envisaged by the founding fathers of the Union. It is clear however that such a borderless Europe tolls the death bell of national tax systems in their traditional form.

This state of affairs may be very exciting for tax academics, very lucrative for tax practitioners, but is very unfortunate for the Secretaries of Finance in the Member States. Because of the absence of any comprehensive tax legislation at the European level the Court of Justice is forced to impose 'negative tax harmonisation' on the Member States i.e. singling out which tax provisions violate the basic treaty provisions with direct effect. European taxation and the national tax systems of the Member States are becoming increasingly and in an unbalanced way determined by the imperatives of a borderless society.

In spite of this sorry situation the Member States are not ready to give up their veto power on tax matters. Like the permanent members of the Security Council of the United Nations they cling to the notion of fiscal sovereignty, thereby condemning themselves to inaction and in fact to a gradual loss of fiscal sovereignty.

In this issue proposals are discussed to break this deadlock.

One contribution is a memorandum to the European Convention proposing minimum but also maximum powers of taxation for the European Union, which could be implemented with a majority voting procedure. These proposals remain strictly within the logic of the concept of the single market that has been the main objective of the European Treaties from the start. The memorandum follows the economic logic of the European Treaties to the end: full Economic and Monetary Union and full national fiscal sovereignty are incompatible. Europe will finally have to make a choice between these two objectives. A second contribution deals with the limits of the case law of the Court of Justice and more particularly with the question how far the principles of non-discrimination and non-restriction can be used in adapting national tax systems to the imperatives of full market integration and economic and monetary union without destroying the core functions of the tax systems of the Member States.

Finally we have invited our younger colleagues from various European tax jurisdictions who will make their impact felt in the 21st century to share their views on some important European and international tax issues..

At the tenth anniversary of this review, we express the hope that within the small window of opportunity, before accession of the new Member States, European leaders will show the necessary lucidity and statesmanship to lay the foundations of a well balanced European tax construction respecting the imperatives of full market integration and economic and monetary union on the one hand and the legitimate interests on the Member States on the other.