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Editorial

Corporate tax in the EU: a never-ending story?

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The passing of the European Company (SE) Statute prompted one author to refer to the end of the 'Thirty Years War,[1] while others have compared the complicated process of harmonisation of corporate tax with the 'Hundred Years War'.[2] Personally, I believe that rather than a hundred years war it would be more appropriate in this case to talk of a 'never-ending story', since although some significant achievements have been made, the objectives and in particular the legal instruments or means by which to harmonise the tax systems of the Member States have not always been clearly defined.

During this process we have witnessed a succession of legal instruments (directives), jurisprudence (the doctrine of the ECJ concerning the principles of non-discrimination and non-restriction), soft law (the Code of Conduct for business taxation) or the latest proposal of the Commission to make use of enhanced cooperation to get a certain number of Member States to adopt a common corporate tax system. The main obstacles to this process are only too well known. First and foremost, the legal basis of the EC Treaty (harmonisation of national legislations in the interest of a common market) is indirect and weaker than the legal basis for harmonisation of indirect taxation.[3]

Another subsequent obstacle was the principle of subsidiarity.[4] The European Commission itself was the first to mention this principle following publication of the Ruding Report and since then the way in which subsidiarity has been interpreted has simply reinforced the idea that direct taxation is, above all, the competence of the Member States.

In addition to these limitations of the Treaty, which may be termed substantive, there is another obstacle, which although procedural in nature is of no less importance. I am of course referring to the rule of unanimity, which must be complied with for any directive on tax matters to be adopted. It seems obvious that this has been an insurmountable obstacle to all attempts to harmonise corporate tax, and will probably continue to be an obstacle if we consider that the new European Constitution project maintains the requirement of unanimity in tax matters.[5] In this respect, the future European Constitution cannot certainly be said to represent a significant advance in the establishment of a tax law that meets the demands of a single market.

As we have already mentioned, all these factors have not prevented the adoption of certain directives on specific aspects which are very important, especially for European multinational companies. Moreover, some important tax obstacles to the development of these groups have been removed, for example, the elimination of double taxation of inter-company dividends, deferment of capital gains in cases of restructuring of companies, and most recently, the elimination of double taxation of interest and royalty payments between associated companies.[6] However, other initiatives have been lost along the way (for example, the draft Directive on compensation for losses, withdrawn by the Commission in December 2003), and furthermore the latest directives appear to contemplate a 'two speed' option, most probably as a compromise due to the need to achieve unanimity so that the directives may be adopted.[7]

These directives, while no doubt important, do not mean that corporate tax is harmonised. There are still 25 different corporate taxes in the EU (with different tax bases and rates, both nominal and effective). It is precisely this lack of harmonisation of corporate tax that has favoured and continues to favour (even more so now with the adhesion of new Member States) a strategy of tax competition which in some circumstances has been classified as harmful and led to soft law initiatives such as the Code of Conduct for business taxation.

1 Schwarz, 'Zum Statut der Europäischen Aktiengesellschaft', ZIP 2001.

2 E. Manso Ponte, 'Societas Europaea: especial referencia a la armonización contable y a su impacto en la normativa fiscal', *Noticias de la Unión Europea* 2004, no. 229.

3 Articles 93 and 94 of the ECT.

4 Article 5 of the ECT.

5 Article III-172 of the European Constitution Project; Article 95(2) of the ECT.

6 Directive 90/435, Directive 90/434 and Directive 2003/49 respectively.

7 Directive 2003/48 (taxation of savings): Austria, Belgium and Luxemburg will not apply the general system of automatic information exchange during a transition period. Directive 2003/49 (interest and royalty payments between associated companies): Greece and Portugal (interest and royalty payments) and Spain (royalty payments) will not apply the Directive during a transition period. Recently Directive 2003/49 was amended to extend the moratorium for its application to some of the new Member States (Council Directive 2004/76/EC of 29 April 2004).

However, there is no doubt that since the 1990s the jurisprudence of the ECJ in matters of direct taxation has played a fundamental role in this evolution. The doctrine of the Court, centred on application of the principles of non-discrimination and non-restriction, has considered certain legal provisions of the Member States in matters of corporate taxation to be contrary to these principles. In this respect, the work carried out by the Court has been described as a means of 'indirect harmonisation' or 'harmonisation by the back door'.

Personally, I do not believe that the harmonising effect of the decisions of the ECJ is so obvious. First, the Court's job is certainly not to alleviate the legislative task of the Council. Furthermore, its opinions do not refer to the effects a lack of harmonisation may have on the development of a single market, but only (and this is no mean task) on whether the tax legislation of the Member States complies with the principles and freedoms guaranteed in the EC Treaty. Secondly, it is precisely because of this lack of harmonisation that breach of the Treaty by the tax legislation of one Member State does not necessarily imply that the same occurs in the case of all the other Member States,[8] and therefore, the decision of the Court with regard to one state will not necessarily apply to another. Thirdly, the decisions of the ECJ may provoke a variety of reactions. The harmonising effect of such decisions is obvious when they refer to provisions of Community law, which clearly cannot ignore the jurisprudence;[9] however, in other cases, the effect produced by the judgment not only fails to harmonise but, since the reactions of the Member States are different, a disintegrating effect is produced, thereby accentuating the original disparity between national legislations.[10]

This is the confused, complex panorama of European taxation that the recently created European company has to face. Moreover, the SE Statute lacks any specific tax framework, since regulation of tax matters is one of the things it expressly excludes. This situation has given rise to two divergent positions.

On the one hand, what we could call the 'pessimist' faction considers that without tax provisions, the *Societas Europaea* will be a failure. The main argument put forward to support this opinion is that lack of harmonisation of the tax systems of the Member States, especially corporate tax, will be an obstacle to this type of company. As I discussed at an earlier date,[11] the supposed 'supra-nationality' of the *Societas Europaea* is shattered when it comes up against the unyielding immobility of the national tax systems that go no further than to guarantee that the European company (Spanish, French, German, etc.) will be given the same tax treatment as other companies of the same nationality. Since there is no common corporate tax system, this is equivalent to guaranteeing the tax inequality of the European company depending on the state in which it resides.

On the other hand, those holding the 'optimistic' point of view consider that development of the *Societas Europaea* will encourage harmonisation of corporate tax. The European company will be an incentive for this process to advance; it will act, in Malcolm Gammie's words[12] as a 'Trojan horse'. The main argument of this faction is that the existence of 25 different corporate tax legislations could be an advantage for the European company, since this type of company can move around easily within the EU. It could therefore be used as an instrument for tax planning, which implies advantages for taxpayers and disadvantages for the Member States (or at least some of them). In this case, there would be a demand for a common regulation to guarantee neutrality and act as a safeguard against tax competition.

In this situation two options have been considered. On the one hand, whether it is advisable to establish a specific tax system for the European company; and on the other, if proposals are made to harmonise corporate tax within the EU, whether the SE could be used as a guinea pig to implement such proposals. The latter seems to be the option chosen by the European Commission which since 2001 has been promoting the idea of using the SE as a 'pilot project' to implement the different proposals for harmonisation of corporate tax presented in the 2001 and 2003 Communications.[13]

Recently, however, there have been signs that this idea is being reconsidered, due to the doubts of the European Commission itself as to the compatibility of a project of this type with the provisions of Community law, since both application of a special system for European companies and the procedure of enhanced cooperation suggested for its implementation could involve a high risk of breach of the provisions of the Treaty.[14]

Personally, I believe that this type of analysis entails a certain paradox which may lead taxation of the European company to a dead end. The absence of tax regulation in the Statute means that for tax purposes a European company lacks the pan-European dimension it has for corporate law purposes. However, when the Commission proposes a common system that would endow a European company with supranational dimensions, thereby neutralising its main Achilles' heel,

[8] This would be the case of the Spanish legislation in relation to the judgments in the *Saint Gobain* and *Bosal* cases.

[9] The recent amendment of Directive 90/435 includes the solution in the *Saint Gobain* judgment.

[10] For example, the different reactions of the German and Spanish legislator to the judgment in the *Lankhosrst-Hohorst* case may be cited.

[11] Inaugural conference of the 1st Symposium on Global Tax Law held in the Istitito de Estudios Fiscales (Madrid, 25 November 2004).

[12] M. Gammie, 'EU Taxation and the *Societas Europaea* – Harmless Creature or Trojan Horse?', *European Taxation* 2004, no. 1.

[13] Commission Communication, *Towards an internal market without tax obstacles*, COM(2001)582, 23 October; Commission Communication, *An internal market without company tax obstacles: achievements, on-going initiatives and remaining challenges*, COM(2003)726, 24 November.

[14] According to the report commissioned by the European Commission: *Study on analysis of potential competition and discrimination issues relating to a pilot project for an EU tax consolidation scheme for the European Company (Societas Europaea)*, written by Deloitte EU Tax Group (TAXUD/2003/DE/305), 18 August 2004.

the fact that it is considered a purely domestic company for tax purposes appears to make any proposal for a common system unviable. On the other hand, I am convinced that the Commission's proposal to use the European Company as a pilot project for application of a common corporate tax system was based not so much on a strategy of positive discrimination of the European company but the intention to use this type of company as a guinea pig to try out the system. This would be more in line with the idea of a 'Trojan horse' since, based on the results of the experiment, it would then open the door to application of the system to other companies, thereby achieving a common system for groups of companies within the EU.