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Letter to the Editorial Board

Again: there is no such thing as tax Coca Cola!

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It was a great pleasure for me to read Professor Vanistendael's rejoinder to my note 'There is no Such Thing as Tax Coca Cola!'. It is also an honour that it was written by a master in European Community tax law, and to be referred to by him as 'distinguished' and 'esteemed'. Professor Vanistendael mentions that I raised important issues, but gave short answers. I accept they were short, within the constraints of my article, but not as regards the ideas behind them.

- Should harmonisation not be discussed, or the need for it?
- Should some Member States not be cornered into a tax ghetto?
- Should harmonisation reflect not only the interest of one group, but of all, that is, should allocation of taxing rights between the country of residence and that of source be addressed in a different way from that used up to now for institutional harmonisation?
- Should the tax rules have due regard to the 'status' of the fiscal space in question?

It is clear to all that wisdom is, as always, needed here. Is greater clarity also needed? Let us clarify!

To a greater or lesser extent, according to the different degrees of integration of the Member States – and the construction of the Internal Market is a notable landmark – it is important to eliminate the points of attrition, the friction, the collisions, the tax impediments to the intended objectives. As long as harmonisation cannot be abandoned, it would be foolish not to recognise that the ECJ has contributed to it, in particular eliminating obstacles derived from the rule of the unanimity. However, harmonisation should always have a suppletive and not obsessive character (by the way, spontaneous harmonisation still has a role to play). Harmonisation should take into account the experience of jurisdictions where it has already occurred, as in the federal states, where differences remain acceptable, even if more or less limited. In any way, when advisable and necessary, it would be a serious error, having regard to the inequality of the situation of the states involved, to allow the interests of groups of states that are net exporters of capital to prevail over those of the net importers of capital. Compatibility, rather than subordination, should be the objective, but it is that domination that is evident from the harmonisation that has been achieved so far. This has reached the stage of being considered a 'gift'; the possibility to tax temporarily at source, when this reflects only a relinquishment of the exercise of an undeniable and unquestionable power that has been given up only due to a set of circumstances where certain interests have prevailed.

But also, conditions do not have to be created that lead to the taking off of some, leaving others behind. In another way, the aims of integration would be undermined, having some integrated and others not. Would this not hurt the cohesion pivot of true integration: some would be more equal than others? The greatest common measure should always prevail.

With regard to unanimity, I am in agreement – any other view would be unrealistic – that it is difficult to achieve it among 25 or 27 countries. However, to overcome these difficulties by creating conditions that, unhappily, could serve only the self-interests of the more powerful – or, at least, so it seems from existing decisions – without guaranteeing the communitarian interest, does not offer enough security of impartiality and equity. Therefore, generically or theoretically, I am in accordance with the rule of qualified majority, but, looking to reality, prudence must be present regarding how much to give the respective shelter.

On the necessity of diversity of national tax policies, the intent and the variety of the economic and social policies, due in particular to the different degrees of development, make it obvious that they will remain themselves, in greater or minor degree. We all know of

* This text is a continuation of the forum debate between Professor Manuel Pires and Professor Frans Vanistendael, the Chairman of the Editorial Board. The Editorial Board was of the opinion that it was more appropriate to publish this reply at the end of the issue and at the same time to open a new feature in the form of 'Letter to the Editorial Board', giving the opportunity to readers to publish reactions to the articles in the EC Tax Review and to air their views on issues of European taxation.

the shock that can be caused and is caused in a reality integrated by the elimination or erosion of tax borders, with tax heteropolitics, and the maintenance of political borders, with the self-politics in this area. This diversity is another reason for the coordination of all interests involved in the harmonisation. To walk in the right direction requires that one understands this. We are now walking in the wrong direction. And I never mentioned nor involved the action of the ECJ beyond the questions presented: it is in the plan of the interpretation and of the application of the enacted law and I raise questions on the guidance of the enacted law and the law to be enacted. There is a great distance between what I wrote and unilateral statements supporting 'protection of the national revenue base at any cost'. All Member States are not in 'immediate danger' of being 'obliged to brew standardised tax Coca-Cola in Europe', but, for the approved directives, it seems already to have lacked more. The consequence of the opinion of the 'important' ones (what is the criterion for importance?) is clear, when my dear friend and colleague writes: 'When the national tax administrations of three or four *important* Member States concerned with the same problem would agree on such reasonable rules [reasonable will be for them, of course], other Member States would most likely not be opposed' (emphasis mine)! Can we or must we accept 'intimidation' and 'pressure tactics' where all the interests of the diverse states must be considered in the communitarian interest?

In this way, we did not change a word in the guidance of the previous writing, having in its short dimension the aim of only saving time for the readers who had had the patience of reading.

A word to conclude: the substitution of Coca-Cola for alcoholic beverages – as seems to imply the beginning of the plea of my dear and honourable colleague Frans Vanistendael – is somewhat dangerous. Alcohol can befuddle the mind, causing one to lose one's wits. I suggest first a good fruit cocktail (taxation in the country of residence and of source, appropriately mixed), that will give health and certainly eliminate the thirst for justice. In this way, I end my side in this very interesting and necessary dialogue, conscious that the solutions are often more appropriate when they go up than when they go down.