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Editorial

Some Twenty-Seven Years after…

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When I started writing this editorial a question quickly came to my mind: what have I been doing all these years that I devoted to taxation and more specifically to European tax policy? Then I thought it was time to say how I saw this period, what was my vision of the job(s).

Obviously it started with VAT, mid-1988, when I was appointed Head of the VAT unit in the European Commission Services. The objective at that time was both to complete the harmonization process (notably putting an end to the many derogations that existed; proposing a regime for second hand goods and works of art, for transports of persons . . .) and preparing the ground for a yet undefined VAT system without border controls that should be implemented by 1 January 1993. I quickly realized that my background as an economist was helpful but far from sufficient. The legal side of this activity was clearly dominant but what appeared essential to me was to open the door to the key players: taxpayers, business organizations, tax administrations, academics. In this respect I felt like the middleman between these key players, trying to reconcile their often divergent views in a consistent project: consultation is a key instrument which I decided to use for all coming initiatives.

Halas, that was not enough to obtain a satisfactory regime for intra-EU transactions and this is my first regret. I do believe that not only the whole EU Single Market would have benefitted from a more business-oriented VAT scheme but also the Treasuries of all Member States who have and still are suffering from a high level of (carrousel) fraud that the 'Transitional VAT regime' was unable to prevent. Today, the actual project of the Commission services, based on the (short) experience obtained from the MOSS (mini one-stop shop) for services, seems almost exclusively devoted to the fight against VAT fraud and provide only very limited benefits for the business community notably in terms of administrative burden and compliance cost. It might even be more complex than the present regime as taxing supplies of goods according to the rules of the country of destination at the level of the supplier might well result in increasing uncertainty and complex obligations for that supplier. Some basic principles like the equality of treatment and the objectivity of the VAT system (independent of the nature of the persons involved in a transaction) have been lost.

This evolution shows how difficult it may be to harmonize indirect taxation along the lines of Article 113 of the treaty. In fact, there is a general contradiction between the Single Market based on a principle of origin (with mutual recognition) and the very nature of all national tax systems which are based on a destination/residence principle! Reconciling these opposite principles in an efficient system can only take place with a very high degree of harmonization which may well not be compatible with the subsidiarity incrusted in the Article 113.

That was also the question raised by some authors with taxation of savings when they said that the Savings directive was not an EU progress in harmonizing direct taxation but a simple 'renationalisation' of cross-border income taxation through the automatic exchange of information. In this respect it is true that the exchange of information is giving back the power to tax at the national level as the information on all the elements of personal income becomes available. In fact, this situation may not be as dramatic as some would say because the need of approximation of personal income tax systems in the actual EU is far less important than in the other areas of tax policy.

Corporate taxation remains the subject that attracted most attention these last few years (and is again a top priority) and has also been the most substantially explored through in-depth consultation. Starting in the year 1999 with the creation of two panels, Panel 1 devoted to effective taxation and Panel 2 to corporate tax obstacles to cross-border economic activity, this initiative resulted (after several years of intensive work in the CCCTB Working Group and regular consultation of all interested parties notably business organizations and academics) in the well-known CCTB proposal of March 2011.

From the beginning a major issue in the discussion was transfer pricing. It was even listed as the first priority by the business representatives in Panel 2. This is to say how important it was considered that an

approach which would not resolve the constant difficulties encountered by companies with transfer pricing would not be 'a solution'. Halas, I am afraid that this is the situation we are in today!

In fact, be it at the EU level where the chapter 'Improvements to the transfer pricing framework' of the Action plan recently adopted by the Commission is extremely unconvincing[1] or at the OECD/BEPS level where guidance on the use of profit split method was not (yet) found[2] to allow taxation of profits where they are generated, one can only be disappointed! In the EU, the ECOFIN Council never had a serious discussion of the CCCTB proposal which could have offered strategic guidelines for future work. Simple harmonization of the corporate tax base, as seems to be the intention of the Commission' action plan, has been many times on the table of the institutions in the past and led nowhere as no one (tax administrations or businesses) is really interested by such a move which would not bring a solution to most of the problems. In this approach, a further move to consolidation and apportionment just appears as an illusion that will never become real. Moreover, who could trust the statement according to which the compensation of profit and loss (one of the most important benefit to businesses from a CCCTB) will be obtained in a separate proposal when so many such proposals have failed in the past and when the support that some were hoping to find in the jurisprudence of the Court is vanishing after each new decision.

Consolidation and apportionment were the decisive elements in support of CCCTB by business organizations because it offered a systemic solution to profit allocation. The systematic rejection of solutions based on formulary apportionment by the OECD does not mean that this approach is not justified for such an economically integrated market as the EU. If the apportionment formula is questionable, notably if it does not sufficiently reflect the allocation of profits were they are generated, it might be wiser to have a more policy oriented discussion at EU level than a simple renouncement as otherwise no solution will emerge at the international level.

What about the other areas of taxation? What policy should be conducted at the EU level? Is there a need for more harmonization? These questions have been a constant element of discussions in the past. Personally, I always considered that, in many areas, harmonization was neither necessary nor possible but I also thought that many difficulties, obstacles, discriminations which often could result in litigation should be better and more efficiently resolved by voluntary coordination between Member States. 'Building on national tax systems while rendering them compatible with the Treaty and with each other': this was the logic of the three Commission's Communications of 2006[3] on coordination of direct tax systems. Unfortunately, there again, these initiatives were never extensively considered by the Member States or the ECOFIN. The beginning of a coordinated approach was initiated for corporate exit tax under the Dutch Presidency in 2007 and resulted in a Council Resolution but this was not continued or extended to other areas. The practical result of the absence of coordination lies often in a higher cost solution: be it litigation or the continuation of inefficient systems as seen from a global EU level.

Finally, let me say a few words about the governance of tax policy in the EU. The Single Market is no doubt a very integrated economic area where the benefit of the fundamental EU freedoms has produced a high degree of legal certainty for businesses and consumers. Unfortunately, this is much less the case in the tax policy area due to the considerable differences that persist between the tax systems of Member States reflecting the exercise of their sovereignty. In order to provide confidence and to increase legal certainty for taxpayers one might consider as a first step the adoption of a European Charter of the rights and obligations of taxpayers. Reaffirming the benefits of the fundamental freedoms and offering guidance on their application to the tax matter such a charter would also clarify the obligation for all citizens to pay the taxes due in the EU!

[1] See: Michel Aujean, *Rapprocher la fiscalité de là où les profits sont générés et assurer une imposition effective des profits: oui mais comment?*, Le Blog de Taj: http://taj-strategie.fr/spip.php?article269.

[2] '*As part of the Report, a mandate is included for follow-up work to be done on the transactional profit split method, which will be carried out during 2016 and finalised in the first half of 2017. This work should lead to detailed guidance on the ways in which this method can usefully and appropriately be applied to align transfer pricing outcomes with value creation, including in the circumstances of integrated global value chains.*'

[3] See notably 'Coordinating Member States' direct tax systems in the Internal Market' COM(2006) 823.