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HARMONIZATION OF LEGAL AND FISCAL PROVISIONS IN THE EEC

The Concept of the European Company, fiscal harmonization; banking and insurance

by

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Whereas my honourable friend, Ambassador Linthorst Homan, has stressed with eloquent success the role of the EEC in a world context, my duty today seems rather to take the opposite line and confront the world - and in particular the candidates for membership - with the hard realities of the internal market, show them what is involved, and what may be expected once you are in and going through the mills of legislative harmonization.

Certainly - to quote an old anti-Market pamphlet - "no one ever heard of a missionary jumping into the cannibals' pot just to bring down the temperature". However, if we believe "The Economist" (and who would not ?), harmonization of legislation is not an issue which is likely to make anyone boil. In an article called "Fresh air in the glasshouse" this famous weekly wrote last year :

> "It is in the dull work of harmonizing legislation and removing other barriers to a single market that he hopes to shift things forward".

Maybe my words today will shake your belief in the wisdom of this generally so infallible magazine, just as mine was slightly shaken when I read those cynical lines.

Anyway, to me harmonization work is the most heartwarming thing a lawyer can do - short of being killed, of course, as Shakespeare advocated a long time before "The Economist" started publication.

I agree, however, that harmonizing national legislations may constitute, if carried too far, a dangerous undertaking indeed. But no one wants to turn the EEC into a legal melting-pot : all convinced Europeans are aware that this continent can only flourish if we respect as much as possible one another's culture, habits and traditions, which find their expression in the law.

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So harmonization of legislation should never become a matter of "art for art's sake", never start living a life of its own, but always be in the service of economic necessities.

As a matter of fact, in a single Community market, goods, persons and business enterprises, capital and services should be free to flow and go where they can be most effectively utilized, as is the case within any domestic market. The Treaty of Rome provides for those freedoms, and we are well on our way to carrying them into effect. But, at a time when our political leaders want to go ahead and fix a schedule for attaining a European economic and monetary union, the full realization of such an internal market becomes more and more urgent - in fact, I should say it is even a prerequisite for such a Union.

A single, common market, however, is not all the Treaty prescribes. In addition, it provides for progressively approximating the economic policies of Member States. Only when both elements have been implemented, is the Community expected to lead our peoples into the European Promised Land by promoting "throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, increased stability, an accelerated raising of the standard of living, and closer relations between its Member States", to quote Article 2 of the Treaty.

I would like to stress the words throughout the Community used in this text. This means that the Treaty regards the development of economic activities of the whole Community as its goal, not those of each individual Member State.

Thus, business activities are measured in terms of their contribution not to one single nation but to the Community of which that nation is a part. This means that the Community refutes the classic theory that in Western Europe the nation-state is still the best means of organizing economic activity effectively.

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Obviously, no single national administration is entitled to give priority to anything that goes beyond national interests. Therefore, the development of economic activities throughout the Community must be entrusted to common institutions acting independently, although, of course, supervised and checked by the member governments and the representatives of all citizens of the Community.

The EEC aims to guarantee to any business enterprise within the area that even in the long run their freedom of action, the terms of their trade, and equal opportunities of competition will not be disturbed by any national device, law or administrative action.

The most simple solution to avoid this would be, of course, not to allow national administrations to legislate at all. The Treaty of Rome does so in numerous cases, in particular when national provisions or measures would be contrary to the main purposes of the Treaty. For instance, it puts Member States under the obligation to do away with discriminatory measures, to refrain from internal customs duties or charges having an equivalent effect, to abolish progressively existing restrictions on establishment, the supply of services or the movement of capital and not to introduce new ones, not to maintain in effect any measures granting special rights to public undertakings contrary to the common rules of competition etc. There are, however, many other national provisions which cannot simply be abolished or forbidden without creating a vacuum or which by their differences alone constitute an obstacle to the fulfilment of the purposes of the Community. It is there that legislative harmonization comes in.

In compliance with the day's programme I should now like to discuss, from among the numerous fields requiring harmonisation of legislation, just four - tax harmonization; the European company; banking, and insurance. Obviously, in the time at my disposal I cannot enter into detail.

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These four subjects must first of all be seen in the perspective of minimizing the differences in the national laws in so far as they affect the establishment or the operation of the Common Market. At the same time, this effort serves to fashion a new modern legal framework for transnational Community business.

This seems to imply that "transnational Community business" is a good thing, requiring a better legal climate for its development. That is exactly what I mean to imply.

According to classic economic thinking, all national economies are based on the idea that products move over the whole world but that the factors of production should be carefully kept within the national boundaries. By exporting more commodities and services than other nations, a surplus accrues which enables the nation concerned to acquire wealth and power.

The Community, however, pursues two aims simultaneously - which seems contradictory to this philosophy. It promotes, by the abolishment of customs duties, the export of products. At the same time it permits the factors of production, i.e. persons, including business enterprises; services and capital to move freely across national boundaries, giving rise to investment, production and employment in other Community countries. As a result, more and more former national business enterprises will become transnational and acquire foreign substance.

In order to provide industries with the legal framework needed to adapt themselves and benefit from the new dimensions of the market, fiscal and other legislative barriers have to be removed. This legal framework comes about by the harmonization of existing national laws, including company, tax and industrial property laws, and, where necessary, by the creation of new, modern forms, such as the proposed European patent or the European form of company.

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Moreover, uniform conflict-of-laws rules have to be established, such as the Convention on recognition of companies, the Convention on judicial jurisdiction and execution of judgments in civil and commercial cases, the proposed Convention on mergers between companies from more than one member country and the Convention on bankruptcy law. All these conventions supplement, in a way, the Treaty of Rome. They have been, or are to be, concluded exclusively among the Member States of the Community, but any State that joins the Community is supposed to adhere to them.

TAXATION

The scope of tax harmonization sometimes goes beyond the purpose of helping industry to become multinational. What has been done or proposed in the field of indirect taxation (TVA and excise duties) serves to guarantee fair border-tax adjustments. This means that no charges shall be levied on imported products in excess of the charges levied on similar domestic products, and that tax refunds on exported products shall not exceed the real internal charges imposed on them. In the longer term, these Community tax measures are meant to permit the abolition of all internal border controls; this, however involves not only harmonization of the tax systems and their bases of assessment, but also almost complete approximation of tax rates for all consumption taxes.

New members, of course, must introduce the value-added tax system (TVA) replacing other taxes such as the sales tax. and comply with any measure relating to the TVA rates and excise duties taken by the Community before their entry. For Britain this may, at the most, mean a slight increase of its total indirect taxation - though the increase is much smaller than Luxembourg, the Netherlands and the Federal Republic of Germany are having to apply. On the other hand, it will involve a rather substantial decrease of Britain's present heavy excise charges.

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This loss of income for the Treasury, however, will be compensated by yields from the general value-added tax.

Business in the Member States will profit by these tax measures in so far as, from then on, equal competitive conditions will prevail throughout the Community in the field of indirect taxation. Even greater benefit, however, may be derived from the Community's activities in the field of corporation- and withholding-taxes.

The contribution of corporation tax in relation to total tax revenues is a rather small one (average for the Community, 7.5%; Great Britain, 7.9%). Within the Six, the rates, the definition of taxable profits, allowance for depreciation and other basic elements of corporation taxation may vary, but at first sight there is no need to bring them into line, although the differences in corporation tax rate may have some influence on the decisions taken by business enterprises to invest in one rather than in another Member State. Much more important - for business - is the avoidance of double taxation, both at home and abroad. Two directives cover this point :

The first directive grants exemption from tax on dividends received by parent companies from their subsidiaries abroad. In addition, such dividends are exempt from withholding tax at the subsidiaries' level. Parent companies may finally opt for taxation on a worldwide basis, which, again, may encourage new economic activities either within the Community or abroad.

The second directive, applicable to merger-type operations, eliminates any taxation on the transfer of property and on hidden reserves which come to light while the merger is being carried out. If, after the merger, the activities of the absorbed company are carried on by its merger partner in one form or another, all double taxation of the

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profits is excluded, such taxes being levied solely by the State where these activities take place. Furthermore, merged companies may opt for being taxed in their homeland for all profits and losses made either within the Community or in non-member countries, deduction being allowed for local taxes. This again avoids double taxation.

The Council of Ministers hesitates to adopt this directive in view of the differences in tax rates. Some Governments fear indeed an encouragement to mergers by companies whose registered office is in low-rate States, and consequent emigration of companies whose office is in high-rate States. This may ultimately lead to the harmonization of corporation tax rates.

The tendency to harmonize corporation tax rates is further strengthened by the desire to develop a Community-wide industrial policy as well as a common policy on economic trends and the balance of payments, the level of employment, and the stability of price levels. Moreover, measures for regional development and aids granted by Member States for the production of certain goods or favouring certain undertakings are coming more and more to be considered as matters of common concern, not national ones, and therefore calling for common action. Indeed, national action in these fields is becoming less effective as economic integration progresses, and these measures taken at national level often threaten to distort competition or adversely affect trade between Member States and their industry.

Tax measures, specifically corporation taxes, are often used to carry out national policies. However, once the national policies are replaced by Community policies, the Community itself has to have at its disposal the necessary means for putting them into effect. So the Community itself will have to decide on the tax measures which are instrumental to these policies. Otherwise, no such Community policy can be effective.

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For these reasons, corporation taxes seem a necessary object of harmonization; profits, losses, depreciation, reserves, etc., have to be bound by common rules, permitting exceptions, freedoms or reductions decided upon by the Community organs in order, for instance, to accelerate or curb investment and regional development, to raise or lower the level of employment, or to give aid to declining industries, in the light of specific economic circumstances.

Since the intention is that I should deal with some other fields of harmonization, I will leave tax matters now, though I may return to them later on in connection with certain aspects of insurance and banking.

THE EUROPEAN COMPANY

In June last year, the Commission put before the Council of Ministers a proposal for a statute for a new uniform type of limited company, the European company, with the request that it should be embodied in a binding regulation and, once adopted, be directly adopted, be directly applicable in each Member State.

As the proposed proposed statute contains 284 articles, it is difficult to say much about it in a few words. However, I will try !

At present, the matter is before the European Parliament and the Economic and Social Committee, and has already provoked a mass of comments, literature, discussions, colloquia, praise and criticism. That was exactly what was hoped for when the text was drafted, and after the opinions of industrial organizations and trade unions had been given. The draft statute not only represents a new legal instrument, but also attempts to furnish solutions for problems that any company may face in the future, such as co-determination, rules governing groups of companies,etc.

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A number of tricky problems had to be solved, such as : who may establish such a company ? Anyone, Community citizens only, existing corporate bodies, companies with or even without trans-frontier interests ? The draft limits access to existing limited companies whose registered office is within the Community. Only they may create a European company, in three cases :

1) when a merger takes place between companies from different Member States. In such a case the resulting company may be created as a European company;

2) when two existing limited companies from different States want to establish a subsidiary in the form of a European company; and

3) when two companies from different States want to set up a holding company.

The basic idea behind this restricted access is obviously that European companies should be an instrument for European business cooperation, and not a sort of method for adding goodwill to purely local business affairs.

The European company will have legal personality, recognized in all Meber States, it may transfer its seat from one part of the Community to another and may even have a seat in more than one Member State, but not outside the Community. Its capitl must be divided into shares. The amount of its corporate capital differs according to the way in which it comes into being. In the case of a merger or the creation of a holding company, a minimum capital of 500 000 units of account (1 unit of account = 1 US dollar) is required. In the case of a joint subsidiary the capital should be no less than 250,000 u.a. European companies have to be entered in a register, like all limited companies on the continent. This register will be kept by the Court of Justice of the European Communities in Luxembourg.

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Following the Dutch and German pattern, the power within the company lies in the hands of three separate organs - the board of management, the supervisory board and the shareholders' meeting. The majority of the board of management must be citizens of the Member States.

The supervisory should have at least twelve members if the European company is established in more than one Member State. Co-determination of the workers is assured by the fact that at least one third of its members have to be representatives of the company's employees. The other two thirds are elected by the shareholders' meeting.

The representatives of the employees on the supervisory board are elected by the company's central works council, which in turn is elected by local councils formed by employees from all the different places where the Company carries on its business. The central council is required to defend the interests of all employees of the business. It has the right to be informed about the company's economic position and general situation, and its consent is needed for decisions by the management in so far as they directly affect the position of the employees.

The company's balance sheet, its profit and loss account, and a financial report explaining these documents and commenting on the company's situation have to be published, after having been audited by independent auditors. Minority shareholders may take legal action if they believe that the accounts or the special report were presented in a way that contravened the provisions of the Statute. Debenture holders may also take legal action, but only through their representatives.

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