# The integration of European and South American markets tested by tax competition *

**Adriano Di Pietro**[1]

### *National tax protections and the market integration*

The integration of the markets and the economic freedoms within the European Union represents a coherent and essential hendiadys.

Integrating the markets means, from the fiscal point of view, overcoming the territorial limits to trade: those fixed by national jurisdictions with controls on products at the borders, on financial investments, on industrial or commercial investments and on the territorial delocalization of the economic activities. National taxation had contributed to protect the markets. It had done it and continues to do it. The tax choices are many, depending on the economic areas in which the investments are made. States can create custom duties to increase the tax cost of the imported products in order to protect those goods which are produced and exchanged on the territory. States can penalize financial investments abroad with differentiated and more onerous tax systems in respect of those within their territories. States can incentivate industrial or commercial investments which entail settlements in the national territory as well as they discourage national non investments due to the delocalization of activities out of the national territory.

These national protections now have lost their primacy. Their role has been reduced while the national European markets integrated themselves in order to create what has been defined, since the Treaty of Rome, a free

* How to quote this article: A. DI PIETRO, *The integration of European and South American markets tested by tax competition*, translated by ALESSIA FIDELANGELI, University of Bologna, in Studi Tributari Europei, n. 1/2017 (ste.unibo.it), pp 1-21, DOI: 10.6092/issn.2036-3583/8845.

[1] Adriano Di Pietro, Director of Studi Tributari Europei, Former Professor of Tax Law at the University of Bologna.

trade area with the same conditions of competition. This was, in 1957, for the States that created the European Economic Community, a choice of economical convenience and usefulness: both were national and were thought to acquire an economic space within which to freely operate in trade. In fact, these exchanges, subtracted from the national competition, would have contributed to reinforce the national economies, thanks to the free movements that would have amounted to an important corollary of the national choices concerning the economic policy. At the same time, a common market, as the one which had been imagined, would have permitted to the States to better react to the protectionist policies which emphasized and emphasize the hegemonic role of the strongest economies.

The European Union teaches that the effectiveness of the tax protections in defense of national markets depends on their degree of integration. This has required to the States a political effort that lasted more than ten years and increased as long as the States became aware of the advantages that the national economies would have had from a Common Market. With its creation and consolidation the reasons for national fiscal protections would have expired; on the contrary, their permanence would have amounted to an obstacle to the full development of the European market, when the national regimes would have restricted the economic freedoms.

***The difficult integration of the markets in Latin America between free trade areas and custom unions***

To leave the national tax protections to create a common market that would have been controlled by the primacy of a legal regime such as the European one, would have required a political responsibility which is too high for the countries of South America whose economic, political and cultural difficulties were known. However, everyone, small and big countries of the american continent, could not face alone the success of a national economy that found out of the national borders the reasons of its development and affirmation. The same reasons that induced many States of the continent to look for forms of integration of their markets. In this way, even though with different accents, they could have exchanged freely their goods or services.

In this way, they could have created the best commercial conditions for the development of their economies and they could have strengthened their national markets in an international competition. The destiny of those fiscal systems with which the States would have or could have maintained a national fiscal protection, either to protect their goods and markets or to favor investments and entrepreneurial settlements in their territories, would have been dependent on the different level of economic integration.

***The economic weakness of Mercosur***

Within the geography of the Latin America's markets, the big economies, such as the ones of Brasil or Argentina, hesitate to integrally accept a custom union that protects a free trade area which is shared with countries that are evidently weaker, such as Uruguay or Paraguay, or that have economic difficulties, such as Venezuela. These asymmetries make the engagement made since 1991 with the Treaty of Asuncion, then modified in 1995, scarcely effective, these should have led to the abolition of custom duties between the adhering States and to the creation of a common custom tariff to apply to the exchanges with third countries. Notwithstanding this and together with the efforts to create new and original Mercosur Institutes, between the others a Parliament, the protectionist obstacles have not been overcome yet, in front of the evident and not yet overcome economic superiority of Brasil that, alone, develops more than 70% of the total richness within Mercosur. It is difficult, with these conditions, to grant the best and most effective conditions to develop the national economies nor to protect the national markets from the invasions and arrogance of the hegemony of the international economies even though making use of a common custom tariff. This is an economic weakness that does not allow the participating States to create the illusion to defend the national financial interests and to effectively protect their markets, goods or services and to consolidate investments and international settlements with tax regimes that territorially incentivate or disincentivate them.

### ***The Custom Union in the Latin American market***

The custom union becomes the natural protection for the free trade areas when it involves countries which have small, or even very small, dimensions, such as those of Latin America. These created, set un by 1960 Treaty, then integrated in 1962, a custom union that has a double intent: on the one side to avoid forms of protectionism that would have made their economies even weaker in the world market and, on the other side, would have created a legal protection that is better than the one of the single markets in comparison of the aggressive commercial policies of the strongest countries and that would have seen the small countries, such as those of South America, to succumb in the custom competition. The political differential between the States that participate such as El Salvador, Nicaragua, Guatemala, Costarica and Honduras has incidence on the effectiveness on the liberalization of internal trade.

Because of this reason, the Custom Union did not prevent these States from adopting fiscal controls aimed at protecting their markets as long as the circulation of goods is concerned. Without a complete integration of the markets and, above all, a legal system that can provide for the liberalization of the internal trade, as it has happened in Europe, the States, even though they adhere to the internal market, can continue to adopt fiscal systems to prevent the risks for their markets. These include also the ones that fiscally incentivate the location of certain wealth and consumption on their territory.

### ***Market integration and legal system of the Andean Community***

The substantial economic homogeneity and a shared cultural tradition between the countries of the northern Latin America, such as Bolivia, Colombia, Equador and Perù, would have allowed a more evolved form of markets integration. The original Andean Pact, that then became the Andean Community, in 1969, was one of these, where institutions such as the Parliament or the Court of Justice were born, coherently with a closed and substantially protectionist economic system. After the debt crisis in the 80s, the opening to the international markets prevailed: the creation of a free trade area corresponded not only to a common custom tariff but should have been protected by the economic freedoms. The commitment was to create a legal system to grant, thanks to rules and institutions that had been created since the first applications of the Andean Pact, the preservation and effectiveness of the integrated markets. In this way they could eliminate the tax competition in the free trade area and overcome forms of custom protectionism that would have altered the competition concerning goods and would have weakened the single markets in front of international competition. Alone, the member States could not effectively oppose themselves to forms of protectionism from the most important countries from the economic perspective. Moving from the free trade area to more intense forms of integration of the markets, the tax competition moves from the circulation of goods, to the adoption of a common custom tariff, to the competition concerning income and consumption. In fact, the States can continue to adopt national fiscal regimes either to favor national consumers, either to incentivate investments and establishments on their territories. In fact, the relative tax competences continue to be exercised by the States that compose it without the Andean Community to intervene. In fact, the latter one lacks of competence in terms of general taxation meaning the one that is not linked with customs and consumption. For these reasons, also within an integrated market, such as the one that corresponds to the Andean Community, the economic freedoms can live together with national tax regimes that, with the intention to control national markets, restrict the rules on which the same integration of the markets is based. Nonetheless the solution, more political than technical, would be to take forward a process of legal integration which is coherent with the development of the markets.

### *National tax controls and European market*

In Europe, the States have accepted more easily to apply common fiscal rules when it comes to grant the full integration of what would have become the European market. With the Custom Union, that became exclusive competence of the Union, today Europe offers the highest level of protection to the free movement of goods. This is a great achievement, as its execution after more than 35 years from the Treaty of Rome, confirms; an achievement that consolidated as long as the European market enlarged with the opening to new member States. Hence, the primacy of the European legal system strongly excludes or reduces the tax cost of the integration of the markets as well as the competition in the intra-community relationships. Even without a process of legal integration, as the one that concerns the Custom Union, both the services and the goods have found in the tax harmonization concerning consumption a legal reaction which is adequate to the European market. Hence, thanks to the free movement of goods and services, the European States cannot anymore make use of forms of taxation on consumption or production that contrast with the harmonized model. The States can not even adopt a national discipline that, to incentivate the location of services or the acquisition of goods in their markets, either contrasts with the criteria of territoriality belonging to the harmonized model, either makes the regime of exportations more complex and onerous, either presents itself as particularly generous in the liquidation of the tax on consumption, allowing those who are localized on its territory to take advantage from a right of deduction which is higher than it would have been if the inherence principle was applied in a more rigorous way. These national choices contrast not only with the European discipline of consumption taxation but also with the legal features that qualify it, as the principle of neutrality.

## *The fiscal regimes of transnational income resist to the integration of markets*

The national taxing rights on transnational income resists to the integration of the markets that can not legally or explicitly limit it. This happens not only when, as in the case of Mercosur or in the Market of Central America, there is no legal system that can share the competences between the participating States. Not only when, even though a legal system exists, as in the case of the Andean Community, this has spheres of competence and effectiveness inferior to those of the European system and then it can remain far from the competences in terms of income taxation. The same

European legal system managed to limit the right to tax of the States only when these, with their tax regimes, could have restricted the economic freedoms that amount to the most precious defense against the integration of national markets within the European one.

***The national financial interest continues to take precedence over markets integration***

Thanks to the exclusive competence of the European States in the field of income taxation, the right to tax establish itself on the territory. This happens because the States would obtain the highest financial interest combining the criteria of residence and source in order to broaden, with different effects, the link with national taxation. This is a claim from the States the underpins the national fiscal regimes of transnational income. A claim that has not disappeared even in presence of an integration of the markets that, even though with different levels, involves national economies. These, from their side, can obtain more benefits from the free movement of persons, capitals investments and establishment. Actually, the national financial interest continues to prevail over the economic effects for the market, even though these are negative. For example those which are provoked by the juridical double taxation, stimulated by criteria of territorial taxation of the legal systems whose aim is to obtain the highest tax revenue.

***Juridical double taxation as a tax cost for the integration of the markets***

The traditional solution to eliminate or reduce juridical double taxation was and remains the solution of conventions. Its operation does not depend on the integration of the markets when these are not governed by a legal system as it happens in the European market. In fact, the integration, in the Latin America markets, does not affect neither the operation nor the effectiveness of the conventions. Their primacy over the national tax regimes, those which protect national markets, belongs to the hierarchy of the sources of law that the legal systems of the States that participate in the integration of the markets adopt and apply. Also within the integrated markets the conflict that the application of the convention provokes, is renovated. From the one side, the interest of the economic operators to make use of conventions to avoid double taxation, from the other side, the financial interest of the State to apply and interpret the convention so to ensure the highest percentage of revenue within its territory. This is a comparison that formally concerns tax payers and tax administrations of the States that participate in the process of regional integration of the markets. The interpretation and application thereof can nonetheless be influenced by the economic weight of the countries that signed the agreement. Thus the tax cost of double taxation can vary depending on the degree of economic homogeneity of the markets and the resulting political influence. This result that in the future can be exacerbated by the modification of the OECD convention. Nowadays, the latter, in order to eliminate the double taxation provoked by the double residence of legal persons, in fact, does not refer to the administrative seat but to the choices agreed by the States that signed the agreement. Thus, the tax cost of the integration of the markets is destined to vary depending on the effects on the choice of the State of residence of the economic differentials of the countries that signed the agreement and on their different political weight.

***The European legal system reduces the tax cost of double taxation within the internal market***

On the contrary, the primacy of the European market over the national ones for sure reduces the tax cost of double taxation within the European market. This happens also thanks to the conventions signed by the States which are members of the Union. These have greater coherence in terms of effectiveness of interpretation and application. The evident economic differentials between States can not prevail on the European market. Hence, they can not provoke discriminatory tax choices between the application of one or the other State or with both the States, for a different interpretation and application of the criteria of territorial allocation, such as residence and permanent establishment. In fact, the European legal system recognizes the legitimacy of the Conventions that have been concluded between the States that make up the Union and between these States and third countries. In fact, they share the same objective: the double taxation that the conventions should eliminate, according to the European legal system and to its interpretation, amounts to a cause for altering the market and its freedoms, amounting, in this way, to an obstacle to its development. The European legal system, even though it recognizes the bilateral effectiveness of the conventions, limits it every time the interpretation or application of the conventions can result in discriminations or is likely to restrict the exercise of the economic freedoms within the European market. In essence, when the solutions adopted with the conventions can question the primacy, within the European system, also in the field of transnational income that can not be included in the tax competences of the Union.

Thus the tax cost of double taxation within the European market is even more limited thanks to the application of the European legal system and thanks to the efficacy of its primacy on those tax regimes that, in order to better protect the national markets, in turn, provoke double taxation. This is a benefit against which the European market has an advantage in respect of the Latin American ones. The latter ones either limit themselves to free trade areas or, even though they are not disciplined by a legal system, as it happens for the Andean Community, the latter does not prevail over the national systems that have the European one as reference, also in the field of transnational taxation. Hence, the Latin America's markets will not be able to oppose themselves to the national fiscal regimes that want to continue to have benefits from the advantages due to the integration of the markets but, at the same time, want to continue to protect the national fiscal interests corresponding to their own markets. Thus, the Latin American countries will continue to live a contradiction between the economic benefit common to all the markets that integrate themselves, from the one side, and the claim of the national fiscal interests, from the other side. In the name of the right to tax, the States continue to adopt criteria for determining the location that, even though they favor national revenue, increase the risk of double taxation. However, in this way, the tax cost of markets integration increases together with its weakness and, with the latter one, the economic benefit common to the States, because of which the markets had been created, is reduced.

***Juridical double taxation as a restriction of freedoms within the European market***

Then, with the same parameters, those of the restriction of the free movement of capitals and establishment in addition to the ban on discrimination, the European legal system intervenes in evaluating the compatibility between those fiscal controls with the national markets that are built on residence and permanent establishment. These, independently from the competences of the Union, would be qualified with too broad criteria, also because of their territorial vagueness, to be compatible with the economic freedoms and, specifically, with the freedom of establishment. On the other side, transnational income can produce discriminations if they can be referred to a permanent establishment and not to the branch of a non resident subject. If they are considered to be compatible with the European legal system, national tax regimes become more certain to the benefit of European investors. These will be able to fully exploit the economic utility that derives from transnational income obtained thanks to the economic integration of the European market and to the freedoms that can be exercised without fear of restriction for the criteria of territorial taxation adopted by the national legal systems. On the contrary, once recognized the differences of the national criteria of taxation as compatible, the European economic actors will be able to decide on the location of their enterprises, choosing the one which is more favorable from the fiscal perspective. In fact, the application of the national tax regimes depends on the seat or the permanent establishment. Their differences amounts, by now stably, to reasons and occasions of tax competition. The latter does not represent a limit but rather a corollary of the economic freedoms that characterize the European market. In turn, the competition defined by way of residence and permanent establishment, anyway remains differently declined in the national legal systems and requires the necessary support of the conventions. Its effectiveness in the market depends on the degree of uncertainty that their interpretation and application entails, even though it is tempered by the respect of the features and the freedoms that the European system imposes to the transnational income.

***The other interesting aspect of the financial interest: tax regimes in order to attract income to the national markets***

Without a legal system that had primacy as the European one but at the same time lacks of a specific competence in the field of income taxation, the States are oriented to exploit the optimal conditions for the exchanges and investments offered by the integration of the markets. In this way they can better emphasize the financial interest that arises from the location of economic operators within the internal market and their successive permanence there. The tax regimes in this case measure the degree of economic attractiveness of the national markets. At the same time, they contribute to elevate the tax cost of the integration of the markets. In order to better protect for tax purposes the internal market, the tax regimes are more rigorous for non residents than for residents. At the same time, they can make more expensive, from the point of view of taxation, the exit of those who are settled in the national market advantaging another market even though in the area of European economic integration. The examples are recurrent. The national regimes concerning transnational income that can be differentiated for the extraordinary transactions, for the distributions of dividends, for the investments of capitals, can be considered such.

Again, it is the European system to make a difference. Its primacy, even though it is not accompanied by a specific competence in the field of income taxation, imposed to the States to respects those freedoms on which the development of the European market is based. This is a combined effect of both the European rules and the Court decisions. The interpretations thereof, in order to grant the uniform application of the European legal system, bind the judges and national interpreters in addition to, naturally, the legislators.

Thus, nowadays, the transnational income can be increasingly produced, allocated and distributed according to the rules of the European market. Hence, they suffer less and less because of the costs of the tax variables deriving from the coexistence of national tax regimes. This is a beneficial effect that does not only concern the forms of corporate organization as those of the groups of societies that are the first beneficiaries of transnational income. Their operations of corporate organization, as well as the distribution of profits are, today, completely neutral independently from the State. In fact, even the logic of investments with the allocation of the returns thereof, finally assumed a European dimension that is coherent with the market. In this way it fell, or anyway is destined to fall because of the economic freedoms and, more specifically, because of the free movement of capitals and establishment, those attempts of the States to continue to protect their financial interests with national regimes for transnational income.

***National penalization for tax purposes of the emigration of enterprises and corporations within the integrated markets***

The same destiny also for the transnational income that is penalized by choices of corporate emigration. This is fiscally hindered by regimes that still want to protect the national markets. The intention is to subject to taxation the capital gains that privates and enterprises would have accrued without to be taxed before to emigrate in another State but that, probably, will be taxed in the latter. The logic of exit taxation adopted by many European States, even though legitimate according to the national legal systems, is in conflict with the European market. The national regime wants to make every change of residence fiscally onerous, even when this is not justified by the convenience of the economic operators to better exploit the economic opportunities offered by the European market.

For this reason, considered the lack of a European regime concerning exit taxation, the mutually agreed solution between the national legal systems and inspired by the European case law prevailed. Such a solution has been left to national tax systems, each of which, both in the case it has hosted or is about to host a European enterprise, renounces to integrally tax the capital gains in the name of the freedom of establishment. Hence, avery State accepts to limit its right to tax only to the capital gains that have a link with its territory: in a first moment potential, in a second moment realized.

This is a solution that, especially because it is imposed by the European system, prevails on the national tax regimes. Nonetheless this is not easy to export for those markets, such as the Latin American one, that are not governed by a legal system or, when they are, as in the case of the Andean Community, do not benefit from the same primacy that the European Union recognizes to its legal system.

Accordingly, for the markets of Latin America, the national tax regimes continue to operate in contradiction with the same reasons of their integration: the reasons that brought to the creation of a free trade area or of a custom union or of an integrated market, depending on the choices made by the respective founding Treaties.

***The attraction of transnational income from infra-group transactions: the tax regime of transfer pricing***

The market freedoms, and more specifically the free movement of capitals and establishment, have a small role in respect of the national regimes that concern transnational infra-group exchanges. Once again, also within the European market, as well as in the Latin American one, the groups of companies amount to the most economically viable form to operate in the integrated markets. Nonetheless the States are suspicious in respect of the operations of the groups because the income that they produce is naturally transnational and they can not control the part that affects their territory. For this reason, the national tax regimes, in claiming their share of revenue, want to ensure that the amount is integrally to be attributed to the territory. This represents an exigence that is diffused and constant in every market, included the European one, but that can not be satisfied unilaterally by the national tax regimes.

Without criteria that are shared by the States, particularly European, the hunt of everyone to transfer pricing condemns every intra-group transaction to uncertainty. Anyway every country remains arbiter to affirm its territorial claim on the prices that it considers congruous in relation to the type of planning of supplies and services in the contest of the group.
The uncertainty is added to the potential double taxation of income relative to the exchanges of goods and services between the societies of the group: the one that is provoked by the national claims to apply own criteria to determine the adequacy or prices and to judge the rationality and economic coherence of infra-group transactions.
This is a defeat, for the integration of the markets, that suffers the tax cost of the national regimes on transfer pricing. The latter ones continue to have control over the markets, without having regard of the full economic integration that the political decisions of the States or the legal efficacy of the Treaties aimed at ensuring. Useful, even though till now undetermined, the ten years' OECD efforts to apply criteria for the determination of transfer pricing that were shared by the participating States.
Here international law can in turn sustain the efforts of the markets to fully implement its models of economic development, reducing the tax cost of integration. On the contrary, national legal systems, claiming their tax sovereignty on transnational income, did not take care of the effects on the integration of the markets of unilateral measures aiming at quantifying the transfer price of infra-group transactions. The international success of these efforts of the OECD to define, with objective criteria and solutions that are shared between the States in which the exchanges of goods or services take place and that are potentially verifiable in the light of transfer pricing, could be useful to increase the legal certainty of multinational groups and to reduce the risk of double taxation. Both the objectives are common to the European legal system. Hence, the international solutions shared by the States within OECD could, once adopted, be useful also for the European market. This, notwithstanding the primacy of its legal system, till now did not menage to affirm itself on the fiscal regimes with which the European States continue to make the financial interest to acquire part of the income

derived from the exchanges within multinational groups prevailing. The compatibility of the national regime concerning transfer pricing with the European legal system shows that. This, in the absence of European solutions, was recognized by the case-law of the Court of Justice in name of the rational allocation of competences between the States and the Union. Thus, we understand the efforts of the Union to approve a convention in the form of a directive, directive 90/436, that left to an arbitration panel the solution of national controversies born from the disparity of national criteria used to calculate transfer pricing.

***Over the financial interest: tax competition within the integrated markets***

Once the risk to be potential obstacles to the market for transnational income has been overcome, national fiscal regimes can become instruments of economic policy rather than financial policy. This happens when they exclusively concern national income, with the declared intention to diminish the tax burden, reducing the taxable base and the applicable tax rates.

These are regimes that, even though they do not have transnational fiscal relationships as an object, do nor directly affect the functioning of the integrated markets. The sacrifice of national financial interests that the adoption of these fiscal choices entails, reassures market participants, included the European one. At the same time, the choice the reduce the tax burden for national enterprises is not without any effect in an integrated market. The regimes of national income can induce the enterprises to localize and invest in the State with the lowest income taxation. In this case, they would take advantage from a regime which is more favorable also for income produced abroad.

In this way, in Europe, a comparison between fiscal systems was created which is the more effective for the enterprises and corporations the more they can benefit from this tax competition. A tax competition that is made easier by the integrated markets that allow the free location of capitals, of investments and of production activities.

***National markets suffer tax competition***

Closed by the national claims to adopt fiscal regimes that protect national markets and tax strategies to attract companies, the integrated markets show their weakness especially with those multinational companies to whom they addressed competition. Multinational companies are those that can attract the greatest benefit from the tax competition which is offered to them by different tax regimes. In fact, companies can decide to localize their economic activities or to organize their productive structures according to tax strategies that are facilitated from the freedom of investment or by the freedom of establishment, that are offered by a integrated market as the European one, especially when this is granted by an own legal system. For this reason, the transnational strategies will follow the evolution of the national fiscal regimes. The States, in turn, find it difficult to evaluate the economic and financial effects of their choices in terms of competition. In fact, every State has to decide whether to maintain those regimes or to make them less advantageous depending on whether the financial interest or the competitive interest prevails. In this way the fate of tax competition in Europe is sealed: born because of the asymmetries of tax regimes, it increasingly concurs to solicit them, as the tax convenience becomes an integral part of the strategies of evolution and development of the multinational companies. These know that they can easily take advantage from it thanks to the freedom of investments and establishment that are granted by the European system.

***National markets suffer from harmful tax competition***

The competitive advantage in the European market, in order to be fully exploited, has to overcome the uncertainty of national applications that, in turn, depend on the interpretation of national judges and administrations. For this reason, companies increasingly make use of tax planning: the one that allows to rationalize the entrepreneurial choices also through the tax advantage. In this way, in the European market, organizational models and contractual forms that can better reconcile the natural economic interest of investments and establishment of companies with the tax saving offered by national tax regimes which are more attractive, follow one after the other and alternate. Nonetheless, the tax advantage, even though legitimate, can never prevail on the economic interest nor it can exclude it. The economic interest as driving force for the development of the European market can not be frustrated by the planning of the companies that exploit the asymmetries of the national tax regimes that are increasingly competitive. The tax planning can not make the the tax advantage prevailing on those freedoms that allow the development of the European market. The economic interest deserves a genuine respect that can not be eluded with forms of territorial organization that are purely artificial because the corresponding legal forms lack of economic consistency. Nor the management of transnational economic activities can be left to contractual forms that are inter-related or provide for a temporally separate enforcement so to make, in the complexity of enforcement, the economic interest by which they would have been naturally inspired, forgotten. The economic interest and the market within which the latter can freely manifest itself find, in the European legal system, the safeguard with respect to forms of tax planning that, when they want to maximize the tax advantage thanks to the asymmetries with which the States believe to pursue competition contradict, if they want to pursue the economic interest, the same reasons underlying the market and its freedoms.

Thus, the European system, firstly imposes to the States the introduction of anti-abuse clauses, that amount to the first form of European reaction to the forms of aggressive tax planning precisely because they are considered to be incompatible. Then it intensifies the forms of collaboration between the administrations and the forms of exchange of information to make the forms of national administrative control more effective towards the so called aggressive tax planning that are naturally transnational. In this way, the European legal system can support the European functions of judges and national administrations in order to overcome the difficulties they meet in applying the anti-abuse clauses in a geographical area, because it corresponds to their national functions, when, on the other side, the tax planning, even when it is aggressive, in order to be effective, must be transnational.

In all of the markets in which, such as the Latin American ones, the level of integration is not as high as in Europe, tax planning can not count on the same freedom from which the companies, that want to take advantage from the fiscal asymmetries of the various States that participate in the European market, can take advantage from in Europe.

In fact, the aggressive tax planning encounters, within Mercosur or within the Market of Central America, the obstacles to economic freedoms that derive from controls and constraints raised by the different States on those who are localized or for operations carried out within its territory. These legal obstacles have a different weight, depending on the economic dimension of the companies that operate in the markets, even though with a different level of integration. The greater and the more substantial are their dimensions, the more they can support the reasons underlying tax planning, in this way reducing the effectiveness of the application of anti-abuse clauses and, consequently, also the national financial interest which was already weakened by the competition of the attractive tax regimes.

In the absence of a legal system such as the European one that does not only allow but imposes forms of collaboration that are more and more intense and binding between the tax administrations and the judges of the member States, the administrations and the national judges will have to grant the effectiveness of anti-abuse clauses. This is an effort that has to face the territorial limits of controls and, hence, fails in front of the transnational dimensions of the companies that the tax planning, especially if aggressive, presents. Especially that dimension makes it difficult, for the judges and the national tax administrations, to verify the distinction between virtuous tax planning and aggressive tax planning, in the absence of a unique market such as the European one and without the support of the primacy of a legal system.

It is the economic interest to make a difference, as it follows from the European anti-abuse directives. Only its primacy on the tax advantage can give economic consistence and legal effectiveness to the entrepreneurial business choices adopted by the multinational companies and the contractual forms used to menage the commercial and industrial relationships on the different markets within which the companies operate.

***Integration of the markets and national tax competition: a complex hendiadys***

The tax competition finds, in the integration of the markets, a faithful ally. In fact it is made easier in a European market that, in the name of the economic freedoms, eliminated the legal and administrative obstacles for the enterprises that would take advantage from the asymmetries of the national tax regimes. On the other side, the integration of the markets relies on tax competition to progressively align the tax regimes of the enterprises as the differentials between the taxable bases are reduced and, accordingly, the economic incidence on income taxation is reduced as well.

In this framework, that enhances the economic effectiveness of taxation, but forgets the financial function, it is possible to understand that every attempt of companies to substitute the tax advantage to the economic interest that drives the development of the European market is unacceptable for the European market and for the legal system that governs it. The forms of abuse and avoidance created by the same companies that would have become the first beneficiaries of the European market, are not acceptable because they alter the orderly development and allow economic advantages that, if obtained through the unduly exploitation of favorable tax regimes, grant a competitive advantage in respect of the companies that, in national tax asymmetries, look for a legitimate tax saving.

It should be for each member State to defend the European market from aggressive tax planning but this is not without contradiction. The States can use the powers and tools offered by the European system; at the same time they can nonetheless maintain those regimes of tax advantage that they consider to be competitive towards those belonging to the other legal systems, even though, in this way, they foster the tax planning, included the aggressive one.

This contradiction is even more evident where, as in Latin America, the integration of the markets has not reached the level of the European market and can not rely on the same freedoms. Without the protection of a legal system, as the one that rules over the European market, the States will adopt national measures against the aggressive tax planning even though they know, nonetheless, that their effectiveness can be weakened from the tax advantage that the companies, that operate in the national markets, even though integrated at various levels, want to obtain. For this reason, they will be able to use their economic strength in order not to abandon those markets that had attracted them with non favorable regimes which were, as a consequence, competitive with the ones of other States. Neither international law can solve this contradiction that is consumed in the integrated markets. It intervenes in the bilateral positions of the States: the positions that, with the reciprocal limitation of sovereignty, are left to the conventions against double taxation and, hence, leave aside the positions of the States in the integrated markets.

For sure, the original solution of multilateral convention proposed by the OECD would translate in conventional terms the actions that the same OECD had adopted as effective in contrasting the initiatives with which the multinational enterprises erode the taxable bases of the different States. The latter ones, in adhering to the multilateral convention, could in turn adequate their bilateral conventions without need to renegotiate them. Each of them will be able, in this way, to enrich itself with actions and solutions that were elaborated by the OECD to contrast the erosion of the taxable base because of the aggressive tax planning.

Their effectiveness, even though innovative, does not overcome the difficulties of the bilateral application. This solution is coherent with the essence of a convention but can not aim at extend ing itself to other States, neither it can be applied on the integrated markets.

It is difficult to imagine the effect on tax planning of the bilateral conventions, even though the latter ones are integrated by the anti-erosion measures of the multilateral OECD convention. It depends, again, on the interpretation and application that are left to national judges that, from their side, can make use of OECD commentary. However, the same multinational companies, to whom the anti-abuse measures, even though conventional, refer, remain arbiters. From the other side, renouncing to the convention, for the companies, means to integrally assume the burden of double taxation with an evident economic burden.

The States remain responsible if, even towards a conventions which includes anti-abuse measures, they do not want to change the national regimes that, born as a protection of the national markets, then alimented tax competition and, finally, favor, with their asymmetries, the aggressive tax planning. The latter one could, in this way, continue to affirm itself in order to combat, through the abuse of the conventions, the tax advantage of double non taxation in an international area other than the one of the integrated markets, when the aggressive tax planning wants to negate the primacy of the economic interest that represents the same driving force of the integration of the markets.





© Copyright Seast – Tutti i diritti riservati