Limited ambitions.

The European Convention and decisions concerning taxation in the EU after enlargement

by

Nico Groenendijk
Centre for European Studies
University of Twente, The Netherlands

Paper presented at
"Tax Policy in EU Candidate Countries. One the eve of enlargement"

Eurofaculty
12-14 September 2003
Riga - Latvia

JEL Classification: H30, H77, H87
Keywords: European Union, Tax co-ordination, European Commission, Council of Ministers, Enlargement, Institutional reform

1. Introduction

One general consequence of enlargement of the European Union (EU) will be the increased difficulty of legislating on taxation, since in this field unanimity is generally required in the Council (European Parliament, 2003: 11). This problem was addressed at the Intergovernmental Conference (IGC) in 2000, but the resulting Treaty of Nice has not made any significant amendments to the Treaty establishing the European Community (TEC) with regards to decision-making on taxation.

The European Convention, the outcomes of which will be decided upon in October 2003, has -in its draft constitution- introduced the possibility of qualified majority voting in issues of administrative cooperation and tax fraud and evasion. In all other tax matters the status quo has been retained (i.e. unanimity as the decision rule within Council and consultation as the legislative procedure), even though at the last plenary session of the Convention regret was voiced by various Convention members with the fact that it had not been possible to reach consensus on extending qualified majority voting (QMV) to decisions concerning taxation[1].

In this paper the (legal) instruments the EU has in the field of tax co-ordination are discussed, as well as the decision-making procedures that are involved. The main question the paper addresses is: *What impact will (proposals for) institutional reform have on the legal framework for EU tax co-ordination, in an enlarged EU?*

In section 2 we will discuss in a more general way the instruments for tax co-ordination as they are currently available in the EU. Section 3 deals with the current decision-making framework regarding legislation on taxation. In section 4 the actual use of the decision-making procedures in the period 1976-2003 is portrayed. Various proposals for reform of legislative procedures will then be discussed, with an emphasis on the 2000 IGC (section 5) and the European Convention (section 6). Section 7 concludes.

2. Instruments for tax co-ordination

So far, tax co-ordination issues in the EU have been tackled in three ways (Groenendijk, 1999: 65).

First, outside the EU framework (and often within the framework of the Organization for Economic Co-operation and Development, OECD) member states have used tax treaties for

bilateral or multilateral[2] co-ordination, especially for preventing double taxation. The obligation for EU member states to prevent double taxation is laid down in the TEC (article 293).

Secondly, there is EU-legislation directed at tax harmonisation, on different levels:

- the first level consists of the EU treaties (primary law);
- the second level consists of EU directives and regulations (secondary law);
- the third level: decisions of Council and Commission based on secondary law (tertiairy law);
- the fourth level: case law by the Court of Justice. Cases can be brought to the Court of Justice by both citizens/companies and EU institutions (including the Commission: infringement procedures).

Thirdly, there is the non-legal approach to tax co-ordination, involving multilateral agreements between member states (like the Code of Conduct on business taxation), and all kinds of guidelines, recommendations and communications, aiming at developing processes of peer review and pressure.

Table 1 Instruments for EU tax co-ordination

	Inside EU framework	Outside EU framework
Binding "Hard" Legislative approach	Council (and EP) directives Council (and EP) regulations Council decisions Commission decisions Infringement procedures/case law	Bilateral and multilateral tax treaties
Non-binding "Soft" Non-legislative approach Open method of co-ordination	Codes of Conduct Council policy guidelines Commission recommendations Commission guidelines Commission interpretative notices Commission communications	-

The legislative approach is still dominant. The Commission, in a review of the instruments at its disposal to reach tax policy objectives, has argued that the main problem within that approach is the lack of progress, as the pace at which proposals for directives in the tax field are agreed is disappointingly slow, which is caused by a combination of insufficient political will and the unanimity rule (European Commission, 2001: 21-22). Moreover, where the TEC does give clear legal competence to the Union regarding indirect taxation (especially article

[1] See *Summary Report on the plenary session* (Brussels, 9 and 10 July 2003, CONV 853/03).

[2] The composition of the multilateral group of countries sometimes coincides with the EU-15, see for instance 90/436/EEG.

93 TEC), in the case of direct taxation the Treaty has provided hardly any legal base at all. It has been necessary to justify legislative action in this field as being in pursuit of more general objectives: the free movement of workers (article 39 TEC), freedom of establishment (article 43 TEC), free movement of capital (article 56 TEC), the functioning of the common market (article 94 TEC), and preventing distortions of competition (article 96 TEC)[3]. In that regard the development of case law has become rather important. Most often individual litigants (taxpayers) have brought cases to the European Court of Justice; the Commission itself has been responsible for only a limited number of infringement proceedings against member states. Especially in the field of (direct) taxation a lot is left to chance because the Commission only reacts to cases taken to the European Court of Justice by taxpayers.

The legal approach thus suffers from a general problem concerning progress, but also from a problem of asymmetry: it 'favours' indirect taxation.

As far as the legislative approach is concerned the Commission proposes the following improvements:

- a move to qualified majority voting at least for certain tax issues;
- an increased use of the implementing powers conferred on the Commission by the Council, in order to adapt and modernise legislation more quickly;
- a more active, and especially more pro-active strategy of the Commission (as guardian of the Treaties) in the field of tax infringements by member states (legal action).

The use of non-legislative approaches or soft legislation may be an additional means of making progress in the tax field. The advantage of this approach is that the asymmetry-problem can be overcome (European Commission, 2001: 23-24). The downside of this approach is that it is very resource-intensive and that the outcomes are not enforceable, neither in legal terms nor in political terms[4]. As such the future of for instance the Code of Conduct on business taxation is rather uncertain (Meussen, 2002: 158)[5]. Moreover, the role of European Parliament in this approach has been rather limited[6].

[3] Article 308 TEC (which gives a legal net to the Council in case the Treaty does not provide the necessary powers) is sometimes also mentioned as a possible legal basis for harmonisation in the field of direct taxation.

[4] The thing with gentlemens' agreements like the Code of Conduct is that those participating are not always gentlemen.

[5] Partly due to the package-deal character of the Code of Conduct on business taxation and other proposals in the field of direct taxation, on which final agreement has recently been reached.

[6] For a more extensive review of the use of soft law (with an application to competition policy) see Cosma en Whish (2003).

The actual use of this method has so far been limited to:

- the Code of Conduct on business taxation, of 1 December 1997, and its follow-up;
- two Commission recommendations: one on the taxation of small and medium-sized enterprises and one on taxation of certain items of income received by non-residents in a member state other than in which they are resident[7];
- a large number of Commission reports and communications.

The latter category is dealt with in more detail in table 2[8].

Table 2 Commission reports, communications et cetera, 1976-2003

A. Period	*Number*	
1976-1980	6	
1981-1985	15	
1986-1990	18	
1991-1995	17	
1996-2000	28	
2000-2003	12	
Total	96	
B. Type	*Number*	
Working paper	4	
Report	44	
Communication	47	
Memorandum	1	
Total	96	
C. Subject	*Number*	
Taxation in general	13	
Indirect taxation, general resp. total	5	71
VAT	40	
Excises	7	
Fuel taxes/excises	8	
Vehicle tax	2	
Tobacco tax/excises	5	
Energy products	3	
Environmental taxes	1	
Direct taxation, general, resp. total	1	12
Company taxation and/or savings income tax	10	
Personal income tax	1	
Total	96	

From table 2 it becomes quite clear that the use of reports and communications is indeed on the increase since 1996. Reports (that in principle do not contain policy positions by the

[7] Of 25 May 1994 (C (1994) 1305 respectively 21 December 1993 (C (1993) 3702).

[8] The data in this section and the following sections are gathered using the Prelex-database on inter-institutional procedures, kept by the Secretariat-General of the European Commission. It contains all relevant (legislative and non-legislative) documents used in decision-making within the EU, since 1976. The database has been searched for data on tax and excise issues. The decision-making processes regarding the system of own resources, as well

Commission) and communications (which do) are well-balanced. The majority of reports and recommendations is on indirect taxation, which means that up till now in the actual use of the non-legal approach there has been quite some asymmetry as well.

Enhanced cooperation

The Amsterdam and Nice Treaties have introduced the possibility of closer cooperation between subgroups of like-minded member states (articles 11 and 11a TEC). The actual use of enhanced cooperation in the tax field can be problematic however. The policy areas concerned have to be self-contained so that member states cannot pick and choose between policies as best suits them. Enhanced cooperation must not undermine the internal market, constitute a barrier to or discrimination of trade, distort the conditions of competition, or affect the competences, rights and obligations of the non-participating member states (European Commission, 2001: 24). Hence, it is clear that the areas of VAT and excise duties are by and large off-limit for enhanced cooperation, as any deviation from the current harmonised EU wide system will bring about distortions. Often the areas of environmental and energy taxation are mentioned as examples where enhanced cooperation could be useful, as well as business taxation. The problem with enhanced cooperation in these fields is that it is likely that those member states that do not wish to participate will do so because they feel their tax systems in these specific areas should be more 'tax-payer friendly' than participating members. In that respect it is not likely, contrary to what Bradley has argued more generally (mentioned in and followed by Meussen, 2002: 159), that in the tax field the 'threat' of enhanced co-operation can be used to let member states make compromises within the ordinary EU-wide (unanimity-ruled) decision-making processes. Luxembourg, for instance, would be have been over the moon if the other 14 member states had opted for enhanced cooperation concerning savings income taxation.

In our view:

- the alternative instrument of increased legal action against member states by the Commission is at best an additional one;
- there is only very limited experience with the use of recommendations by the Commission and the impact these recommendations may have. It is not very likely however that

as tax matters relating to customs duties, have been excluded from the gathering of data for this paper.

member states will take Commission recommendations to heart in cases where these recommendations are at odds with their own interests and position;

- codes of conduct suffer from weak enforceability, which to a certain extent has got to do with the same problem the legal approach suffers from, i.e. the impossibility to take measures against the will of a member state;
- enhanced cooperation has only limited use in the field of taxation.

In the remainder of this paper we will therefore focus on the legal approach, more specifically on the various legislative procedures and the issue of QMV-unanimity, because that is in our view the most relevant issue.

3. The current decision-making framework regarding taxation

The Treaties currently provide for more than 22 different decision-making procedures for the adoption of legislative acts[9]. These procedures can be classified taking into account the voting system used by the Council, the involvement of Parliament and the consultation of institutions or other bodies.

Table 3 Current legislative procedures within the Union

Decision rule (Council)	*Role of EP*	*Relevance to taxation*	*Article TEC*
QMV	Codecision	Harmonisation measures relating to the internal market Customs cooperation Fraud affecting the financial interests of the Community	**95(1)** 135 (new) 280(4)
QMV	Simple consultation	-	-
QMV	Cooperation	-	-
QMV	Assent	-	-
QMV	No participation	Fixing of Common Customs Tariff Duties Approval of measures concerning charges other than turnover taxes, excise duties and other forms of indirect taxation Adoption of directives to eliminate distortion within the common market	26 92 96 second part
Unanimity	Codecision		
Unanimity	Simple consultation	Harmonisation of indirect taxation Approximation of laws Provisions of a fiscal nature (environment)	**93** **94** **175(2)**
Unanimity	Assent	-	-
Unanimity	No participation	-	-

[9] For a description see annex I of *Legislative procedures (including the budgetary procedure) – current situation* (Praesidium Convention, Brussels, 24 July 2002, CONV 216/02).

Basically, there are four procedures[10] that are relevant to taxation[11].

First, *article 93 TEC* deals with the harmonisation of indirect taxes. In this procedure, the Commission comes up with a proposal, European Parliament and the Economic and Social Committee are consulted[12], and the Council has to decide by unanimity. The output of this procedure is –in almost all cases- Council directives. Article 93 states that provisions for harmonisation of indirect taxes are adopted "to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market".

Secondly, *article 94 TEC* deals with approximation of laws in general, and has been used in the field of direct taxation, as there is no article in the TEC that deals explicitly with direct taxation (as article 93 does with indirect taxation). Again, the Commission comes up with a proposal, European Parliament and the Economic and Social Committee are consulted, and the Council has to decide by unanimity, resulting in directives. Article 94 deals with "approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market". This wording (directly affect the functioning of the internal market) constitutes a much stricter criterion for EU-intervention than that of article 93 (necessary to ensure the functioning of the internal market). Sometimes direct taxation has a clear impact on the four freedoms and/or the right of establishment for individuals and companies, but in most cases there is no real need for harmonisation or alignment. As far as indirect taxation is concerned: the internal market simply operates most effectively when there is complete harmonisation of national tax legislation.

Thirdly, *article 175(2) TEC* (introduced by the Single European Act) deals with the measures to achieve the environmental objectives of the EU. The Council, acting unanimously on a proposal from the Commission and after consulting Parliament and the Economic and Social Committee, can adopt (amongst other things) provisions of a fiscal nature. Article 175(2) leaves open which type of taxation is involved[13].

Lastly, *article 95 TEC* has been used to deal with administrative matters concerning taxation. Article 95 is similar to article 94 as both articles refer to the approximation of laws et cetera in

[10] Of course there are other articles of the TEC that are relevant to taxation as well like article 90 TEC (which prohibits any tax discrimination which would, directly or indirectly, give an advantage to national products over products from other Member States).

[11] Article 96 has never been applied. See Meussen (2002: 158) about the possible usefulness of this article to fight harmful tax competition.

[12] This is the mandatory consultation, in some cases the Committee of the Regions may also be consulted, on an optional basis.

[13] See Borgsmidt (1999) for a more extensive review of ecotaxes in the framework of EU law.

general. Article 94 deals with directives (and follows the consultation procedure, and requires unanimity in the Council), article 95 deals with "provisions" which can be directives, regulations as well as decisions. Article 95 follows the co-decision procedure, in which Council and Parliament participate as co-legislators, on an equal footing[14], and Council has to decide by qualified majority. Paragraph 2 of article 95 explicitly rules out fiscal provisions (they have to be dealt with by article 93 or article 94) but in practice some administrative matters regarding taxation have been dealt with using this article.

4. The actual use of the various procedures, 1976-2003

Table 4 shows the legislative output in the tax field, since 1976. The bulk of the output is made up of Council Directives and Council Decisions. It also becomes clear that with Council Directives, the withdrawal of its proposals by the Commission is quite common. About a quarter of such proposals has to be withdrawn. In the case of Council Decisions on the other hand, withdrawal is exceptional.

Table 4 Legislative output based on Commission proposals (n=291), in the field of taxation, 1976-2003[15]

Type of intended output	*State of affairs*					
	In force	*In progress*	*Withdrawn*	*Partly in force, partly withdrawn*	*Not clear*	*Total*
Council Directives	68	18	33	2	-	121
Council Regulations	10	-	4	-	-	14
Council Resolutions	-	-	1	-	-	1
Council Decisions	137	2	3	-	4	146
EP and Council Directives	1	1	1	-	-	3
EP and Council Regulations	2	2	-	-	-	4
EP and Council Decisions	2	-	-	-	-	2
All	220	23	42	2	4	291

In table 5 the different procedures are listed, as well as the legal basis of the legislation in primary or secondary law. The table holds no big surprises. It is clear that article 93 TEC is the most relevant one as far as primary law is concerned, often in combination with other TEC articles. Table 4 does not explicitly list article 175 (2) TEC on environmental taxation: up till now that article has not been used.

[14] With mandatory consultation of the Economic and Social Committee.
[15] Excluding Commission decisions.

In all cases where secondary law provides the legal basis, we are dealing with Council Decisions (based on Directives) that do not involve European Parliament.

Table 5 Legal basis and procedure, Commission proposals for EU tax legislation (n=291), 1976-2003

Procedure	*TEC Art. 93 (99 old)*	*TEC Art. 94 (100 old)*	*TEC Art.95 (100 A-D old)*	*TEC Mix of arts. 93-95 and/or other TEC articles*	*Secon-dary law*	*Not clear*	*Total*
Not clear	1	-	1	-	-	1	3
None	-	-	-	4	139	2	145
Consultation	63	15	-	38	6	9	131
Codecision	-	-	7	3	-	-	10
Cooperation	-	-	1	1	-	-	2
All	64	15	9	46	145	12	291

Table 6 shows how the legislative output relates to the type of taxation involved. Table 7 does the same thing for the different legal procedures.

Table 6 Legislative output, by type of taxation, based on Commission proposals (n=291)

Output	*Indirect taxes*		*Direct taxes*		*General*		*Total*
Council Directives	VAT and/or excises Tobacco Fuel Alcohol Vehicle Carbon/energy	71 16 4 4 2 2	Company tax Capital tax Savings income Income tax Interest Securities Direct taxes, general	11 2 2 1 1 1 2		2	121
Council Regulations	VAT and/or excises Fuel	5 1	Community tax	8		-	14
Council Resolutions		-		-		1	1
Council Decisions	VAT and/or excises Fuel Alcohol	92 50 3				1	146
EP and Council Directives	VAT and/or excises	2		-		1	3
EP and Council Regulations	VAT and/or excises	3		-		1	4
EP and Council Decisions	VAT and/or excises	2		-		-	2
All		257		28		6	291

Table 7 Legislative procedures, by type of taxation, based on Commission proposals (n=291)

Procedure	*Indirect taxes*		*Direct taxes*		*General*		*Total*
Not clear	VAT and/or excises	2	Company tax	1		-	3
None	VAT and/or excises Fuel	90 49	Community tax	4		2	145
Consultation	VAT and/or excises Tobacco Fuel Alcohol Vehicle Carbon/energy	74 16 6 7 2 2	Company tax Capital tax Savings income Income tax Interest Securities Direct taxes, general Community tax	10 2 2 1 1 1 2 4		1	131
Codecision	VAT and/or excises	7				3	10
Cooperation	VAT and/or excises	2					2
All		257		28		6	291

It is clear that EU legislation on taxation is indeed a matter of indirect taxes, supplemented with some legislation on company taxation. As far as the legislative procedure is concerned: roughly it is either a matter of consulting Parliament, or passing over Parliament. There are a few legal acts that have been adopted using the co-decision procedure, which are all on VAT and/or excise administrative matters (like the establishment of the Fiscalis programme, which intents to improve the operation of the indirect tax systems in the internal market, including communication and information exchange systems, and multilateral controls).

How successful has the Commission been in its efforts to get legislation adopted? In the previous sections we referred to Commission documents in which the lack of political will of member states to legislate on taxation was criticised, as well as the length of the procedures involved.

Table 8 shows what has happened with Commission proposals. First, it follows from that table that there is an increasing legislative activity on the part of the Commission in the field of taxation. Furthermore, up till 2000 the adoption rate (number of proposals eventually adopted/number of proposals) has steadily increased. By and large, the Commission has increased its (effective) productivity in this field.

Table 8 Commission legislative proposals ,legislation adopted by Council, by period (1976-2003)

Period	*Number of proposals*	*In force (adoption rate)*	*In progress*	*Withdrawn*	*Partly withdrawn, partly in force*	*Not clear*
≤ 1976-1980	30	19 (0.63)	1	10	-	-
1981-1985	35	19 (0.54)	1	13	2	-
1986-1990	36	25 (0.69)	-	11	-	-
1991-1995	62	53 (0.85)	2	6	-	1
1996-2000	88	76 (0.86)	7	2	-	3
2000-2003	40	27 (0.68)	13	-	-	-
Total	291	219 (0.75)	24	42	2	4

How about the lengthy procedures? Actually, the problem seems to have diminished considerably. In the early days of European integration it would take on average more than three years to get tax legislation adopted. Nowadays, it takes about half a year. Of course, it could well be that the Commission (which has agenda-setting power in EU legislation) has limited itself more and more to the painless issues, and has steered well away from everlasting procedures.

Table 9 Length of decision-making procedure, legislation adopted by Council, by period (1976-2003)

Period	*Adopted proposals*	*Difference between date of proposal and date of adoption (in days)*
≤ 1976-1980	19	1221
1981-1985	19	636
1986-1990	25	457
1991-1995	53	192
1996-2000	76	198
2000-2003	27	171
Total	219	All procedures: 349 days Codecision /QMV: 565 days (n=5) Consultation/unanimity: 674 days (n=81)

The average length of the legislative procedures of 349 days does of course involve both legislation for Council decisions (which are fairly simple and short), as well as the more intensive procedures (consultation and codecision) for Council directives.

Of the 291 procedures that have been analysed, ten followed the codecision procedure of article 95 TEC, in which Council can decide by QMV. Five of these ten procedures have resulted in adoption by the Council (one proposal was withdrawn, four procedures are still in progress). The average length of these five finished procedures was 565 days. For finished legislation under the consultation procedure with unanimity as the voting rule in Council, the

average length is 674 days (n=81 procedures). That means that QMV does speed up the decision-making process, in particular when we take into account that the more intensive involvement of Parliament in the codecision procedure as such, compared to its involvement in the consultation procedure, is bound to lengthen the process.

In the next two sections we will have a closer look at the issue of QMV in EU tax legislation.

5. Previously on the same show ……the IGC of 2002 and the Treaty of Nice

In the run up to the 2000 IGC the Commission came up with a communication on the issue of QMV in the taxation and social security fields (European Commission, 2000). The Commission concluded that (in the tax field) QMV should be introduced for:

- adoption of coordinating provisions intended to remove a direct obstacle to the exercise of the four freedoms, and in particular to prevent discrimination and double taxation;
- measures which modernise and simplify existing Community rules in the indirect tax area in order to eliminate distortions of competition;
- measures which ensure a uniform application of existing indirect taxation rules and guarantee the simple and transparent application of such rules[16];
- taxation measures which have as their principal objective the protection of the environment and have a direct and significant effect on the environment;
- adoption of provisions directly governing the levying of tax and aimed at preventing fraud, evasion or tax avoidance in order to eliminate cases of double non-taxation in cross-border situations and to prevent circumvention of existing provisions, particularly in the VAT field.

According to the Commission, the use of QMV in these areas should be accompanied by the use of the codecision procedure. Furthermore the Commission proposed to include in article 93 TEC (consultation procedure, unanimity) both indirect and direct taxation, so as to give an explicit legal basis to direct tax legislation.

All the IGC delegations, even the most ambitious, wanted unanimity to remain the rule in matters of taxation. At the same time the vast majority of the members was in favour of the use of QMV in taxation matters concerning cross-border issues: situations where separate tax systems are a barrier to the free movement of persons, goods, businesses and services (double

[16] The idea here is to describe in more detail which question this covers in a protocol annexed to the Treaty (see http://europa.eu.int/comm/igc2000/geninfo/fact-sheets/fact-sheet2/index_en.htm (8-12-2000).

taxation, VAT, cross-border fraud, eco-taxes). There was consensus that in no case could tax rates be harmonised by QMV.

Compared to the consensus at the IGC that some change should take place, the outcome of Nice was disappointing, as the Nice Treaty does not make any change to the TEC in the field of taxation. Not surprisingly, in the years after 2000, the issue remained subject of discussion. The Commission, in its 2001 communication on the priorities for tax policy in the EU, repeated its preference for the introduction of QMV in selected tax matters (European Commission, 2001: 21).

The parliamentary Della Vedova Report (in reaction to Commission communications on tax policy of 2001[17]), which resulted in Parliament's resolution on general tax policy of March 2002, argued that the subsidiarity principle should guide EU taxation policy, that decisions on levels of tax should remain within the exclusive competence of the member States, and that the principle of unanimity should be retained whenever tax bases or rates of taxation are at issue. The report however supported a limited extension of qualified majority voting in Council for decisions concerning mutual assistance and co-operation between tax authorities. In any case, Parliament should be given co-decision powers in the taxation area (European Parliament, 2003: 15/16). According to Parliament (European Parliament, 2003: 11) the Treaty should be changed to allow the use of weighted majority voting in certain areas of taxation (for example on mutual assistance between tax authorities) and/or greater use should be made of "enhanced co-operation" which allows a subgroup of Member States to proceed with a policy opposed by a blocking minority.

There is a considerable difference between the positions of the Commission and Parliament. Both agree on the use of QMV in administrative matters (in line with the practice of using article 95 TEC, see the previous sections), but the Commission explicitly comes up with a number of matters concerning the content of taxation (like environmental taxation, modernisation of indirect taxation), which it thinks should also be dealt with by QMV. As we will see such a dividing line also runs through the European Convention.

[17] On future priorities in general tax policy (COM 2001(260)) and on a consolidated corporate tax base (COM 2001(582)).

6. Taxation and the European Convention

The Nice and Laeken Declarations on the future of the Union have asked the European Convention to look into the question of establishing a more precise delimitation of competence between the European Union and the Member States and of checking compliance with that delimitation. Furthermore, the Convention was supposed to deal with reform of the legislative procedures. The high number of these procedures, the fact that sometimes different procedures are applied in areas which are closely related (or appear in the same provision of the Treaty), their complexity, and the need to maintain and/or improve their efficiency in an enlarged Europe, are all arguments for an effort to rationalise and simplify legislative procedures[18].

The Working Group on Economic Governance dealt with monetary policy, economic policy and institutional issues. By and large it argued in favour of maintaining the current structure whereby exclusive competence for monetary policy lies with the Union (exercised by the ECB) and competence for economic policy lies with the Member States[19]. However, it felt that there is a need for improved coordination between the economic policies of the Member States.

As far as taxation is concerned, the Working Group argued in favour of maintaining the competences of the Union as set out in Articles 93, 94 and 175 TEC, as it was divided on change. A majority of the Working Group recommended changes in order to facilitate progress in the area of fiscal policy, in terms of sufficient approximation of rates, minimum standards and tax bases in the areas of indirect and company taxation, all to ensure that the proper functioning of the single market is not affected by harmful tax competition or serious trade distortion. The objective of these changes should not be the establishment of unified taxes, nor should it concern the areas of personal and property taxation. According to this majority the Constitution should[20]:

[18] See *Legislative procedures (including the budgetary procedure) – current situation* (Praesidium Convention, Brussels, 24 July 2002, COVNV 216/02, point 10).
[19] See *Final report of Working Group VI on Economic Governance* (Brussels, 21 October 2002, CONV 357/02, p. 2).
[20] Idem, p. 6/7.

1. provide for an exhaustive list of specific types of measure where QMV should apply[21], for practical and logical reasons linked to the proper functioning of the internal market, and in areas affecting directly the fundamental freedoms, or where such measures might be essential for sustainable development[22];
2. indicate explicitly that these specific measures adopted by QMV cannot (directly or indirectly) affect the substance of other areas of tax policy, in particular personal and property taxation.

Some Working Group members stated that they were not able to accept any move towards QMV and preferred to maintain unanimity in all decisions on taxation. During the plenary debate of the European Convention on the Final report of Working Group VI this discord was dutifully reported by Working Group Chairman Hänsch but not further discussed. The area of taxation was "a particularly sensitive one"[23].

Following up on the preliminary draft of a new EU Treaty by the Convention Praesidium of October 2002, the working party of legal experts started working on the idea of a single constitutional treaty replacing the Treaty establishing the European Community and the Treaty on European Union. It proposed to leave articles 90 to 93 TEC unchanged, as well as articles 96 and 97 TEC. Changes were proposed to articles 94 and 95 TEC. The Draft Constitution of May 2003 introduced the possibility of QMV for measures relating to administrative cooperation or to combating tax fraud, in the field of indirect taxation and in the field of company taxation (see annex). According to the Convention Praesidium, the objective of the changes has been to respond to calls from the Working Group on Economic Governance for a move to QMV on tax issues, whilst recognising the sensitivity of this issue as expressed by a number of Convention members both in and out the Working Group[24]. The modification defines these areas where QMV should be applied, and introduces a mechanism by which the Council can only decide on a proposed measure if it has previously confirmed, by unanimity, that it does fall within the scope of those areas to which QMV applies.

[21] Under the co-decision procedure.
[22] The exhaustive list can thus be thought to be concerned with indirect taxation (including 'green taxes') and company taxation.
[23] *Summary report of the plenary session of 7 and 8 November 2002* (Brussels, 13 November 2002, CONV 4000/02, p. 3.)
[24] See *Drafts sections of Part Three with Comments* (Praesidium Convention, Brussels, 27 May 2003, CONV 727/03)

Going by articles III-62 and III-63 (see annex) QMV is possible when the following conditions are (cumulatively) met:

a) measures in the field of indirect taxation or company taxation;
b) which are necessary to ensure the functioning of the internal market and to avoid distortions of competition;
c) which relate to administrative cooperation or to combating tax fraud and tax evasion;
d) the latter to be decided upon unanimously by Council, on a proposal from the Commission.

Both article III-62 and III-63 state that the consultation procedure is to be used, in all cases (i.e. also when QMV is used as the decision rule in Council).

7. Conclusion

If we compare the Draft Constitution's provisions with the current legislative framework, the following differences stand out:

- tax legislation on company taxation is given an explicit legal basis, which is however limited to cases where all previously mentioned conditions are met. There is still no explicit basis in the Treaty for EU tax legislation on direct taxation in general;
- Parliament is sidelined, as it is currently involved as a co-legislator in article 95 TEC-procedures, and the Convention has opted for consultation in all tax matters;
- the current application of article 95 TEC does not require prior unanimity of the Council.

It can then be argued, as was done by several Convention members[25], that in some respects the Convention outcomes are a retrograde step compared with existing provisions. Others have argued that the proposed changes leave the door wide open to the use of QMV on issues of tax bases and tax rates, as tax administration cannot be isolated from wider tax policy. Allowing for QMV in an apparently limited area could affect the right of member states to control much of their own tax policy[26]. The glass is either half full or half empty!

-0-0-0-0-0-

[25] See *Summary Report of the plenary session, Brussels 30 and 31 May 2003* (Brussels, 16 June 2003, CONV 783/03), and the letter by members Amato, Brok and Duff (Brussels, 22 July 2003, CONV 829/03).

References

Borgsmidt, K., "Ecotaxes in the Framework of Community Law", in: *European Environmental Law Review*, 8 (1999), p. 270-280.

Borgsmidt, K., "European Tax Policy and Characteristics of EU Secondary Tax Law", in: *European Business Law Review*, 14 (2003), p. 161-181.

Cosma, H.A. and R. Whish, "Soft Law in the Field of EU Competition Policy", in: *EBLR*, 2003, p. 25-55.

European Commission, *Supplementary contribution of the Commission to the Intergovernmental Conference on institutional reforms – Qualified majority voting for Single Market aspects in the taxation and social security fields*, Brussels, 14/3/2000, COM (2000) 114 final.

European Commission, *Tax policy in the European Union – Priorities for the years ahead*, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Brussels, 23/5/2001, COM (2001) 260 final.

European Parliament, *Taxation in Europe: recent developments*, Working Paper Directorate-General for Research, Economic Affairs Series, ECON 131 EN, 2003.

Groenendijk, N.S., "Tax co-ordination and the enlargement of the European Union", in: *Journal for Institutional Innovation, Development and Transition*, 3 (1999), p. 55-73.

Meussen, G., "The EU-fight against harmful tax competition; future developments", in: *EC Tax Review*, 2002/3, p. 157-159.

-0-0-0-0-0-

[26] See the contribution by member Hain c.s. (Brussels, 3 June 2003, CONV 782/03).

Annex: relevant articles from the Draft Treaty establishing a Constitution for Europe (European Convention, 18 July 2003)

Article III-59 (article 90 TEC, unchanged) No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.
Article III-60 (article 91 TEC, rephrased) Where products are exported by a Member State to the territory of another Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.
Article III-61 (article 92 TEC, rephrased) In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the provisions contemplated have been previously approved for a limited period by a European decision adopted by the Council of Ministers on a proposal from the Commission.
Article III-62 (article 93 TEC, changed) 1. A European law or framework law of the Council of Ministers shall lay down measures for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation provided that such harmonisation is necessary for the functioning of the internal market and to avoid distortion of competition. The Council of Ministers shall act unanimously after consulting the European Parliament and the Economic and Social Committee. 2. Where the Council of Ministers, acting unanimously on a proposal from the Commission, finds that the measures referred to in paragraph 1 relate to administrative cooperation or to combating tax fraud and tax evasion, it shall act, notwithstanding paragraph 1, by a qualified majority when adopting the European law or framework law adopting these measures.
Article III-63 (new) Where the Council of Ministers, acting unanimously on a proposal from the Commission, finds that measures on company taxation relate to administrative cooperation or combating tax fraud and tax evasion, it shall adopt, by a qualified majority, a European law or framework law laying down these measures, provided that they are necessary for the functioning of the internal market and to avoid distortion of competition. That law or framework law shall be adopted after consultation of the European Parliament and the Economic and Social Committee.
Article III-64 (article 94 TEC, changed) Without prejudice to Article III-65, a European framework law of the Council of Ministers shall establish measures for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. The Council of Ministers shall act unanimously after consulting the European Parliament and the Economic and Social Committee.
Article III-65 (article 95 TEC, changed) 1. Save where otherwise provided in the Constitution, this Article shall apply for the achievement of the objectives set out in Article III-14. European laws or framework laws shall establish measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Such laws shall be adopted after consultation of the Economic and Social Committee. 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons or to those relating to the rights and interests of employed persons. 3. The Commission, in its proposals submitted under paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council of Ministers will also seek to achieve this objective. 4. If, after the adoption of a harmonisation measure by means of a European law, framework law or regulation of the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article III-43, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well

as the grounds for maintaining them.
5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by means of a European law, framework law or regulation of the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions and the reasons for them.
6. The Commission shall, within six months of the notifications referred to in paragraphs 4 and 5, adopt a European decision approving or rejecting the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.
In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.
When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.
7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.
8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures.
9. By way of derogation from the procedure laid down in Articles III-265 and III-266, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.
10. The harmonisation measures referred to in this Article shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article III-43, provisional steps subject to a Union control procedure.