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COVER NOTE

from: The Clerk of the UK House of Commons
date of receipt: 12 May 2011
to: The President of the Council of the European Union

Subject: Proposal for a Council Directive on a Common Consolidated Corporate Tax
Base (CCCTB)
[doc. 7263/11 FISC 23 - COM(2011) 121 final]
- *Opinion¹ on the application of the Principles of Subsidiarity and
Proportionality*

Delegations will find attached the abovementioned opinion.

Encl.

¹ This opinion is available in English on the interparliamentary EU information exchange site (IPEX) at the following address: <http://www.ipex.eu/ipex/cms/home/Documents/pid/10>

Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

Draft Directive on a common consolidated corporate tax base (7263/11)

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(2) TEU:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

2. The EU institutions must ensure “constant respect”¹ for the principle of subsidiarity as laid down in Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.²

4. By virtue of Article 5 of Protocol (No 2), any draft legislative act should contain a “detailed statement” making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

— some assessment of the proposal’s financial impact;

¹ Article 1 of Protocol (No 2).

² Article 2 of Protocol (No 2).

- in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and
- qualitative and, wherever possible, quantitative substantiation of the reasons for concluding that an EU objective can be better achieved at EU level.

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(2) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity:

“For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

“The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of

competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;

- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.”³

Proposal

7. The proposed Directive seeks to introduce a Common Consolidated Corporate Tax Base (CCCTB). A CCCTB would introduce a single set of harmonised rules for calculating the tax base for taxable profits of companies resident in EU Member States, and allow groups of companies to calculate their total EU-wide consolidated profit for tax purposes.

8. This profit would then be allocated to companies making up the group on the basis of an apportionment formula composed of sales, payroll, number of employees and assets in each Member State. Member States would then tax the profit apportioned to companies in their Member State.

9. Allocating profit on this basis would be a significant change from the *status quo* — the current arrangements are for separate accounting in each Member State to determine location of income and thus tax due. The proposal would redistribute the tax base between Member States, but they would continue to set their own corporate tax rates.

10. If adopted, the Directive would have to be transposed into national law. Member States would be required to manage two distinct tax systems, their existing national system, which is covered by existing legislation, and a CCCTB. According to the UK Government, this would not require an adjustment to existing legislation in the UK, but would increase costs: new costs associated with the need for coordination with other administrations; and one-off costs such as the need for employee training and upgrading of IT systems.

Impact assessment

11. The Commission's proposal is accompanied by an explanatory memorandum, a summary of the impact assessment, and by the impact assessment itself. The impact

³ Article 5.

assessment follows the Guidelines of Secretariat General for Impact Assessments and accordingly provides: “(i) a review of the consultation process; (ii) a description of the existing problems; (iii) a statement of the objectives of the policy; and (iv) a comparison of alternative policy options which could attain the stated objectives”.⁴ It also includes the results of five studies undertaken for the Commission. The four alternative policy options are — the proposed optional CCCTB, a compulsory CCCTB, an optional Common Corporate Tax Base (that is with separate accounting remaining in place, rather than consolidating tax results) and a compulsory Common Corporate Tax Base.

12. The impact assessment of the Commission’s preferred option suggests that if the UK participated along with all 26 other Member States, the UK’s share of the EU wide corporate tax base would increase from 20.3% to 20.5%.

13. At EU level the impact assessment shows a negative impact on investment (-0.74% to -0.87%), employment (0% to -0.01%), and GDP (-0.15% to -0.17%), with only a marginal gain in welfare (+0.02%).

14. For the UK it shows a shows a negative impact on investment (-0.77% to -0.93%), employment (-0.03% to -0.04%), and GDP (-0.02% to -0.05%) for the UK, with only a marginal gain in welfare (0 to +0.02%).

15. The Commission concedes it is difficult to predict the proposal’s exact impact on the tax revenues of individual Member States. The proposal would effectively redistribute the EU corporate tax base amongst Member States, based on allocation factors. The explanatory memorandum states that:

“[i]n fact, the impact on the revenues of Member States will ultimately depend on national policy choices with regard to possible adaptations of the mix of different tax instruments or applied tax rates. In this respect it is difficult to predict the exact impacts on each of the Member States. In this context, as an exception to the general principle, where the outcome of the apportionment of the tax base between Member

⁴ Explanatory memorandum, page 7.

States does not fairly represent the extent of business activity, a safeguard clause provides for an alternative method.”⁵

The view of the UK Government

16. The UK Government believes there are significant shortcomings in the Commission’s estimates of the impact of the proposal on the UK and in the impact assessment as a whole. It does not accept the assumption that a CCCTB is necessary to address the broader objectives of the proposal or that 27 different national corporate tax systems inherently impede the proper functioning of the internal market. It is not convinced that a CCCTB is necessary to improve the simplicity and efficiency of corporate tax systems in the EU. It considers that the fiscal impediments to cross-border activity that the proposal claims to tackle — compliance costs, double taxation, and over-taxation — can be addressed through other routes, such as informal coordination or bilateral solutions. It remains to be convinced, therefore, that the Commission has provided a sufficiently strong justification that action at EU level is required and that the proposal is compliant with the requirements of subsidiarity and proportionality; when negotiations begin the Government will be pressing the Commission for any further analysis it is able to provide on compliance with subsidiarity and proportionality.

Aspects of the Directive which do not comply with the principle of subsidiarity

17. The House of Commons considers that the draft Directive on a common consolidated corporate tax base does not comply with either the procedural obligations imposed on the Commission by Protocol (No 2) or the principle of subsidiarity in the following respects.

i) Failure to comply with procedural obligations

18. Section 2.4 of the impact assessment (on subsidiarity and proportionality) does not contain a “detailed statement” to make it possible to appraise compliance with the principle of subsidiarity (and proportionality), as required by Article 5 of Protocol No 2. The summary of the impact assessment states that the impact assessment followed the Guidelines of Secretariat General for Impact Assessments, which do not appear to include a provision for a detailed statement in accordance with Article 5 of Protocol (No 2) (see

⁵ Page 6.

paragraph 11 above). Section 2.4 falls a long way short of the level of detail required to substantiate action at EU level, and also includes irrelevant considerations of legal base and compliance with the EU Charter on Fundamental Rights:

“2.4. Subsidiarity and proportionality

“The right for the Community [*sic*] to act in the field of direct taxation is set out in article 115 of TFEU, which provides that ‘[t]he Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment and functioning of the common market’. Moreover, the envisaged policy options are compatible with the EU Charter of Fundamental Rights.

“As pointed out in the previous sections, the current framework with 27 different national corporate tax systems impedes the proper functioning of the Internal market. Member States cannot provide a comprehensive solution to this problem. Non-coordinated action, planned and implemented by each Member State individually, would replicate the current situation, as taxpayers would still need to deal with as many tax administrations as the number of jurisdictions in which they are liable to tax. Community action is necessary in view of establishing a juridical framework with common rules. The Commission has taken initiative having in mind that, under the principle of subsidiarity, Member States are free to determine the size and the composition of their tax revenues.

“The measures to be taken under the present initiative are both suitable and necessary for achieving the desired end (i.e. proportionate). The comprehensive proposals examined in this document do not imply a harmonisation of corporate tax rates in the EU and, therefore, they do not restrict Member States’ capability to influence their desired amount of corporate tax revenues. They do not interfere with national choices in terms of the size of public sector’s intervention and composition of tax revenues. They propose a more efficient way to collectively manage the problems arising from the segmentation of national corporate tax systems in view of

a more efficient Internal market. In line with the general understanding of the subsidiarity principle, they offer solutions allowing managing collectively the market failures resulting from the separate working of 27 national tax systems”.⁶

19. The presumption in Article 5 TEU is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but be justified with sufficient detail and clarity that an EU citizen can understand the qualitative and quantitative reasons leading to a conclusion that EU action rather than national action is justified. In its impact assessment the Commission has failed to discharge the obligations placed on it to present a *detailed* statement on subsidiarity by Article 5 of Protocol (No 2).

ii) Failure to comply with principle of subsidiarity

20. The first recital of the proposal sets out the legislative objective:

“(1) Companies which seek to do business across frontiers within the Union encounter serious obstacles and market distortions owing to the existence of 27 diverse corporate tax systems. These obstacles and distortions impede the proper functioning of the internal market. They create disincentives for investment in the Union and run counter to the priorities set in the Communication adopted by the Commission on 3 March 2010 entitled Europe 2020 – A strategy for smart, sustainable and inclusive growth. They also conflict with the requirements of a highly competitive social market economy.”⁷

21. Compliance of this objective with subsidiarity is appraised in the light of the guidance set out in paragraph 6 above.

22. There is an assumption, rather than clear evidence in the form of qualitative and quantitative indicators, in the impact assessment that the issue under consideration has transnational aspects *which cannot be satisfactorily regulated by action by Member States*, for example through informal coordination as suggested by the UK Government.

⁶ Pages 15-16.

⁷ P.11 of the proposal.

23. Similarly, there is an assumption, rather than clear evidence in the form of qualitative and quantitative indicators, in the impact assessment that action by Member States alone or lack of EU action would conflict with the requirements of the EU Treaties, in this instance the internal market. Whilst it is clear that different corporate tax regimes place additional burdens on companies operating in more than one EU Member State, and that a unified corporate tax base would attenuate these burdens, this is not the same as the contention made by the Commission that such burdens amount to an *impediment* to the functioning of the internal market:

“the tax barriers faced by EU firms when they expand across national borders can be defined as cost-increasing barriers resulting in market-entry restrictions. The removal of such barriers is akin to a liberalisation policy to be analysed within the framework of the freedom of establishment in the Internal market.”⁸

There is insufficient evidence in the impact assessment to justify this proposal on the grounds of it being “akin to a liberalisation policy to be analysed within the framework of the freedom of establishment in the internal market.”

24. There is insufficient evidence in form of qualitative and quantitative indicators in the impact assessment that action at EU level would produce *clear benefits* by reason of its scale or effects compared with action at the level of the Member States. Although the reduction in tax compliance costs is estimated to be in the range of 7%, the impact assessment shows a negative impact on investment, employment and GDP at the EU level, with only a marginal gain in welfare. The benefits for Member States are equally questionable: a safeguard clause is deemed necessary to allow for an alternative method of apportionment where the redistribution of the tax base between Member States is considered unfair on a Member State.

25. For these reasons the House of Commons concludes that this proposal does not respect the principle of subsidiarity.

⁸ Section 2.3 of the impact assessment “Summary of the problems and the baseline scenario”, page 14.