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COVER NOTE

From:	The House of Representatives of Malta
date of receipt:	15 February 2024
To:	Council of the European Union
Subject:	Proposal for a COUNCIL DIRECTIVE on Business in Europe: Framework for Income Taxation (BEFIT)- [COM(2023) 532 - Council ST 12965/23 - 2023/0321 (CNS)] - Reasoned opinion on the application of the Principles of Subsidiarity and Proportionality[1]

Delegations will find attached the above-mentioned document followed by a courtesy English translation.

[1] The translation(s) of the opinion may be available on the Interparliamentary EU Information Exchange website (IPEX) at the following address: https://secure.ipex.eu/IPEXL-WEB/document/COM-2023-0532

REASONED OPINION
OF THE
HOUSE OF REPRESENTATIVES OF MALTA

Proposal for a COUNCIL DIRECTIVE on Business in Europe: Framework for Income Taxation (BEFIT)

COM (2023) 532

The principle of subsidiarity is referred to in Article 5(3) of the Treaty on the European Union (TEU), whereby:

> *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.*

Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality to the Treaty on the Functioning of the European Union (TFEU) provide that any national Parliament or any chamber of a national Parliament may send to the President of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft proposal in question does not comply with the principle of subsidiarity.

In evaluating compliance with such principle, Article 5 of Protocol (No 2) provides that:

> *Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.*

Recalling also its Reasoned Opinions on the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM (2011) 121) of 17 May 2011, as well as the relaunched initiative on 26 December 2016 (COM (2016) (683)), the House of Representatives of Malta notes that the Proposal for a Council Directive on a Business in Europe: Framework for Income Taxation (BEFIT) (COM (2023) 532) raises similar concerns on the principle of subsidiarity which are the subject of this opinion.

Having regard to the Treaty provisions highlighted above, the House of Representatives is of the opinion that the BEFIT proposal does not comply with the principle of subsidiarity, reasons for which are set out below:

1. It is questionable whether the European Commission has adequately met the procedural requirements (in Protocol 2, Article 5) to provide a detailed statement with sufficient quantitative and qualitative indicators to allow national parliaments to fully assess all the implications of this proposal. The Explanatory Memorandum section accompanying the Commission proposal as well as Section 3 of the accompanying Staff Working Document dealing with these principles are rather declarative in nature and are hardly substantiated to the required set standard.

2. It is pertinent to recall that the Treaties do not provide for explicit provisions governing the harmonisation of direct tax legislation; the TFEU only provides for a generic provision dealing with the approximation of laws (Article 115), and only when there is a clear internal market justification; *"...as directly affect the establishment or functioning of the internal market."* In this respect, it should be recalled that a mere finding of disparities between national laws is not sufficient to justify recourse to the Treaty provisions on approximation of laws. The proposal and the accompanying documents thereto do not explain concretely where such differences between national rules exist thus obstructing the fundamental freedoms and have a direct effect on the functioning of the internal market or to cause appreciable distortions of competition.[1] There again, any appraisal on these grounds is hardly possible with the justifications put forward by the proposal.

3. Considering the ambit within which this proposal is put forward (the area of direct taxation, wherein the above considerations are warranted for Union action) one would have expected a more conscientious approach, considering the profound implications that such single corporate rulebook could have on peripheral island Member States like Malta. There is considerable uncertainty regarding the proposed initiative's financial and economic consequences for Malta,[2] particularly given the possible future formulaic approach to allocate profits. Noting, as per the Explanatory Memorandum that *"a common approach for all Member States would have the highest chances of achieving the intended objectives"* without considering whether such aims cannot (really) be sufficiently achieved through action undertaken by each Member State while acting on its own, would devoid such subsidiarity check from its intended purpose in such area of shared competence.

4. The purported simplifications brought about by the overlay of BEFIT rules are doubtful. Concerns also arise for smaller tax administrations being required to handle an additional set of rules (with their own administrative and operational requirements) in addition to national tax rules which will remain in place. Furthermore, Multinational Enterprises

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1 See Cases C-376/98, *Germany v Parliament and Council*, paragraph 106; C- 300/89, *Titanium dioxide*, EU:C:1991:244, paragraph 23.

2 The information made available (for example within the accompanying Impact Assessment) does not allow such country assessment. This is also acknowledged in different parts of the Impact Assessment, eg Sec 6.3.4 notes: *"The impact may nevertheless affect Member States differently. This means that in the shorter term, some Member States may have significant benefits, while for other Member States there may not be a direct gain. It is difficult to estimate the effects accurately, given uncertainties and limited data availability."*

(MNEs) will equally remain subject to traditional transfer pricing (TP) rules outside the EU, establishing different systems that heightens complexity and compliance costs for MNEs in scope and tax authorities alike.

5. Since the original CCCTB initiative in 2011, action to address unwarranted or unintended opportunities of tax avoidance and base erosion and profit shifting within the internal market has been materially stepped up through the Directives laying down rules against tax avoidance practices that directly affect the functioning of the internal market (so-called 'anti-tax avoidance directive' (ATAD I and II)) as well as successive initiatives in the field of administrative cooperation (so-called 'administrative cooperation in the field of taxation' (DACs)). The Multinational Groups to which the mandatory scope of the BEFIT initiative is intended to apply overlaps with the scope of the so-called Pillar 2 Directive. The inadequacy of such instruments has hardly been demonstrated, particularly considering that the Pillar 2 directive is only now taking effect from 1 January 2024.

David Agius M.P.
Deputy Speaker

16th **February 2024**

KAMRA TAD-DEPUTATI HOUSE OF REPRESENTATIVES
PARLAMENT TA' MALTA

16 ta' FRAR 2024

PRESIDENT TAL-PARLAMENT EWROPEW
PRESIDENT TAL-KUNSILL TAL-UNJONI EWROPEA
PRESIDENT TAL-KUMMISSJONI EWROPEA

OPINJONI MOTIVATA: PROPOSTA GĦAD-DIRETTIVA TAL-KUNSILL DWAR IN-NEGOZJU FL-EWROPA: QAFAS GĦAT-TASSAZZJONI TAL-INTROJTU (BEFIT) (COM (2023) 532)

IL-PARLAMENT TA' MALTA EŻAMINA L-'*PROPOSTA GĦAD-DIRETTIVA TAL-KUNSILL DWAR IN-NEGOZJU FL-EWROPA: QAFAS GĦAT-TASSAZZJONI TAL-INTROJTU (BEFIT) (COM (2023) 532*' U KKONKLUDA LI DIN IL-PROPOSTA MA TISSODISFAX IL-PRINĊIPJU TAS-SUSSIDJARJETÀ.

GĦALDAQSTANT, ANNESSA MA' DIN L-ITTRA QED NGĦADDILEK OPINJONI MOTIVATA MILL-PARLAMENT TA' MALTA, SKONT ID-DISPOŻIZZJONIJIET TA' PROTOKOLL NRU 2 TAT-TRATTAT TA' LISBONA.

DEJJEM TIEGĦEK,

DAVID AGIUS
DEPUTAT SPEAKER

Courtesy Translation

16th February 2024

President of the European Parliament
President of the Council of the European Union
President of the European Commission

REASONED OPINION: *PROPOSAL FOR A COUNCIL DIRECTIVE ON BUSINESS IN EUROPE: FRAMEWORK FOR INCOME TAXATION (BEFIT) (COM (2023) 532)*

The House of Representatives of Malta examined the '*Proposal for a COUNCIL DIRECTIVE on Business in Europe: Framework for Income Taxation (BEFIT) (COM (2023) 532)*' and concluded that the above proposal does not satisfy the principle of subsidiarity.

Therefore, attached to this letter please find a reasoned opinion of the Parliament of Malta as provided for in Protocol No. 2 of the Lisbon Treaty.

Yours sincerely,

David Agius
Deputy Speaker