EUROPEAN COMMISSION

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*SGD*

*Dear Speaker,*

*I would like to thank you for the reasoned opinion of the Kamra tad-Deputati on the Commission proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB) {COM(2011) 121}, in which you raise concerns in relation to the compliance of the proposal with the principles of subsidiarity and proportionality.*

*In responding to the Opinion, I will begin with some general remarks on the political context of this proposal and its compliance with the principles of subsidiarity and proportionality, before returning to the specific points raised in the Opinion in greater detail.*

*National corporate tax systems operate within a context of globalisation, international tax competition and companies which increasingly look beyond borders for market opportunities. However, the co-existence of 27 highly disparate sets of tax rules in the single market means that companies are faced with significant tax obstacles which may discourage and impede their cross-border activities. This divergence in national tax rules reduces the transparency of tax systems and creates obstacles in the internal market which give rise to significant distortions and compliance costs for businesses.*

*The situation is particularly acute for small and medium sized enterprises (SMEs), which often lack the resources to overcome these inefficiencies and therefore face strong disincentives to expand across borders. Without further action, there is a real risk that this situation will persist, creating unnecessary compliance costs in the single market.*

*In this context, the CCCTB proposal offers Member States the opportunity to consider corporate taxation from a more sustainable and transparent perspective, whilst allowing businesses to enjoy easier access to the single market. The Commission is convinced that only concerted action at the level of the European Union can address the challenges of corporate taxation in a single market in a systematic manner and thereby secure benefits for businesses and national public finances.*

*The Commission has taken great care to ensure that this proposal respects fully the principles of subsidiarity and proportionality. The reasoning is set out in the explanatory memorandum and recitals to the Directive [COM(2011) 121 final], as well as in the accompanying impact assessment report (IAR) [SEC(2011) 315 final].*

*Dr Michael FRENDO*
*Speaker*
*House of Representatives*
*The Palace*
*MT – VALLETTA CMR 2000*

*In the view of the Commission, the objectives which the proposed Directive seeks to achieve could not be attained by Member States acting alone. Given that the aim of the legislation is to tackle fiscal impediments to efficient cross-border operations resulting mainly from the fragmentation created by 27 disparate tax systems, further uncoordinated action by Member States would not address the fundamental problems and would risk perpetuating or exacerbating them.*

*The proposal sets out an option for companies of choosing a single set of rules for computing, consolidating and sharing the tax bases of associated enterprises across the Union. Considering the scale and effects of the proposed action, its objectives, to attenuate the distortions resulting from the current interaction of 27 national tax regimes and create more favourable conditions for cross-border investment in the single market, would be better achieved at Union level.*

*The rules set out in the proposal, such as relief for cross-border losses, tax-free internal group restructurings and the elimination of complex intra-group transfer pricing, address issues that are intrinsically cross-border in nature and could only be resolved within a context of common regulation. National initiatives are unlikely to be as effective at tackling these issues and may create further distortions in the market, notably double taxation or non-taxation. Common rules are also a prerequisite for creating a 'one-stop shop' for companies or groups of companies operating across the EU.*

*According to the IAR, the CCCTB is indeed expected to create more favourable conditions for cross-border investment in the internal market. It is estimated that it would allow substantial tax-related savings connected with the costs of establishing abroad through a medium sized subsidiary. A representative large parent would save around 62% of the estimated costs incurred in the current situation. The savings would reach 67% in the case of a medium-sized parent. Further, companies would be likely to derive considerable benefits from the reduction in compliance time and costs. Current costs are to be reduced by 7%, which is equivalent to up to EUR 0.7 billion across the EU. The possibility to offset losses across national borders within the same group could also lead to annual savings of EUR 1.3 billion for companies in the EU.*

*I would like to emphasise that the proposal is proportionate to what is necessary to achieve the objectives of the Treaties.*

*It does not affect the Member States' sovereignty over the setting of their own corporate tax rates. The CCCTB proposal deals with harmonising the corporate tax base, which is a prerequisite for curbing the identified tax obstacles and rectifying the elements that distort the concept of a single market; it does not entail harmonisation of tax rates.*

*The CCCTB proposal is also designed as an optional system. It does not oblige companies that do not intend to operate across borders to implement the common rules and bear the associated costs. Naturally, national tax authorities will have to meet certain one-off financial and administrative costs for the purpose of switching to the new system. It is also true that administrations may choose to maintain their domestic corporate tax rules alongside the CCCTB, which would add to the current*

*cost of running their tax systems. However, in both cases, it is expected that the mid-term positive impact of the CCCTB will outweigh the additional costs.*

*It is clear that these benefits could not be realised through an approach based on tax coordination alone. While the Commission has consistently promoted the coordination of national tax practices, experience has shown that this approach is slow and the results have hitherto been modest. Moreover, tax coordination typically addresses only specific, targeted issues and is not sufficient to address the wide variety of problems faced by companies in the single market.*

*The Commission is therefore convinced that the proposed CCCTB Directive represents the most proportionate response to the serious problems identified and is fully in line with the principle of subsidiarity.*

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*Turning to the other specific points raised in the Opinion, the Kamra tad-Deputati is of the view that the scope of Article 115 TFEU is not broad enough to act as a legal basis for the CCCTB; and that the achievement of the fundamental benefits of the system (e.g. cross-border loss relief) does not necessitate coordinated action at the EU level.*

*The Kamra tad-Deputati believes that 'the Treaties do not clearly confer power upon the Institutions to adopt, under Article 115, a Directive containing a measure which attempts to establish the proposed CCCTB system for the determination of the corporate tax base,..., in such an extensive manner'. The reasoned opinion also notes that, based on the fact that the Treaty of Lisbon explicitly refers to the principle of conferral, the Commission is now 'duty-bound to prove that every measure proposed under Article 115 falls thereunder'.*

*The Commission agrees that the principle of conferral is a cornerstone of European law and informs the division of competences since the creation of the Communities in the 1950s. Current Article 115 TFEU actually reproduces the wording of Article 94 of the Treaty on the European Community and can be traced in the Treaties as far back as 1957 (it appears as Article 100). I would also like to underline that Article 115 TFEU and its predecessors have so far served as legal bases for all EU Directives in the field of direct taxation. As a matter of fact, corporate tax Directives have thus always addressed problems of a cross-border nature with an impact on the internal market. And the CCCTB proposal for a Directive is no different in this respect.*

*The Kamra tad-Deputati takes the view that the 'approximation' of laws shall mean that 'a common result is achieved by means of the convergence of national laws for that purpose' and that it shall not mean that 'laws are unified or that a single European law or system is created'. It also finds that the CCCTB goes 'beyond the limits of the harmonisation of laws'. However the CCCTB does not seek to bring about full harmonisation of corporate tax laws. It is designed as an optional system and does not touch upon tax rates. What is more, the CCCTB does not eliminate tax competition but makes it more transparent by providing common rules for the tax base.*

*The Kamra tad-Deputati puts forward that the CCCTB will affect tax rates by implication as Member States will be compelled to change them. The Commission is convinced that national budgetary choices are likely to depend on a variety of factors. For instance, the number of companies to opt for the CCCTB may be one of the elements to consider in this regard. 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.*

*Although it is true that the Commission's proposal cannot benefit from a history of interpretation by tax administrations and tribunals, this fact cannot in itself represent an impediment to a new piece of legislation. Legislation evolves to meet the economic and social needs and, in that sense, administrations and courts often have to decide without precedent.*

*The Kamra tad-Deputati fears that, as an optional system, the CCCTB could disadvantage small companies which 'might find it difficult to choose the best system for themselves'. The Commission rather believes that the optionality feature of the CCCTB is significant for small companies in particular. There is indeed no reason why enterprises operating locally and without any intention to expand across the border should be forced to change their tax system.*

*As far as compliance costs and the interaction with tax authorities are concerned, individual companies which apply the system will only be interacting with the tax authorities of their Member State of tax residence as they currently do. When it comes to groups of companies with members in more than one Member State, all group companies will be referring to the same tax authority, which is namely that of the principal taxpayer (EU group parent). The Commission doubts that the introduction of more electronic devices at Member States level would by itself represent an efficient means to attain the overall objective. Most Member States have already introduced electronic services in their tax administrations, which facilitate their taxpayers lives, yet without tackling the issue at stake in the CCCTB proposal.*

*I agree that the CCCTB does not eliminate the need to deal with transfer pricing disputes when it comes to the transactions and dealings between the group and entities outside the group. However, it significantly contributes to reducing the number of cases where taxpayers will have to work out adjustments of pricing according to the 'arm's length' principle. The Directive provides for a mechanism to deal with disputes amongst Member States. This does however not concern transfer prices but primarily other issues which may emerge in the context of a cross-border consolidated group.*

*The Kamra tad-Deputati is convinced that action at EU level is not required in the field of transfer pricing 'since appropriate mechanisms already exist'. Reference is made to Double Tax Treaties, the Arbitration Convention and the results obtained by the Joint Transfer Pricing Forum (JTPF). The Commission values greatly the achievements of the JTPF but wishes to stress that, despite the progress made, the process moves slowly and only partially addresses one of the problems (i.e. transfer pricing) which place obstacles to companies' cross-border commercial activity in the internal market.*

*The Kamra tad-Deputati envisages the possibility that Member States have to reduce cross-border losses incurred by a group through action at the national level. It also refers to the jurisprudence of the ECJ in this field – notably Marks & Spencer (M&S)*[1]*. The Commission believes that the position of the ECJ in cross-border losses, as elaborated in M&S and the line of cases which followed, does not offer adequate ground for taking account of cross-border losses. The impact of these cases on changing Member States' attitude towards allowing such losses has been minimal.*

*The Kamra tad-Deputati also questions the General Anti-Abuse Rule (GAAR) as well as the specific anti-abuse provisions of the proposed Directive. Specifically, it identifies the Code of Conduct for Business Taxation as a sufficient mechanism for regulating harmful tax practices within the EU. However, the Code of Conduct has a limited scope delineated by 5 criteria for harmfulness the fulfilment of any of which may qualify a certain national measure as harmful. In that sense, it was never intended to act as a replacement of national anti-abuse measures. The anti-abuse provisions in a legislative text are aimed at tackling a wider range of issues than those covered by the Code of Conduct. It should also be noted that the Code of Conduct Group does not produce legally binding decisions.*

*Finally, the Kamra tad-Deputati suggests that 'this formula causes distortion as regards the comparative and competitive advantage of the Member States' because it rewards economies that depend on intensive work whilst penalising economies with a high productivity. It also anticipates that a larger portion of income will be distributed in the Member States with a higher corporate tax rate. In the Commission's view, the CCCTB features do not a priori penalise higher productivity. On the contrary, when it comes to the labour factor in the formula, the use of payroll – in addition to the number of employees – allows for taking into account productivity as reflected in the wage levels. Service-oriented economies are also not expected to a priori lose from the apportionment under the CCCTB as fixed assets which are understood to be of low value with service companies are not the only factor which determines the allocation of revenues but, instead, solely accounts for one third of the three-part formula.*

*In any case, if the Kamra tad-Deputati considers preferable an alternative allocation system that would give significant weight to productivity, the Commission is open to any suggestion on alternative factors for apportionment.*

*I would like to thank you again for the Opinion of the Kamra tad-Deputati and I hope that these explanations serve to clarify the points raised in the Opinion. I look forward to continuing our political dialogue in the future.*

*Yours faithfully,*

*Maroš Šefčovič*
*Vice-President*

[1] Case C-446/03 *Marks & Spencer plc v David Halsey* (Her Majesty's Inspector of Taxes).