REASONED OPINION OF THE MALTESE PARLIAMENT

Proposal for a Council Directive on a common system of Financial Transaction Tax and amending Directive 2008/7/EC [COM (2011) 594]

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COM (2011) 594

The principles of subsidiarity and proportionality assume relevance in areas of shared competence between the Union and its Member States, in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union. If this were not the case, the issue would not arise. The Union's exclusive competence is naturally excluded in fiscal matters. Consequently, the only other possibility (as the Commission assumes) is that the Union and the Member States enjoy shared competence in fiscal matters, as permitted by the Treaty on the internal market in general. The question is whether the Union possesses the power to adopt fiscal harmonisation measures of the nature of this particular proposed measure.

The Union's power to act

The legal basis for this Proposal is Article 113 of the Treaty on the Functioning of the European Union. This provides as follows:

> *"The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition."*

In this context, the Treaty on the Functioning of the European Union requires that the Commission clearly shows that any measure it proposes is necessary in order to achieve the specific aim of the provision concerned – meaning, in this case, ensuring the establishment and operation of the internal market and avoiding, through such harmonisation, distortion of competition; and this only, therefore, through proportionate measures which harmonise the Member States' laws. Consequently, the Treaty does not permit the creation of a system which goes beyond the limits of legislative harmonisation and which has an impact on a Member State's fiscal sovereignty. The Commission must also prove that the Member States, individually or collectively, cannot attain common objectives with the same efficiency as can be attained on a European Union level (subsidiarity) and it should clearly result that the measures proposed by the Commission are in fact the minimum required for the establishment and functioning of the Single Market – in this case in the financial services sector – without going beyond such objective (proportionality). The Commission must justify its actions in detail and show that the benefits deriving from the Proposal heavily outweigh the disadvantages.

The Proposal for a Council Directive on a common system of Financial Transaction Tax and amending Directive 2008/7/EC [COM (2011) 594] does not demonstrate how the FTT can be more beneficial at EU level, and nor does it attempt to explain why the Member States cannot attain the same objectives on an individual basis. This implies that the Commission is not in a position to prove that the principles of subsidiarity and proportionality have been respected.

While one notes that the Proposal's main objective is to strengthen the Internal Market for Financial Services, mainly by ensuring that financial institutions contribute towards the expenses incurred by Member States as a result of the financial crisis, it appears that this objective will not be achieved for several reasons. The European Commission is stressing that the Directive will ensure fiscal harmonisation between Member States and that the Directive will have the same impact in each Member State. However, it also appears that this will not occur for various reasons. In fact, it clearly transpires that the real primary and ultimate aim of the Proposal is to raise up to 60 million euro annually in addition to the financial resources at the disposal of the Union itself and which are intended to be used in the hypothetical scenario of a new crisis in the future caused by the 'financial sector'. Other objectives declared by the Commission are: to impose 'penalties' against operators who cause actual damage in the markets (although in fact against everyone) since these would be forced to contribute towards the expenses brought about by the financial crisis; to impose a tax with the aim of eliminating from the market those transactions which do not 'enhance the efficiency of financial markets'; and on the basis of the introduction of such tax in Europe, the Union would be able to strive for the introduction of a global FTT on a global level.

These are the reasons why it is felt that the Proposal is in violation of the subsidiarity principle:

- Presently some Member States already impose some type of tax on financial transactions. However, this never had a negative effect on the other Member States which chose not to impose similar taxes. Member States will still be allowed to choose different rates, as long as they generate the established minimum. Consequently, since there were no negative repercussions on other European jurisdictions, the Commission does not enjoy the necessary prerogatives to harmonise legislation in this area.

- On a general note, if the FTT is applied only within the European Union, there is a good possibility that capital will move outside Europe. This would mean that the introduction of this tax would have negative repercussions on all European jurisdictions, unless it is in the form of a global tax on international financial transactions, and therefore those not place the European financial sector in a disadvantaged position. Concerning the idea that the Union would gain more clout within the context of a global initiative which it might intend to launch sometime in the future, experts opine that it would be a big mistake if the Union were to introduce such tax unless this is part of a worldwide FTT agreement; furthermore, this measure is not proportionate to such aim, and in fact an isolated European FTT would most probably produce a negative effect for the Union's entire financial sector since it would be a unilateral measure with no corresponding measures adopted by its competitors worldwide. Currently, and for the foreseeable future, there is no real support by other countries in the world for a global tax. Furthermore, it noteworthy that while the financial sector is very important for the European economy, the size of the financial sector in relation to the economy of each Member State varies from one State to another. This means that Member States will be impacted by the tax in a different and disproportionate manner. Consequently, this Proposal not only inflicts negative repercussions on all European jurisdictions, but also has a worse impact on some Member States than on others.

- The Maltese Parliament stresses that the principle of the Member States' fiscal sovereignty must be safeguarded. Article 113 of the Treaty on the Functioning of the European Union (TFEU) grants the Union competence to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

  However, the Commission's Proposal goes beyond harmonisation. The Commission's objective is to create a new source of revenue, with the aim of gradually substituting national contributions towards the EU budget in order to alleviate pressure on national budgets. The following paragraph under the heading 'Budgetary Implication' on page 11 of the Commission's Proposal states as follows:

  > *'The revenue arising from the FTT in the EU can be wholly or partly used as own resource for the EU Budget replacing certain existing own resources paid out of national budgets, which would contribute to budgetary consolidation efforts in the Member States. The Commission will separately present the necessary complementary proposals setting out how the FTT could be used as a source for the EU budget.'*

Parliament is of the opinion that it is within the competence of each Member State to secure the country's welfare by ensuring the appropriate allocation of tax revenue. An excessively wide application of the rules which grant additional legislative powers to the Commission ultimately leads to the erosion of national sovereignty. It is vital that Member States retain adequate revenue in order to secure the welfare which they are committed to provide to their citizens. In other words, the Commission's Proposal is not aimed towards legislative harmonisation in any area where action by individual Member States is insufficient, but is aimed to increase the European Union's revenue under its own resources. At the same time, nothing prevents Member States from introducing a tax or taking different measures other than taxation in order to cater for future needs. These steps do not necessarily include tax. The regulation of the sector can, and is leading to, more prudent and better controlled market operations which only impacts on those institutions and transactions which truly need to be controlled. Such steps are in fact being discussed and adopted also on a European level. Therefore – contrary to what the Commission should prove – there is no need for such tax on a national or European level. The Union's budget can and should increase, if necessary, in a different way than proposed.

- The Commission also stresses that the tax can be a source of income for the European budget. However, the fact that Member States will not contribute equally will make it extremely difficult for them to negotiate the apportionment of this tax revenue in an equal and fair manner. The arguments in favour of financial stability as proposed by the Commission should not be linked in any manner with the European budget.

- It seems that the Commission did not consider in detail the impact of the tax on consumers, who would have to pay it on pension funds and collective investment schemes. It would be wise to remember that when the United Kingdom introduced a pensions tax, consumers suffered from a reduction in their investments with the consequence that pensioners' savings shrunk on retirement.

- This Proposal's impact assessment[1] provides a negative picture of each aspect of the Proposal. However, it is clear that the Commission wishes to point its finger to the source of the financial crisis we are experiencing. This is also being done in a context where the consumer will have to pay the ultimate price and not the financial institutions. The idea of taxing trading books seems a much fairer option even in the context of the difference between the applicability of the tax on investment banks and commercial banks. Since, as explained above, it will be the consumer who will have to pay the ultimate price, and since the Member States will be affected in a disproportionate manner, this means that the citizens of those Member States will have to shoulder a heavier load. This must also be considered within the context of the possibility that this measure will constitute a source of revenue for the European budget. This behaviour certainly cannot be considered as a case where the objectives can be better achieved on a European Union level.

- The reference to the pension fund on page 9 of the Proposal is not clear and raises serious doubts on whether the Commission is not excluding pensions established under the so-called pension trust from other funds. There are also serious doubts whether the references to Undertakings for Collective Investments in Transferable Securities (UCITS) and Alternative Investment Funds under collective investment schemes (see page 17) mean that non-UCITS sales schemes do not fall under the Proposal's remit.

- The Proposal states that FTT should be levied if any part of a financial transaction is resident in the EU. It is understood that this is intended to prevent the movement of companies outside the EU. However it is not clear whether the tax is also due in cases where a person within the EU transits outside the EU. The question arises whether a reverse charge mechanism (as in Value Added Tax) will apply.

[1] SEC (2011) 1102

- In its Proposal the Commission stresses that under the present Directive on value added tax (Council Directive 2006/112/EC), financial transactions are exempt. However, this Proposal does not discuss the Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax, as regards the treatment of insurance and financial services. Furthermore, the Proposal ignores the fact that the majority of ‘natural’ persons (consumers) who purchase these products as part of their portfolio from an intermediary will be charged VAT also on the investment advice they receive from the intermediary.

Proportionality

Nor does the proposed measure respect the principle of proportionality, as the Commission was required by the Treaties to demonstrate. The supposed targeting of institutions and transactions responsible for the financial crisis ends up by creating a European fiscal measure which has an immediate impact on each institution and each transaction, and at the same type all types of investor. Furthermore, as previously stated, it is worth noting that while the financial sector is very important for the European economy, the size of the financial sector in relation to the economy of each Member State varies from one State to another. This means that under this Proposal, Member States will be impacted by the tax in a different and disproportionate manner. Consequently, this Proposal can not only cause negative repercussions in all European jurisdictions, but also impact some Member States more negatively than others. Furthermore, the measure is intended to introduce a tax which once introduced, will result in the perpetual loss (in practice) of each Member State’s discretion to impose or not to impose tax in each particular case, when it is clear, also from expert and other studies, that there exist measures which do not undermine this sovereign power and which can be taken by the Member States individually, and on which a unanimous agreement can also be reached on a European level. This measure is not one of those.

Conclusion

In view of the impact on the State’s sovereignty, due to the anticipated serious consequences of this measure in its present form, particularly for those economies with a relatively larger financial sector, and also due to the fact that the benefits, both for the various Member States as well as for the Union as a whole, are inexistent when compared to the damage caused, or if anything are of a speculative and dubious nature:

The Maltese Parliament has decided to object to the Proposal concerned and to deliver this reasoned opinion in accordance with the procedure defined in Article 6 of Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.

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Parliament of Malta