

RESOLUTION
of the Sejm of the Republic of Poland
of 13 May 2011
on declaring the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM(2011) 121 final) to be incompatible with the principle of subsidiarity

Pursuant to Article 148cc of its Standing Orders, the Sejm of the Republic of Poland declares that the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM(2011) 121 final) is incompatible with the principle of subsidiarity referred to in Article 5(3) of the Treaty on European Union. The proposal infringes the principle of subsidiarity due to the lack of competence of the European Union to adopt legal acts on direct taxation. The reasoned opinion stating the reasons why the Sejm deems the Proposal to be incompatible with the principle of subsidiarity is enclosed as annex to the Resolution.

Reasoned opinion of the Sejm of the Republic of Poland of 13 May 2011 stating the reasons why the Sejm deems the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM(2011) 121 final) to be incompatible with the principle of subsidiarity

Having considered the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (COM(2011) 121 final), the Sejm of the Republic of Poland deems the proposal to be incompatible with the principle of subsidiarity referred to in Article 5(3) of the Treaty on European Union (TEU). The proposal infringes the principle of subsidiarity due to the lack of competence of the European Union to adopt legal acts on direct taxation.

Pursuant to Article 5(2) of the TEU, the European Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. According to the Sejm, the European Union does not have the competence to adopt provisions concerning the rules of determining the corporate tax base. The Sejm is of the view that, by adopting the proposal for a Directive on a Common Consolidated Corporate Tax Base, the European Commission exceeded the competences conferred upon the European Union and acted in the area falling within the exclusive competence of the Member States.

The European Commission declared Article 115 of the Treaty on the Functioning of the EU (TFEU) to be the legal basis for the proposed Directive. Pursuant to that Article, without prejudice to Article 114 of the TFEU, the Council shall, acting unanimously in accordance with a special legislative procedure 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 or functioning of the internal market. In order to identify which provisions the EU may adopt pursuant to Article 115 of the TFEU it is necessary to refer to other provisions of the Treaty.

The internal market, referred to in Article 115 of the TFEU, comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the TEU and TFEU (Article 26(2) of the TFEU). Article 114(1) of the TFEU, referred to in Article 115, states that the following provisions shall apply for the achievement of the objectives of the establishment and the functioning of the internal market. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the 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. Paragraph 2 of the said Article states that Article 114(1) of the TFEU shall not apply to fiscal provisions.

Irrespective of Article 115 of the TFEU, cited by the Commission to justify the adoption of the proposal for a Directive, it should be noted that pursuant to Article 113 of the TFEU, 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. This means that the competences of the European Union in the field of taxation are defined by Article 113 of the TFEU which only allows legislation pertaining to indirect taxation. The proposed Directive concerns the Common Consolidated Corporate Tax Base. Since income tax is not an indirect tax, it is not covered by Article 113 of the TFEU.

Regardless of the fact that neither Article 114 of the TFEU nor Article 115 of the TFEU provided as the basis for the proposed Directive can serve as the basis for adopting any taxation provisions by the European Union, the attempt to use Article 115 of the TFEU as a basis for adopting legal acts of the European Union on direct taxation must be considered a circumvention of the law, and in particular of Article 113 of the TFEU which grants the Union the competence with regard to indirect taxation. Therefore, pursuant to Article 5(2) of the TFEU, exclusive competence on direct taxation remains with the Member States.

Since, pursuant to Article 5(1) of the TFEU, the use of the European Union competences is governed by the principle of subsidiarity, exceeding the competences conferred on the Union must be considered an infringement of the principle of subsidiarity.