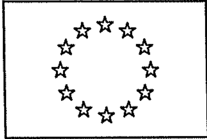

EUROPEAN COMMISSION

Brussels, 4 NOV. 2011
C/2011/ final
SGD

Dear Marshal,

I would like to thank you for the reasoned opinion of the Sejm on the Commission proposal for a Directive on a Common Consolidated Corporate Tax Base (CCCTB) {COM(2011) 121 final}, 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].

Mr Grzegorz SCHETYNA
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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.

Turning to the other specific points raised in the Opinion, the Sejm holds the view that legislation in the field of direct taxation does not fall within the scope of Article 115 TFEU.

The Commission agrees that the principle of conferral is a cornerstone of European law and informs the division of 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 Commission notes that the present area of taxation falls under shared competence. Article 115 TFEU provides the legal base for measures in this area. It is on this basis that the Commission has adopted the present proposal, with the aim of reducing the tax-related obstacles that businesses face in the situations covered by the proposal.

In relation to the interaction between Articles 114 and 115, it is instructive to refer back to the legislative history. Up until the Lisbon Treaty, the two provisions (i.e. 114 and 115 TFEU) appeared in reverse order. In that context, Article 115 TFEU, requiring unanimity in Council, would lay down the default rule whilst Article 114 TFEU, allowing decisions to be taken by qualified majority, would cover, without prejudice to the former (then, Article 100 and later, 94), those cases 'which have as their object the establishment and functioning of the internal market'. As mentioned above, Article 115 TFEU used to be Article 100 in the Treaty of Rome (1957). Article 114 TFEU was added as Article 100a by the Single European Act (1987). The Lisbon Treaty has made Article 114 the default rule. This reflects the fact that, as a result of the Treaty revisions since 1957, more and more policy areas have moved to decision by qualified majority voting in Council. In this context, the Treaty of Lisbon introduced the ordinary procedure (i.e. qualified majority in Council and veto power

to the European Parliament) as the default rule for decision-making. Both Articles 114 and 115 are deliberately formulated in an open-ended manner, so as to cover all areas in which action might turn out to be necessary for the purposes of the proper functioning of the internal market, subject only to more specific legal bases such as Article 113 TFEU.

Finally, Article 113 TFEU on indirect taxes has always been a separate provision (featured as Article 98 in the Treaty of Rome - 1957). Yet, the fact that indirect taxation is explicitly referred to cannot be taken to mean that direct taxation falls outside the scope of the Treaties.

I would like to thank you again for the Opinion of the Sejm 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