European Scrutiny Committee
House of Commons 7 Millbank London SW1P 3JA
Tel (020) 7219 5465/3292 Fax (020) 7219 2509 Email escom@parliament.uk Website www.parliament.uk/escom

From: Mr William Cash MP

30 June 2011

Mr Jose Manuel Barroso
President of the European Commission
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

Dear M. José Manuel Barroso

Draft Directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity (COM (2011) 169; Council doc. 9270/11 and ADDs 1–3)

Commission Communication: Smarter energy taxation for the EU: proposal for a revision of the Energy Taxation Directive (COM (2011) 168; Council doc. 9267/11)

The European Scrutiny Committee writes to you in relation to the above proposal as part of its ongoing political dialogue with the Commission: lack of time prevented the House of Commons from issuing a reasoned opinion in this instance.

The stated aim of this legislative proposal is to bring the present Energy Taxation Directive more in line with the EU's energy and climate change objectives, and in so doing to enable Member States to use energy taxation more effectively for environmental and other policy purposes and to improve the functioning of the internal market.

Among its provisions are the following two proposals, which address national energy tax regimes:

— the introduction of a new mandatory requirement for Member States to operate both of two tax bases for the taxation of energy products. One

would cover the carbon emissions associated with the use of energy products, the other the energy content of each product, that is the net calorific value of each energy product; and

— the requirement, in addition to the existing requirements for meeting the EU minimum rates, for national tax rates to be structured in a way that ensured competing energy products were taxed in relative proportion to their tax base. This would mean that for the carbon emissions tax base, national tax rates for competing energy products would have to be set at the same rate per carbon emission, even if they were above the minimum rate; and for the energy content tax base, competing energy products would have to be taxed at the same rate per energy content.

In terms of national impact, we consider that both proposals will have considerable consequences on the autonomy of Member States' energy tax regimes, and on businesses operating in the energy market. To this extent, then, action at EU level should be justified in detail and consistent with the legal base proposed.
In this regard we note that Article 113 TFEU, the proposed legal base, only permits the EU to harmonise 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".

At its meeting of 29 June 2011, the European Scrutiny Committee concluded that, in relation to the above two proposals, the Commission had failed both to comply with the procedural obligations imposed on it by Protocol (No 2), and to substantiate the obstacle to the functioning of the internal market that justifies further harmonisation of energy taxation. We also concluded that the predominant legislative purpose of the proposal was compliance with energy and climate change objectives, rather than the good functioning of the internal energy market that can only be achieved by harmonisation of energy taxes in Member States.

Procedural requirements

The impact assessment does not contain a "detailed statement" to make it possible to appraise compliance with the principle of subsidiarity (and proportionality), as required by Article 5 of Protocol (No 2.) Indeed, there is no section to be found on "subsidiarity" at all. Rather, paragraph 3.3 concerns the EU's "right to act", a heading which arguably displays a less than neutral perspective on the application of the principle of subsidiarity. The contents of paragraph 3.3, and the remainder of the impact assessment and explanatory memorandum, in our view fall far short of meeting the requirements of a detailed statement for a proposal such as this.

The presumption in Article 5 TEU is that decisions should be taken *as closely as possible to the EU citizen.* A departure from this presumption should not

be taken for granted but be justified with sufficient detail and clarity so that an EU citizen can understand the qualitative and quantitative reasons leading to the conclusion that EU action is necessary. In its impact assessment the Commission has failed to discharge the obligations placed on it to present a *detailed* statement on subsidiarity by Article 5 of Protocol (No 2).

Substantiation of the risk

In terms of substance, in paragraph 3.3 of the impact assessment the Commission says that "national approaches [to energy tax] *risk* distorting the internal market"; similar observations are repeated elsewhere in the impact assessment and explanatory memorandum. We, however, think the test to be applied is whether the internal market *will be* distorted if EU legislation is not adopted, and we do not consider that the Commission has provided sufficient evidence to this effect.

Legal base

Furthermore, in explaining the necessity for EU action in paragraph 3.3, the Commission defines the first objective as follows:

> "However, as explained in point 2.2.2, these minima [rates of energy taxation] do not properly take into account environmental and energy policy consideration and even promote the use of more polluting energy products. It is therefore crucial to revise the minima providing for a consistent treatment of different energy sources in order not to limit the level of ambition that Member States can pursue with taxes on energy, in particular for business use."

The statement "in order not to limit the level of ambition that Member States can pursue with taxes on energy" does not, in our view, address a single market objective, which would permit the harmonisation of indirect taxation under Article 113 TFEU, but rather an environmental one — the limitation of CO_2 emissions — which would not. This latter objective is cited by the Commission throughout the impact assessment and the explanatory memorandum, to the extent that it would appear to be the predominant objective of this proposal.

For the reasons outlined above, the European Scrutiny Committee asks the Commission to reconsider whether this proposal complies with the principle of subsidiarity and with the requirements of Article 113 TFEU.

Yours,

Bill Cash

CHAIRMAN