

Courtesy Translation

**REASONED OPINION OF THE HOUSE OF REPRESENTATIVES,
PARLIAMENT OF MALTA: PROPOSAL FOR A COUNCIL DIRECTIVE
LAYING DOWN RULES AGAINST TAX AVOIDANCE PRACTICES THAT
DIRECTLY AFFECT THE FUNCTIONING OF THE INTERNAL MARKET
(COM (2016) 26)**

While noting that the primary objective of the proposal is to lay down rules against tax avoidance practices, the Parliament of Malta is of the opinion that the European Commission is going beyond the powers (*ultra vires*) of what is permitted by the Treaties of the European Union. The Parliament of Malta, whilst affirming that it is in favour of measures aimed at combating tax avoidance, it contends that the solution should not be based on the creation of a set of common rules for all persons in the same manner without allowing an element of flexibility. The element of flexibility is present in a series of actions recommended by the OECD which is however missing in this proposal.

The principles of subsidiarity and proportionality become relevant where the Union and the Member States share their competence in a field in terms of the Treaty on European Union and of the Treaty on the Functioning of the European Union. If this is not the case, the issue does not arise. The exclusive competence of the Union is obviously excluded in fiscal matters. Therefore, the only other possibility (as the Commission may assume) is that the Union and Member States possess shared competences in fiscal matters, as allowed by the Treaty on the Functioning of the Internal Market as a whole. The question is whether the Union has the power to adopt fiscal harmonisation measures having the same nature of this particular measure which is being proposed.

The Explanatory Memorandum accompanying the proposal includes sections dealing with subsidiarity and proportionality. These sections are of a rather declarative nature and they do not justify – with any qualitative or quantitative indicators – the assertion that “*such aims cannot be sufficiently achieved through action undertaken by each Member State while acting on its own*”. Taking into account the scope within which this proposal is put forward (namely the field of direct taxation) one would have expected a tighter approach.

The Treaties of the European Union (the Treaties) do not directly provide for provisions which govern the harmonisation of legislation relating to direct taxation. The Treaties only provide for a generic provision which concerns the approximation of laws (Art.115), and as such only where there is clear internal market justification (“... *as directly affect the establishment or functioning of the internal market.*”). By simply repeating this statement in the proposal (including the title of the proposal) does not exempt from the requirement to substantiate with valid reasons an evaluation of conformity with the principles of subsidiarity and proportionality as required by Article 5 of Protocol 2 concerning the application of these principles.

It should be recalled that a mere assessment of differences between national laws does not suffice to justify recourse to the provisions of the Treaty concerning the approximation of laws.

The section on subsidiarity in the Explanatory Memorandum sets out that if Member States take on board the OECD recommendations (or parts thereof) in their national tax legislation in a separate manner, this might possibly aggravate the existing fragmentation in the internal market and the current inefficiencies and distortions may be indefinitely extended with the interaction of these distinct measures. The proposal and its accompanying documents do not appear to explain where these differences between national rules would be such as to hinder the fundamental freedoms and would thus have a direct effect on the functioning of the internal market or would cause significant distortions of competition.¹ While it is recognised that recourse to this provision (Art. 115) may be possible to prevent future obstacles to trade in the event that Member States take different measures,² the obstacles should be likely and the proposed measures should be designed to prevent such obstacles.³ It should also be noted that distortions of competition need to be significant in order to justify the adoption of measures at Union level. An evaluation on this basis is not possible with the justifications put forward by the Commission.

The Commission's proposal is in breach of the principle of subsidiarity in the case of articles 8 and 9 on *Controlled foreign company legislation*. The principle of subsidiarity allows the EU to take action only if “the objectives of the action envisaged cannot be sufficiently attained by the Member States”.

In its BEPS activities the OECD has acknowledged that in many areas there is a need for flexibility in order to implement the recommendations made by various countries in a manner consistent with the policy objective of their global fiscal systems. In particular, the OECD has made the following remarks in its report on Action 3 of the BEPS: “*because each country prioritises policy objectives differently, the recommendations provide flexibility to implement CFC rules that combat BEPS in a manner consistent with the policy objectives of the overall tax system and the international legal obligations of the country concerned*”. This shows clearly that a single set of rules on the CFC for the European Union as proposed in articles 8 and 9 is not required.

The Commission's proposal also infringes the principle of proportionality in the case of article 4 (*Interest Limitation Rule*). The Commission finds that the proposed measures do

¹ See Cases C-376/98, *Germany v Parliament and Council*, paragraph 106; C- 300/89, *Titanium dioxide*, EU:C:1991:244, paragraph 23

² See Cases C-154/04 and C-155/04, *Alliance for Natural Health*, EU:C:2005:449, paragraphs 29-32; C-210/03, *Swedish Match*, EU:C:2004:802, paragraph 30; C-350/92, *Spain v Council*, EU:C:1995:237, paragraph 35; C-376/98, *Germany v Parliament and Council*, paragraph 86; C-377/98 *Netherlands v Parliament and Council*, EU:C:2001:523, paragraph 15; C-491/01, *British American Tobacco*, paragraph 61.

³ See Case C-58/08 *Vodafone and others*, EU:C:2010:321, paragraph 33 u quoted case law.

not go beyond the minimum level required in order to protect the internal market and that the proposal does not go beyond what is necessary to achieve its objectives, and therefore these measures are in line with the principle of proportionality. On this point, the Committee disagrees with the Commission where it finds that the Directive is in accordance with the principle of proportionality. This is due to the fact that the rule on the deduction of interest also affects purely national situations. Purely national situations are not related to the internal market and therefore this proposal goes beyond what is necessary in order to protect this market.

It is pertinent to note that no impact assessment has been carried out with regard to this proposal. Article 2 of Protocol No. 2 concerning the application of the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty on the European Union, states that before proposing a legislative act, the Commission shall carry out broad consultations. Such consultations shall, where appropriate, take account of the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission may not make such consultations. It shall give reasons for its decision in its proposal.

The Commission gave the following reasons by way of justification for this failure:

1. there is a strong link with the OECD's BEPS activities;
2. the *Staff Working Document* published by the same Commission provides substantial evidence and analysis;
3. the interested parties have been involved extensively in consultations on the technical elements of the proposed rules in a previous phase; and
4. in particular, there is an urgent real demand for coordinated action in the European Union on this matter of international policy priority

It is evident that by this decision (not to perform an impact assessment) the Commission failed to carry out a consultation which would take into account Malta's local dimension as required for the purposes of the application of the principles of subsidiarity and proportionality. It should here be noted that:

1. Malta is not a member of the OECD and hence any study which could have been performed by the OECD would not take into account Malta's circumstances. Furthermore, in its reports the OECD did not recommend that all the measures which had been recommended should apply for all as a *minimum standard*, as the European Commission is proposing in this Directive. Consequently, the argument that the consultations made within the OECD sufficed was not a valid argument. It was purposely that the OECD allowed flexibility in respect of the implementation of its recommendations. It is also pertinent that Action 3 (*Controlled Foreign Companies*) and Action 4 (*Interest Limitation Rules*) are not minimum standards

according to the OECD, this being so because it was recognised that the different circumstances relating to jurisdictions are pertinent;

2. The above mentioned *Staff Working Document* does not contain any impact assessment of this proposal on Malta;
3. The consultations on the technical elements of the proposed rules in a previous phase were on the CCCTB proposal system where it was evident that this proposal would have a negative impact on Malta. In addition, discussions within the CCCTB framework cannot be regarded as a justification for the absence of an impact assessment since the objectives and the scope of the CCCTB Directive are completely different from those of the present Directive. The requirements for a common tax system covering the EU (which is what concerns the CCCTB) differ from the requirements of a stand-alone directive on tax evasion;
4. The Commission has failed to provide satisfactory reasons why there actually exists a “matter of urgency” that led the Commission to take the decision not to perform an impact assessment. It only mentioned the Council Conclusions of 18 December 2014, and that some Member States of the EU, and which are also OECD members, committed themselves to implement the OECD’s BEPS project output in their national laws, and to act in this manner urgently. These factors alone are not compelling enough as to prevent an impact assessment of this proposal.

Given its impact on State sovereignty, given the serious consequences anticipated by this measure as it actually stands, particularly for those economies dependent on services which have been planned over a period of several decades, given that the benefits, both for various Member States and for the Union, do not exist when compared to the damage or, are rather speculative and doubtful:

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

**Foreign and European Affairs Committee
16 March 2016**