



EUROPEAN PARLIAMENT

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*Committee on Legal Affairs
The Chair*

30.1.2012

Mrs Sharon Bowles
Chair
Committee on Economic and Monetary Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2011)0121 – C7 0092/2011 – 2011/0058(CNS))

Dear Madam Chair,

By letter of 12 January 2012 you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to give its opinion on the proper legal basis for adopting the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB)

The Commission submitted the proposal on the basis of Article 115 TFEU. Your request bears on whether "to include also as a legal basis Article 136 TFEU".

By letter of 23 January 2012, Parliament's Legal Service provided an analysis of the question and concluded that it was not justified to amend the legal basis of the proposal by adding Article 136 TFEU, and that Article 115 TFEU was the right legal basis.

Background

I. The proposal

The proposal aims at reducing compliance costs for companies in the internal market in the area of taxation by establishing a system for a common base for company taxation. More specifically, it proposes to establish a CCCTB as a system of common rules for computing the tax base of companies which are tax resident in the EU and of EU-located branches of third-

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country companies. The CCCTB would be an optional system available to all companies whatever their size. For groups of companies the CCCTB aims at providing a single set of tax rules across the Union, so that they would have to deal with one administration only. The proposal includes a complete set of rules for company taxation. A company that opted for the CCCTB would no longer be subject to the national corporate tax arrangements in respect of all matters covered by the common rules.

II. The legal bases in question

1. Legal basis of the Commission proposal

The Commission proposal is based on Article 115 TFEU which reads as follows:

"Article 115

Without prejudice to Article 114, 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."

The choice of the legal basis is explained by the Commission in the explanatory memorandum as follows:

"Direct tax legislation falls within the ambit of Article 115 of the Treaty on the Functioning of the EU (TFEU). The clause stipulates that legal measures of approximation under that article shall be vested the legal form of a Directive."

2. Proposed change of the legal basis

You have requested on behalf of ECON the opinion of the Committee on Legal Affairs on the addition of Article 136 TFEU as a legal basis, based on the following reasoning: "If EU-wide application to all 27 Member States of the CCCTB is not possible, there are two possible options for proceeding with a smaller number of Member States:

- the ordinary enhanced cooperation under the TFEU, or
- measures specific to those Member States whose currency is the euro, based on Article 136 TFEU."

An amendment that changes the legal base accordingly with this justification has been tabled in ECON (Amendment 15).

Article 136 TFEU reads as follows:

"Article 136

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a)."

Article 121 TFEU contains provisions on the coordination of economic policies between Member States, and Article 126 TFEU stipulates the procedure to follow in cases of excessive government deficits.

III. Analysis

Certain principles emerge from the case law of the Court as regards the choice of legal basis. First, in view of the consequences of the legal basis in terms of substantive competence and procedure, the choice of the correct legal basis is of constitutional importance¹. Secondly, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred upon it by the Treaty². Thirdly, according to the case-law of the Court of Justice, *"the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure"*³. Finally, as regards multiple legal bases, where a measure has several contemporaneous objectives or components which are indissolubly linked with each other without one being secondary and indirect in respect of the others, the measure must be based on the various relevant Treaty provisions⁴. However, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of Parliament⁵.

The general objective of the proposal in question is *"to tackle some major fiscal impediments to growth in the Single Market"*⁶. Its scope is defined in Article 1 as follows: *"This Directive establishes a system for a common base for the taxation of certain companies and groups of companies and lays down rules relating to the calculation and use of that base."*

The TFEU contains two legal bases for the *"approximation of laws, regulations and administrative provisions"* of the Member States within the internal market: Article 114 TFEU is applicable where the objective is *"the establishment and functioning of the internal market"*, and Article 115 where the measures in question *"directly affect the establishment and functioning of the internal market"*. Article 114(1) TFEU provides for the adoption of *"any measure"* by Council and the European Parliament in accordance with the ordinary

¹ Opinion 2/00 *Carthage Protocol* [2001] E.C.R. I-9713, para. 5; Case C-370/07 *Commission v. Council*, paras. 46-49; Opinion 1/08, *General Agreement on Trade in Services* [2009] ECR I-11129, para. 110.

² Case C-403/05 *Parliament v. Commission* [2007] E.C.R. I-9045, para. 49, and the case-law cited therein.

³ See most recently Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585.

⁴ Case C-165/87 *Commission v. Council* [1988] E.C.R. 5545, para. 11; Case C-178/03 *Commission v. European Parliament and Council* [2006] E.C.R. I-107, paras. 43-56.

⁵ Case C-178/03 *Commission v. European Parliament and Council* [2006] E.C.R. I-207, para. 57.

⁶ Explanatory Memorandum, p. 1.

legislative procedure, which requires a qualified majority in Council; under Article 115 TFEU the Council is to adopt directives unanimously after consulting the European Parliament. In practice, Article 115 is relevant above all in the areas which Article 114(2) excludes from the application of Article 114(1). One of these exclusions concerns "*fiscal provisions*". This points to Article 115 as appropriate legal basis to choose for the proposed measure.

As regards the question whether to include Article 136 TFEU as legal basis, the criteria for multiple legal bases would have to be applied, i.e. a second objective or component under Article 136 TFEU which is indissolubly linked to the first one and of the same value would have to be identifiable. The proposal does not contain any measures specific to those Member States whose currency is the euro with a view to ensure the proper functioning of economic and monetary union. Furthermore, the procedures under Article 121 and 126 TFEU are completely different and thus irreconcilable from the consultation procedure under which the act in question was proposed.

The Committee on Legal Affairs considered the above question at its meeting of 26 January 2012. At this meeting, it accordingly decided, by 22 votes in favour, with one abstention¹, to recommend that the appropriate legal basis for the proposal for a Council Directive on a Common Consolidated Corporate Tax Base should be Article 115 TFEU, and that Article 136 TFEU should not be included as legal basis.

Yours sincerely,

Klaus-Heiner Lehne

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu, Marielle Gallo, Eva Ortiz Vilella, Tadeusz Zwiefka, Françoise Castex, Lidia Joanna Geringer de Oedenberg, Antonio Masip Hidalgo, Bernhard Rapkay, Alexandra Thein, Diana Wallis, Cecilia Wikström, Jiří Maštálka, Francesco Enrico Speroni, Dimitar Stoyanov, Jean-Marie Cavada, Vytautas Landsbergis, Kurt Lechner, Dagmar Roth-Behrendt, Jan Philipp Albrecht, Eva Lichtenberger.